

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

In the Matter of: )  
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L. G. M. ) OAH No. 07-0153-PER  
 ) Div. R & B No. 2007-010

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**DECISION AND ORDER**

**I. Introduction**

L. G. M. has requested a waiver of the 90-day deadline to file an application for occupational disability benefits under the Public Employees' Retirement System (PERS). The Commissioner of the Department of Administration referred the request to the Office of Administrative Hearings (OAH) for a hearing and recommended decision.

The hearing was held on June 27, 2007. Mr. M. appeared in person and was not represented by counsel. Toby N. Steinberger, Assistant Attorney General, represented the State of Alaska, Department of Administration, Division of Retirement and Benefits (Division). Administrative Law Judge Kay L. Howard conducted the hearing.

Based on the record as a whole and after due deliberation, Mr. M. did not file a timely application for occupational disability benefits, nor did he show that "extraordinary circumstances" resulted in his inability to file an application for benefits within 90 days of his termination from employment. Thus, his request for a waiver of the 90-day deadline to apply for occupational disability benefits is denied.

**II. Facts**

The Anchorage School District is a PERS employer. L. M. first worked for the Anchorage School District as a school bus driver from September 17, 1976, through August 29, 1978.<sup>1</sup> Mr. M. is a Tier I employee.<sup>2</sup> He was born on September XX, 19XX.

At the time Mr. M. was employed as a school bus driver, AS 39.35.410(f) provided that an applicant for occupational disability benefits was required to file the application with the PERS administrator "within six months after the date of the accident, if disability is attributable

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<sup>1</sup> Exh. A.

<sup>2</sup> Testimony of Bernadette Blankenship, Retirement and Benefits supervisor.

to an accident or within six months after the date that the disability begins if the disability is caused by an occupational disease.”<sup>3</sup>

While he was employed as a school bus driver, the Division sent Mr. M. the 1976 and 1977 PERS handbooks which informed PERS members about occupational disability benefits. Both handbooks contained a copy of the applicable statute, AS 39.35.410(f).<sup>4</sup> The 1976 PERS handbook also provided that the “[a]pplication for a disability pension must be filed within six months of the occurrence of the disability.”<sup>5</sup>

In 1986, the Legislature amended AS 39.35.410(f) to provide that a member must apply for occupational disability benefits within six months after an accident, if the accident is the cause of the disability; within six months after the date the disability begins, if it is caused by an occupational disease; or within 30 days of termination of employment, whichever is later. The amendment further provided that the PERS board had the authority to waive the application deadline for cause.<sup>6</sup>

On July 15, 1986, Mr. M. returned to work for the Anchorage School District as an electrician. After returning to his employment with the District, the Division sent him a PERS handbook dated July 1, 1986, which contained current information about disability benefits and the filing deadlines for disability benefits.<sup>7</sup> The Division also sent Mr. M. subsequent PERS handbooks as they were published in July 1988, February 1990, February 1993 and January 2000; each handbook informed him and other PERS members of the deadlines to file for occupational disability benefits that were adopted by the Legislature in 1986.<sup>8</sup>

In 2000, the Legislature made a significant amendment to the filing deadline for occupational disability benefits. AS 39.35.410(f) was amended to read:

An employee is not entitled to an occupational disability benefit unless the employee filed an application for it with the administrator within 90 days of the date of terminating employment. If the employee is unable to meet and filing requirements of this subsection, it may be waived by the commissioner if there are extraordinary circumstances that resulted in the employee's inability to meet the filing requirement.

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<sup>3</sup> Exh. B at 7; Exh. C at 6-7.

<sup>4</sup> Exh. B at 7; Exh. C at 6.

<sup>5</sup> Exh. B at 4.

<sup>6</sup> Exh. G at 5. These provisions remained unchanged until the year 2000. *See* Exh. K at 3.

<sup>7</sup> Exh. G.

<sup>8</sup> Exhs. G-K.

