

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

In the Matter of	)	
B C	)	
_____	)	OAH No. 06-0456-PER
	)	Div. R&B No. 2006-021

**DECISION**

**I. Introduction**

Ms. C filed a claim for occupational disability benefits after the statutory deadline for filing of such claims. Ms. C has requested a waiver of the filing deadline based on extraordinary circumstances. The Commissioner requested that the Office of Administrative hear the matter and recommend a decision. Administrative Law Judge Dale Whitney heard the matter on December 1 and December 5, 2006. Ms. C appeared by telephone, and Assistant Attorney General Joan Wilkerson represented the Division of Retirement and Benefits. Because Ms. C's failure to apply for occupational benefits before the deadline was the result of extraordinary circumstances, her application should be processed as timely.

**II. Facts**

Ms. C has worked as an Environmental Services Journey I at the No Name Pioneer's Home since 1980. On October 21, 2004, Ms. C injured her back while moving a patient's refrigerator. From the following day until June 28, 2005, Ms. C was on leave. About a week after the injury, on October 28, 2004, Ms. C filed a report of injury with the Division of Worker's Compensation.

Ms. C returned to work on June 28, 2005, and attempted to work a partial shift. The last day she worked was July 13, 2005. When she did not return from family/medical leave, Ms. C was separated from service on October 15, 2005. Ms. C filed her application for occupational disability benefits on May 3, 2006, approximately 201 days after her date of separation.

Ms. C testified that during the ninety days after she separated from state service, depression aggravated by the loss of her job and her husband's declining health led her to a sense of despair that made it difficult for her to accomplish anything. On October 13, 2005, Ms. C contacted the Division of Retirement and Benefits to request information about occupational disability and withdrawing funds from her supplemental annuity account. Ms. C mentioned at this time that she had filed a worker's compensation claim about a year earlier and said she would continue to work

on that case. Ms. C testified that it took her days to muster the strength to make the call to the division, and she did so mostly at the urging of her husband. When she received the supplemental annuity forms, Ms. C's husband took them to the couples' accountant, who filled them out. Her husband then took Ms. C to the bank to have her signature notarized.

Ms. C called several witnesses at the hearing. Ms. C's husband testified that Ms. C's attitude since her injury had been that she was going to get better, she was going to go back to work, and that she would continue with her life as it had been. Mr. C testified that Ms. C did not adapt well to the emerging reality that she would not be able to return to work or to do the things she used to enjoy doing. Ms. C also called a close friend and confidante, D H. Ms. H has no medical training, but she has been treated for depression through counseling and medication, and is currently taking prescribed antidepressants. Ms. H testified that in the depths of her depression she felt hopeless and unable to get out of bed to accomplish anything, and that she recognized similar symptoms in Ms. C. Ms. H did not identify the specific times at which she observed symptoms, other than from Ms. C's injury at work up to the present.

Ms. C also called her internist, Dr. Robert Hunter, Jr. M.D., to testify. Dr. Hunter mostly specializes in internal medicine, but also has credentials in geriatrics and is a qualified general practitioner. Though not a psychiatrist, Dr. Hunter testified that he is competent to diagnose and treat clinical depression. Ms. C has been a patient in Dr. Hunter's multi-physician clinic for about twenty years, and Dr. Hunter could be considered Ms. C's primary physician for about the last two years. Dr. Hunter saw Ms. C the day after her back injury, and again on October 26, 2004, five days after her back injury.<sup>1</sup> Although Dr. Hunter has seen Ms. C on other occasions over the years, this visit was the first for her back injury and it is from this time that Dr. Hunter could be regarded as Ms. C's primary physician.

When Dr. Hunter first saw Ms. C for her back injury, she had already been suffering some other physical problems and had been previously diagnosed for depression. At that time she had been prescribed Zoloft, and also Roxicet for recurring migraine headaches. Dr. Hunter testified that regarding depression, he initially relied on a previous diagnosis from an earlier physician, but over time his own observations confirmed the diagnosis.

Questioning of Dr. Hunter focused on the ninety-day period from October 15, 2005, through January 15, 2006, which immediately followed Ms. C's separation from service. As early

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<sup>1</sup> Exhibits 55-57.

as August 24, 2005, Dr. Hunter was becoming concerned about Ms. C's emotional state, and he recommended that she consider starting back with the antidepressants that she had stopped taking because of the cost.<sup>2</sup> On October 13, 2005, Dr. Hunter again saw Ms. C and diagnosed depression with "psychological symptoms upset by work termination notice." The records indicate that receiving her termination notice had aggravated Ms. C's psychological condition, even though she had been expecting the notice, resulting in "stress of losing job assoc with financial issues and loss of insurance."<sup>3</sup> The October 13 notes show Ms. C suffering from fatigue, and anorexia and insomnia after receiving the notice. Dr. Hunter's records show that Ms. C had previously been treated with sertraline with some benefit, but she had discontinued that medication because of the cost.

