

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

In the Matter of J. A. W.)
) OAH No. 07-0530-PER
) Div. R&B No. 2007-024

ORDER ADOPTING DECISION

The undersigned, Commissioner of Administration, in accordance with AS 44.64.060, adopts the attached December 1, 2008 Decision, amended only to correct the following typographical errors:

1. On page one, in line two of the second paragraph, insert “on” between “based” and the first “the,” so that the phrase begins “based on the prior precedents”;
2. On page three, in line 11 of the second full paragraph, strike the words “for the several,” so that the clause reads “coping abilities for the ten month period after the last visit on April 30, 2004”; and
3. On page four, in line nine of the second paragraph, following “during the visit she ask” should read “asked”; and
4. On page 11, in the last line of the first full paragraph, delete the “s” from the word “claims” so that the line begins “worker’s compensation claim does not equal an application.”

In all other respects, the December 1, 2008 decision is adopted unchanged 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 this decision is mailed to the parties.

DATED this 12th day of January, 2009.

By: Signed
Annette Kreitzer
Commissioner of Administrative

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DECISION

I. Introduction

This is J. A. W.’s appeal to the Commissioner of Administration for a waiver of the deadline to apply for occupational disability benefits under the Public Employees Retirement System (PERS). Ms. W. did not apply for PERS disability benefits within 90 days after she terminated employment, but she asked the Division of Retirement and Benefits to waive the deadline and consider her application. Based on the information before it at the time it denied the waiver request, the division concluded that Ms. W. had not demonstrated the extraordinary circumstances necessary for a waiver and denied the request.

Additional information and arguments were presented through an evidentiary hearing. Despite that information and arguments, based on the prior precedents from cases decided by the former PERS board and by the commissioner, Ms. W. was not able to demonstrate that extraordinary circumstances prevented her from filing before the deadline. Instead, the evidence shows that more likely than not the ordinary circumstances of suffering pain from an injury and distress at the loss of a job, coupled with a lack of information about different types of disability benefits that might be available, contributed to Ms. W.’s year-long delay in applying. Her request for a waiver of the deadline, therefore, is denied.

II. Facts

J. W. first worked in a PERS-covered job as a nurse for one of the Alaska Pioneers’ Homes in 1989.¹ She worked for thirteen to fourteen months and then was off work due to a disabling problem with her spine from 1990 through 1998 or 1999.² During that period, she received counseling for anxiety-related problems and regained her confidence, with the result that she was able to drive again, attended nursing and computer classes, and got her lapsed nursing license restored.³ She also underwent total hip surgery, which gave her some physical relief, as did a then-new non-narcotic pain medication.⁴

¹ November 8, 2007 Testimony of J. A. W. (“W. Testimony”).

² W. Testimony.

³ W. Testimony; November 8, 2007 Testimony of Dixie A. Hood (“Hood Testimony”).

⁴ W. Testimony.

In 1998 or 1999, Ms. W. went to work as a registered nurse for a municipal PERS employer, where she worked for seven to eight months.⁵ While there, she suffered a needle-stick injury and had the experience of filling out workers' compensation-related paperwork as a result.⁶

In 2000, Ms. W. returned to work at the Pioneers' Home, where she worked without injury or other physical problems until 2004.⁷ On February 14, 2004, she injured her shoulder turning a patient at work.⁸ The injury was later diagnosed as a rotator cuff tear.⁹

The Pioneers' Home terminated Ms. W.'s employment on February 27, 2004, reciting mistakes concerning patient medications occurring several days after her injury and a few months before as the reason.¹⁰ The situation at work was tense and she left without her personal belongings and termination paperwork, but her union representative later arranged for them to be sent to her.¹¹ She did not grieve her termination.¹²

Ms. W. recalls filling out paperwork for a workers' compensation claim on February 14, 2004, and other disability-related papers around March 9, 2004.¹³ She took some of the paperwork around to her doctors.¹⁴ Her past experience from the needle-stick incident led her to conclude that it takes five to six months for workers' compensation claims to be processed, so when more than that amount of time had passed, she followed up on her claim's status, got help

⁵ W. Testimony.

⁶ W. Testimony.

⁷ W. Testimony.

