

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON  
REFERRAL FROM THE DEPARTMENT OF ADMINISTRATION**

In the Matter of D.S. )  
 )  
 ) OAH No. 05-0740-PER  
 ) Div. R & B No. 100-006

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**I. Introduction**

This is D.S.'s appeal of the Division of Retirement and Benefits' decision that she is not eligible to receive occupational disability benefits under the Public Employees Retirement System (PERS). The division denied Ms. S.'s application for benefits after it concluded that her work did not cause her vision loss. The evidence in record supports that conclusion. The division's decision, therefore, is affirmed.

**II. Facts**

A. History

On May 4, 2001, Alfred D. DeRamus, M.D., confirmed that Ms. S. had a congenital condition known as pseudoxanthoma elastica or PXE.<sup>1</sup> Dr. DeRamus noted that angioid streaks were already visible in Ms. S.'s retinas even though, with correction, she then still had 20/20 vision in both eyes.<sup>2</sup> Dr. DeRamus provided Ms. S. with information on PXE and she called him about that information on May 21, 2001.<sup>3</sup> Ms. S. did not keep a follow-up appointment with Dr. DeRamus scheduled for June 19, 2002.<sup>4</sup>

On January 13, 2003, the Department of Corrections hired Ms. S. as an Administrative Clerk II.<sup>5</sup> Ms. S. was promoted to a position as an Eligibility Technician I/II with the Department of Health and Social Services and transferred to that department in October 2003.<sup>6</sup> Because this was a promotion, Ms. S. needed to successfully complete a period of probation.<sup>7</sup>

<sup>1</sup> Division's Exhibit 4 at 1 (describing results of examination for PXE) & at 4 (referencing May 4, 2001 diagnosis in later letter to Michael Jensen).

<sup>2</sup> Division's Exhibit 4 at 5-6.

<sup>3</sup> Division's Exhibit 4 at 7 (describing 2001 and 2002 events in June 17, 2004 letter to Jensen).

<sup>4</sup> Division's Exhibit 4 at 7.

<sup>5</sup> Agency Record at 68-72 (applicant certification, personnel action forms, letter, and employment clearance form collectively showing hire date and name change, and identifying employing department as Corrections and position as Administrative Clerk II).

<sup>6</sup> Agency Record at 72-73.

<sup>7</sup> June 1, 2006 Testimony of Jeri Hughes (Hughes Testimony). Ms. Hughes was Ms. S.'s supervisor for the Eligibility Technician position.

Ms. S. had difficulty in her new position and her performance was not meeting expectations.<sup>8</sup> Eighty-five to ninety-five percent of her work as an Eligibility Technician involved reading and computer use.<sup>9</sup> Her supervisor testified that Ms. S.'s work habits were disorganized and that she had difficulty following instructions, relating to the trainer, and completing work in a timely manner.<sup>10</sup> According to her supervisor, when it became clear Ms. S. would not pass probation, she had the option of being demoted back to her prior Administrative Clerk II job classification.<sup>11</sup> Instead, she was laid off from her Eligibility Technician position effective June 21, 2004.<sup>12</sup> She had worked for state PERS employers less than two years.<sup>13</sup>

Meanwhile, late in March 2004, Ms. S. first told her employer (through the trainer) that she had a problem with her eyesight and was having headaches.<sup>14</sup> Ms. S. left work and was seen by Dr. DeRamus.<sup>15</sup> When Ms. S. returned to work on March 31, 2004, she reported that the doctor had concluded she was legally blind in one eye and going blind in the other.<sup>16</sup> For the next day or two, Ms. S. walked a co-worker through her case files and stayed off the computer.<sup>17</sup> Her employer "sent her home" around April 2, 2004, after the supervisor spoke with Dr. DeRamus and he told the supervisor that Ms. S. should not be looking at a computer screen and that doing so could cause her condition to worsen.<sup>18</sup>

<sup>8</sup> Hughes Testimony.

<sup>9</sup> Division's Exhibit 7 (stating same in "effect of disability" section of report by Hughes); *also* Hughes Testimony.