On November 25, 2005 Dr. Hunter saw Ms. C and concluded that she was suffering from symptoms caused by stress.<sup>4</sup> Dr. Hunter's examination notes show that Ms. C was suffering insomnia because of worry. While no longer suffering anorexia, her appetite was "not great." The notes show that Ms. C was "depressed and upset," concerned about her husband's health, and sometimes overwhelmed to the point of crying. These notes of November 25, 2005, are the most recent medical records in the file. These notes show that Ms. C had "been advised to consider disability status" and that Dr. Hunter had completed a form for Ms. C's occupational disability application.

When asked on cross-examination why she did not complete the submission of her occupational disability application on time, Ms. C struggled for words. Ultimately she testified that she had been struggling to focus on the various different benefits and complete the proper paperwork, she had been trying to get better, she had been trying to get back to work, she had been trying to help her husband with his health, and she felt that she was failing in all of these things. She began to feel a sense of hopelessness, and with no hope that anything she did would help her and her husband's situation, she began to stop trying to do anything.

At the hearing, Dr. Hunter testified that Ms. C was clinically depressed during the period beginning in the middle of October, 2005, through November 25, 2005. Though he did not have more recent records available, Dr. Hunter testified that it was his recollection that Ms. C continued in a state of clinical depression at least through January, 2006. During this period Ms. C was not

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<sup>2</sup> Exhibit 21, page 3; testimony of Dr. Hunter.

<sup>3</sup> Exhibit 19.

<sup>4</sup> Exhibit 17; testimony of Dr. Hunter.

taking antidepressant medication, although Dr. Hunter felt at the time that she should have been. Ms. C was taking narcotic pain relievers, a combination of Roxicet, Lisinopril and Flexeril. Dr. Hunter testified that the narcotic element of Roxicet, oxycodone, could have the effect of making a person “drowsy and stupid” in addition to other potential side effects. He testified that Flexeril contains cyclobenzaprine, a muscle relaxant that can cause sleepiness and drowsiness. Dr. Hunter testified that use of these medications could be expected to interfere with or prevent completion of routine daily tasks.

### **III. Discussion**

In order to obtain occupational disability benefits, AS 39.35.410(f) requires the applicant to apply for such benefits within 90 days of the termination of employment. The statute provides for waiver of the deadline “if there are extraordinary circumstances that resulted in the employee’s inability to meet the filing requirement.” Before 2000, the statute required an application for benefits within 30 days of termination, and waiver was allowed for “good cause.” Because the PERS Board has traditionally interpreted “good cause” to require extraordinary circumstances, there has not been a significant change in the standard.<sup>5</sup>

“Extraordinary circumstances” are not specifically defined in regulations applying to waiver of the filing deadline for application for disability benefits. A regulation governing waiver of the deadline for appealing a denial of disability benefits provides that “extraordinary circumstances may include being adjudged as incompetent or confined to a hospital, but does not include lack of information or mere neglect.”<sup>6</sup>

The administrator relies on *ITMO X Y-Z*<sup>7</sup> for the argument that a psychological condition such as depression does not constitute extraordinary circumstances when the applicant had actual and constructive notice of the deadline. In *Y-Z*, the PERS Board determined that although Ms. Y-Z claimed a mental disability, the evidence showed that the reason her application was late was simply her own ignorance of the filing deadline. The Board gave little credence to her claim that she suffered a mental disability, and found that even if she did have a disability, it did not prevent her from filing on time.

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<sup>5</sup> Testimony of Retirement Manager Kathy Lea. Ms. Lea has worked for the Division of Retirement and Benefits for 17 years, and testified that the statutory change from “good cause” to “extraordinary circumstances” was made to codify what had been the board’s actual practice before the change.

<sup>6</sup> 2 AAC 35.290(d).

<sup>7</sup> *In the Matter of X Y-Z*, PERS Board Decision 02-10 (August 23, 2002); Attachment C to Administrator’s Prehearing Brief.

The Y-Z case differs from Ms. C's case. Although Ms. Y-Z testified that she was despondent after terminating her employment and had at some point been diagnosed with depression and bipolar disorder, the board appeared to accept the truth of Ms. Y-Z's initial statement that "I realize that my application is extremely dilatory and the only reason I can offer is the truth, which is the fact that I was uninformed concerning the disability programs offered through PERS." The board noted that Ms. Y-Z was capable of doing other things requiring focus during the application period, including taking classes and studying for and passing a test to obtain a real estate license.