⁸ W. Testimony; *also* Disability Retirement Application (Ex. W-12; Rec. 16) (stating "I was using a turn sheet to move a client at work" in response to the instruction "[d]escribe the nature of your disability").

⁹ March 1, 2005 [receive stamped] Physician Statement (Rec. 35) (listing "rotator cuff tear" as diagnosis under "Examination" section); *also* W. Testimony.

¹⁰ February 27, 2004 Letter from Fradley to W. (notifying Ms. W. of her termination for medication errors occurring in February 2004 and the previous September) (Ex. W-25); *also* W. Testimony (discussing the letter and her communications with her employer concerning the medication errors); September 11, 2003 Memo (Ex. W-27) (describing a "verbal warning" regarding a medication error).

As explained during the hearing, whether Ms. W.'s employer had good cause to terminate her and whether her disabling injury was a factor in the termination are not questions raised in this waiver appeal. The particulars of Ms. W.'s termination are pertinent only to provide background and context for the testimony (her own and that of witness Dixie Hood) about how Ms. W. was coping with stress during the relevant period. Nothing in this decision constitutes a finding or conclusion about the cause for Ms. W.'s termination or the role, if any, her injury may have played in it.

¹¹ W. Testimony.

¹² W. Testimony (explaining that she was in communication with her union but did not grieve the termination, but recalling that the union "did not feel their help was necessary at that time").

¹³ W. Testimony.

¹⁴ W. Testimony.

from an attorney, and eventually received a partial compromise and release of the claim in December 2006.¹⁵

Before her February 14, 2004 injury, Ms. W. had begun seeing her counselor again in January about problems at work.¹⁶ She saw the counselor again just two days before the February 27 termination letter was issued.¹⁷ The next time she saw the counselor was more than a month later, in April 2004.¹⁸ Because no one had asked for a diagnosis or a report during the January through April period, the counselor did not record a diagnosis at that time but did refer Ms. W. to another medical provider.¹⁹ The counselor did not identify by name or specialty the provider to whom the counselor referred Ms. W., and no other witnesses were called to testify about Ms. W.'s state of mind around the time of her injury and termination or in the months immediately following.

Ms. W.'s counselor testified from memory, nearly four years after the injury, that Ms. W. had had an "adjustment disorder" characterized by overreacting to the circumstances of her termination.²⁰ The counselor observed that Ms. W. was in a lot of pain, was not able to talk descriptively about how she was carrying on daily, was confused, felt hopeless, was not sleeping, was "overwhelmed with indecision and depression[,] and did not reach out to family for support."²¹ The counselor did not tie these observations to any particular visits of the five (two before the injury and three after) occurring in the January through April period. The counselor testified she did not recommend that Ms. W. obtain a guardian. The counselor acknowledged that it is natural to be distressed by pain and termination from a professional position. Nothing in the counselor's testimony indicated she had specific personal knowledge of Ms. W.'s state of mind or coping abilities for the ten month period after the last visit on April 30, 2004, until Ms. W. applied for PERS disability benefits.

¹⁵ W. Testimony; *also* December 18, 2006 Letter from Batchelor to Cadra and accompanying first page of Partial Compromise and Release Agreement (Rec. 4-5).

¹⁶ Hood Testimony (recalling with the aid of an appointments list that she saw Ms. W. on January 4 and 14, 2004, and stating that she (Hood) thinks the reason for the visits was because of Ms. W.'s "treatment at work and the supervisor's acceptance of some opinions" of relatives of the patients).

¹⁷ Hood Testimony (noting that the appointments list showed a February 25, 2004 visit).

¹⁸ Hood Testimony (identifying appointments on April 3 and 30, 2004).

¹⁹ Hood Testimony.

²⁰ Hood Testimony (concluding that "all of the symptoms [displayed by Ms. W.] were in excess of normal expected for the type of stressor").

²¹ Hood Testimony.

