

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

In the Matter of:

L.V.

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OAH No.06-0701-PER

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**FINAL DECISION & ORDER**

**I. Introduction**

On March 3, 2008, and March 7, 2008, Administrative Law Judge Mark T. Handley of the Office of Administrative Hearings (OAH) held a hearing to consider the matter of L.V., who appealed the denial of her claim for occupational or non-occupational disability retirement benefits.

Ms. V. filed an application for occupational disability benefits. The Administrator of the Alaska Division of Retirement and Benefits (Administrator) denied Ms. V. occupational disability benefits because the Administrator determined that Ms. V. did not suffer a work-related injury that presumably permanently disabled her from doing her work.

Ms. V. also filed an application for non-occupational disability benefits. The Administrator also reviewed Ms. V.'s application for non-occupational disability benefits, and denied Ms. V.'s non-occupational disability benefits as well, because Administrator determined that Ms. V. does not have a disabling condition that permanently prevents her from returning to work. Ms. V. appeals the Administrator's denial of occupational disability benefits.

Because Ms. V. suffered from a disability due to a brain injury on-the job that made her unable to perform her job duties and caused her termination, the Administrator's denial of Ms. V.'s claim for PERS occupational disability retirement benefits is overturned.

**II. FACTS**

**Summary of Employment and Termination**

Ms. V. began working for the State of Alaska, Department of Health and Social Services on February 1, 1989.<sup>1</sup> She has 15.09220 years of credited PERS service which includes .91305 years of paid-up claimed Workers' Compensation service.<sup>2</sup> Her most recent position was

<sup>1</sup> Agency Record P4, 20, 147.

<sup>2</sup> Agency Record P4.

that of an Eligibility Quality Control Technician 1.<sup>3</sup> This job was a primarily a desk job.<sup>4</sup> However, Ms. V. was required to travel. Her job also required the Ms. V. to understand the complex inter-play of changing state and federal laws and make decisions about whether these laws were being correctly applied by the eligibility technicians whose work she reviewed. Ms. V.'s quality control reviews could lead to substantial state liability for federal fines, if audits of her work discovered errors.<sup>5</sup>

Ms. V.'s employment with the state of Alaska was terminated effective December 31, 2003, because she had not been to work since her accident on March 27, 2003. Ms. V. had not returned to work because she believed that she could not competently perform her duties. As the result of a brain injury received in the on-the-job car accident, Ms. V. found that she no longer had the mental ability to understand and apply changes in the laws that controlled the eligibility determinations it was her job to review. Ms. V. met with her supervisor and proposed a plan that reduced the complexity of her workload and limited the state's liability for the mistakes she feared that she might make as the result of her disability, but her proposal was rejected. During the appeals process for her claim for disability benefits, Ms. V. was diagnosed with advanced anal cancer. Although she appears to have recovered some of her mental ability, she will probably never be able to return to work.

### **Medical History Prior to Disabling Injury**

Ms. V. has a long history of medical problems and treatment. Some of her problems may have been exacerbated, and some of the treatment she received certainly was less than optimal, because her two most serious medical conditions, her brain injury and her cancer, were not diagnosed by some of the health care professionals who examined and treated her.<sup>6</sup> During her 15 years of employment with the state, Ms. V. received treatment for neck, back and shoulder pain,<sup>7</sup> and she also filed several workers' compensation claims.<sup>8</sup> Ms. V.'s medical

<sup>3</sup> Agency Record P20, 147.

<sup>4</sup> Agency Record P755-56, 779-87.

<sup>5</sup> Recording of Hearing.

<sup>6</sup> Recording of Hearing.

<sup>7</sup> *See for example*, Agency Record P645-730 (Dr. James C. Emerson, March 17, 1989—May 11, 1998); Agency Record P546-49 (Westchester Physical Therapy, April 13, 1992—May 12, 1992); Agency Record P538-45 (United Physical Therapy, August 4, 1997—August 27, 1997); Agency Record P214-55 (Dr. Michael B. Armstrong, September 26, 1994—May 13, 1998); Agency Record P268-82 (Alaska Family Medical Associates, October 27, 1991—October 3, 1995); Agency Record P314-359, (Dr. Jay Van Houten, October 29, 1996—August 22, 2002).

<sup>8</sup> Agency Record P736-56; September 8, 1994 (repetitive strain on neck, shoulders, arms, back, head and face); May 19, 1995 (repetitive strain injury of neck, shoulders, back, arms, and hands; injury date noted as 6/1991); October 2, 1997 (hand, arm, shoulder and back pain); February 24, 1998 (repetitive strain injury of neck, shoulders, back, arms and hands; injury date noted as 8/30/1997); April 7, 1998 (repetitive strain injury of neck, shoulders,

records, chart notes, injury reports and physician statements, describe neck, shoulder and back pain, as early as March 1989.<sup>9</sup> Ms. V. continued to suffer from shoulder, neck and back pain through the 1990s.<sup>10</sup> For example, on September 26, 1994, Dr. Michael B. Armstrong, a rheumatologist, noted "[t]en out of 18 fibromyalgia tender points" including "the anterior and posterior cervical, intrascapular areas, right superior gluteal, and left trochanteric, as well as the medial aspect of the right knee."<sup>11</sup> Consequently, Dr. Armstrong diagnosed Ms. V. with fibromyalgia and myofascial syndrome (cervical and right shoulder girdle).<sup>12</sup> A *Compensation Report* dated December 6, 1994, shows that Ms. V. was paid temporary total disability (TTD) benefits from August 25, 1994 through November 27, 1994.<sup>13</sup>

On September 30, 1997, Ms. V. was injured when, in a "non-violent intervention training", a co-worker demonstrated a martial arts "take-down" technique on Ms. V.<sup>14</sup> Consequently, Ms. V. filed a workers' compensation claim, and on January 19, 1998, her chiropractor, Dr. James C. Emerson recommended that Ms. V. "refrain from all physical activities, including work, until further notice" because of "exacerbation of symptoms."<sup>15</sup>

On March 18, 1998, Ms. V.'s rheumatologist, Dr. Michael B. Armstrong completed a *PERS Physician's Statement* diagnosing Ms. V. with myofascial pain syndrome.<sup>16</sup> He opined that Ms. V.'s condition completely restricted her job performance, and that he did not expect her to improve to the extent that she could perform work in the future.<sup>17</sup>

As early as April 1998 or even earlier, Ms. V. may have been suffering from undiagnosed anal cancer.<sup>18</sup> Despite her numerous medical treatments and evaluations after that

back, arms and hands; injury date noted as 9/30/1997; May 14, 1998 (repetitive strain of neck, shoulders, back, arms and hands; injury date noted as 9/30/1997); April 3, 2002 (left knee, shoulder, trunk, legs, arms and back pain due to motor vehicle accident).