Unlike Ms. Y-Z, Ms. C does not deny being aware of the filing deadline, and she did in fact have Dr. Hunter complete a form for her application before she gave up. Ms. C asserts that she did not file on time because of the psychological state arising from her depression and medication.

The administrator also states that Ms. C's "case is analogous to the *Appeal of C P*." In that case the applicant applied for occupational disability benefits three and a half years after the filing deadline.<sup>8</sup> Mr. P's only stated reason for not applying on time was an allegation that nobody ever told him about occupational disability, and that he was not sophisticated in matters of retirement planning. The *P* case is not analogous to Ms. C's case; regardless of whether one accepts her argument, Ms. C's position is that a documented medical condition prevented her from filing on time. Again, as Ms. C does not claim ignorance as an excuse, the *P* case does not provide guidance.

Two other cases present factual situations more similar to Ms. C's than those relied on by the administrator. In the *Matter of the Appeal of D D*, the PERS Board found that Ms. D, who applied for occupational disability benefits about a year and a half after the filing deadline, was confused about whether she could qualify for benefits.<sup>9</sup> While restating that simple ignorance of potential eligibility did not constitute cause for waiver of the deadline, the board found "cause to arise from (a) confusion which reasonably had been expected to arise when Ms. D assumed worker's compensation constituted the sole source of medical payments, and (b) the state of depression and drugs to cure depression which may have left Ms. D in a situation of less than full ability to focus on protecting her rights under PERS."

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<sup>8</sup> *In the Matter of the Appeal of C J. P*, PERS Board Decision 02-15 (November 22, 2002); Attachment G to Administrator's Prehearing Brief.

<sup>9</sup> *In the Matter of the Appeal of D D*, PERS Board Decision 96-4 (July 29, 1996).

In the *Matter of the Appeal of K N*, the PERS Board considered an appeal of a denial of occupational disability benefits that was appealed to the board after the expiration of the 30-day appeal deadline.<sup>10</sup> In determining whether extraordinary circumstances merited waiver of the deadline, the board found that

it is highly likely that Mr. N's failure to file a timely appeal with this board was caused by confusion and misunderstanding on his part, which confusion and misunderstanding may well have been precipitated by PTSD [post-traumatic stress disorder] and depression. Confusion and failure to meet deadline are a manifestation, according to credible witnesses in this case, of the mental condition which burdens Mr. N. Because of the unique circumstances of this case, particularly when weighed against the hardship which would be imposed on Mr. N should he be prevented from presenting his appeal, the Board finds that extraordinary circumstances exist to justify waiving the 30-day filing deadline prescribed by 2 AAC 35.100.

Mr. N had terminated from his job as an Anchorage municipal attorney in 1994. Mr. N had suffered post-traumatic stress disorder resulting from his combat experience in Vietnam, which in turn resulted in depression. The evidence in that case showed that forgetfulness and confusion regarding deadlines was characteristic of PTSD and depression.

Ms. C's case is most similar to the *D* and *N* cases. Ms. C did not claim ignorance of the filing deadline, and in fact the administrator established, and Ms. C did not dispute, that Ms. C was fully aware of the deadline. She in fact took initial steps to apply by having Dr. Hunter complete a form. It is more likely than not that Ms. C's state of clinical depression combined with her use of prescription narcotics prevented her from filing her application for occupational disability benefits in a timely manner. Considering her awareness of the filing deadline and her family's troubled financial state at the time, it is very unlikely that Ms. C would have failed to complete the application out of mere forgetfulness or lack of appropriate diligence; the evidence supports the likelihood of some intervening cause, such as a medical or psychological condition.

The administrator correctly points out that Ms. C was not receiving any counseling, medication, or other therapy during the three months after termination of her employment. But the evidence in the record establishes that she probably should have been. In fact, had Ms. C been taking the antidepressants that Dr. Hunter felt were appropriate at the time, there is a much better chance she would have filed her application on time. In the sense that the board has consistently assigned to the term "extraordinary circumstances," it is more likely than not that extraordinary

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<sup>10</sup> *In the Matter of the Appeal of K T. N*, PERS Board Decision 2000-15 (December 24, 2000).

circumstances prevented Ms. C from filing her occupational disability benefits application in a timely manner.

**IV. Conclusion**

Because extraordinary circumstances prevented Ms. C from filing her application for occupational disability benefits in a timely manner, her late application should be accepted as timely in accordance with AS 39.35.410(f).

DATED this 17<sup>th</sup> day of April, 2007.

By: Signed  
DALE WHITNEY  
Administrative Law Judge

**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 1<sup>st</sup> day of June, 2007.

By: Signed  
Signature  
Annette Kreitzer  
Name  
Commissioner, Department of Administration  
Title

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