After her February 14, 2004 injury, Ms. W. began receiving a series of injections, with the first given on March 9, 2004.²² She testified that her doctor was confident the injections would fix the problem but told her it could take months. She received the next injection in August 2004, and that one “lasted till October,” at which point she had a third on October 16, 2004.²³ By the time of the October 16th injection, Ms. W. had realized that “she wasn’t going to be able to take care of people” anymore.²⁴

About a month later, Ms. W. received a letter from the division about needed action on her deferred compensation account, which led her to visit the division.²⁵ She testified that during the visit she asked “when she would be getting disability benefits[,]” which led to her learning about the ability to seek a waiver to late-file an application for PERS disability benefits.

On January 10, 2005, the division received a letter from Ms. W., essentially asking for a waiver of the disability benefits application deadline.²⁶ By letter dated January 20, 2005, the division sent Ms. W. an application and recommended that she submit a more detailed explanation of the reasons for her delay in filing, emphasizing that “lack of information or mere neglect are not sufficient reasons for a waiver of the timeliness requirement.”²⁷

On February 14, 2005—exactly one year after her injury—Ms. W. filed a PERS disability benefits application with the division.²⁸ At the same time, the division received her February 10th letter with a more detailed explanation of her delay in applying.²⁹ Medical records submitted in support of Ms. W.’s application suggest that she may have been taking several types of

²² W. Testimony; Ex. W-6 at 2 (describing injection administered on March 9, 2004).

²³ Ex. W-7 (describing injection administered on August 4, 2004); W. Testimony (discussing August and October 16, 2004 injections).

²⁴ W. Testimony; *also* February 10, 2005 Letter from W. to Alaska PERS (Rec. 17; Ex. C to division’s pre-hearing brief) (stating the following: “[M]y rotator cuff tear didn’t heal as it should have and in October [I] realized I couldn’t work”).

²⁵ November 19, 2004 Letter from Couzin to W. (Ex. W-9); W. Testimony.

²⁶ January 6, 2005 [receive stamped January 10] Letter from W. to Mellhorn [sic] (Rec. 19) (explaining that Ms. W. “was caught up in the paper work for Short-term Disability and Workman’s compensation” when she realized she was not recovering and learned from the division that she might be able to obtain a waiver to apply for “the State offered Disability Program”).

²⁷ January 20, 2005 Letter from Davis to W. (Rec. 18).

²⁸ February 14, 2005 [receive stamped] Disability Retirement Application for J. A. W.. (Rec. 16). The accompanying Employer’s Statement of Disability form (also received stamped by the division on that date) indicates that Ms. W.’s last day of work was “3-4-2004” and that she was in leave-without-pay status at the time the form was completed (a year after the injury and eleven and one-half months after the termination letter was issued). *See* Rec. 21. In answer to the questions about “the reasons the employee has terminated[,]” the supervisor wrote: “Judy was unable to do her duties as was required due to her disability.” *Id.* The Employer’s Statement is inconsistent in these respects with other evidence in the record, including Ms. W.’s own very credible and detailed testimony, but it is not necessary to reconcile those inconsistencies to decide whether to waive the deadline.

²⁹ February 10, 2005 Letter from W. to Mellhorn [sic] (Rec. 17).

medication, but the records are limited to doctor visits beginning in December 2004.³⁰ One medical record submitted as a hearing exhibit relates to an October 2004 visit; it lists several medications but none of their effects.³¹ Office notes from Ms. W.'s orthopedic surgeon dated March 9, 2004, list four medications, but the notes say nothing about their effects.³² No evidence was offered as to the effects of any medications she was taking, or whether she was taking any of those listed in the medical reports, after her injury and in the several months leading up to October 2004. Ms. W. provided no evidence on which to find that she was taking medications that might have affected her ability to timely file an application in the months immediately following her injury and termination.³³

On February 23, 2005, the PERS Administrator disapproved Ms. W.'s waiver request.³⁴ That disapproval was communicated to Ms. W. in a letter concluding that she had not demonstrated extraordinary circumstance.³⁵ Ms. W. appealed the Administrator's decision to the PERS board, but her appeal had to be postponed due to medical treatment she underwent for a serious condition unrelated to her workplace injury.³⁶ By the time Ms. W.'s appeal was ready to proceed, the PERS board had been abolished and the appeal, in effect, transferred to the Commissioner of Administration.³⁷

The division requested that Ms. W. complete a "Request for Waiver of Timeliness" form before it would send the matter to the Office of Administrative Hearings, which would hear the matter for and make a recommendation to the commissioner.³⁸ Ms. W. complied; the statement of her reasons for requesting a waiver included the following:

After my on the job injury, my Supervisor did not complete the paper work to Workman's Compensation. I was then fired by this Supervisor. I believed that my employers [sic] position of denial defined the benefits available to me. My physical pain and emotional stress from these events

³⁰ See Rec. 24-33 (showing visit dates between December 2004 and February 2005).

