IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

M. M. Appellant, v. STATE OF ALASKA, PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Appellee.	)	Case No. 3AN-09-8472 CI

Decision on Appeal

M. M. used to drive a People Mover bus in Anchorage. He sought disability benefits[1] based on a wide variety of physical and mental conditions, described at some length in the hearing officer's decision denying the claim.[2] He argues[3] that the decision was not supported by the evidence, that the process was unfair and placed too much emphasis on "independent" evaluations, and that both counsel for the Retirement System [PERS] and the ALJ acted improperly in several respects.

Mr. M., PERS[4] and Administrative Law Judge Rebecca Pauli have set out the facts in some detail, and they all agree that the record is lengthy and complex. The claim was first denied by the agency, and by statute[5] the appeal went to the

[1] AS 39.35.400-410.
[2] Exc. 767-825. This decision will instead be cited herein by its original page numbers.
[3] Appellant's Opening Brief, First Amended Copy 5/14/10 [At. br.].
[4] Brief of Appellee [Ae. br.], filed 3/30/10.
[5] AS 39.35.006.

office of administrative hearings.[6] ALJ Pauli reviewed over 5000 pages of medical, employment and other records, including two dozen evaluations by doctors, chiropractors, psychologists, psychiatrists and other professionals, and heard evidence over a period of four days. Her 59 page decision demonstrates an understanding of that evidence. Given the contentions raised by Mr. M. in this appeal, I am not going to restate the facts in detail, but simply allude to those necessary to determine whether the decision was indeed based on substantial evidence.[7] Readers who wish to fully understand the facts are referred to the decision of the ALJ and the parties' briefing.[8]

The record, proposed additions and the motions to strike.

ALJ Pauli noted in her decision that delays were caused "by the production of over 5500 pages of additional documentation,"[9] and that the volume of evidence, extensive time frame and number of opinions complicated the proceedings.[10] This trend continues, and there are two motions pending to strike documents which Mr. M. wants to insert into the appellate record.

The first of these is somewhat hard to follow. The State moved last March to strike[11] "five unnumbered pages in table format" that were at the beginning of Mr. M.'s Excerpts of Record, and miscellaneous other pages allegedly scattered throughout the excerpts. The court did not have the excerpts at that time and so

[6] AS 44.64.
[7] *See infra* at pp. 5-7.
[8] At. br. at 1-2, Ae. br. 1-29.
[9] Decision at 1.
[10] *Id.* at 4.
[11] Motion to Strike, filed 3/5/10.

entered an order requiring Appellant to add the new pages as an appendix to his brief.[12] The state then renewed its motion,[13] and argued further that Mr. M. had improperly revised his brief and added even more supplemental material, in addition to that previously noted.[14]

Mr. M. did not file a timely opposition to the second motion to strike, instead filing a motion for an extension of time in which to do so.[15] The state opposed.[16] Appellant proceeded to file his opposition, quite late,[17] and argued that the state's position confirmed "the unethical conduct of the [state's attorney] and ALJ." But of course it is not unethical to urge the court to apply the rules, and it is confusing when a party files documents out of order and without first seeking leave to do so.[18] While some leniency must be afforded those proceeding without counsel, this would not include a blanket exemption from the rules, nor leave to accuse opposing counsel of unethical behavior for filing a legitimate motion.

That said, the motion for an extension of time is granted and the motion to strike is denied in part. Mr. M. seeks to raise issues of procedural unfairness, and if he thinks the supplemental materials advance his cause, I see no prejudice to the state by admitting them for that purpose only.

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[12] Order of 4/9/10.
[13] Motion to Strike New and Additional Argumentation and Allegations, etc., filed 5/21/10, citing Appellate Rule 604(b).
[14] Now labeled exhibits 1-3.
[15] Motion for Extension of Time, filed 6/22/10.
[16] Opposition filed 7/1/10.
[17] Corrected Opposition, filed 7/26/10.
[18] *See also* Ae. br. at 29-30 (alleging similar filings during the administrative process).

On September 7, Appellant filed another round of papers, some 73 pages according to the State, and it again asks that they be stricken, asserting that he has included documents that were not before the ALJ.[19] One of these documents is a deposition transcript from testimony given eight months after the administrative hearing that occurred in this case.

