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

IN THE MATTER OF:	)	
	)	
A. H.	)	OAH No. 07-0392-PER
	)	Div. R & B No. 2007-017

FINAL DECISION AND ORDER

I. Introduction

This is A. H.'s appeal of the Division of Retirement and Benefits' ("division's") decision that he is not eligible for health insurance premiums paid by the Public Employees Retirement System ("PERS" or "system"). H. alleges that he is disabled. Were he to receive disability benefits, his health insurance would be paid. The division concluded that H. could not apply for disability benefits because he was eligible for a normal retirement and, under AS 39.35.410(a) a PERS member is not eligible for disability benefits if the member is eligible for normal retirement. H. believes there are special circumstances in his case that are problematic with the division's interpretation of the law.

The division requested summary adjudication two days before the evidentiary hearing in this matter. Over the division's objection, an evidentiary hearing was held on September 20, 2007. H. represented himself. He testified as did his wife, his psychiatrist, and his occupational therapist. The division presented the testimony of several division employees. After the hearing's conclusion the parties submitted proposed findings of fact and conclusions of law. H. was provided with an opportunity to respond to the division's proposed findings and conclusions, which he did. The evidence at the hearing and in the documentary record supports the division's conclusion that, as a matter of law, H. is not eligible for disability benefits and the division's decision, therefore, is affirmed.

II. Facts

H. commenced employment with the State of Alaska as a peace officer on September 29, 1986. Barring a break in service H. would accrue 20 years of credited peace officer service on September 29, 2006, and be eligible for normal retirement as of that date. H. had served in the military and used his military service time to purchase an additional five years of general service

in PERS and thereby increase his monthly retirement benefit. The purchased years of service are not credited peace officer service for purposes of retirement eligibility.[1]

On May 3, 2006, H. sent a letter to the division noting that he was approaching his 20 year anniversary, at which time would be eligible for normal retirement. H. inquired whether his five years of purchased service would qualify him "for health insurance as would a 25-year Tier II retiree who worked 25 years. If not I am requesting a detailed explanation…."[2]

On May 9, 2006, before the division responded to his May 3, 2006, request, H. injured his right shoulder while subduing a suspect. He was placed on administrative leave as of May 10, 2006. Under the terms of his collective bargaining agreement he could remain in administrative leave status for up to one year and continue to collect his full salary and accrue all benefits including leave time as well as credited peace officer service for purposes of retirement.

On May 15, 2006, the division responded to H.'s letter informing him that he would need 25 years of credited peace officer service to receive system paid medical benefits. The division calculated that H. had 19.605 years of credited police and fire service plus five years of purchased military service as of May 7, 2006. Because his purchased military service does not count toward credited peace officer service the division informed H. that if he retired with 20 years of credited peace officer service he could elect medical coverage as a retiree, but he would have to pay the monthly group premium until he reached age 60.[3]

Orthopedic surgeon, Lawrence Wickler M.D., performed surgery to repair H.'s shoulder on May 22, 2006. While H.'s shoulder recovery progressed as expected, Wickler's chart notes reflect that H. reported trouble sleeping and diminished cognitive function as early as June 29, 2006. By mid-August, H. was still reporting memory loss.

On August 21, 2006, H. contacted the division via email and requested an application to receive occupational disability benefits. Division records indicate that H. was mailed a package on August 26, 2006.[4] H. testified that he did not receive a response to his August email and did not receive the requested application.

In response to H.'s complaints regarding his cognitive function, Dr. Wickler referred H. to neuropsychologist, Paul Craig. On September 13 and 14, 2006, Dr. Craig performed a

[1] Division Rec. at 7.
[2] Division Rec. at 6.
[3] Division Rec. at 7.
[4] Exhibit K, at 3.

neuropsychological evaluation of H. It was Dr. Craig's opinion and recommendation that H. not return to work as a peace officer due to measurable neurocognitive deficits; however, Dr. Craig was hopeful that H. would improve to a level that would allow him to return to work in the future and suggested H. be reevaluated in a few months. Upon receipt of Dr. Craig's report, Dr. Wickler took H. "off work indefinitely."[5]

On September 29, 2006, because he had been placed on administrative leave and did not suffer a break in service, H. accrued 20 years of peace officer service and was eligible for normal retirement.