In addition to PERS handbooks, the Division produced informative newsletters entitled *PERS Newsbreaks*. In September 2000 and May 2001, the Division sent Mr. M. and other PERS members *Newsbreaks* which informed them of the new 90-day deadline to file for occupational disability benefits.<sup>9</sup> Mr. M. recalled receiving the *PERS Newsbreaks* newsletters.<sup>10</sup>

In 2003, the Division created the 2003 PERS handbook which, like the *Newsbreaks* before it, set forth the new 90-day deadline for filing for occupational disability benefits that the Legislature had adopted in 2000.<sup>11</sup> The Division distributed the handbook to PERS members, including Mr. M. He remembered receiving PERS handbooks over the years, although he could not specifically remember which ones.<sup>12</sup>

In 2005, the Division prepared another current PERS handbook, but only distributed an actual physical copy of it to new PERS hires.<sup>13</sup> For existing PERS members, the Division placed the 2005 PERS handbook on its website, along with a PERS brochure on occupational disability benefits.<sup>14</sup> Mr. M. had access to the Internet and these documents at his place of employment.<sup>15</sup>

On August 3, 2005, Mr. M. had an accident at work.<sup>16</sup> He was coming down a ladder, missed a step, and injured his left ankle. He had minor pain initially; after working another week, his symptoms worsened. Initial X-rays showed no evidence of a fracture; he was treated with a steroid injection, received physical therapy and was given an ankle brace and walking boot.<sup>17</sup> Subsequent diagnostic imaging revealed Mr. M. had a broken talus, the ankle bone that connects the leg and foot.<sup>18</sup> Apparently, Mr. M. did not return to his employment with the Anchorage School District and subsequently began receiving workers compensation benefits.

On April 7, 2006, Mr. M. met with Pete Fisher, a PERS retirement counselor in Anchorage, to learn about retirement benefits.<sup>19</sup> Mr. M. told Mr. Fisher that he had had a work-related injury and was concerned that he might not be able to return to his job. Mr. Fisher told

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<sup>9</sup> Exh. L.

<sup>10</sup> Testimony of L. M.

<sup>11</sup> Exh. M; testimony of Bernadette Blankenship.

<sup>12</sup> Testimony of L. M.

<sup>13</sup> Exh. O; testimony of Bernadette Blankenship.

<sup>14</sup> Testimony of Bernadette Blankenship.

<sup>15</sup> Testimony of L. M.

<sup>16</sup> Exh. S.

<sup>17</sup> Exh. W at 13.

<sup>18</sup> [http://en.wikipedia.org/wiki/Talus\\_bone](http://en.wikipedia.org/wiki/Talus_bone).

<sup>19</sup> Testimony of L. M.

Mr. M. about the PERS occupational disability benefits.<sup>20</sup> Mr. Fisher also sent an e-mail message to Flora Ward in the Division's Juneau office and asked her to send an application packet for occupational disability benefits to Mr. M. Mr. Fisher's e-mail reads as follows:

L. G. M., PERS: . . . ., is an employee of the Anchorage School district who hurt his back on the job and has been off of work on workers comp for the last 8 months. He does not think he can return to work and ASD does not have any light duty assignments they can give him. If he cannot return to work in the next couple of months they are going to terminate him. [H]e wants to apply for occ disability benefits, please send him the packet. His address is the one of record and his phone is 783-2305. He might take early retirement while waiting.<sup>[21]</sup>

Mr. M. testified that Pete Fisher did not inform him of the 90-day deadline to apply for occupational disability benefits. According to Bernadette Blankenship, Retirement and Benefits Supervisor, the retirement counselors should tell members about the 90-day deadline and they do have a practice of informing members of it. However, the Anchorage-based retirement counselors do not provide in-depth occupational disability counseling; it is a specialized area of expertise and members are referred to the Juneau office for information and application packets.

The Division sent Mr. M. an application packet for occupational disability benefits on April 7, 2006.<sup>22</sup> He received the application packet<sup>23</sup> which contained instructions for applying for occupational disability benefits, including the deadline by which an application must be filed. The instructions read in pertinent part:

**Do you have to terminate employment before applying for disability benefits?**

No, you do not need to terminate employment before applying for a disability retirement benefit. However, if your disability benefit is approved, you must terminate within 30 days of the PERS Administrator's decision. Your termination from employment must be due to the medical condition(s) causing your disability.