<sup>9</sup> See for example, Agency Record P546 (neck pain); Agency Record P538 (cervical, thoracic and lumbar pain); Agency Record P730 (neck and back pain); see also, Agency Record P281 (note that Ms. V. sustained a back injury while working as a checker at a grocery store in or about 1986); Agency Record P195 (cervical strain); Ex. 277 (diagnosis of cervicothoracic strain).

<sup>10</sup> See for example, Agency Record P235 (variable and marked pain in the right shoulder girdle, upper extremity, neck, face, head; intermittent nausea; difficulty concentrating; difficulty performing repetitive tasks fatigue); P269 (injury to lower back on January 17, 1995); P717 (letter dated July 15, 1996, from Dr. James Emerson indicating that V. should not work until July 22, 1996 at the earliest); P645-756 (daily chart notes from Dr. Emerson).

<sup>11</sup> Agency Record P236.

<sup>12</sup> Agency Record P236.

<sup>13</sup> Ex. 748.

<sup>14</sup> Agency Record P742.

<sup>15</sup> Agency Record P671.

<sup>16</sup> Agency Record P.214.

<sup>17</sup> Agency Record P.214.

<sup>18</sup> Recording of Hearing.

time, Ms. V. was not diagnosed with anal cancer until after she sought treatment in Florida from Dr. S. Ali Safdar on April 26, 2006.<sup>19</sup> By this date, Ms. V. was already in the process of her administrative appeal of the Division's denial of her disability retirement claim. By the time that Ms. V. received the diagnosis of cancer, it was in a very advanced stage.<sup>20</sup> Ms. V. testified that the size of her tumors at the time they were diagnosed indicated that they may have been growing for eight or more years.<sup>21</sup>

Ms. V.'s medical reports and medical records dating from at least 1998 forward, should now be read with the hindsight that they were written at a time when Ms. V. may have been suffering from a life threatening medical condition that her care providers and the Workers' Compensation and the Division's experts were unaware of. At the hearing, the Division's expert witnesses admitted that these records and reports might have reached different conclusion if the experts had been aware of her cancer when it started, which may have been contributing to her symptoms.<sup>22</sup>

Due to her workers' compensation claim, Ms. V. underwent two orthopedic independent medical evaluations, one on April 18, 1998, by Dr. Scott Fechtel<sup>23</sup> and one on July 25, 1998, by Dr. Bryan H. Laycoe.<sup>24</sup> Dr. Fechtel diagnosed Ms. V. with chronic pain syndrome, stating, "I doubt fibromyalgia, and I doubt myofascial pain syndrome."<sup>25</sup> Dr. Fechtel explained that despite Dr. Armstrong's finding of "prominent fibromyalgia tender points," he had "searched diligently for such tender points [and] found no texture changes in her muscles characteristic of those tender points."<sup>26</sup> Both doctors concluded that Ms. V. displayed no orthopedic, neurologic or chiropractic impairment of function other than her chronic, subjective pain. Accordingly, they concluded that Ms. V. had no ratable impairment, and that she was capable of working in her sedentary job.<sup>27</sup>

Because Dr. Fechtel suspected that Ms. V.'s symptoms were caused by psychological or psychiatric factors,<sup>28</sup> Ms. V. also underwent a psychiatric IME by Dr. Randal W. Winn on July

<sup>19</sup> Recording of Hearing.

<sup>20</sup> Recording of Hearing.

<sup>21</sup> Recording of Hearing.

<sup>22</sup> Recording of Hearing. At the hearing, the Division brought out that Ms. V. had been suffering from symptoms consistent with Irritable Bowel Syndrome and anal cancer for over ten years.

<sup>23</sup> Agency Record P48-55.

<sup>24</sup> Ex. 28-30.

<sup>25</sup> Agency Record P53.

<sup>26</sup> Agency Record P28.

<sup>27</sup> Agency Record P26; P30.

<sup>28</sup> Agency Record P53.

10, 1998.<sup>29</sup> Ms. V.'s mental status examination was for the most part normal, but Dr. Winn noted that "[w]hen left to her own devices, she gravitates toward a somatic focus and a description of her subjective sense of pain and medical history, although she is readily redirectable."<sup>30</sup> Dr. Winn diagnosed Ms. V. with dysthymia, controlled.<sup>31</sup> Dr. Winn concluded that Ms. V.'s medical/psychological condition was not "producing any significant barrier to her return to the world of work. In fact, gainful activity, to the extent she is able to tolerate it physically, would likely be therapeutic and improve her level of self-esteem and confidence and therefore psychological function."<sup>32</sup>

A *Compensation Report* dated September 15, 1998, reveals that Ms. V. was paid temporary total disability (TTD) benefits from January 19, 1998, through September 2, 1998.<sup>33</sup> According to the form, however, Ms. V.'s disability ended June 1, 1998.<sup>34</sup>

After June 1, 1998, Ms. V. continued to receive regular treatment for neck pain, shoulder pain, back pain, insomnia and depression through early 2002.<sup>35</sup> On April 18, 2001, Ms. V. sought treatment from Dr. Van Houten, complaining of neck pain.<sup>36</sup> According to those records, Ms. V. was involved in a motor vehicle accident on or about April 8, 2001, while vacationing in Hawaii.<sup>37</sup> Examination revealed "neck spasm pain tenderness" but normal reflexes and sensation.<sup>38</sup> Dr. Van Houten diagnosed Ms. V. with cervical strain.<sup>39</sup>

Ms. V. testified that a few weeks before the accident in March of 2002, she thinks that her medical problems had stabilized somewhat due to the treatment she received as the result of a sleep study.<sup>40</sup>

### **Disabling Injury**

On March 27, 2002, Ms. V. was involved in a motor vehicle accident when she lost control of her vehicle on some ice and hit another vehicle nearly head-on.<sup>41</sup> Both vehicles were

<sup>29</sup> Agency Record P31-41.