On October 13 and 23, 2006, speech pathologist, Anne Ver Hoef, M.A., conducted a speech-language-cognitive evaluation of H. Ver Hoef believed that H. could make good progress "to increase his competencies and return to as many of his former activities as possible."[6]

On October 13, 2006, H. requested another disability application from the division. The division checked H.'s status and concluded that because H. had reached 20 years of service and was eligible for normal retirement, as a matter of law, he could not apply for occupational disability benefits and the division would not send him a disability application package.

H. started treatment with psychiatrist, Aron S. Wolf, for depression in November 2006. Dr. Wolf remarked in a January 25, 2007, chart note that H.'s disability was permanent. In February 2007, after re-evaluating H., Dr. Craig opined that "it was improbable that H. would return to police officer work"[7] and recommended H. pursue other vocations.

On May 10, 2007, H. was no longer eligible for administrative leave and was administratively terminated. He began to receive normal retirement benefits which did not include system paid health insurance.

H. has not worked since his May 9, 2006, injury and subsequent surgery. He attributes his diminished cognitive function and inability to return to peace officer work to his shoulder surgery. H. filed a workers' compensation claim which was accepted by his employer. Medical bills associated with his work injury are paid through workers' compensation. To obtain health insurance for non-work related conditions and his family, H. is purchasing health insurance at a

[5] Exhibit Mem. 8, p. 2.
[6] Exhibit Mem. 4, p. 5.
[7] Exhibit Mem. 10, p.10.

cost that equals one-third of his retirement benefit. At the time of hearing he was in the re-employment process and training to become a mechanic.

III. Discussion

It is undisputed that H. was hired and enrolled in PERS in September 1986 and is a Tier II member. Therefore, he is entitled to benefits as a Tier II member.

When the legislature created the Tier II PERS member, it created a new class of PERS member with benefits that differed from a Tier I PERS member. Under Tier I, a peace officer can retire with 20 years of credited peace officer service and receive system-paid health benefits.[8] Under Tier II, a peace officer may retire with 20 years of credited peace officer service but will not receive system-paid health benefits until the member either accrues an additional 5 years of peace officer service or reaches age 60.[9] A non-peace officer Tier II member is eligible for normal retirement upon 30 years of credited service at which time the member will receive system-paid health benefits.[10] However, a Tier II disabled member or a disabled member appointed to regular retirement receives system-paid health benefits regardless of years of service.[11]

To be eligible for occupational disability benefits, H. must have been terminated because of an occupational disability before his normal retirement date. "An employee is eligible for an occupational disability benefit if employment is terminated…*before the employee's normal retirement date.*"[12] H. does not dispute that on its face the applicable statute provides that once an employee reaches normal retirement, the employee is no longer eligible to receive occupational disability benefits. Nor does he dispute that the division applied the statute as written. However, H. believes that under his unique facts and circumstances application of the statute according to its plain language works an injustice and he is entitled to system-paid medical benefits. Specifically H. argues:

1. The plain language of the statute is contrary to the purpose of the PERS retirement system – to encourage qualified personnel to enter and remain in public service.

[8] AS 39.35.370(a)(1) AS 39.35.535(a)(1)
[9] AS 39.35.370(a)(2); AS 39.35.535(a)(2), (c).
[10] AS 39.35.370(a)(3); AS 39.35.535(a)(2), (c).
[11] AS 39.35.535(c)(2).
[12] AS 39.35.410(a) (emphasis added).

2. The plain language of the statute creates a substantial disparity and hardship to peace officers who are occupationally disabled between their twentieth year of service and age 60 and within the Tier II membership.
3. He requested an occupational disability application before he was eligible for normal retirement but did not receive one and was not informed of the "*Cinderella deadline"* by any division employee.
4. Because he was not terminated until after his normal retirement date he could not apply for occupational disability before his normal retirement date.
5. He was occupationally disabled as of the date of his injury.

The division argues that, as a matter of law, once a member is eligible for normal retirement, he cannot apply for occupational disability benefits. In the alternative, the division argues that if H. were permitted to apply, he has not established that he is occupationally disabled. The division also believes that H. received a benefit from remaining on administrative leave.

The threshold issue in this matter is whether H., as a PERS Tier II member, would ordinarily be precluded from applying for occupational disability benefits after he is eligible for normal retirement. If so, the next step in the inquiry is whether the division is estopped from applying the preclusion in his case. If the answer to either is yes, then it is appropriate to determine whether H. is occupationally disabled and, if so, the effective date of his disability.