Mr. M. argues that the expert report of Dr. Winn should have been produced to him in discovery,[20] even though the state did not call the witness to testify. But a deposition conducted after the hearing (and apparently for a workers' compensation claim) cannot possibly be used as a basis for overturning the earlier decision. Further, after review of the Winn materials, I conclude that the state produced what it was required to, that Dr. Winn's 2007 evaluation was done without reference to the extensive information that was available, and that his final report was indeed received shortly before the hearing.[21] PERS Specialist Bernadette Blankenship[22] testified that they sought a psychiatric review to determine if Mr. M.'s medication was appropriate, but they didn't receive the report timely.[23] The documents filed by Appellant confirm this statement, with Dr. Winn's evaluation dated scarcely a week before the administrative hearing. There certainly is no evidence of "perjury"[24] in this exchange, nor is it clear how this report would have mandated a different result. Dr. Winn's original report is

[19] Motion to Strike Appellant's Materials filed September 7, 2010, filed 9/24/10.
[20] Opposition, filed 9/29/10.
[21] *See also infra*, at 8-9.
[22] Transcript of Proceedings [Tr.] 5, 475.
[23] Tr. 502.
[24] Untitled submission of 9/8/10.

already part of the record.[25] While Mr. M. is of course foreclosed from using the material to argue that the decision of the ALJ was not based on substantial evidence, he believes that it is central to his unfairness argument. Accordingly, the state's motion to strike this material is denied. While this in most cases would require that I allow the state to file a surreply on the issues raised, I note that it has already addressed the matter,[26] and that further briefing is not required for a fair adjudication. This issue will be revisited[27] after the next section, which considers whether or not the decision was based on substantial evidence.

Was the decision by the ALJ based on substantial evidence?

ALJ Pauli stated at the outset what Mr. M. needed to prove,[28] and she reduced this to writing in her decision.[29] Mr. M. does not appear to challenge this legal standard.[30] The real question was whether it was one or more of his ailments which prevented him from driving a bus, or the use of unnecessary medication. The ALJ decided it was the latter, and there was certainly evidence to support that decision. On appeal, it is not this court's role to reweigh that evidence, but only to make sure it was relevant, and such that a reasonable mind would find adequate to support the conclusions drawn from it.[31]

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[25] *See* tr. 11.
[26] Ae. br. at 53-57.
[27] *See infra* pp. 7-8 & 11-12.
[28] Tr. 5-6.
[29] Decision at 4.
[30] *See* AS 39.35.400 & 410 and Decision at 49-51. *See also Rhines v. State, Public Employees' Retirement Board*, 30 P.3d 621, 624-25, 628 (Alaska 2001).
[31] *See Lopez v. Administrator, Public Employees' Retirement System*, 20 P.3d 568, 570 (Alaska 2001) and other cases cited in the Brief of Appellee at 32-33.

The problem for Mr. M. is that the decision made by the administrative law judge was based on the fact that, after four days of direct observation and interaction with Appellant, she didn't believe him; she found in the record substantial evidence that his credibility was poor, and she relied on that evidence. It is usual in claims for occupational disability benefits to be faced with a medical question of whether a work-related injury is a substantial factor in an employee's disability; that is, which injury caused the disability, or was it perhaps a degenerative disease?[32] But here there was a complex combination of physical and mental ailments, dozens of reports and thousand of pages, and much of it was not favorable to Mr. M.'s position. It is natural that he would feel some antagonism towards the lawyer who helped collect this evidence and the judge who relied upon it, but a fair reading of the decision written by the ALJ demonstrates that it was based on evidence properly admitted. Citing to that evidence, she concluded that the appellant doctor-shopped, that he disregarded medical advice with which he disagreed, and that he persisted in believing he had symptoms which could not be medically substantiated. There was evidence that he argued with and pressured providers to go along with his preferences for certain medications. Interspersed with his many motor vehicle accidents were reports from passengers and his employer which added context to the application for benefits,[33] and he walked out in the middle of one IME. There were occasions

[32] *Id., State, Public Employees' Retirement Board v. Cacioppo*, 813 P.2d 679 (Alaska 1991).
[33] *See* Ae. br. at 3-4 *et seq.*

when providers concluded that he had omitted parts of his history when seeking a diagnosis, and reports of non-work activity arguably inconsistent with his disability claim.[34] Further, there was evidence that he didn't follow recommendations for self-directed activities that might have ameliorated his symptoms to some degree, and two independent medical evaluators concluded that he should discontinue use of the medications that now prevent him from operating a bus.

(In his reply, Mr. M. argues that he wasn't terminated for misconduct nor for use of drugs.[35] This is true, he left work after the assault,[36] but these facts did not foreclose the possibility that he could return to work in the future.)