³¹ Ex. W-8 (relating to an October 16, 2004 doctor visit).

³² Ex. W-6 at 2 (listing four "Meds" that presumably had been prescribed for/were being taken by Ms. W.).

³³ An inference might be drawn from Ms. W.'s testimony that the non-narcotic pain medication she began taking after her hip surgery was something she would continue to take indefinitely. She gave no indication in her testimony that the medication did anything other than help her with pain. Since she began taking it before returning to work at the Pioneers' Home in 2000—years before her injury and termination—it would not be reasonable to infer that this medication adversely affected her ability to timely file for disability benefits.

³⁴ February 15, 2005 Memo from Jones to Millhorn (showing a signature dated 2-23-05 with an "X" in the "Disapproved" box) (Rec. 15).

³⁵ February 24, 2005 Letter from Millhorn to W. (Rec. 13).

³⁶ See May 20, 2007 Letter from W. to Weed (describing the medical cause for delaying board hearing).

³⁷ See April 25, 2007 Letter from Weed to W. (explaining waiver of timeliness process changes in aftermath of PERS board being abolished).

³⁸ *Id.*

were overwhelming for me. As there has now been a withdrawal of the controversion against me and Workman's Compensation has granted me back pay, I believe this is the right time to apply for disability benefits.^[39]

An evidentiary hearing was conducted on behalf of the commissioner on November 8, 2007, more than three and one-half years after Ms. W.'s injury and termination. Ms. W. represented herself at the hearing. She was well prepared, articulated her arguments clearly, ably examined her own witness (her counselor) and the division's witness, provided detailed fact testimony of her own, and deftly used prior decisions of the former PERS board to support her argument that, like other PERS members, she should receive a waiver. Because the hearing took place years after Ms. W.'s injury and termination, no inference will be drawn from her exceptional capabilities at the hearing about how she must have been functioning years earlier, in the months following her injury and termination.

During the hearing, the division's witness testified to the division's practices regarding communications with members through distribution of the *PERS Newsbreak* newsletters, PERS handbooks, and yearly statements.⁴⁰ Ms. W. recollected receiving the *PERS Newsbreak* newsletter and yearly statements, but not the PERS handbook. The record was held open following the hearing, to allow the parties to file copies of Ms. W.'s pre-termination yearly PERS statements,⁴¹ and to allow Ms. W. to file the disability-related paperwork she recalled filling out in March 2004.

Both Ms. W. and the division filed copies of some of her yearly PERS statements, including the statement current through June 30, 2003, which would have been the most recent statement prior to her February 14, 2004 injury.⁴² That statement included the following paragraph under the heading "Disability Benefits":

If you become totally and presumably permanently disabled while employed by a PERS employer, you may be eligible to receive monthly disability benefits from the PERS. There are two types of PERS disability benefits – occupational and nonoccupational. Occupational disability

³⁹ May 20, 2007 Request for Waiver of Timeliness (Rec. 2).

⁴⁰ November 8, 2007 Testimony of Bernadette Blankenship ("Blankenship Testimony"). The PERS publications specialist testified by affidavit to the same practices. *See* November 19, 2007 Affidavit of Claudette Kreuzenstein at ¶¶ 2-4.

⁴¹ The yearly PERS statement filed prior to the hearing (Ex. W-1) was a post-termination statement showing accrued contributions through June 30, 2005. That statement would not have contained information on availability of disability benefits because such information is included on the statements only for active employees. Blankenship Testimony. The record, therefore, was held open to allow filing of earlier statements, to determine whether those would have informed Ms. W. about the availability of PERS disability benefits.