A. H. may not apply for occupational disability benefits as a matter of law once he is eligible for normal retirement.

H.'s first and second arguments set forth above are that the division's application of the statutes results in an unintended disparity between Tier I and Tier II peace officers and between Tier II peace officers and other Tier II members. As argued by H.:

> For non-peace officer/firefighter employees system paid medical is provided after 30 years of service; and Peace Officer/ Fire fighter after 20+ 5 years of service. …. An employee in the 30 year retirement does not experience a period when he would be denied paid medical insurance should he/she become occupationally disabled before his/her normal retirement date and would automatically qualify for paid medical upon 30 years credited service. Whereas, the peace Officer/firefighter would not be eligible for system paid medical resulting from occupational disability between 19 or 19 ½ and 24 [years].[13]

[13] H. Proposed Findings of Fact and Conclusions of Law at 4.

Therefore, to correct this disparity, H. believes he should be permitted to apply for disability benefits after he is eligible for normal retirement.

This disparity was brought to the legislature's attention in 2003 when it considered HB 91, "An Act relating to a cost-of-living allowance and medical benefits for retired peace officers after 20 years of credited service." House Bill 91 was intended to correct "the delay by allowing peace officers to receive their medical benefits upon normal retirement, as other Public Employees' Retirement System (PERS) recipients do."[14] Proponents of the bill argued that HB 91 would, in keeping with the stated purpose of PERS, promote the retention of qualified state employees.[15] Regardless, HB 91 was never enacted into law. The legislature considered the disparity, heard arguments similar to those raised by H. and declined to take corrective action changing the law so it could be applied as H. is requesting here. Neither the division nor the Office of Administrative Hearings may, through administrative adjudication, override and circumvent the legislative process.[16] Thus, H.'s first and second arguments set forth above fail and the division is correct that as a matter of law, H. was not eligible for disability benefits once he became eligible for normal retirement.

B. The division's decision to deny H. an occupational disability application is affirmed.

H.'s remaining arguments are that the division should be estopped from denying him an opportunity to establish that he is occupationally disabled. The Alaska Supreme Court applied the doctrine of equitable estoppel against the division to bar its reliance on a statutory deadline in a 1997 case, *Crum v. Stalnacker*.[17] In *Crum,* the court found the division was estopped from

[14] Hearing before the Alaska State Legislature House Labor And Commerce Standing Committee, HB 91-RETIRED PEACE OFF.COLA/MEDICAL BENEFITS, February 21, 2003, 3:15 p.m., Journal No. 0116 "House Bill 91 corrects the delay by allowing peace officers to receive their medical benefits upon normal retirement, as other Public Employees' Retirement System (PERS) recipients do." (Testimony of one of the bill's sponsors, T. Anderson)

[15] *See e.g. Id.*

[16] "All persons are equal and entitled to equal rights, opportunities, and protection under the law." Alaska Const. art. I, § 1. A law may violate a person's right to equal protection either as written or as applied. Absent disparate treatment of similarly situated persons, a law as applied to the aggrieved person does not violate that person's right to equal protection. *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 787 (Alaska 2005). This decision does not preclude the possibility that under a different set of facts and circumstances, AS 39.35.410(a) could be found to violate a member's equal protection as applied.

[17] 936 P.2d 1254, 1256 (Alaska 1997) (applying estoppel against the government test to a Teachers' Retirement System case).

denying an application where the member established his failure to timely file an application was due to:

> (1) the division asserting a position by conduct or words;
> (2) the member acted in reasonable reliance thereon;
> (3) the member suffered prejudice as a result of their reasonable reliance on the division's position; and
> (4) the estoppel serves the interest of justice so as to limit public injury.[18]

All four elements must be present for H. to prevail. In *Crum,* the division denied a retired teacher the opportunity to convert his accumulated sick leave to credited retirement service because he had missed the statutory deadline for filing such a request. The Court found that the division had induced reasonable reliance by Crum when the division failed to provide him the necessary form to convert his sick leave, and provided him with retirement application paperwork which, taken as a whole, indicated that it would not be necessary for him to take any additional steps to convert his leave thereby receiving full retirement benefits. The division's actions prejudiced Crum because he missed the statutory deadline. The Court concluded that the division had induced Crum's reliance that he was not required to take any further action and thus the division was equitably estopped from enforcing the deadline to file the additional paperwork.