<sup>30</sup> Agency Record P36.

<sup>31</sup> Agency Record P36.

<sup>32</sup> Agency Record P39.

<sup>33</sup> Agency Record P746.

<sup>34</sup> Agency Record P746.

<sup>35</sup> See, Agency Record P41-48 and Agency Record P917-19.

<sup>36</sup> Agency Record P322.

<sup>37</sup> Agency Record P322.

<sup>38</sup> Agency Record P322.

<sup>39</sup> Agency Record P322.

<sup>40</sup> Recording of Hearing.

<sup>41</sup> Agency Record P583, 751-54.

traveling at about 45 miles per hour.<sup>42</sup> This means that their combined speeds were 90 miles per hour at the time of the head on crash. Ms. V. | was wearing her seat belt and the airbag deployed.<sup>43</sup> Ms. V. was on State of Alaska business when the accident occurred.<sup>44</sup> At the hearing, Ms. V. described her recollection of her experience of the crash as so violent and painful that it felt like a huge explosion on her body, which caused her to think that she was going to die.<sup>45</sup> The car that she drove was totaled.<sup>46</sup> The emergency responders had to extract her from the car.<sup>47</sup> She was taken to be ambulance to the Valley Hospital Emergency Room.<sup>48</sup> Ms. V. | admits that her memory of the period after the accident is somewhat incomplete and contains large gaps.<sup>49</sup> She does not remember being asked about loss of consciousness during the accident, but the intake form indicates that she had indicated that she had not lost consciousness.<sup>50</sup>

### **Medical History After the Accident**

The emergency room physician, Dr. Lee, ruled out any acute abnormalities, prescribed Percocet for pain management and released Ms. V. in stable condition with discharge instructions to follow up the next day with Dr. Van Houten, her primary physician.<sup>51</sup> Six hours passed between the time of the accident and the time the hospital called Mr. V.<sup>52</sup> Ms. V.'s recollection was that when her husband came to pick her up, Mr. V. discovered that her pants were wet from loss of bladder control.<sup>53</sup> On the way home, the muscles in her back were spasming so badly that her husband took her directly to her own physician Dr. Van Houten.<sup>54</sup>

Ms. V.'s mental function after the accident was impaired by the trauma the accident caused to her brain, the pain she suffered as the result of other injuries, and the side effects of the drugs she was prescribed.<sup>55</sup>

<sup>42</sup> Recording of Hearing.  
<sup>43</sup> Recording of Hearing.  
<sup>44</sup> Agency Record P741, 749.  
<sup>45</sup> Recording of Hearing.  
<sup>46</sup> Recording of Hearing.  
<sup>47</sup> Recording of Hearing.  
<sup>48</sup> Recording of Hearing.  
<sup>49</sup> Recording of Hearing.  
<sup>50</sup> Recording of Hearing & Agency Record P581-95.  
<sup>51</sup> Agency Record P583.  
<sup>52</sup> Recording of Hearing.  
<sup>53</sup> Recording of Hearing.  
<sup>54</sup> Recording of Hearing.  
<sup>55</sup> Recording of Hearing.

Ms. V., her husband, and her parents all testified credibly about the changes in her mental ability after the accident.<sup>56</sup> Ms. V. and her family describe her as an unusually intelligent go-getter, very successful in her job who was very ambitious and who had an almost photographic memory prior to the accident.<sup>57</sup> Mr. V. testified that his wife was like a different person after the accident.<sup>58</sup> He had to constantly repeat himself to her and remind her of what they were doing.<sup>59</sup>

In the months between the accident and her termination, Ms. V. slowly recovered from the most serious chronic pain that was the result of the physical trauma she suffered from the crash.<sup>60</sup> Unfortunately, between the accident in March 2002 and January of 2003, Ms. V. was prescribed so many drugs to manage this pain, and the sleeping difficulties that this pain caused, that her husband and her parents to became concerned about the side effects.<sup>61</sup> In January of 2003, Ms. V. sought medical assistance to lower her use of these drugs from Dr. Byron E. Perkins.<sup>62</sup> Ms. V. believes that she was not free from the side effects of these drugs until April of 2003.<sup>63</sup> This was several months before her termination in December of 2003. Despite being free from the side effects of pain and sleep medication, Ms. V. was still suffering from cognitive problems that prevented her from resuming her duties.<sup>64</sup>

Ms. V. made numerous visits to Dr. Van Houten following the March 27, 2002 motor vehicle accident.<sup>65</sup> At the hearing, Ms. V. admitted that her memory of the week following the accident is clouded and that her primary recollection of that period is that her whole body was in incredible pain.<sup>66</sup> Although, records pointed to by the Division indicate that Ms. V. denied any head trauma on the date of the accident.<sup>67</sup> Two weeks later, on April 12, 2002, Dr. Van Houten noted "forgetfulness, possible loss of consciousness from MVA [, ]<sup>68</sup> [and] possible traumatic brain injury."<sup>69</sup> At the hearing, Ms. V. testified that she remembers Dr. Van Houten telling her

<sup>56</sup> Recording of Hearing.

<sup>57</sup> Recording of Hearing.

<sup>58</sup> Recording of Hearing.

<sup>59</sup> Recording of Hearing.

<sup>60</sup> Recording of Hearing.

<sup>61</sup> Recording of Hearing.

<sup>62</sup> Recording of Hearing.

<sup>63</sup> Recording of Hearing.

<sup>64</sup> Recording of Hearing.

<sup>65</sup> Agency Record P323-P335

<sup>66</sup> Recording of Hearing.

<sup>67</sup> Agency Record P334

<sup>68</sup> Cf. Agency Record P583.