⁴² Division's Ex. I; Ex. W-40.

benefits are payable as a result of a work-related illness or injury. Non occupational disability is available for members who have five paid-up years of PERS service, are totally and presumably permanently disabled for any reason, and are unable to perform their usual duties or the duties of another job. Benefits typically end when you recover or become eligible for normal retirement. Medical coverage is provided for you and your eligible dependents while you are receiving disability benefits. While you are employed by a PERS employer, you may receive the following estimated monthly benefit:

- Occupational Disability: \$1,835
- Nonoccupational Disability: \$0^[43]

Ms. W. filed a group of documents related to her application for and receipt of disability payments from the insurer Unum Provident.⁴⁴ These include a blank Annuity Benefit Election Form, a tax form on payments to Ms. W. in 2005 from Unum Life Insurance Company of America, and copies of Ms. W.'s bank statements showing deposits of payments from Unum of America for disability benefits between December 2004 and June 2005.⁴⁵ Nothing in the documents suggests that the application form or the payments relate to PERS disability benefits.

III. Discussion

Ms. W.'s appeal raises a single issue: has she demonstrated that extraordinary circumstances prevented her from filing for disability benefits within the 90-day period following her termination. To receive occupational disability benefits, a PERS member has to file within 90 days after terminating employment, unless the Commissioner of Administration waives the deadline.⁴⁶ Prior to 2005, the former PERS board made final waiver decisions.⁴⁷ From 2000 until the board was abolished in 2005, the same extraordinary circumstances requirement now in effect applied to the board's waiver decisions.

⁴³ Division's Ex. I at 5; Ex. W-40 at 2.

⁴⁴ Exs. W-29 through W-38.

⁴⁵ *Id.* The statements' deposit entries include the notation "LTD-BEN" after the word "TYPE," suggesting that these deposits were for long-term disability benefits. *See, e.g.*, Ex. W-35.

⁴⁶ AS 39.35.410(f), which states:

An employee is not entitled to an occupational disability benefit unless the employee files an application for it with the administrator within 90 days of the date of terminating employment. If the employee is unable to meet a filing requirement 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.

⁴⁷ In July 2005, the Commissioner of Administration was substituted for the board in AS 39.35.410(f) as the waiver decisionmaker and the provision giving the board authority to delegate such decisions to the division was repealed. 2005 Sess. Laws of Alaska (First Special Session), ch. 9, § 111.

Previously, the law had allowed the board to waive a filing requirement “for cause” if the applicant for disability retirement benefits was “unable to meet a filing requirement”⁴⁸ Though a “for cause” standard sounds different—perhaps easier to meet—than an “extraordinary circumstances” standard, the board considered itself to be applying what was essentially an “extraordinary circumstances” standard when it granted waivers “for cause.”⁴⁹ The board also adopted a regulation that identified the extremes between circumstances that certainly will be treated as “extraordinary” and those that certainly will not, but it left the middle ground open, thereby allowing for the standard for extraordinary circumstances to be developed on a case-by-case basis. The regulation states: “Extraordinary circumstances may include being adjudged as incompetent or confined to a hospital, but do not include lack of information or mere neglect.”⁵⁰ The regulation remains in effect.

The division argued that reliance on the former PERS board’s pre-2000 decisions should be tempered by an assumption that the board was more forgiving of lateness when PERS members had only 30 days, instead of the 90 days allowed under the present law, in which to apply. That argument might be persuasive if the members given waivers in the pre-2000 cases were missing the 30-day deadline by just days or a few weeks, but some were missing the deadline by many months.⁵¹ Though the relative shortness of the application period prior to 2000 may have influenced the board to grant waivers a bit more freely than after the law changed, that does not undermine the potential value of the board’s prior decisions as to what kind of delay-causing circumstances are “extraordinary” rather than ordinary. Accordingly, the board’s waiver decisions issued before and after the statute changed and the regulation was adopted, as well as the commissioner’s waiver decisions, can serve as persuasive precedents in Ms. W.’s case.

The question, therefore, becomes: how do Ms. W.’s circumstances compare to those of other PERS members who have been granted or denied waivers.

⁴⁸ AS 39.35.410(f) (1999). Subsection (f) was rewritten in a 2000 amendment and now contains an “extraordinary circumstances” standard for waiver of an application requirement for occupational disability. *Compare* AS 39.35.410(f)(2007).

