

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

IN THE MATTER OF:

R.M.

Case No. OAH-05-0811-PER
Div. R&B Case No. 2005-006

DECISION & ORDER

I. Introduction

R.M. filed an application for occupational disability benefits from the Public Employees' Retirement System (PERS). The administrator denied the application. The administrator also reviewed Mr. M.'s case to see if he would qualify for non-occupational disability benefits, but determined that Mr. M. would not qualify for these benefits either. Mr. M. appealed the denial of his application for occupational disability benefits.

A hearing was held on March 13, 2006. Mr. M. appeared by telephone. Assistant Attorney General Toby Steinberger represented the Division of Retirement and Benefits. The administrative law judge affirms the administrator's decision.

II. Facts

Mr. M. began working for the State of Alaska in 1977 doing general maintenance work. From 1980, he worked for the state at the Kulis Air National Guard Base ("Kulis"). Mr. M.'s job at Kulis included snow and ice removal around facilities and walkways in the winter months and maintenance of the ground surfaces, such as mowing and fertilizing the lawn, during the rest of the year. His job duties also included painting interiors and exteriors of buildings, changing light bulbs, moving furniture, faucet repair and cleaning window surfaces.

In January, 1995, neurosurgeon Louis Kralick examined Mr. M. primarily for neck pain. Dr. Kralick diagnosed a disc herniation of the cervical spine at the C5-C6 level, and performed an anterior discectomy and fusion at the C5-C6.¹ With respect to his back, Mr. M. reported to Dr. Kralick that he has had low back pain for years.² However, x-rays of the lumbar spine showed only minor degenerative changes.³

¹ Exhibit L, p. 191.

² Exhibit L, p. 203.

³ Exhibit L, p. 202.

In March of 2002, Mr. M. reported neck, back, right rib and nose pain due to hitting the windshield of a snow blower at work. Upon examination, Mr. M. did not demonstrate any pain during palpation of the lumbar spine. He suffered some diffuse tenderness in the thoracic area. His doctor released him to work, unrestricted, after a week.⁴

On May 7, 2003, Mr. M. filed a report of injury to his right wrist.⁵ He was diagnosed with a wrist sprain with ligament tear, which was treated surgically. Mr. M. was released to his regular job duties without restriction on January 8, 2004.⁶

On July 2, 2004, Mr. M. filed a report of occupational injury, claiming that on June 1, 2004, while driving a riding lawn mower, he suffered back pain.⁷ In July of 2004 Dr. Jerry Coles, a urologist, examined Mr. M. During this examination, Mr. M. reported that he had been suffering lower back pain, and that over-the-counter anti inflammatory drugs significantly reduced the back pain.⁸ Also in July of 2004, Dr. Derek Hagen, D.O., examined Mr. M. to assess his complaints of upper and lower back pain. X-rays dated July 12, 2004 show only moderate degenerative changes in the thoracic and lumbar spine, as before in 1995.⁹ Dr. Hagen released M. to return to work with minimal restrictions and wrote: "Unless he discontinues alcohol completely, I do not recommend trying anything else at this point."¹⁰ On August 13, 2004, M. returned to see Dr. Hagen, still complaining of back pain. Dr. Hagen again released Mr. M. to return to work with minimal restrictions, and referred him to a pain clinic.¹¹

M. was placed on temporary light duty on August 23, 2004, until September 2, 2004, when he was placed on medical leave because the drugs he had been prescribed impacted his ability to safely perform his duties.¹²

On October 21, 2004, M. underwent an MRI at the request of Dr. Gary Gerlay, M.D., at the Aurora Pain Clinic. The physician performing the MRI reported "there is mild

⁴ Exhibit L, p. 257.

⁵ Exhibit L, p. 297.

⁶ Exhibit L, p. 92.

⁷ Exhibit L, p. 295.

⁸ Exhibit L, pp. 83-84.

⁹ Exhibit L, p. 66.

¹⁰ Exhibit L, p. 46.

¹¹ Exhibit L, p. 43.

¹² Exhibit L, p. 279.

diffuse annular bulging at 3-4. No significant mass effect on adjacent neural elements is seen. The study is otherwise unremarkable."¹³

On October 29, 2004, Dr. Woodward, an orthopedic surgeon, examined Mr. M. at the request of the State's workers' compensation adjustor. Dr. Woodward reviewed all the medical records, including the x-ray and MRI reports mentioned above, and conducted a physical examination. Dr. Woodward concluded that M.'s work did not permanently injure M.'s lumbar spine, which was within normal limits for a man of 49 years of age. Dr.¹⁴ Woodward noted that M. had some restriction of lumbar extension and slight restriction of lateral flexion.¹⁵ However, Dr. Woodward opined that the only treatment that M. needed was mild over-the-counter analgesics for his lumbar condition. He noted that M. could return to work and perform his duties with no restrictions.¹⁶