<sup>69</sup> Agency Record P323.

at some point that her wet pants and loss of bladder control at the time of the accident was an indication that she had lost consciousness.<sup>70</sup> Ms. V. testified at the hearing that she lost her sense of smell for several months after the accident.<sup>71</sup> Ms. V. testified that she told Dr. Van Houten about this at some time and was informed that this was caused by trauma to a bony area in her head within her olfactory system.<sup>72</sup> At the hearing, Ms. V. stated that she does not believe that she was able to get all her records from Dr. Van Houten because he later lost his medical license.<sup>73</sup>

On or about July 23, 2002, Ms. V. was involved in a minor motor vehicle accident.<sup>74</sup> She reported immediate low back pain for which she sought treatment from Dr. Van Houten.<sup>75</sup> Dr. Van Houten gave Ms. V. Toradol (anti-inflammatory analgesic ketorolac) injection.<sup>76</sup>

On or about August 27, 2002, at the request of Ms. V.'s primary physician Dr. Van Houten, Ms. V. was evaluated by Dr. Larry A. Levine, a physiatrist. According to his notes, Ms. V. reported "several minutes" of lost consciousness as a result of the March 27, 2002 collision. Ms. V. also reported that she loss of bladder control after the accident to Dr. Levine.

On October 23, 2002, Ms. V. was referred to Anne Ver Hoef, MA, CCC-SLP, who conducted an initial speech-language pathology interview and evaluation.<sup>77</sup> At the hearing, Ms. V. explained that this referral was made at the instigation of her physical therapist. Ms. V. recalled that her physical therapist, Karen Edwards, called Ms. V.'s attention to her inability to remember and properly process physical therapy instructions.<sup>78</sup> Ms. V.'s speech therapist, Ms. Ver Hoef, diagnosed Ms. V. as having a "traumatic brain injury" and "cognitive disorder."<sup>79</sup> Ms. V. testified that Ms. Ver Hoef worked with other patients with brain injuries.<sup>80</sup> Ms. Ver Hoef recommended to Ms. V. that she work with her to learn some coping skills.<sup>81</sup> Ms. V. continued individual speech therapy with Ms. Ver Hoef through 2004.<sup>82</sup> During these sessions, Ms. V. reported word-finding difficulties, dropping items, and problems with keeping track of

<sup>70</sup> Recording of Hearing.

<sup>71</sup> Recording of Hearing.

<sup>72</sup> Recording of Hearing.

<sup>73</sup> Recording of Hearing.

<sup>74</sup> Agency Record P108; *see also*, P417,422, and 435.

<sup>75</sup> Agency Record P108.

<sup>76</sup> Agency Record P108.

<sup>77</sup> Agency Record P508.

<sup>78</sup> Recording of Hearing & Agency Record P267.

<sup>79</sup> Agency Record P508.

<sup>80</sup> Recording of Hearing.

<sup>81</sup> Recording of Hearing.

<sup>82</sup> Agency Record P.469-508.



materials.<sup>83</sup> At the hearing, Ms. V. recollected that she worked with Ms. Ver Hoef help her get ready to return to work. Ms. V. remembered taking some with materials from work to Ms. Ver Hoef, so that Ms. Ver Hoef could help her cope with her diminished metal capacity, and learn new ways to do her job.<sup>84</sup>

As noted earlier, Ms. V. had stopped the taking the pain medication that was, in her own words making her "feel like a zombie" by April of 2003. Although, this period overlapped some of the time Ms. V. was receiving help from Ms. Ver Hoef, the problems that Ms. Ver Hoef helped her with did not go away after April of 2003.<sup>85</sup>

Ms. Ver Hoef helped Ms. V. develop skills to compensate for the difficulty that Ms. V. was having with word retrieval; reading and understanding what she read; paraphrasing back to Ms. Ver Hoef; and seeing everything that was on a page of written material. Ms. V. explained that Ms. Ver Hoef was trying to help her compensate for her loss of mental ability, through learning "tricks" like carefully scanning each page with her finger and putting up sticky notes to remind herself of things. Ms. V. did quite a lot of homework for Ms. Ver Hoef. She continued to see Ms. Ver Hoef, at her own expense, even after the workers' compensation insurer stopped paying for her treatment.<sup>86</sup>

On January 27, 2003, Ms. V. had established care with Dr. Byron E. Perkins, a family practitioner.<sup>87</sup> At the hearing, Ms. V. explained she asked Dr. Perkins to help her to cut back on her pain and sleep medication at her mother's instigation, as explained earlier. Ms. V. had been going to a pain management clinic before this and they had her on a regime of prescription drugs that were having side effects that were causing her family concern. Ms. V. medical records with Dr. Perkins show that she informed him that she had suffered "a significant traumatic brain injury and has lost functional memory" as a result of her March 27, 2002, motor vehicle collision.<sup>88</sup> Ms. V. testified that Dr. Perkins told her that he hoped that reducing her medication might reduce some of the cognitive difficulties that she was experiencing. Ms. V. testified that before Dr. Perkins helped her reduce her medications, she felt like she was in a stupor.<sup>89</sup>

<sup>83</sup> Agency Record P469-508.

<sup>84</sup> Recording of Hearing.

<sup>85</sup> Recording of Hearing.

<sup>86</sup> Recording of Hearing.

<sup>87</sup> Agency Record P211.

<sup>88</sup> Agency Record P211.

<sup>89</sup> Recording of Hearing.

Dr. Perkins diagnosed Ms. V. with post-traumatic brain injury, cervical degenerative joint disease (DJD), depression and post-traumatic stress disorder (PTSD).<sup>90</sup> Dr. Perkins also completed a *Work Status Form*, opining that Ms. V. was temporarily unable to resume any work and would be disabled "from 1/13/03 through 3/1/03."<sup>91</sup>

On April 7, 2003, Ms. V. reported to Dr. Perkins for follow up treatment for her chronic pain.<sup>92</sup> Ms. V. continued to see Dr. Perkins regularly through 2003.<sup>93</sup>

**Ms. V.'s Termination from Employment.**

At the hearing, Ms. V., her husband and her parents explained that Ms. V. loved her job and did not want to stop working.<sup>94</sup> Ms. V. testified that although she had other health problems before the head-on collision, she believes that she would have been able to keep working but for the brain injury that she suffered as the result of the accident.<sup>95</sup> Ms. V. testified that she went into work several times after her head-on accident to talk to her co-workers and that these conversations made her realize that she could not understand the changes in the law that they were talking about.<sup>96</sup> Ms. V. explained that after the head-on collision and through most of 2003, she continued to hope that she would be able to return to work either through recovery of her former mental abilities, developing coping skills, or some form of accommodation from her employer.<sup>97</sup> Finally, when Ms. V. did not make enough progress from the first two of these possibilities to allow her to resume her duties, Ms. V. met with her supervisor and made a proposal to return to work with restricted duties.<sup>98</sup> Ms. V. asked that her duties be reduced to limit the complexity of her workload and also limit the state's liability for her mistakes.<sup>99</sup> Ms. V. asked that she be asked only to review determinations in areas where the laws did not frequently change and where there was no chance of a federal audit.<sup>100</sup> This proposal was rejected.<sup>101</sup> On December 18, 2003, the Division of Public Assistance notified

<sup>90</sup> Agency Record P211.