Here, unlike *Crum,* the division did not assert a position by conduct or words that a private party could reasonably rely upon. H. has failed to present evidence sufficient to establish that the division made any representation or asserted a position by conduct or words that somehow would convey to him any position other than that taken by the division – that once H. reached normal retirement, he would no longer be eligible to apply for occupational disability. H. appears to be taking the position that the division should have notified him that he would not be eligible for occupational disability benefits upon reaching normal retirement or the division should have followed up to see if he received the application. H.'s expectations are not reasonable under these facts.

H. requested an occupational disability application and the division more likely than not mailed him an application. The division does not have an obligation or duty to seek out every member who files for a workers' compensation claim and provide them with an occupational disability application. If H. did not receive an application, under the facts presented it was incumbent upon him to follow up with the division. H. has failed to establish, on a more likely

[18] *Crum*, 936 P.2d at 1256.

than not basis, that the division asserted a position or made a representation that he reasonably relied upon. Thus, H. has not presented evidence sufficient to support a finding that the division should be estopped from denying him the opportunity to apply for occupational disability benefits.

H. also argues that because he was on administrative leave or otherwise protected in his job (such as through his collective bargaining agreement) he could not be terminated. He argued that because his job was protected he could not apply for disability benefits in a timely manner. A member may apply "for a determination of eligibility for disability benefits before employment is terminated…."[19] H. requested an application for occupational disability benefits from the division before he was terminated. His actions, requesting an occupational disability package while on administrative leave, undermine this argument.

Finally, H. argues that he was occupationally disabled as of the date of his injury, May 9, 2006, and, as such, he was disabled prior to his 20-year date. Therefore, he believes he meets the statutory requirement and should receive system-paid health benefits. It is undisputed that H. suffered a work-related shoulder injury as of May 9, 2006. However, the medical evidence does not establish that H. was occupationally disabled as defined by PERS as of that date. Dr. Craig evaluated Mr. H. on September 13 and 14, 2006, two weeks before he was eligible for retirement. Dr. Craig did not opine that H. would be permanently precluded from returning to work at that time. Rather, Dr. Craig wanted to re-evaluate H. in a few months and thought it possible that H. could improve to the point where he could return to work in the future.

Because H. requested a disability application prior to that date, it is more likely than not that he believed there was a possibility he may be occupationally disabled and unable to return to work. However, the medical evidence presented by H. does not support a finding that he was occupationally disabled as defined by the PERS statute prior to becoming eligible for retirement.[20] In this instance, the medical evidence offered by H. is given more weight than his belief. Thus, it is irrelevant whether he received a disability application in August 2006, prior to his normal retirement date, because he has presented no doctor's opinion that he was permanently precluded from returning to work as a result of a work injury prior to September 29,

[19] 2 AAC 35.290(b), Application For Disability Benefits.

[20] This decision holds only that H. failed to demonstrate he was occupationally disabled as of September 29, 2006, in this proceeding.

2006. Therefore, H. has not met his burden of establishing that it is more likely than not that he was occupationally disabled before his normal retirement date.[21]

Because H. reached his eligibility for normal retirement prior to termination, he is not, under the facts and circumstances presented, eligible to apply for or receive PERS occupational disability benefits.

IV. Conclusion

The decision of the division that A. H. is not eligible to apply for occupational disability because he is eligible for normal retirement is affirmed. A. H.'s appeal of the division's decision is denied.

DATED this 3rd day of January 2008.

By: ___*Signed*_____
Rebecca L. Pauli
Administrative Law Judge

[21] Because H. has failed to present persuasive evidence that he was occupationally disabled prior to his normal retirement date, this decision does not resolve the question of "retroactivity" of a disability or at what point a member is considered occupationally disabled for purposes of benefits. Nor does this decision address whether H.'s disability is work related. This decision is limited to the facts of this appeal.

Adoption

This Order is issued under the authority of AS 39.35.006.

The Office of Administrative Hearings transmitted to the parties a proposed decision and order on October 30, 2007. By means of a notice that accompanied the proposed document, the parties were given until January 2, 2008, to submit proposals for action under AS 44.64.060(e). The Administrator submitted a proposal for action, requesting a non-substantive correction to the discussion. Mr. H. submitted a request for remand to take additional evidence and to make additional findings. Mr. H.'s request for remand is denied. The Administrator's request for correction is granted. Pursuant to AS 44.64.030(e)(3), the undersigned incorporates the correction in the text above.

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 3rd day of January, 2008.

By: *Signed*
Rebecca L. Pauli
Administrative Law Judge

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