On December 21, 2004, in response to an inquiry from the State's workers' compensation adjustor, Dr. Hagen reviewed Dr. Woodward's report as well as the job description for Mr. M. 's position (Ex. L at 280-287). Dr. Hagen wrote, "I do feel Mr. M. is capable of performing those job functions outlined on the form. I believe he could perform these duties on [a] full time basis. As far as medication goes, Mr. M. was prescribed Vicodin Extra Strength, which is a narcotic pain reliever in September of this year. He was subsequently referred to a pain management specialist, Dr. Gerlay at Aurora Pain Management. I am not aware of his current medication usage.. I am sure he has already used up the Vicodin Extra Strength that I had given him in September by this time."¹⁷ Mr. M. returned to work in December, 2004.¹⁸

On February 2, 2005, Mr. M. filed a report of occupational injury claiming that on January 28, 2005, he hurt his wrist and back while he was climbing a permanently mounted ladder.¹⁹ On February 14, 2005, Dr. Hagen noted that no trauma had occurred and he referred Mr. M. to physical therapy, but did not restrict his work.²⁰ Mr. M. saw Dr. Hagen for back and neck pain again on March 14, 2005, and on May 13, 2005; Dr. Hagen allowed Mr.

¹³ Exhibit L, p. 81.

¹⁴ Exhibit B, p. 9.

¹⁵ *Id.*

¹⁶ Exhibit B, p.10.

¹⁷ Exhibit L, p. 37.

¹⁸ Exhibit L, p. 279.

¹⁹ Exhibit L, p. 293.

²⁰ Exhibit L, p. 33.

M. to continue working without restriction.²¹ On June 6, 2005, Dr. Hagen wrote that he was now aware that a local pain management specialist had prescribed Mr. M. narcotics that would affect a person's ability to safely operate a vehicle or other machinery. Accordingly, Dr. Hagen restricted M.'s work activities due to the narcotic medications.²² Mr. M. was placed on medical leave that same day.²³

On August 22, 2005, Mr. M. was terminated from employment because he was unable to perform his job duties.²⁴

Dr. Radecki, a physiatrist, examined Mr. M. on November 11, 2005, concerning his January, 2005, report of injury to his back and wrist when he was climbing a ladder. This examination was made at the request of the State's workers' compensation adjuster. Dr. Radecki examined Mr. M.'s neck, back, and right wrist.²⁵ Dr. Radecki opined that Mr. M. did not suffer any permanent injury with respect to the alleged January, 2005, injury, and that at most he suffered a temporary flare-up that subsided.²⁶ Dr. Radecki wrote that Mr. M. could "return to work unrestricted," and that Mr. M. did not need medications; it was Dr. Radecki's opinion that M.'s problems are more psychosocial than physical.²⁷ Based on the reports of Drs. Woodward and Radecki, the state, as employer, controverted Mr. M.'s workers' compensation claims.²⁸

At the hearing, Dr. Radecki affirmed his written opinion. He also testified with detailed explanation that some of Mr. M.'s complaints of back pain are inconsistent with any medical condition that would produce pain. Dr. Radecki observed that when he was asked to demonstrate flexibility during the examination, Mr. M. appeared very inflexible and was not able to bend his back, but when he was dressing and bending to put on his shoes and clothes Mr. M. was very flexible and able to move freely in positions that during the examination he stated he could not obtain.

As noted above, On October 21, 2004, an MRI requested by Dr. Gary Gerlay of the Aurora Pain Clinic did not show any particularly unusual conditions to Mr. M.'s back.²⁹

²¹ Exhibit L, p. 29, 31.

²² Exhibit L, p. 25.

²³ Exhibit L, p. 279.

²⁴ Exhibit E.

²⁵ Exhibit I.

²⁶ Exhibit I, p. 8.

²⁷ *Id.*

²⁸ Exhibit I, p. 10.

²⁹ Exhibit L, p. 81.

Nevertheless, Dr. Gerlay prescribed a combination of hydrocodone, soma, and zonegran.³⁰ By April 28, 2005, Dr. Gerlay was prescribing to Mr. M. the following drugs:³¹

Zonegran 100 mg
Soma 350 mg
Percocet 10 mg
Oxycontin 20 mg
Cataflam 50 mg
Zoloft 50 mg

On April 21, 2005, the State Medical Board summarily suspended Dr. Gerlay's license to practice medicine for, among other things, prescribing unnecessary medication, failure to conduct adequate evaluations of his patients, unprofessional conduct, and incompetence.³²

Mr. M. did not present any evidence. In his closing argument at the hearing, Mr. M. stated his view that his medical condition may be more serious than stated by the physicians, but he agreed that he was currently capable of working:

As we speak now, I can't even wear tight stuff around my waist, like belts, and I had to carry this radio that looks like a walkie-talkie, and I mean that's killing me, you know like as we're speaking now. There is something wrong with me you know. But you know I'm not saying that this was all that bad that I couldn't go back to work. I would go back to work in that kind of condition, I mean, you know, like finish up my years. But I'm saying that where those other people were, on the state's side, that took my job, they were the ones that [unintelligible] me out like that, they, you know, what can I do, I'm just in the middle, I'm just following orders, I'm not insubordinate or anything, I didn't quit my job walk out of there. They say my injury's too severe and it's in black and white I mean if you see that paper there, whatever that is I don't know that paper we talked about that I sent you guys,³³ it's in black and white, your injury's too severe, we separate you from the state without prejudice. They separate me from the state without prejudice. And you know he walked me out the gate, you know? And I thought I would take the message, we can't work you in that kind of condition. That's what they told me. Walked me out the gate and took my job.