<sup>10</sup> Hughes Testimony.

<sup>11</sup> Division's Exhibit 7; Hughes Testimony.

<sup>12</sup> Agency Record at 74-76. It is not clear from the record why Ms. S. was laid off rather than demoted. Ms. Hughes indicated that Ms. S. may not have agreed to the demotion. Because Ms. S. declined to participate in the hearing, it was not possible to determine whether she, in fact, was given the option and expressly declined for health or other reasons.

<sup>13</sup> Agency Record at 69 & 76 (showing initial appointment in January 2003 and lay off in June 2004).

<sup>14</sup> Hughes Testimony.

<sup>15</sup> Hughes Testimony.

<sup>16</sup> Hughes Testimony.

<sup>17</sup> Hughes Testimony.

<sup>18</sup> Hughes Testimony.

The March 31, 2004 visit apparently was Ms. S.'s first examination by Dr. DeRamus since he diagnosed her with PXE in May 2001.<sup>19</sup> Dr. DeRamus noted that Ms. S. complained of decreased vision when reading and using a computer.<sup>20</sup> She reported that when she would stop reading or using the computer her vision would improve.<sup>21</sup>

In correspondence Dr. DeRamus stated that Ms. S.'s loss of vision in her eyes was caused by the PXE, not work.<sup>22</sup> He explained that PXE is "a congenital and hereditary disease that takes time to manifest itself in terms of the effects on a persons [sic] visual acuity."<sup>23</sup> He stressed that Ms. S.'s condition is genetic and is not related to anything that Ms. S did or did not do.<sup>24</sup> He opined that with Ms. S.'s visual difficulties, working on the computer "would be difficult at best and impossible at worst."<sup>25</sup>

B. Application for Benefits

On April 14, 2004, about two months before she was laid off, Ms. S. applied for PERS disability benefits.<sup>26</sup> On her application for disability benefits, Ms. S. listed "Approx. Feb. 25, 2004" as the date of her disabling injury or illness and checked the "yes" in the "accident" box.<sup>27</sup> She described the "nature of disability" as an epithelial tear in her right eye and deterioration in her left eye, which she attributed to "strain/stress from computers, fine detailed images (i.e. files, manuals) secondary to PXE."<sup>28</sup> Ms. S. reported to Ms. Hughes that computer use and reading strained her good eye and would cause her to become cross-eyed.<sup>29</sup>

On May 19, 2004, Dr. DeRamus completed the required "Physician's Statement."<sup>30</sup> In the statement he described the nature of Ms. S.'s illness or injury as "angioid streaks from

<sup>19</sup> Division's Exhibit 4 at 7 (describing his 2001 diagnosis and a missed appointment scheduled for 2002, and stating that Ms. S. "was seen again 2 years later on the 31st of March [2004] with a complaint of a drop in visual acuity ...").

<sup>20</sup> Division's Exhibit 3 at 2.

<sup>21</sup> Division's Exhibit 3 at 2.

<sup>22</sup> Division's Exhibit 4 at 5.

<sup>23</sup> Division's Exhibit 4 at 7.

<sup>24</sup> Division's Exhibit 4 at 5.

<sup>25</sup> Division's Exhibit 4 at 5.

Division's Exhibit 8 (Occupational/Nonoccupational Disability Application); Agency Record at 74 & 76 (showing separation date of June 21, 2004).

<sup>27</sup> Division's Exhibit 8.

<sup>28</sup> Division's Exhibit 8.

<sup>29</sup> Division's Exhibit 7.

<sup>30</sup> Division's Exhibit 2.