<sup>91</sup> Agency Record P212.

<sup>92</sup> Agency Record P202.

<sup>93</sup> Agency Record P197-211.

<sup>94</sup> Recording of Hearing.

<sup>95</sup> Recording of Hearing.

<sup>96</sup> Recording of Hearing.

<sup>97</sup> Recording of Hearing.

<sup>98</sup> Recording of Hearing.

<sup>99</sup> Recording of Hearing.

<sup>100</sup> Recording of Hearing.

<sup>101</sup> Recording of Hearing.

Ms. V. that her employment with the state was being terminated effective December 31, 2003, because she had not been to work since March 27, 2003.<sup>102</sup>

### **Cancer Diagnosis and Treatment**

More than two years after her termination, on April 26, 2006, Ms. V. sought treatment from Dr. S. Ali Safdar, complaining of "rectal bleeding with mucous in the stools for the last three or four weeks."<sup>103</sup> Ms. V. had been having this symptom on and off for several years.<sup>104</sup> Ms. V. testified at the hearing that when she explained her symptoms to Dr. Safdar, he picked up his phone and scheduled a colonoscopy while she was in his office. Ms. V. subsequently underwent a colonoscopy and was diagnosed with anal cancer.<sup>105</sup> On June 23, 2006, Ms. V. followed up with Dr. Catherine Chodkiewicz.<sup>106</sup> Because the exact location of Ms. V.'s lesions was unclear, Dr. Chodkiewicz ordered a second colonoscopy.<sup>107</sup> The second colonoscopy revealed "2 separate lesions; one in the anal canal extending from anal verge to dentate line with an intervening segment of apparently normal mucosa and then a second partially submucosal mass noted between 5 and 6 cm in the distal to mid rectum, approximately 3.5 cm in diameter."<sup>108</sup> Ms. V. testified she obtained information from the National Cancer Institute that indicated that her cancer could have been growing for three to seven years to grow to 1 cm in diameter.<sup>109</sup> Ms. V. testified that in discussions with her surgeon and her chemotherapist, her radiologist and her oncologist that they had indicated that her cancer was growing for three to eight years before it was diagnosed.<sup>110</sup>

Ms. V. admitted that anal cancer is a very rare disease. She stated that she does not blame the care providers who treated and examined her for failing to diagnose her condition until it was so far advanced.<sup>111</sup>

Ms. V. has been undergoing treatment for her cancer since it was diagnosed.<sup>112</sup>

### **Division & Worker's Compensation Experts After Accident**

<sup>102</sup> Agency Record P777; *see*. Agency Record P199.

<sup>103</sup> Claimant's Supplemental Records ("Supp.") 906-07.

<sup>104</sup> Recording of Hearing.

<sup>105</sup> Supp. 908.

<sup>106</sup> Supp. 908.

<sup>107</sup> Supp. 908.

<sup>108</sup> Supp. 912.

<sup>109</sup> Recording of Hearing.

<sup>110</sup> Recording of Hearing.

<sup>111</sup> Recording of Hearing.

<sup>112</sup> Recording of Hearing.

On March 18, 2003, Ms. V. had applied for PERS occupational disability benefits, claiming that she was disabled due to post-traumatic brain injury, post-traumatic stress disorder, depression, fibromyalgia, chronic fatigue syndrome, irritable bowel syndrome and cervical degenerative disc disease.<sup>113</sup> She claimed that the March 27, 2002 motor vehicle collision was the cause of her disability.<sup>114</sup>

For Ms. V.'s workers' compensation claim, on March 31 and April 1, 2003, she underwent a neuropsychological evaluation by psychologist, Dr. Jeffrey Powel.<sup>115</sup> As part of the evaluation, Dr. Powel reviewed Ms. V.'s medical records, interviewed Ms. V., and performed 15 neuropsychological tests, including MMPI, MMPI2, MCMI-II, Wechsler Intelligence Scale-III, Wide Range Achievement Test-Revised, Dodrill Discrimination Index, a Tactual Performance Test, a Category Test, and Wechsler Memory Scale-III.<sup>116</sup> Dr. Powel concluded that Ms. V.'s test results did not indicate a post-traumatic brain injury or impaired cognitive functioning.<sup>117</sup> Dr. Powel explained that he suspected undifferentiated somatoform disorder, stating, "Ms. V. suspected emotional disorder causes an overinterpretation or misinterpretation of somatic experience. . . . [S]he misrepresents any mental lapse as indicative of 'brain damage,' which appears to be a condition she currently embraces."<sup>118</sup> Dr. Powel recommended psychiatric evaluation, as "her primary disability is explained on the basis of psychiatric overlay and not brain injury."<sup>119</sup> Dr. Powel opined there were no restrictions from a neuropsychological perspective, and that there had been in the past no "neuropsychologically based injury" resulting in disability precluding Ms. V.'s ability to return to work at her former position.<sup>120</sup>

<sup>113</sup> Agency Record P20.

<sup>114</sup> Agency Record P20.

<sup>115</sup> See, Agency Record P929; P123-24.

<sup>116</sup> See, Agency Record P929-32.

<sup>117</sup> See for example. Agency Record P129

Memory functioning . . . was generally normal although emotional reactivity may have lowered her scores to an unknown extent. Measures reveal competent performance on language tasks, attention measures, sensory perceptual and motor functioning, and . . . exception strength on selective attention. On . . . alternating attention, Ms. V. had difficulty and on fine motor and gross motor task, her performance was . . . outside . . . normal ranges but . . . associated . . . physical discomfort . . . likely related to her chronic physical maladies. In short, the neuropsychological measures are interpreted as normal without evidence of brain-based sequelae to injuries sustained on 03/27/02.