ALJ Pauli reviewed the records, including those of two psychiatrists who concluded that Mr. M. had assumed the role of a "professional patient,"[37] and concluded that he had no psychiatric disability, and that his poor credibility called into question his subjective complaints.[38] She further concluded that he had not established that he suffers from a physical condition that presumably permanently prevents him from performing his duties as a bus driver.[39] It is conceivable that this decision could have gone the other way, but the determination was by no

[34] *Id.* at 9-10.
[35] Appellant's Cross Reply, filed 6/3/10.
[36] *See* Ae. br. at 9.
[37] Decision at 42-43, quoting Drs. Goranson and Campbell. *See also* Decision at 56-57.
[38] *Id*. at 52.
[39] *Id*. at 54.

means simple, and the burden of proof was on Appellant.[40] The decision was based on substantial evidence.[41]

Were the proceedings before the ALJ conducted fairly and impartially?

Mr. M. recognizes that his claim was damaged by the testimony and reports of independent medical examiners, and he believes their use to be unfair. This may in a sense be a challenge to the burden of proof and the adversary process; it is no doubt true that Appellant thought that the work he put into his claim and the thousands of pages of documents submitted would entitle him to benefits. But his challenge to the role of IMEs generally is foreclosed by his failure to raise the issue in the agency.[42] As to his other challenges to the process, he has failed to point to specific instances of misconduct or unfairness in the record that establish a violation of due process.

Dr. Winn's report of 9/8/08.

Appellant's first specific claim of error[43] directs our attention to the deposition of Dr. Winn, which he says shows that Retirement System withheld evidence and conspired to find an opinion that was favorable to its side. (This is the deposition that was taken after the hearing, in 2009, referenced earlier.) But a reading of the transcript shows nothing irregular, just that the doctor's initial review was based on an incomplete picture and his final report was produced immediately before the hearing. While counsel for PERS was vigorously

[40] *Capioppo, supra,* 813 P.2d at 683. *But see* Reply at 3.
[41] *See also* Ae. br. at 36-43.
[42] *Apone v. Fred Meyer, Inc.*, 226 P.3d 1021, 1029-30 (Alaska 2010).
[43] At. br. at 7.

representing her client, which had already denied Mr. M.'s claim, there is no evidence of a conspiracy. Appellant could have called Dr. Winn as his own witness,[44] and he did use the report to seek reconsideration,[45] which was denied.[46] Judge Pauli's discussion of Dr. Winn's 2007 report was brief[47] and was not one of those on which she principally relied.[48] It was unfortunate that the doctor did not have time to produce his report further in advance of the hearing, but the Retirement System had no duty to call him, nor is there evidence that they sought to withhold the report from Mr. M.

Further, the state maintains that the second report was for the workers' comp claim, and so counsel immediately shredded it.[49] It was presumably sent to Appellant's workers' comp attorney. There was some confusion and delay in a complex proceeding, but ultimately it was up to Mr. M. to call his own witnesses. Dr. Winn was not his witness, and no-one actively sought to deny him access to evidence. Under the circumstances of this proceeding, I do not find error that would require a remand to consider this report.[50]

The decision-making process.

Mr. M. argues both that the ALJ took too long to reach her decision[51] and that she didn't do enough in analyzing his case and in regulating discovery.[52] He

[44] *See* tr. 11-12 (M. representative says they plan to call Dr. Winn.)
[45] Exc. 828-33; Ae. br. at 54.
[46] Order of 6/8/09.
[47] Decision at 47.
[48] Tr. 245-48.
[49] Ae. br. at 53.
[50] *See also infra*, at 11-12.
[51] At. br. at 10.

suggests that maybe a panel would be more appropriate. It is certainly true that some cases are more complicated than others.

The state responded to Mr. M.'s call for a return to hearing these cases with a board,[53] and I find its arguments persuasive. First of all, the application was originally denied by the agency, which does have expertise in the matter, and only then appealed. Secondly, Mr. M. does not suggest how a panel would have reduced the risk of an erroneous deprivation in this case, nor does he discuss the government's interest in the present system, or the administrative burden of making a change, all of which are necessary elements for a due process challenge to the procedure that was used.[54] These questions are not self-evident. Hearing officers and single-judge courts hear cases on a wide variety of subjects on which they have no special expertise, just as citizen juries may be convened to hear complex cases from anti-trust to patent infringement. While you can argue that a given procedure is the not the best way to decide such a case, it takes more to establish a constitutional violation.