PXE." He listed the probable cause as "part of the natural history of PXE."<sup>31</sup> Under "prognosis" he wrote that Ms. S. "is legally blind in her right eye and severely visually disabled in her left eye" and that he did not expect her to improve.<sup>32</sup>

At the division's request, two physicians—William Cole and Irvin Handelman—reviewed Ms. S.'s medical records. Both of these physicians also testified at the hearing; Dr. DeRamus did not.<sup>33</sup>

Based on a review of the medical records, both Drs. Cole and Handelman found no evidence that Ms. S.'s vision loss was due to her work.<sup>34</sup> Dr. Handelman was reluctant to state with certainty that Ms. S. suffers from PXE without a tissue biopsy.<sup>35</sup> He opined that Ms. S. suffers from macular degeneration secondary to angioid streaks.<sup>36</sup> Dr. Handelman concluded that Ms. S.'s work did not aggravate her preexisting condition.<sup>37</sup> He testified that Ms. S.'s visual loss is attributable to heredity factors and would have happened regardless of the work.<sup>38</sup>

Though he could not be certain that Ms. S. suffers from PXE without a biopsy, Dr. Handelman stressed that his opinion would be the same whether the angioid streaks were attributable to PXE or another condition. Dr. Cole essentially concurred. Dr. DeRamus was confident that Ms. S. has PXE but also concurred that her work did not cause the condition. Ms. S. offered no contradictory evidence. The uncontradicted evidence,

<sup>31</sup> Division's Exhibit 2.

<sup>32</sup> Division's Exhibit 2.

<sup>33</sup> The division attempted to call Dr. DeRamus as a witness, but he did not make himself available for the hearing, despite several attempts to get him on the telephone, promises by his staff that he would be available shortly, and resulting delays in the hearing. Eventually, the division decided to release him as a witness. Because Ms. S. elected not to participate in the hearing, she suffered no prejudice to her right to examine the division's witnesses from Dr. DeRamus' unavailability.

<sup>34</sup> June 1, 2006 Testimony of William Cole; *also* Division's Exhibit 5 (concluding implicitly by its decision that Ms. S. should be denied occupational disability benefits though she suffers from a disabling condition that Ms. S.'s conditions was not caused by her work); June 1, 2006 Testimony of Irvin Handelman (Handelman Testimony); *also* Division's Exhibit 1 at 2 (concluding that Ms. S.'s "job injury" did not aggravate her pre-existing condition but rather "the condition is part of the natural progression of the degenerative process").

<sup>35</sup> Division's Exhibit 1 at 1; Handelman Testimony.

<sup>36</sup> Handelman Testimony.

<sup>37</sup> Handelman Testimony.

<sup>38</sup> Exhibit 1; Handelman Testimony.

therefore, establishes that Ms. S. suffers from macular degeneration not caused by her work but by PXE or some other condition, and that the condition preexisted her PERS employment and was not aggravated by the work she performed as a state employee.

### **III. Discussion**

The division denied Ms. S.'s application for disability benefits, reasoning that the medical documents submitted did not show her condition to be "occupationally caused."<sup>40</sup> The division's focus was on whether Ms. S. was eligible for occupational disability benefits. In her Notice of Appeal, Ms. S.'s focus was broader: she simply asserted that she is "entitled to benefits" and disagrees with the division's decision.<sup>41</sup> Though Ms. S.'s application and the division's decision concern only occupational disability,<sup>42</sup> this decision first will briefly discuss nonoccupational disability because Ms. S.'s eligibility for those benefits was raised during the hearing and prehearing processes.

PERS employees who become disabled may be eligible for one of two types of disability benefits: occupational or nonoccupational. Nonoccupational disability benefits are available to PERS employees who are not yet eligible for regular retirement and cannot continue working due to a disability that was not caused by their work, but the benefits are available only to employees who have been PERS members for five years or more at the time employment is terminated.<sup>43</sup> Because Ms. S. had been a PERS employee for less than two years when her employment terminated, she is not eligible for nonoccupational disability benefits.

Occupational disability benefits are available to PERS employees even during the first five years of employment, but only "if employment is terminated because of a total and apparently permanent occupational disability[.]"<sup>44</sup> To be considered an "occupational disability" within the meaning of the PERS statutes, the disabling condition must be caused by "a bodily injury sustained, or a hazard undergone, while in the performance and within the scope of the

<sup>39</sup> Handelman Testimony.

<sup>40</sup> Division's Exhibit 9 (denying application as of September 13, 2004, but expressing a willingness to reconsider if "additional medical information is made available which supports [Ms. S. 's] eligibility under the law").