**How do you apply?**

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<sup>20</sup> *Id.*

<sup>21</sup> Exh. P at 1. It should be noted Mr. Fisher incorrectly stated that Mr. M. had hurt his back at work, not his ankle.

<sup>22</sup> Exh. P at 3.

<sup>23</sup> Testimony of L. M.

Your application must be received, or postmarked, by the Division of Retirement and Benefits within 90 days after termination of employment. Remember, you do not have to terminate employment before you apply. However, if you have already terminated employment, you must file your application within the 90-day period. If you have missed the 90-day deadline, please contact the division for assistance.<sup>[24]</sup>

Mr. M. did not read the occupational disability packet when the Division sent it to him. He said he read it “after that”, but there is no information in the record as to how much time passed before he read the materials.

On July 31, 2006, Mr. M.’s physician, Dr. Sean D. Taylor, referred him to the Alaska Spine Clinic for a Physical Capacities Evaluation (PCE).<sup>25</sup> The evaluation was completed on August 3, 2006, by physical therapist Alan Blizzard, PT, who prepared his report for Dr. Taylor the same day.<sup>26</sup> Mr. Blizzard’s report indicates that Mr. M. tested at the strength demand level of a “light/medium” capacity, which does not meet the minimum standard for an electrician, which requires a strength demand level of “medium” capacity.<sup>27</sup>

On August 10, 2006, Mr. M. met with Dr. Taylor to go over his PCE test results. Dr. Taylor then placed Mr. M. on a six-week work hardening program with the hope that his strength would increase to the level that would allow him to return to his customary employment as an electrician.<sup>28</sup> Mr. M. began the work hardening program at the Alaska Spine Clinic on August 21, 2006, with occupational therapist John DeCarlo, OTR.<sup>29</sup> Mr. M. told Mr. DeCarlo that he was fearful of losing his job and that his employer had told him that he needed to be back to work the week after Labor Day.<sup>30</sup>

On September 5, 2006, Todd Hess, Director of Contract Administration for the Anchorage School District, met with Dale Miller, a Teamsters Local 959 representative, about Mr. M.’s situation. Mr. M. had been on leave for one year. Mr. Hess wrote to Mr. M. about the meeting the next day and stated, among other things:

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<sup>24</sup> Exh. V at 4.

<sup>25</sup> Exh. W at 17.

<sup>26</sup> Exh. W at 18.

<sup>27</sup> *Id.*

<sup>28</sup> Exh. W at 17.

<sup>29</sup> Exh. W at 13.

<sup>30</sup> Exh. W at 14.

During that meeting, Mr. Miller shared with me a letter from your physician, Dr. Taylor, stating that you are unable to meet the requirements of your position as an electrician. Mr. Miller also requested an extension of leave on your behalf.<sup>[31]</sup>

Mr. Hess' September 6, 2006, letter to Mr. M. denied the latter's request for an extension of leave and then terminated Mr. M.'s employment with the Anchorage School District.<sup>32</sup> Mr. Hess based his decision on the fact that there was no certainty when Mr. M. would be able to return to his full duties as an electrician.<sup>33</sup> Mr. Hess informed Mr. M. that in the event Mr. M. "received a full medical release to return to work" he would be considered for any position in the maintenance department for which he was qualified.<sup>34</sup>

On October 3, 2006, Mr. M. finished the six-week work hardening program and Mr. DeCarlo prepared another Physical Capacities Evaluation.<sup>35</sup> The report states that Mr. M. told Mr. DeCarlo that he wished to move into a supervisory position and that he believed he would not be continuing his work at the school district because he had been terminated and did not wish to pursue being rehired.<sup>36</sup> Mr. M. also reported to Mr. DeCarlo that he did not think he could do overhead work from a ladder, which is routine work for an electrician.<sup>37</sup>

After a visit to Dr. Taylor on October 18, 2006, Dr. Taylor wrote in Mr. M.'s chart:

