

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

In the Matter of: )  
 )  
 K. L. ) OAH No. 07-0511-PER  
 ) Div. R & B No. 2007-022  
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**DECISION AND ORDER**

**I. Introduction**

K. L. appealed a May 17, 2007, decision of the Administrator denying his application for non-occupational disability benefits. The hearing in this matter was held before Administrative Law Judge James T. Stanley on November 9, 2007. Mr. L. represented himself. The Administrator was represented by Toby Steinberger, Assistant Attorney General. Testifying during the hearing were witnesses Rhonda Bowman, Eligibility Technician IV, and Deborah Gage, Eligibility Technician IV, in addition to Mr. L. The hearing was recorded. Exhibits A through FF and exhibit 1 were admitted.

**II. Facts**

Mr. L. began working for the state of Alaska in 1989 as an eligibility technician for the Department of Health and Social Services. He became a member of the Public Employees Retirement System (“PERS”) in October, 1989.<sup>1</sup> Mr. L. submitted a letter of resignation on May 15, 2005; the letter contained an effective date of July 5, 2005.<sup>2</sup> When Mr. L. left employment with the state, he had worked sixteen years as an eligibiity technician and was an Eligibility Technician III at the time of his resignation. In his letter of resignation, Mr. L. did not state a reason for terminating his employment. In his appeal of the administrator’s denial of non-occupational benefits, Mr. L. stated “I left due to performance issues related to clinical depression.”<sup>3</sup>

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<sup>1</sup> Exhibit A.  
<sup>2</sup> Exhibit U.  
<sup>3</sup> Exhibit GG.

Mr. L. applied for occupational and non-occupational disability benefits on July 18, 2005.<sup>4</sup> He described the nature of his disabilities as “psychosomatic reaction to stress, high blood pressure, fatigue, numbness, pain, and generic physical pain.”<sup>5</sup> Mr. L. identified “stress” as the cause of his disabilities.<sup>6</sup> On October 5, 2007, during a telephonic status conference, Mr. L. withdrew his claim for occupational benefits, but retained his claim for non-occupational benefits.

Mr. L. was forty-seven years old at the time of the hearing. The record in this case contains numerous reports and evaluations which describe his history of cerebral palsy, diabetes mellitus, hypertension, hypercholesterolemia, chronic fatigue syndrome and low back pain.<sup>7</sup> Mr. L. suffered from cerebral palsy since childhood; he has endured a chronic back condition for most of his adult life.<sup>8</sup> Even though Mr. L. has a long work history, the record as a whole memorializes the deteriorating physical health of Mr. L. during his tenure with the state.

The work history of Mr. L. with the state presents a checkered picture. During his employment with the state, he had periods of low productivity which led to counseling and treatment.<sup>9</sup> In most instances, the counseling and treatment, whether physical therapy or prescribed drugs, or both, appeared to improve his job performance to a satisfactory level. In 1993, 1995, and 1997, he experienced job-related stress; in each instance, he received treatment and his job performance rebounded. He was an intelligent, capable, and knowledgeable employee with a history of performance evaluations that were both good and bad during his seventeen year career with the state. For most of the last five years of his employment, the supervisory evaluations and warnings became increasingly serious; however, there were bright spots during this period. For example, Mr. L. did receive a promotion in 2002.

Mr. L.’s job performance was poor in 2004 and he began to receive increasing scrutiny from his supervisor, Rhonda Bowman. Mr. L. received a letter of reprimand from his supervisor

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<sup>4</sup> Exhibit X.

<sup>5</sup> Exhibit X.

<sup>6</sup> Exhibit Y.

<sup>7</sup> Mr. L. produced (on 10-29-07) a report from the Langdon Clinic, with numerous attachments, which has been marked as exhibit 1. Exhibit S is a medical evaluation by Dr. Winn, commissioned by the Division of Vocational Rehabilitation. Exhibit Y is a history of chiropractic treatments received by Mr. L. Exhibit Z is a lengthy history of treatment by a doctor of osteopathy. Exhibit EE is an evaluation by Dr. Gevaert and Dr. Fu.

<sup>8</sup> Exhibit EE, pp. 5-8. Mr. L.’s low back pain was evaluated at the request of his employer on or about March 17, 1993. At that time, Robert Fu, M.D., recommended regular exercise and stretching. Dr. Fu re-examined Mr. L. on May 13, 1993 and again recommended regular exercise.

<sup>9</sup> Exhibits F through R, and exhibit T, rate and explain Mr. L.’s job performance between October 16, 2000 and May 16, 2005.

on January 18, 2005.<sup>10</sup> He was given time to improve his work in terms of timeliness and accuracy. He was relieved of his “lead” duties. On April 5, 2005, Mr. L. received a final warning that his performance must improve to acceptable levels by May 15, 2005; in the event that it did not improve to acceptable levels, as he had inconsistently demonstrated over the years, he would be terminated.<sup>11</sup>

Mr. L. solicited assistance from the Division of Vocational Rehabilitation (“DVR”) on April 11, 2005. He was referred by DVR to Dr. Winn, a psychiatrist, for evaluation. Dr. Winn examined Mr. L. on April 25, 2005.<sup>12</sup> Dr Winn reported that, over the years, when Mr. L. had encountered job stress and related physical symptoms, receiving counseling seemed to have positive effects which allowed Mr. L. to return to work and perform satisfactorily. Given his lengthy employment and the presence of significant state benefits, Dr. Winn believed that it was in the best interest of Mr. L. to maintain his job with the state.<sup>13</sup> Dr. Winn recommended that Mr. L. seek assistance from the Employee Assistance Program, but Mr. L. did not follow this advice.

