IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

S L. S, Appellant, vs. STATE OF ALASKA DEPARTMENT OF ADMINISTRATION, DIVISION OF RETIREMENT AND BENEFITS, Appellee.	)	Case No. 3AN-07-08162 CI.

ORDER AFFIRMING ALJ'S DECISION

Appellant S S (S) appeals the May 21, 2007 order of the ALJ which held that S did not prove by a preponderance of the evidence that her employment was a substantial factor in her disability. The order thereby affirmed the board's denial of her application for occupational disability benefits.

I. FACTS.

For purposes of this appeal, this court adopts and incorporates the ALJ's factual recitation. Neither party contends that the facts relied upon by the ALJ are incorrect.[1] The facts will be addressed in the discussion section of this order.

II. ISSUE.

The issue for review is whether the ALJ's decision was supported by substantial evidence.

[1] *See* Appellant's Brief at 28.

III. LAW.

The Alaska Supreme Court has established four possible standards of review when a court hears an appeal from an administrative agency: The "substantial evidence test" for questions of fact; the "reasonable basis test" for questions of law involving agency expertise; the "substitution of judgment test" for questions of law where no expertise is involved; and the "reasonable and not arbitrary test" for review of administrative regulations.[2] This court will apply the substantial evidence test in this case because the issue involves a review of the ALJ's factual determination.

The parties agree the ALJ applied the appropriate legal standard in analyzing S's appeal.[3] The ALJ relied on the principle that if one or more possible causes of a disability was occupational, benefits should have been awarded to S if the record established that the occupational injury was a *substantial factor* in bringing about the disability.[4] The party seeking occupational disability benefits has the burden of establishing this by a preponderance of the evidence. In other words, S would have been entitled to occupational disability benefits if she had established by a preponderance of the evidence that prolonged sitting at work was a substantial factor in her medical condition.[5]

The ALJ made a factual ruling when he determined that prolonged sitting, in S's case, was not a substantial factor in her disability. Therefore the substantial evidence test

[2] *Jager v. State*, 537 P.2d 1100, 1107 (Alaska 1975).
[3] The ALJ relied upon AS 39.35.410(a) and AS 39.35.680(27) as well as *Hester v. Public Employees' Retirement Board*, 817 P.2d 472, 476 (Alaska 1991), *State Public Employees' Retirement Board v. Cacioppo*, 813 P.2d 679 (Alaska 1991), and *Lopez v. Administrator, Public Employees' Retirement System*, 20 P.3d 568 (Alaska 2001).
[4] *Cacioppo*, 813 at 683.
[5] *See Hester*, 817 P.2d at 476.

is the applicable standard of review in this appeal.[6] Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support the board's conclusion."[7] The court's review of the facts is confined to determining only whether substantial evidence exists and the court should not "reweigh the evidence or choose between competing theories."[8]

Despite the clear standards of review articulated by the Alaska Supreme Court, S would also like this court to review the ALJ's decision to determine if it was arbitrary and capricious.[9] S cites to federal case law that relies on the APA for guidance in reviewing agency action. Alaska's version of the APA does not contain the same arbitrary and capricious provision. This court will not specifically address S's arbitrary and capricious argument.[10]

IV. DISCUSSION.

The ALJ's decision was supported by substantial evidence. He did not abuse his discretion. His decision appears well-reasoned and as such was not arbitrary. This

[6] *See Cacioppo*, 813 P.2d 679 (the *Cacioppo* court used the substantial evidence test to review whether the board properly concluded that Cacioppo's occupational injuries were not a substantial factor sufficient to cause his disability.)
[7] *Hester*, 817 P.2d at 476 (citing *Miller v. ITT Artic Services*, 577 P.2d 1044, 1049 (Alaska 1978).
[8] *Handley v. State of Alaska, Department of Revenue*, 838 P.2d 1231, 1233; *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 170 (Alaska 1974).
[9] *Natural Resources Defense Council v. U.S. Forest Service*, 421 F.3d 797, 806 (9th Cir. 2005) (the court stated that its "review of agency action is governed by the APA; we will set aside only agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" citing 5 U.S.C.A. §706).
[10] In explaining her argument that the ALJ's decision was arbitrary and capricious, S cites *Natural Resources* for the proposition that an agency must "state a rational connection between the facts found and the decision made." This court finds that there must be a rational connection between the facts found and the decision made in order for there to be substantial evidence to support the ALJ's decision. Thus, although not specifically addressing the arbitrary and capricious argument, reviewing the ALJ's decision based on the substantial basis test will achieve the same result.

court's review of the ALJ's factual determination highlights the following facts as taken from his opinion issued May 21, 2007.

S's original injury occurred from a surgical procedure in 1984. S intermittently suffered symptoms over the next eight years and reported these symptoms to her doctors. At that time she worked for Alaska USA Federal Credit Union. Her duties there varied, included heavy lifting, and did not restrict her to sitting at her desk for the entire day. Yet her symptoms progressed.

In 1989 one doctor noted that S stated the pain was "quite sever at times especially when she's been working at a Crisis Center lifting children or working in the yard."

In 1993 S took a job with the State of Alaska. She continued to regularly report pain symptoms to doctors. By 1998 she was in more or less constant pain. She then began an intensive and prolonged search for medical relief from the pain she was feeling. S had been working (and sitting while working) with the State for five years. Her pain had been worsening. Yet she did not attribute her pain to frequent sitting at this point.