Mr. L. M. is clinically stable. He has had no changes in his objective exam findings in over 45 days. He meets the State of Alaska's definition of medical stability. He will be referred to Dr. Susan Klimow for a PPI rating. He will continue to take Ultracet on an as needed basis for management of his pain complaints. He tells me that he is interested in becoming an electrician supervisor. He was planning on taking the test in January to become an electrical administrator. He tells me that they will only conduct the test every several months. He is unable to return to this customary

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<sup>31</sup> Exh. Q. The "letter" to which Mr. Hess referred is not in the record, nor was it discussed at the hearing. The only actual letter written by Dr. Taylor that discusses Mr. M.'s ability to perform the duties of an electrician is dated February 9, 2007. Exh. U. It could be that Mr. M. gave Mr. Miller, his union representative, a copy of the report from Alan Blizzard's August 3, 2006, Physical Capacities Evaluation, and that is what Mr. Miller showed Mr. Hess during their meeting. It is not unreasonable to surmise that Mr. Hess believed the report to be a letter from Dr. Taylor because the doctor's name was on the front page of the document. See Exh. W at 18-20. However, this is merely conjecture. Without a copy of the "letter" Mr. Miller showed him, it is impossible to know the source of the information Mr. Hess relied on regarding Mr. M.

<sup>32</sup> Exh. Q.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Exh. W at 2.

<sup>36</sup> Exh. W at 3.

<sup>37</sup> *Id.*

employment as an electrician because he is unable to tolerate climbing and sustained weightbearing on ladder rungs. He will follow up with me in two months' time for reevaluation, or sooner if symptoms dictate.<sup>[38]</sup>

In December 2006, Mr. M. was determined to be 1% permanently impaired for workers compensation purposes.<sup>39</sup> On December 19, 2006, Mr. M. contacted the Division about occupational disability benefits.<sup>40</sup> He was told that he had missed the 90-day deadline to apply, but he was referred to Tim Reimer, another Division employee, who sent him an occupational disability application packet and discussed Mr. M.'s situation with him over the telephone.

On December 27, 2006, Mr. M. submitted an application for occupational disability benefits to the Division by facsimile.<sup>41</sup> On the same day, Mr. Reimer responded with a certified letter informing Mr. M. that since he was terminated from employment on September 6, 2006, he had missed the 90-day deadline to apply for occupational disability benefits, and he would have to submit a letter to the Commissioner to request a waiver of the timeliness deadline of his application.<sup>42</sup> The Division also sent Mr. M. the occupational disability forms that he would have to complete if his request for a waiver of the timeliness deadline was approved.<sup>43</sup>

Mr. M. subsequently requested a waiver of the 90-day deadline to file an application for occupational disability benefits. On March 17, 2007, the Commissioner of the Department of Administration referred Mr. M.'s request for a waiver of the deadline to the Office of Administrative Hearings to conduct a hearing and prepare a recommended decision, pursuant to AS 44.64.055. Mr. M. subsequently chose to retire and was appointed to early retirement effective April 1, 2007.<sup>44</sup>

### **III. Discussion**

The provisions of AS 39.35.410(a) determine whether a PERS member is eligible for occupational disability benefits. The statute provides:

An employee is eligible for an occupational disability benefit if employment is terminated because of a total and apparently

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<sup>38</sup> Exh. W at 1.

<sup>39</sup> Testimony of L. M.

<sup>40</sup> Exh. R.

<sup>41</sup> Exh. S.

<sup>42</sup> Exh. T.

<sup>43</sup> *Id.*

<sup>44</sup> Exh. A.

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(26), which states:

"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[.]

To receive occupational disability benefits a member must timely file an application or obtain a waiver of the filing deadline.<sup>45</sup> This decision is limited to issues concerning the filing of Mr. M.'s application. The merits of Mr. M.'s potential claim for occupational disability benefits are not ripe and will not be addressed in this decision.