III. Discussion

Public employees are eligible for occupational disability benefits under AS 39.35.410(a), which provides:

³⁰ Exhibit L, p. 80.

³¹ Exhibit L, p. 69.

³² Exhibit D.

³³ Exhibit E. Mr. M.'s separation letter, dated August 22, 2005 states in part, "You are being separated from state service without prejudice due to the fact that you are unable to perform one or more the of the essential functions of your position due to your injury and your inability to return to work."

an employee is eligible for an occupational disability benefit if employment is terminated because of a total and apparently permanent occupational disability, as defined in AS 39.35.680, before the employee's normal retirement date.

The term "occupational disability" is defined in AS 39.35.680(27), which reads:

"occupational disability" means a physical or mental condition that, in the judgment of the administrator, presumably permanently prevents an employee from satisfactorily performing the employee's usual duties for an employer or the duties of another comparable position or job that an employer makes available and for which the employee is qualified by training or education; however, the proximate cause of the condition must be a bodily injury sustained, or a hazard undergone, while in the performance and within the scope of the employee's duties and not the proximate result of the wilful negligence of the employee[.]

The employee has the burden of proving that the requirements of the statute have been met.³⁴

Thus, Mr. M. has the burden of proving that (1) he has a disability, (2) his disability presumably permanently prevents him from satisfactorily performing his usual duties, and (3) the disability was caused by an injury or hazard at work.

The employer's reason for termination is not determinative of whether an employee is disabled. Rather, the issue is whether the employee is actually disabled and whether the disability was an actual cause of the termination of employment for which the employer is responsible.³⁵

Mr. M.'s argument is understandable; he was terminated from his job because of inability to work, and now he has been denied occupational disability benefits on the grounds that he is not disabled. It appears that from Mr. M.'s perspective, "the state" is the single entity that terminated his employment and then denied him benefits, and the state's positions are inconsistent. Mr. M. overlooks that his employer, the Department of Military and Veterans' Affairs, and the PERS administrator are two separate entities within the state. If Mr. M. believes he was unfairly separated from service, he should take that matter up with the Department of Military and Veterans' Affairs. The PERS administrator's role is not to look to the employer's decision, but rather to look at whether Mr. M. is disabled and unable to work

Mr. M. emphasized repeatedly that he was dismissed "without prejudice." When this testimony is heard in context, it appears that Mr. M. may have misunderstood the meaning of that phrase. Mr. M. appears to have understood "without prejudice" to mean

³⁴ *Rhines v. State*, 30 P.3d 621, 628 (Alaska 2001).

³⁵ *Stalnaker v. M.L.D.*, 939 P.2d 407,412 (Alaska 1997).

that his dismissal was permanent. It is more likely that by using the phrase, Mr. M.'s employer meant that the dismissal was without prejudice to rehiring Mr. M. when he was again able to perform his job. In other words, the employer was open to hiring Mr. M. back.

The evidence in the record does not explain precisely why Mr. M.'s job was terminated, other than that he was "unable to perform one or more of the essential functions of your position due to your injury and your inability to return to work." When Mr. M.'s medical records from Dr. Gerlay are overlaid with the sequence of events in the findings of fact from Dr. Gerlay's appeal of the summary suspension of his medical license, there is reason to believe that Mr. M.'s inability to work had little to do with any injuries, and a great deal to do with the cocktail of narcotics that Dr. Gerlay had prescribed. Excessive and inappropriate subscribing of narcotic medications at the time Mr. M. was terminated would be consistent with the findings in Dr. Gerlay's case about how he had treated other patients. If Mr. M. was unable to work because he had been incompetently medicated at the time, but he was able to work after discontinuing inappropriate medication, he would not be eligible for occupational disability benefits because his disability was not permanent. The record does show that Mr. M. was able to continue working after his alleged January 2005 injury without restriction, until Dr. Hagen learned that M. was taking narcotics.³⁶ This suggests that any disability was not permanent. Mr. M. admits that he is now capable of working.

IV. Conclusion

Mr. M. has not demonstrated that he suffers from a total and apparently permanent occupational disability. The administrator's decision to deny his application for occupational and non-occupational disability benefits should be affirmed.

V. Order

IT IS HEREBY ORDERED that the administrator's decision to deny Mr. M.'s application for occupational and non-occupational disability benefits be AFFIRMED.

DATED this 5th day of July, 2006.

By: DALE WHITNEY
Administrative Law Judge

³⁶ Exhibit L, pp. 29-33.

Adoption

This Order is issued under the authority of AS 39.35.006. 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 Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 6th day of September, 2006.

By: DALE WHITNEY
Administrative Law Judge

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

Case Parties
9/6/06