Mr. L. submitted his letter of resignation on May 16, 2005.<sup>14</sup> His last day at work was June 2, 2005. He turned in his keys and cleaned his desk on June 30, 2005. His official separation date was July 1, 2005; his final pay worksheet was prepared July 7, 2005.<sup>15</sup> Mr. L. partook of some DVR services in July and August, 2005, and then traveled abroad until December, 2005. Because he missed appointments and failed to respond to DVR inquiries, DVR closed his file on March 2, 2006.<sup>16</sup>

Mr. L. applied for occupational and non-occupational benefits on June 30, 2005.<sup>17</sup> With his application, Mr. L. submitted medical records from Derek Hagan, D.O.,<sup>18</sup> and Loren Morgan, a chiropractor.<sup>19</sup> At the request of the Division of Retirement and Benefits (“Division”), Mr. L.’s application and records were examined by Dr. Kim Smith. Because of insufficient information to justify paying benefits, Dr. Smith recommended denial, adding that Mr. L. could

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<sup>10</sup> Exhibit N.

<sup>11</sup> Exhibit Q.

<sup>12</sup> Exhibit S.

<sup>13</sup> Exhibit S at p.8.

<sup>14</sup> Exhibit U.

<sup>15</sup> Exhibit AA

<sup>16</sup> Exhibit V.

<sup>17</sup> Exhibit X.

<sup>18</sup> Exhibit Z.

<sup>19</sup> Exhibit Y.

be given an opportunity to provide further documentation.<sup>20</sup> By letter dated November 22, 2005, the Division invited Mr. L. to submit additional records in support of his claim.<sup>21</sup>

Mr. L. was examined by Dr. Michael Gevaert on (or about) October 4, 2006.<sup>22</sup> Dr. Gevaert found that Mr. L. had the physical capacity to perform work in the light duty category, but that his history of depression and cerebral palsy rendered him an undependable worker; therefore, "...it is obvious that he cannot be gainfully employed because of unpredictable time loss."<sup>23</sup>

The Administrator reviewed Mr. L.'s application and supporting information on May 17, 2007. He determined that Mr. L. was not eligible for disability benefits because he did not terminate employment with the state of Alaska as a result of a total and apparently permanent non-occupational or occupational disability.<sup>24</sup>

### **III. Discussion**

This appeal presents several issues. Did Mr. L.'s employment with the state of Alaska terminate due to a total and apparently permanent disability condition? If the answer is yes, the question then becomes whether he is entitled to non-occupational benefits.

The administrator argues that Mr. L. terminated voluntarily from state employment in the face of an impending termination. Mr. L. argues that he was forced to leave state employment because of chronic depression which unavoidably damaged his job performance.

Public employees are eligible for non-occupational disability benefits under the provisions of AS 39.35.400(a) which provides as follows:

(a) An employee is eligible for a nonoccupational disability benefit if the employee's employment is terminated because of a total and apparently permanent nonoccupational disability, as defined in AS 39.35.680, before the employee's normal retirement date and after five or more years of credited service.

The term "nonoccupational disability is defined in AS 39.35.680(24) which reads as follows:

(24) "nonoccupational disability means a physical or

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<sup>20</sup> Exhibit CC.

<sup>21</sup> Exhibit DD.

<sup>22</sup> Exhibit EE.

<sup>23</sup> Exhibit EE at p. 3.

<sup>24</sup> Exhibit FF.

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 position or job that an employer makes available and for which the employee is qualified by training or education, not including a condition resulting from a cause that the board, in its regulations has excluded;...

The record established in this case makes it very clear that both physical impairments and mental conditions affected Mr. L.'s job performance, especially his productivity. At the same time, the record describes in detail how the "low" periods for Mr. L. morphed into good performance periods by the use, singly or jointly, of counseling, meditation, medical attention, and prescription drugs. In light of the difficulties that Mr. L. was having in 2004 and 2005, the record is devoid of the reason why Mr. L. did not avail himself of the assistance and treatment available to him. By the time he resigned on May 16, 2005, no psychologist, psychiatrist, or physician had assessed Mr. L. as disabled and unable to perform his work as an eligibility technician. Interestingly, at the time of his resignation, Mr. L. had not requested any accommodation to ameliorate or cure his problems.

The statutes establishing PERS disability benefits are designed to compensate PERS members who are no longer able to perform their jobs.<sup>25</sup> The employee bears the burden of proving that the requirements of AS 39.35.400 have been satisfied.<sup>26</sup> The totality of evidence in this appeal strongly supports a finding that Mr. L. did not resign due to a permanent disability. Rather, Mr. L. resigned rather than be terminated. Accordingly, Mr. L. is not eligible for non-occupational benefits.

#### **IV. Conclusion**

Because Mr. L. has not demonstrated that he suffers from a total and apparently permanent non-occupational disability, the Administrator's decision to deny his application for benefits should be affirmed.

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<sup>25</sup> See *Stalaker v. M.L.D.*, 939 P.2d 407, 413 (Alaska 1997)

<sup>26</sup> *Rhines v. State*, 30 P.3d 621, 628 (Alaska 2001); *Cacioppo v. State*, 813 P.2d 679 (Alaska 1991).

**V. Order**

IT IS HEREBY ORDERED that the Administrator's decision of May 17, 2007, to deny Mr. L.'s application for non-occupational disability benefits is AFFIRMED.

DATED this 12th day of June, 2008.

By: Signed  
James T. Stanley  
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 11th day of July, 2008.

By: Signed  
Signature  
James T. Stanley  
Name  
Administrative Law Judge  
Title

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