**A. Mr. M. did not timely file an application for occupational disability benefits, as required by AS 39.35.410(f)**

Under AS 39.35.410(f), an injured employee must file an application for occupational disability benefits with PERS "within 90 days of the date of terminating employment." This deadline has been in effect since the year 2000. Prior to 1986, AS 39.35.410(f) required a PERS member to file an application within 6 months of the occurrence of the disability. When the legislature amended AS 39.35.410(f) in 1986, it left the 6-month deadline intact but also added an alternative provision that allowed a PERS member to file an application for occupational disability within 30 days of the termination from employment. This allowed, for example, an employee who remained employed in a light duty position or who was on administrative leave but met the definition of occupationally disabled to apply for benefits prior to termination. Finally, in 2000, the legislature simplified the application requirements so that AS 39.35.410(f) has only one deadline – a PERS member must file the application for occupational disability benefits within 90 days of the termination from employment.

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<sup>45</sup> AS 39.35.410(f).



Mr. M. prefers the language of the 1976 version of AS 39.35.410(f), which requires that an application for occupational disability benefits “must be filed within six months of the occurrence of the disability.”<sup>46</sup> He interprets the phrase “the occurrence of the disability” to mean October 18, 2006, the date his doctor would not release him to work as an electrician. Mr. M. argues that because this is the date he learned he was disabled from working as an electrician, this is the date his disability “occurred.” Mr. M. concludes, therefore, that his application for occupational disability benefits was timely because he filed it within the 6-month window beginning October 18, 2006.<sup>47</sup>

In the alternative, Mr. M. contends that even if he must comply with a 90-day deadline to apply for disability benefits, as required in the current version of AS 39.35.410(f), that the time should begin to run on October 18, 2006, the date his doctor would not release him to return to work. Mr. M. reasons this is the date his disability occurred because he did not know he was disabled to work as an electrician until October 18, 2006.<sup>48</sup>

The Division argues in response that AS 39.35.410(f) is clear on its face – the statute requires a PERS member to file an application for occupational disability benefits within 90 days of the termination from employment. Since Mr. M. was terminated from his employment with the Anchorage School District on September 6, 2006, the Division asserts the 90-day deadline for him to file his application expired on December 6, 2006. However, assuming October 18, 2006, was the first time that Mr. M.’s doctor told him that he could not return to his prior employment, Mr. M. still had more than enough time to file his claim for occupational disability benefits before the 90-day deadline expired on December 6, 2006.

The Division’s position is correct. The current version of AS 39.35.410(f) requires an injured PERS member to file an application for occupational disability benefits within 90 days of the date his or her employment was terminated. This provision of the statute applies to Mr. M.’s case. It is a procedural rule that was adopted by the Legislature in 2000. The Division provided him with ample notice of the deadline in the form of PERS handbooks, *Newsbreak* newsletters and the occupational disability application packet he received in April 2006. Had Mr. M. read

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<sup>46</sup> Exh. B at pg. 4.

<sup>47</sup> Mr. M. is not arguing that the 1976 version of the PERS handbook should be applied to him by virtue of his entry into the PERS system at that time. Rather, he simply prefers the language of AS 39.35.410(f) as it existed in 1976 because it is the most favorable to him when compared to the other versions of the statute that have been in effect since 1976.

<sup>48</sup> See Mr. M.’s Proposed Findings of Fact and Conclusions of Law at 2.

these documents, especially the application packet he requested, he would have known he had 90 days within which to file his claim after he was terminated by the school district.

Mr. M. may not use a former application deadline simply because it appears to provide a better result. The “occurrence of the disability” is not the triggering event that begins to toll the 90-day deadline; it is the termination from employment.<sup>49</sup> Yet, even if the “occurrence of the disability” were the proper event to use, Mr. M. still would not prevail. The phrase does not mean the date he learned he was disabled. It refers to the injury or illness that was suffered by the PERS member and resulted in the disability. At best, the only significance of October 18, 2006, in this case is that is the date Mr. M. learned his injury had not improved enough to warrant his return to work as an electrician.