<sup>118</sup> See, Agency Record P131.

<sup>119</sup> See, Agency Record P131.

<sup>120</sup> See, Agency Record P132-33.

On April 2, 2003, at the request of the workers' compensation carrier, Ms. V. underwent an IME by neurologist, Dr. Jacqueline Weiss.<sup>121</sup> Dr. Weiss examined Ms. V. and reviewed her extensive medical file. According to Dr. Weiss, Ms. V. suffered no impairment and she was "capable of working without specific restrictions."<sup>122</sup> Moreover, Dr. Weiss opined that based on the objective findings, Ms. V. was not disabled and therefore, deemed Ms. V. capable of working as an Eligibility Technician.<sup>123</sup> Dr. Weiss added that there were no objective findings in the record for concussion or traumatic brain injury, "and certainly the subjective complaints . . . she has regarding memory have a nonphysiologic flavor [involving] . . . overlearned and remote memory, which is not compatible with a concussion."<sup>124</sup> Dr. Weiss asserted that "psychosocial factors are playing a significant role in her presentation," noting that Ms. V. has had ongoing pain complaints in virtually the same areas for over a decade.<sup>125</sup>

On April 2, 2003, also pursuant to Ms. V.'s workers' compensation claim, Dr. Charles N. Brooks, an orthopedic surgeon, performed an IME.<sup>126</sup> Dr. Brooks not only performed a physical examination of Ms. V. but he also conducted a comprehensive review of Ms. V. extensive medical file.<sup>127</sup> Dr. Brooks declared, "[w]hile overtly cooperative during the interview, after reading her records the examiner was left with doubts about Ms. V.'s credibility. This impression was based in part upon repeated instances of mis-attribution of somatic complaints to her employment, claims of conditions that did not exist, injury inflation and deflation and various historical inconsistencies, exaggerations, and misrepresentations."<sup>128</sup> Dr. Brooks doubted Ms. V.'s physical diagnoses, stating, "[m]ost of the physical diagnoses are based primarily, if not exclusively, upon subjective complaints and/or physical findings which can neither be confirmed nor denied. In fact, most of the diagnoses in this case are symptomatic since one cannot identify a specific pathologic cause for the complaint(s)."<sup>129</sup> In response to inquiries regarding Ms. V.'s disability status, Dr. Brooks stated, 'The injuries Ms. V. sustained

<sup>121</sup> See, Agency Record P133-35; P928-29.

<sup>122</sup> See, Agency Record P135.

<sup>123</sup> See, Agency Record P135.

<sup>124</sup> See, Agency Record P135.

<sup>125</sup> See, Agency Record P135; P929.

<sup>126</sup> Agency Record P56-190. See P139-42 for list of healthcare providers or examiners whose records were reviewed, or at least referenced as rendering evaluation and/or treatment for Ms. V f c

<sup>127</sup> Agency Record P56-139.

<sup>128</sup> Ex. 155-56.

<sup>129</sup> Agency Record P157.

on March 27, 2002, were probably temporarily disabling."<sup>130</sup> Dr. Brooks, however, does not believe that Ms. V. suffered a permanent impairment due to the March 2002 collision.<sup>131</sup>

On January 26, 2004, an IME was performed by psychiatrist Dr. Patricia A. Lipscomb in order to further evaluate Ms. V.'s workers' compensation claim.<sup>132</sup> As part of this evaluation, Dr. Lipscomb held a 3-hour interview with Ms. V.;<sup>133</sup> conducted a comprehensive review of Ms. V.'s extensive medical file;<sup>134</sup> and analyzed Ms. V.'s psychological test results for the Minnesota Multiphasic Personality Inventory 2 (MMPI 2), the Millon Clinical Multiaxial Inventory III (MCMI III), and the Millon Behavioral Health Inventory (MBHI).<sup>135</sup> Dr. Lipscomb diagnosed Ms. V. with a pre-existing undifferentiated somatoform disorder, a depressive disorder and an anxiety disorder.<sup>136</sup> Dr. Lipscomb could "find no credible evidence whatsoever that Ms. V. has an organically based cognitive impairment or even that she ever had any such impairment as a result of the 3-27-2002 motor vehicle accident. . . . Her firm belief that she is brain damaged is most likely simply a new variation of her long-standing somatoform disorder."<sup>137</sup> Dr. Lipscomb opined that Ms. V.'s depressive disorder "is permanent and of a waxing-and-waning nature but in general does not seem to have caused impairment to Ms. V.'s functioning." Dr. Lipscomb opined that "Ms. V. probably had some impairment from this disorder [anxiety disorder] in the acute aftermath of the accident. She does not appear to be impaired from it at this time." As for the somatoform disorder: "[t]his condition does not in and of itself produce impairment. However, Ms. V. limits herself by means of her own attitudes, beliefs, and behaviors."<sup>138</sup> Dr. Lipscomb concluded that Ms. V. is not permanently and totally incapable of working.<sup>139</sup>

On June 3, 2004, the Alaska Division of Retirement and Benefits' (Division) medical consultant, Dr. William Cole reviewed "[a] record of four inches of documentation," which included records dating back to 1994 through the present from Ms. V.'s treating physicians, Michael Armstrong, M.D., Jay Van Houten, D.O., and Byron Perkins, D.O./family practice; Valley Medical Hospital physician, Mark Lee, M.D.; and IME reports from Patricia Lipscomb,

<sup>130</sup> Agency Record P186.

<sup>131</sup> Agency Record P189.

<sup>132</sup> Agency Record P901-76.

<sup>133</sup> Agency Record P902.

<sup>134</sup> Agency Record P908-35.

<sup>135</sup> Agency Record P952-54.

<sup>136</sup> Agency Record P963.

<sup>137</sup> Agency Record P962.

<sup>138</sup> Agency Record P963.