Drs. Nolan, Fraiser, and Klimow treated S during this time period. Dr. Nolan noted that S reported no "significant aggravating or alleviating factors." Dr. Fraiser noted that "over the years…the pain has increased in frequency and severity and was exacerbated by *physical activity*." Dr. Klimow noted "there did not seem to be a pattern to her pain but that it was at times much more severe with physical activity." There is no mention of sitting aggravating her pain.

By 2000, S's pain was apparent to co-workers and she spent most of her non-work time laying down and in hot baths, avoiding prolonged sitting and standing. There is still

no indication from her co-workers or doctors that S told them that sitting at work was making her condition worse.

In the summer of 2001 S took personal leave to explore treatment options. On August 22, 2001 she extended her leave and submitted an application for non-occupational disability benefits. On August 28, 2001, approximately 17 years after her condition began, Dr. Trombley noted that prolonged sitting or standing were pain triggers. No doctor had made that assertion up to that point.

S did not return to work. Her extended leave benefits were terminated and she was fully terminated from her position with the state on December 10, 2001.

In November, 2002, S applied for PERS occupational disability benefits. She claimed that prolonged sitting at her state job significantly aggravated her pre-existing medical condition. Her application was denied because the records she provided did not establish that her employment significantly aggravated her condition. She appealed to the Office of Administrative Hearings.

The ALJ presided over a two-day hearing which included the medical opinion testimony of Drs. Blocher, Beard and Smith, the written medical opinion of Dr. Cole, the submission of 900 pages of S's medical records and the testimony of S, S's husband and S's former supervisor.

Dr. Cole, hired by the State, opined that S did not make an adequate case that her employment with the State was a significant aggravating factor of her disability. Dr. Blocher, hired by S, concluded that S's sedentary working conditions were "the only plausible medical etiology" for her condition. Dr. Beard testified that her condition was

not significantly aggravated by her employment. Dr. Smith testified that prolonged sitting would aggravate her condition by 5-10% at most.

The ALJ's decision thoroughly discussed how he evaluated all of the testimony and evidence presented to him. He found Drs. Cole and Blocher's testimony less persuasive due to the basis of their opinions, not the substance. They did not examine S, were hired as experts, and neither had special expertise relevant to S's medical condition. He further noted that Dr. Cole miscategorized another Dr.'s medical report. The ALJ stated that he gave the testimony of Drs. Cole and Blocher less weight.

The ALJ found the basis of Drs. Smith and Beard's testimony more persuasive. They both examined S and had some degree of experience treating patients with similar conditions.

The ALJ continued on to describe his analysis of Dr. Beard's opinion. He concluded that Dr. Beard made his conclusions by applying the wrong legal standard…she defined aggravation as a permanent worsening or flare up. The ALJ stated that for purposes of occupational disability, "aggravation" includes increased pain. Because of this error the ALJ gave Dr. Beard's opinion less weight.

Dr. Smith's testimony was deemed most persuasive. The ALJ stated "while there is no requirement that any specific percentage threshold be reached, it is not inherently unreasonable to conclude that 5 to 10 percent is not a substantial portion of a whole."

The ALJ also stated that sitting at work was simply one of the many contributing factors. He noted that S reported the condition was made worse by sitting, standing, walking, and physical activity generally. He also stated that "the medical records, both

preceding and following the date of disability indicate that many of the ordinary activities of everyday life were pain triggers, and that if sitting at work was an 'aggravating factor' it was no more or less so than anything else S was doing during her period of employment.'"

On May 21, 2007, the ALJ upheld the initial determination that S was not entitled to occupational disability benefits holding that "Ms. S did not prove by a preponderance of the evidence that her employment was a substantial factor in her disability." S now appeals the ALJ's decision to this court.

While S correctly cites the fact that this court cannot reweigh the evidence or choose between competing theories,[11] that is exactly what she is asking this court to do. S believes the ALJ erred because the weight of testimony weighed in her favor, because the ALJ diminished her testimony and the medical experts testimony and because the ALJ incorrectly determined that Dr. Smith's testimony that sitting increased her pain by 5-10% was not substantial factor in aggravating her disability.[12]

Addressing any of these arguments, other than to state that a reasonable mind could conclude that the ALJ did rely on substantial evidence would require this court to inappropriately reweigh the evidence. The ALJ considered all the evidence before him and gave a well reasoned analysis of his factual determination.

[11] Appellant's Opening Brief at 3.

[12] S attempts to argue that the ALJ, by addressing Dr. Smith's 5-10% possible aggravation determination, used an improper legal standard. Simply referring to the 5-10% aggravation level does not mean that he was substituting the legal standard it just shows that he used the 5-10% as one component in his analysis. *See Cacioppo*, 813 P.2d at 864.

The ALJ found it significant that S had been treated by numerous doctors for approximately 19 years before finally mentioning to any of them that prolonged sitting at work increased her pain. This was after she no longer worked (and did not sit at work) and after her application for occupational disability had been denied. He found it significant that many activities and circumstances that were not related to her work aggravated her condition. Bearing that in mind, he found that a possible aggravation of 5-10% was not a substantial factor in aggravating her condition.

S cites no legal authority which more adequately defines "substantial aggravating factor." This court finds that the ALJ did not abuse his discretion in making the factual determination that prolonged sitting at her State job was not a substantial factor in aggravating S's pre-existing medical condition. The ALJ relied on substantial evidence in making his determination. The May 21, 2007 decision of the ALJ is AFFIRMED.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 28th day of April, 2010.

Signed
ERIC A. AARSETH
Superior Court Judge

[This document has been modified to conform to the technical standards for publication.]