**B. Mr. M. has not established “extraordinary circumstances” sufficient to justify a delay of the 90-day deadline to file an application for occupational disability benefits**

If an employee seeking to apply for occupational disability benefits misses the 90-day deadline for filing the application, the deadline, "may be waived by the commissioner if there are extraordinary circumstances that result in the employee's inability to meet the filing requirement."<sup>50</sup> The statute itself does not define the term “extraordinary circumstances,” but a PERS regulation sets out guidelines for interpreting the term. The regulation, 2 AAC 35.290(d), was adopted on February 13, 2004. It reads in pertinent part:

A person who fails to file an application for disability benefits within the time established by this section forfeits the right to apply unless the person demonstrates to the administrator that there are extraordinary circumstances that prevented the person from meeting the deadline. Extraordinary circumstances may include being judged as incompetent or confined to a hospital, but do not include lack of information or mere neglect.<sup>[51]</sup>

The regulation does not literally define “extraordinary circumstances” so much as it describes extreme examples of situations that may or may not be considered extraordinary. For

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<sup>49</sup> Even if “the occurrence of the disability” was the operative event that began to toll the 90-day deadline, it would not apply here.

<sup>50</sup> AS 39.35.4 10(f). Prior to 2005, the statute gave the former PERS Board the authority either to waive the 90-day filing deadline or to delegate that authority to the administrator. As a result of statutory changes in 2005, the Office of Administrative Hearings (OAH) now conducts the hearing and submits a recommended decision to the Commissioner. See AS 44.64.060.

<sup>51</sup> 2 AAC 35.290(d).

example, the regulation considers a member's "being judged as incompetent or confined to a hospital" as possibly constituting extraordinary circumstances, but on the other hand, it rejects the proposition that a member's "lack of information or mere neglect" in failing to file a timely application would be extraordinary. Thus, this language is not an actual definition of the term. Rather, it is a range of scenarios that sets forth the parameters of the term. These parameters in turn serve as guidelines for the commissioner's determination whether "extraordinary circumstances" exist in a particular case.

Mr. M. argues there are extraordinary circumstances in his case that entitle him to a waiver of the 90-day deadline to apply for occupational disability benefits: first, he was in shock upon learning that Dr. Taylor was not going to release him to return to his chosen profession; and second, that retirement counselor Mr. Fisher did not tell him about the 90-day filing requirement. Also, if Mr. Fisher had told him, he would have submitted a timely application.<sup>52</sup>

The Division's position is that there are no extraordinary circumstances in Mr. M.'s case that caused him to be unable to file a timely application for occupational disability benefits. The Division asserts that the law is clear on its face. Mr. M. could have filed an application for disability benefits before his termination, even if he wanted to return to work. The Division does not concede that Mr. Fisher failed to tell Mr. M. about the 90-day deadline to apply for occupational disability benefits. The Division argues that even if Mr. Fisher did not tell Mr. M. about the specific 90-day filing deadline for disability benefits, that Mr. Fisher made sure that an occupational disability application packet was sent to Mr. M. immediately after their meeting on April 7, 2006. It is undisputed that the packet contained all the information Mr. M. would need to file a timely application.

The Division's position is persuasive. Mr. M. has not established extraordinary circumstances that resulted in his inability to file an application for occupational disability benefits within the 90-day requirement of AS 39.35.410(f). An abundance of information was available to Mr. M. which informed him of the 90-day deadline to file for occupational disability benefits. He had PERS system handbooks and *Newsbreaks*, the Division's website, and especially the occupational disability packet that the Division sent to him on April 7, 2006, in response to Mr. Fisher's email request. Significant to this decision is that Mr. M. did not consult any of those

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<sup>52</sup> See Mr. M.'s Proposed Findings of Fact and Conclusions of Law at 2.

resources, including the occupational disability packet. Mr. M.'s own neglect is the reason he lacked the information necessary to timely file an application for benefits.

The evidence in this case does not support Mr. M.'s contention that he was shocked when he learned Dr. Taylor would not release him to return to work as an electrician. The record indicates that Mr. M. knew it was possible as early as April 2006 that he could be disabled. When he met with Mr. Fisher about retirement benefits on April 7, 2006, he told the counselor he was worried about the issue. Mr. Fisher's email message to Flora Ward in the Juneau office specifically referenced Mr. M.'s fear.<sup>53</sup> Moreover, when Mr. M. learned that PERS offered occupational disability benefits, he asked Mr. Fisher to request that an application packet be sent to him. If the prospect of being disabled had not occurred to him, Mr. M. would have had no reason to request an application packet for disability benefits at that time.