M.D., PhD. and Charles Brooks, M.D., P.C.<sup>140</sup> After his review of the records, Dr. Cole opined, "It is evident from these very thorough investigations that the applicant was not permanently impaired by the motor vehicle accident, and thus is not eligible for disability compensation."<sup>141</sup>

On June 9, 2004, the Division's psychiatric consultant, Dr. Thomas A. Rodgers also reviewed Ms. V.'s complete medical file.<sup>142</sup> After reviewing the extensive medical file, Dr. Rodgers agreed that Ms. V. suffers from "Undifferentiated Somatization Disorder" which pre-existed the March 27, 2002, motor vehicle accident.<sup>143</sup> He believes that "the extensive medications, massage, acupuncture, and manipulations just reinforce [Ms. V.'s] underlying problems."<sup>144</sup> He also opines that "[Ms. V.] is currently able to return to a sedentary position if she is so motivated," and "[h]er lack of motivation . . . is the major stumbling block for a return to work."<sup>145</sup> Finally, Dr. Rodgers concluded that Ms. V.'s Somatization Disorder does not prevent her from returning to work: "She has had this problem for many years and yet worked gainfully. She could do so in the future if motivated to do so."<sup>146</sup>

Based on the medical documentation provided, the results of the several IMEs, and the opinions of consulting doctors, Dr. Cole and Dr. Rodgers, the Administrator concluded that Ms. V. was not suffering from a presumably permanent disabling condition.<sup>147</sup> Accordingly, on June 14, 2004, the Administrator denied Ms. V.'s claim for occupational disability benefits.<sup>148</sup> Similarly, because Ms. V. did not have a permanently disabling condition, the Administrator also concluded that she is not eligible for nonoccupational disability benefits.<sup>149</sup> On July 8, 2004, Ms. V. filed her notice that she was appealing that decision.<sup>150</sup>

### **Findings**

Based on the evidence in the record, I find that it is more likely than not that:

1. Ms. V. suffered a brain injury from a motor vehicle accident while on duty was the proximate cause of her disability.

<sup>139</sup> Agency Record P967.

<sup>140</sup> Agency Record P6.

<sup>141</sup> Agency Record PI 1.

<sup>142</sup> Agency Record P14-16.

<sup>143</sup> Agency Record P15.

<sup>144</sup> Agency Record P15.

<sup>145</sup> Agency Record P15.

<sup>146</sup> Agency Record P15.

<sup>147</sup> Agency Record P17.

<sup>148</sup> Agency Record P2.

<sup>149</sup> Agency Record P2.

<sup>150</sup> Agency Record P1.

2. Ms. V.'s state employment was terminated as a result of this disability.
3. This disability presumably permanently prevented Ms. V. from satisfactorily performing her usual duties as an employee on the date of her termination from employment.

### **III. Discussion**

This case is easier to decide in the hindsight provided by the unfortunate developments in Ms. V.'s medical history than it was at the time the Administrator and the experts hired by the Administrator began to review it, shortly after Ms. V. was terminated from state service. This is still a difficult case because of the complex nature of Ms. V.'s medical conditions and the unusual facts surrounding her departure from state service. The evidence in the record shows that Ms. V. probably suffered brain trauma in the head-on car accident that occurred in the course of her employment. This finding is most strongly supported by Mr. and Mr. V.'s testimony regarding her mental condition after the accident, Ms. V.'s testimony about having wet her pants, and loss of the sense of smell after the accident, Ms. V.'s friend's and families' testimony about the change in her mental abilities following the accidents, Dr. Perkins and Dr. Van Houten's observations after the accident, Ms. V.'s speech therapy records and the admissions of the Division's experts at the hearing.

Unfortunately, the doctors who examined and evaluated Ms. V. for her workers' compensation and retirement disability claims were unaware of her undiagnosed cancer. This may have influenced the some of the conclusions found in their reports that indicate that some or all of Mr. V.'s symptoms were caused by emotional and psychological problems rather than physical problems. These experts were faced with an individual in Ms V. who was complaining of a host of physical and mental problems for which they found no significant objective physical evidence. The brain injury Ms. V. suffered would not necessarily have been detected by any of the tests she was subjected to. Both the Division's expert witnesses admitted that it was possible that Ms. V. had received a brain injury in the head-on collision.

While Ms. V.'s treating providers in general concluded that she had suffered a brain injury, the experts hired to evaluate her generally did not. These experts also failed to discover her cancer, although it probably was present when some of these evaluations took place. Furthermore, it is unclear that any of these experts had an adequate benchmark of Ms. V.'s mental abilities before the disabling accident, or an adequate understanding of the mental



requirements of Ms. V.'s usual employment duties. The best evidence of the mental demands of those duties, and of how the reduction of Ms. V.'s cognitive and retention abilities cause by her injury limited her ability to perform those duties, was the evidence provided by Ms. V. through her testimony.

It is understandable that the Division maintained its position regarding Ms. V.'s brain trauma given the fact that according to the emergency room medical records these problems apparently went undetected, and that the factors that indicated a brain injury were somewhat masked by Ms. V.'s pain, her other medical problems, and the medications that her care providers were using to treat them. However, as the Division's expert Dr. Rodgers testified brain trauma sometimes goes undetected even for a few days after the trauma that causes it. Dr. Rodgers also testified that victims sometimes recover fully within several months. It is clear, however, that Ms. V. did not recover from her brain injury before her employment was terminated. There was no prognosis from her care providers at the time Ms. V. terminated that she was likely to recover from the disabilities caused by her brain injury at any time in the foreseeable future. It is unlikely that her health will ever permit her to return to anything like her usual duties at her former employment.

Ms. V.'s testimony was very credible. She did not want to terminate her employment. She worked hard with her speech therapist to develop coping skills that would allow her to be able to perform her duties despite her diminished memory and comprehension. She formulated and made a proposal to her employer that would allow her to attempt to return to work without putting her employer at risk for mistakes that she would make if she attempted to do work that was beyond her limitations.