⁴⁹ PERS Board Decision (PERB No.) 02-10 at 4-5 (Aug. 2002) (stating that “[t]he board has essentially utilized an ‘extraordinary circumstances’ standard in its application of discretion to waivers of filing deadlines . . .” when discussing the previous version of the statute that contained only the “for cause” standard).

⁵⁰ 2 AAC 35.290(d).

⁵¹ *E.g.*, PERB No. 93-2 (Feb. 1993) (granting a waiver to a member who applied several months late); PERB No. 96-4 (July 1996) (granting waiver to a member who applied more than a year after termination and more than two years after the injury).

Waivers granted. One decision by the commissioner and several by the former PERS board illustrate extraordinary circumstances that justified waiving the deadline to apply for disability benefits.

- The commissioner waived the deadline for a member who had the information necessary to file on time but did not merely neglect to do so; instead, the member was prevented from timely filing by untreated depression.⁵²
- The board waived the deadline for a member who was confused that workers' compensation was the sole source of benefits available and may have been unable to focus on protecting her PERS rights due to depression and the effects of medication used to treat the depression.⁵³
- On more than one occasion, the board waived the deadline for a member whose realization that the injury or illness was permanently disabling was delayed beyond the filing deadline.⁵⁴
- The board waived the deadline for a member whose failure to timely file was due to a lack of information, but it did so only because the member was not provided even a minimal amount of advice about his retirement rights at the time of termination and did not recall having seen the PERS handbook or the *PERS Newsbreak* prior to termination.⁵⁵
- The board waived the deadline for a member who did not know until after the deadline that "he was in fact permanently disabled within the meaning of the definition of occupational disability" and who, based on an article he read in the *PERS Newsbreak*, thought that mailing in his worker's compensation application satisfied the PERS requirement as well.⁵⁶

⁵² *In re B.B.*, OAH No. 06-0456-PER at 5 & 6-7 (June 2007).

⁵³ PERB No. 96-4 at 3 (July 1996) (copy submitted as Ex. W-17).

⁵⁴ *See, e.g.*, PERB No. 93-2 (waiving deadline because member "realized that her condition was not improving" after undergoing treatment for a herniated disk "she hoped would render her suitable for work again") (Feb. 1993); PERB No. 93-9 (waiving deadline because member had held a good-faith belief in the prospect of recovery and realized that he might be eligible for occupational disability benefits only after it became apparent that he "was not likely to recover") (Apr. 1993); PERB No. 92-9 (waiving deadline because member did not realize until after seeking medical care that her condition was apparently permanent) (Nov. 1992); PERB No. 86-11 (waiving deadline because member was not initially aware of the permanent nature of his injury and attempted to comply with the law as he understood it) (copy submitted as Ex. W-21).

⁵⁵ PERB No. 93-5 at 3 (Feb. 1993) (copy submitted as Ex. W-18).

⁵⁶ PERB No. 90-3 at 2-3 (Apr. 1990) (copy submitted as Ex. W-19).

- The board waived the deadline for a member “because of his lack of knowledge of his entitlement to disability benefits under the PERS system [sic], and because his physical condition after surgery impaired his ability to investigate the filing requirements for a disability claim.”⁵⁷

Waivers denied. One decision by the commissioner and one by the former PERS board illustrate when circumstances are not extraordinary for purposes of waiving the deadline to apply for disability benefits.

- The commissioner denied a waiver to a member, reasoning that the member’s “own neglect is the reason he lacked the information necessary to timely file”⁵⁸ The member had received information about the filing deadline in the *PERS Newsbreak*, had access to the PERS handbook, spoke with a division representative about his benefits, and was mailed an occupational disability packet but did not read it immediately upon receipt.⁵⁹ Several months later, after attempting to regain the strength needed to return to employment, he finally applied for occupational disability benefits—more than a year after his injury but just 112 days after his employment was terminated.⁶⁰
- The board denied a waiver to a member who applied for benefits 15 months after resigning, who admitted that “the reason for her late application was a failure to understand PERS filing requirements,” and whose later-discovered mental disability had not been apparent at the time her employment terminated.⁶¹ Though she was despondent following her resignation and suffered from depression and bipolar personality, as well as from the residual effects of an auto accident, the member was able to take classes and study for a realtor’s license shortly after her resignation.⁶²

W.’s Circumstances. Superficially, Ms. W.’s circumstances appear to have a little something in common with those of the PERS members in each of the prior cases granting a waiver. Her testimony and that of her counselor show that Ms. W. was suffering from the stress

⁵⁷ PERB No. 88-26 at 3 (Feb. 1989) (copy submitted as Ex. W-20).