Before he was terminated, Mr. M. participated in more than one discussion with his health care providers addressing the fact that he did not meet the minimum physical capacity requirements for an electrician. On August 3, 2006, physical therapist Alan Blizzard completed a physical capacities evaluation of Mr. M. that indicated he did not meet the minimum strength requirements for an electrician.<sup>54</sup> Mr. M. met with Dr. Taylor to review the test results on August 10, 2006. Dr. Taylor placed him on a six-week work hardening program with the hope that he would improve and be able to resume his customary employment; but there is no suggestion in the chart notes that their hoped-for results were at all guaranteed.<sup>55</sup>

Mr. M. believes it was a failure on Mr. Fisher's part to tell him about the 90-day filing deadline that caused him not to file a timely application for occupational disability benefits. He claims that if Mr. Fisher had told him about the filing deadline, he would have submitted a timely application. The record is not clear as to what Mr. Fisher may have told Mr. M. or failed to tell him about filing for occupational disability during their meeting in April of 2006. Neither party to this case called him as a witness. Regardless, Ms. Blankenship, the Retirement and Benefits Supervisor, pointed out that Mr. Fisher is a retirement counselor, not a specialized disability counselor; therefore, he would not have been expected to counsel Mr. M. on the specifics of obtaining occupational disability benefits.

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<sup>53</sup> Exh. P at 1.

<sup>54</sup> Exh. W at 18-20.

<sup>55</sup> Exh. W at 17.

The question whether Mr. Fisher told Mr. M. about the 90-day application deadline would be relevant only if Mr. Fisher had been the sole source of information about the filing deadline. Because Mr. M. had numerous pieces of information available to him regarding the 90-day filing deadline, Mr. Fisher's alleged failure to tell him about it, if true, was not a substantial cause of Mr. M.'s failure to file a timely application for occupational disability benefits.

Another phrase in the waiver statute is significant in this case. AS 39.35.410(f) states that the 90-day deadline for filing an application for occupational disability may be waived "if there are extraordinary circumstances that result in the employee's inability to meet the filing requirement."<sup>56</sup> This language means that an applicant must prove he or she was unable to file the application because of extraordinary circumstances, not merely that the member failed to file in a timely manner. The word "inability" suggests that the member was physically or mentally incapable of filing the application on time, as in the case of a person who is confined to a hospital or has been judged incompetent, as suggested by 2 AAC 35.290(d).

Mr. M. was, in fact, able to file the application on time. He simply failed to do so because he did not know he had a 90-day window after his termination within which to apply for occupational disability benefits. This case turns as much on the ability issue as it does on the specific definition of "extraordinary circumstances." Mr. M.'s failure to file a timely application for occupational disability benefits was not caused by his inability to file the application.

#### **IV. Conclusion**

In order to timely file an application for occupational disability benefits, Mr. M. was required to submit the application within 90 days of the date he was terminated from his employment. He was terminated on September 6, 2006, but he did not file his application until December 27, 2006, more than 90 days later. Mr. M.'s application was therefore untimely.

An employee seeking to apply for occupational disability benefits who misses the 90-day deadline for filing the application may obtain a waiver of the deadline from the Commissioner if extraordinary circumstances result in the employee's inability to meet the filing requirement. Mr. M. failed to meet his burden of showing extraordinary circumstances which resulted in his inability to file an application for occupational disability benefits within 90 days of his

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<sup>56</sup> Emphasis added.

termination from employment. Therefore, Mr. M. is not entitled to a waiver of the 90-day deadline for filing an application for occupational disability benefits.

**V. Order**

Mr. M.'s request for a waiver of the 90-day deadline for filing an application for occupational disability benefits is DENIED.

DATED this 15th day of December, 2008.

By: Signed  
Kay L. Howard  
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 24th day of March, 2008.

By: Signed  
Signature  
Annette Kreitzer  
Name  
Commissioner  
Title

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