***Ex parte* communications, bias.**

Mr. M.'s recent Ex. 1 appears to be an annotated review of the transcript in this case, but some of the notes are quite cryptic. The hearing was long and complicated, and examining statements in isolation after the fact is not necessarily a productive process. Selecting a few at random, I certainly did not come to the

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[52] At. br. at 10-13.
[53] Ae. br. at 43-49.
[54] *Cf. Schiel v. Union Oil Company of California*, 219 P.3d 1025, 1031 (Alaska 2009), citing *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

conclusion that the hearing was unfair or the administrative law judge biased. It is up to Appellant to argue his case, point the court to evidence, and show how a particular violation affected the result. Just as the submission of so many pages of records may have slowed the process, referencing numerous comments as was done here makes it difficult to focus on the point Mr. M. may be trying to make. How did the ALJ "deliberately" miss information; how did she impugn Appellant's character and defame him?[55] It is the nature of the process that the judge sorts through evidence and states her conclusions, even where they may be embarrassing, and it is not helpful to term these comments "slanderous." Appellant has not carried his burden of showing actual bias or prejudgment on the part of the hearing officer.[56]

This is true as well for the "sister-in-law" argument, which it took some time to sort out from Appellant's various filings, including a May 2010 order from the Workers' Compensation Board.[57] Interestingly, one issue in this proceeding was the *employer's* complaint that board designee Joireen Cohen abused her discretion by sending Mr. M. to an examination with Dr. Winn prior to sending the doctor SIME binders and questions, thereby denying the *employer* due process. The Board was unaware that Dr. Winn was involved in the PERS proceeding until after his deposition was taken, and because counsel for the Retirement System

[55] At. br. at 13-14.
[56] *AT&T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007), citing *Bruner v. Petersen*, 944 P.2d 43, 49 (Alaska 1997). *See also* Ae. br. at 52-53.
[57] *McKitrick v. MOA and Nova Pro Risk Solutions*, AWCB Case No. 200604112M, AWCB Decision No. 10-0081, May 4, 2010, annexed to Appellant's Reply.

asserted a work product privilege, it was never clear exactly what transpired between Ms. Cohen and Dr. Winn. But *Mr. M.* did not complain of any *ex parte* contact, and insisted the second opinion was valid.[58]

The Board concluded that although Ms. Cohen's contact with Dr. Winn did not address the merits, he should have been given the binders and questions, and it was also troubled that the doctor appeared to be working both with its case and the PERS proceeding.[59] But while one can understand why Mr. M. would be upset about losing Dr. Winn's opinion in both proceedings, there is really nothing in the workers' comp decision that has implications for the issues raised here.

Mr. M. alleges that this same Ms. Cohen is the sister-in-law of ALJ Pauli, and that there was some sort of improper contact between them. After reviewing the briefing several times, however, it is unclear from where this claim originates. The issue is raised in both the opening brief[60] and the reply,[61] with no citation to the record. Appellant accuses the ALJ of unethical conduct at several junctures,[62] and he may believe it, but he fails to cite to the record with evidence to sustain the charges. Nor does my review of his annotated references to the transcript[63] reveal such evidence.[64]

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[58] *Id.* at 24.
[59] *Id.* at 26.
[60] At. br. at 21.
[61] Reply at 5.
[62] *See* untitled filing of 9/8/10.
[63] Ex. 1
[64] *See, e.g.*, Ex. 1 at 3 citing tr. at 10, Ex. 1 at 7 citing tr. 96-97, Ex. 1 at 9 citing tr. 181.

Disadvantages of proceeding *in pro per*.

There is no question that a person with no legal training is disadvantaged in any adversary proceeding, and clearly Mr. M. was not rewarded for his vigorous efforts in this proceeding. (It is good to see that he has counsel in his workers' compensation case.) It would be ideal if everyone in his shoes had free counsel, but that is not the law, and this becomes increasingly less likely as populations age and increase, without corresponding budgetary increases. As the state points out, he was given a person to help him,[65] and he didn't request any additional accommodation.[66] It is difficult to discern precisely what he help he thought he needed.[67]

Conclusion.

The record in this matter is not straight-forward and Appellant's explanations of what he alleges to have occurred are not always easy to follow. But I have reviewed the record, and do not find that the proceeding below was unfair, either individually or cumulatively. Because Judge Pauli's findings were based on substantial evidence, and because Mr. M. has failed to sustain any of his procedural challenges, the decision is affirmed.

Dated: 12/1/10 *Signed*
Fred Torrisi, Judge

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

[65] Tr. 1, exc. 496; 2 AAC 64.160(a).
[66] Ae. br. at 49-50.
[67] *Apone v. Fred Meyer*, *supra*, 226 P.3d at 1029.