Whether Ms. V. ever would have sufficiently recovered from her brain injury to have been able to re-assume her duties absent her other medical problems is not an issue that needs to be decided in this appeal. The Division correctly pointed out that Ms. V. did an excellent job presenting her case, and except for her tiring quickly, she appears now to have the capacity, given sufficient time, to grasp and articulate well on complicated legal and factual issues. The Division's expert witness Dr. Cole, however, admitted that given Ms. V.'s current medical condition, he would not recommend that she return to full-time employment. There can really be no dispute that Ms. V. is currently disabled, and that the prognosis is that she will probably not be able to return to work in the foreseeable future. Given the finding that Ms. V.'s brain injury was the proximate cause of her termination, and that on that date, the brain injury presumably

permanently prevented her from satisfactorily performing the her usual duties, the Division's denial of Ms. V.'s claim must be overturned. If the Division now wishes to review Ms. V.'s continued eligibility for occupational disability benefits, it must proceed under AS 39.35.410(g).

A public employee seeking PERS disability benefits has the burden of proving she has met the required elements of the statute.<sup>151</sup> A public employee is eligible for occupational disability benefits if the employee's physical condition prevents the employee from performing her usual duties and "the proximate cause of the condition [is] a bodily injury sustained, or a hazard undergone, while in the performance and within the scope of the employee's duties."<sup>152</sup> A bodily injury or hazard in the course of employment is the "proximate cause" of a condition if it aggravates, accelerates, or combines with a pre-existing condition<sup>153</sup> and is a substantial factor in the disability, regardless of whether a non-occupational injury could independently have caused the disability.<sup>154</sup> An injury or hazard may be a substantial factor in a disability if it aggravates the symptoms of a pre-existing condition (*e.g.*, pain), even if it does not aggravate the underlying condition.<sup>155</sup>

Although Ms. V. had other medical problems even before the head-on car accident that made it more difficult to perform her duties, her loss of cognitive ability as the result of the accident was more than a substantial factor in the disability that caused her termination, it was the primary factor, and absent the injury caused by the accident, Ms. V. would not have terminated her employment.

Public employees are eligible for occupational disability benefits under the provisions of AS 39.35.410(a). That statute provides:

Sec. 39.35.410 Occupational disability benefits.

(a) 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.

<sup>151</sup> *Rhines v. State*, 30 P.3d 621, 628 (Alaska 2001); *Cacioppo v. State*, 813 P.2d 679 (Alaska 1991); *Stalmaker v. Williams*, 960 P.2d 590, 593 (Alaska 1998); *see also*, A.S. 39.35.400 ("A disabled employee . . . shall provide the administrator . . . proof of continuing eligibility . . ."); *Bowen v. Yuckert*, 482 U.S. 137, 146 n. 5, 107 S.Ct. 2287, 2294 (1987) ("It is not unreasonable to require the claimant, who is in a better position to provide information about his own medical condition, to do so.").

<sup>152</sup> AS 39.35.680(27).

<sup>153</sup> *Hester v. Public Employees' Retirement Board*, 817 P.2d 472, 475 (Alaska 1991) (adopting test identical to that applied in workers' compensation cases).

<sup>154</sup> *State, Public Employees' Retirement Board v. Cacioppo*, 813 P.2d 679, 683 (Alaska 1991).

<sup>155</sup> *Hester v. Public Employees' Retirement Board*, *supra*, 817 P.2d at 476, note 7. *See Lopez v. Administrator, Public Employees' Retirement System*, 20 P.3d 568, 573-574 (Alaska 2001);

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

(27) "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 willful negligence of the employee[.]* (Emphasis added.)

These statutes do not disqualify an individual if the individual's medical conditions that were not proximately caused by an occupational injury contribute to the individual's disability. As long as the occupational injury was the proximate cause of the employee's termination and a total and apparently permanent occupational disability at the time of termination, the employee's other medical problems do not disqualify her.

The brain injury that Ms. V. received in the course of her employment rendered her unable to continue perform her duties and was the proximate cause of her termination from state service. At the time of her termination Ms. V. suffered from a total and apparently permanent occupational disability, because of her brain injury. She simply could not competently do her job due to her loss of mental functioning, as is clearly shown by her testimony, which is supported by her medical records when those records are properly viewed with the hindsight of Ms. V. subsequent medical history and the insight provided by her testimony.

#### **IV. Conclusion**

It is possible that Ms. V. may have recovered her mental abilities sufficiently to have resumed her duties at some point had her cancer and treatment not added to her health problems, but at the time she terminated, her employment, her occupational disability was apparently

permanent. Ms. V. is entitled to PERS occupational disability benefits. The Division's denial Ms. V.'s application for occupational disability benefits, is OVERTURNED.

DATED: July 17th, 2008

By: Mark T. Handley  
Administrative Law Judge

## Adoption

Having carefully reviewed the proposals for action filed by Ms. V© and the Division, I have determined that the proposed order should be adopted as written, with some clerical corrections, which are incorporated in this Final Decision and Order.

Aside from its simple disagreement with the findings, the concerns raised by the Division in its proposal for action appear to be the result of misreading of the decision, particularly in regards to how the findings were made, and the result of the Division's misunderstanding of the applicable law, particularly in regards to the standard of review applied to the Administrator's determination in this appeal. In this administrative appeal, Ms. V«i had the right to an evidentiary hearing before an independent fact finder on contested issues of fact relevant to her claim for benefits. AS 39.35.006 gave her the right to appeal the decision made by the Administrator to the Office of Administrative Hearings, which succeeded to the former PERS Board's jurisdiction under former AS 39.35.040. There is nothing in the language of AS 39.35.006, that indicates that in this appeal the review of the Administrator's factual findings is limited, or that an appellant's right to provide new evidence to disprove those findings was limited by the transfer of jurisdiction from the former PERS board to Office of Administrative Hearings. The Alaska Supreme Court held that former PERS Board's review of the Administrator's determinations in these cases was more analogous to a trial court than an appellate court. *See Stalaker v. Williams* 960 P.2d 590, 596, (Alaska 1998). A careful reading of the proposed decision in Ms. V^case, after due consideration of the issues raised in Division's proposal, shows that the findings are well supported by the evidence in the record, that the correct standard of review was applied, and that the conclusion reached was correct.

This Order is issued under the authority of AS 39.35.006. The undersigned, in accordance with AS 44.64.060, adopts this Final Decision and Order, which incorporates clerical corrections to the proposed 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 18th day of July, 2008.

By: Mark T. Handley  
Administrative Law Judge

The undersigned certifies that this is a true and correct copy of the original and that on this date an exact copy of the foregoing was provided to the following individuals:

Case Parties  
7/18/08