<sup>41</sup> Agency Record at 3 (October 15, 2004 Notice of Appeal).

<sup>42</sup> See Agency Record at 15 (showing that Ms. S. checked only the "occupational disability" box on her application form); Division's Exhibit 9 (discussing only occupational disability in denying application).

<sup>43</sup> A S 39.35.400(a).

<sup>44</sup> A S 39.35.410(a).

employee's duties ..."<sup>45</sup> A preexisting condition, in and of itself, does not preclude a PERS employee from receiving disability benefits if work-related stress is a substantial factor in aggravating the condition, but on appeal the employee must establish by a preponderance of the evidence that work was a substantial factor in the disability and that the disability prevents the employee from performing the usual duties.<sup>46</sup>

Ms. S. has failed to produce any evidence that work was a substantial factor in her vision loss. She has failed to identify any work injury or incident that would have aggravated the preexisting angiod streaks to bring about her vision loss at the time and in the manner that it occurred. Her medical records establish that Ms. S.'s vision worsened during the period May 2001 to March 31, 2004, after she was first diagnosed with a degenerative macular condition. The uncontradicted medical evidence, however, shows that whether the cause was PXE or something else, Ms. S.'s preexisting macular condition was not made worse by her work but rather by a natural progression of her disease condition.

Ms. S.'s treating physician, Dr. DeRamus, concluded that work was not a factor in her disability. Though he cautioned against further computer use, telling Ms. S.'s supervisor that computer use might cause her condition to worsen, nothing in his correspondence, the medical records he produced or the physician's statement he submitted elaborates on his statement to the supervisor or substantiates the assertion that computer use might cause Ms. S.'s condition to worsen. Instead, the documents from Dr. DeRamus indicate that Ms. S.'s condition was not caused by anything she did but rather was genetic.<sup>47</sup> The division's physicians, Drs. Handelman and Cole, reviewed Dr. DeRamus' chart

<sup>45</sup> AS 39.35.680(27).

<sup>46</sup> *Hester v. Public Employees' Retirement Board*, 817 P.2d 472, 476 (Alaska 1991); AS 39.35.680(27) (defining "occupational disability" as requiring that the condition prevent satisfactory performance of duties); *Lopez v. Administrator, Public Employees' Retirement System*, 20 P.3d 568, 573-574 (Alaska 2001) (concluding that substantial evidence supported finding that a degenerative hip condition unrelated to work, not a workplace injury, caused the disability).

<sup>47</sup> Dr. DeRamus' April 1, 2004 letter and chart notes are the most reliable record of his thoughts after examining Ms. S. The letter was dictated shortly after talking with Ms. S.'s supervisor. The letter is a summary of his conversation with the supervisor as well an explanation of Ms. S.'s condition. It contains a detailed description of the physical events that resulted in Ms. S.'s loss of vision in her right eye. Dr. DeRamus affirmed the contents of his April 1, 2004 letter in subsequent correspondence. In the April 1, 2004 letter, Dr. DeRamus discussed how difficult it would be for someone with Ms. S.'s visual acuities to

notes and correspondence and agreed that Ms. S.'s macular degeneration is not work related.

#### **IV. Conclusion**

Based on the record before it at the time of the decision, the division did not err in denying Ms. S.'s occupational disability benefits. Ms. S. elected not to participate in the hearing. She offered no witnesses and filed no exhibits. She did not meet her burden to establish that her work more likely than not was a substantial contributing factor in her disability. Accordingly, the Division of Retirement and Benefits' decision that Deirdre S. is not eligible to receive occupational disability benefits under the Public Employees' Retirement System is AFFIRMED.

DATED this 25<sup>th</sup> day of July, 2007.

By: Terry L. Thurbon  
Chief Administrative Law Judge

work with a computer, but he did not say doing so would worsen what he considered to be a genetic degenerative condition. *See* Division's Exhibit 4 at 5.

**Adoption**

The undersigned, in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 21st day of August, 2007.

By: Terry Thurbon  
Chief Administrative Law Judge

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

Case Parties  
8/21/07