⁵⁸ *In re L.M.*, OAH No. 07-0153-PER at 12 (Mar. 2008).

⁵⁹ *Id.* at 3-5.

⁶⁰ *Id.* at 3-7 & 13-14.

⁶¹ PERB No. 02-10 at 1-3 & 5-6 (Aug. 2002) (copy submitted as Ex. Div. H).

⁶² *Id.* at 2.

of an injury followed closely by termination from her job under circumstances calling into question her ability to safely practice her profession, and that this stress manifested itself in anxiety and possibly depression—a condition from which a couple of the PERS members who were granted waivers also suffered. Unlike one such member, Ms. W.’s condition was not untreated because she was seeing a counselor, at least for a couple of months after her termination. Unlike the other member, the evidence does not establish that Ms. W. was taking medication that might have compounded her functioning.

Like the PERS members who pursued worker’s compensation, Ms. W. made a claim for worker’s compensation for her workplace injury too. The other members were confused that worker’s compensation was the sole source of benefits or that the worker’s compensation application satisfied the PERS disability benefits application requirement. The evidence shows Ms. W. did not suffer from quite the same confusion. She had prior experience with worker’s compensation from the needle-stick injury years earlier. She applied for and received the long-term disability benefits from Unum Provident, which demonstrates that she understood worker’s compensation was not the sole source of benefits available to her. She may not have realized that the Unum long-term disability benefits and the PERS disability benefits her yearly statement informed her she might be eligible for required separate application processes, but she was aware that something more than worker’s compensation might be available to her and that a worker’s compensation claim does not equal an application for other disability benefits.

Unlike PERS members from two of the waiver-granted cases, Ms. W. did not claim to be misled by the *PERS Newsbreak* or other communications from the division, or that she was not provided even minimal advice or information. Rather, she acknowledged receiving the yearly statements, which give active employees information on disability benefits available from PERS, as well as the *PERS Newsbreak*.

Like many PERS members in the waiver-granted cases, Ms. W. did prove that she realized only after the deadline that her condition would not allow her to return to work. Ordinarily, Ms. W. would have needed to apply for PERS disability benefits before the end of May 2004 (i.e., within 90 days after her February 27, 2004 termination⁶³). Her realization that she could no longer take care of people occurred sometime in the lead up to the October 16, 2004

⁶³ Some of the documents in the record show Ms. W.’s termination date or last day worked as either March 2 or March 4, 2004. This decision uses the February 27, 2004 date because the termination letter of that date purports to be effective immediately and Ms. W. herself testified to and wrote about having been terminated on February 27. Even if an early March termination date were used, her application would have been due in early June 2004.

injection. The difficulty is that Ms. W. did not act promptly when she realized her shoulder would prevent her from caring for patients. Her application was not filed until 120 days after the October 16 injection. It was not filed until almost 90 days after the division's November 19 letter concerning Ms. W.'s need to attend to her deferred compensation account. Though that letter prompted Ms. W. to visit the division, where she discussed disability benefits and the possibility of getting a waiver, according to the evidence in the record, her next action did not occur until early January 2005, when she sent in a letter requesting a wavier. The division's January 20 reply letter transmitted an application form. Ms. W. finally filed her application the next month, on February 14, 2005.

During the 120-day period immediately preceding Ms. W.'s application, her failure to act promptly to apply was more akin to ordinary circumstances ("mere neglect") than extraordinary ones. Her circumstances are similar to those of the PERS member in the waiver-denied case decided by the commissioner in March 2008: both spoke with the division about disability benefits; both were sent paperwork needed to apply; both failed to act quickly to do so. Ms. W. acted more quickly after the paperwork was sent to her than did the other PERS member, but the length of that member's neglect to get the application in after he received it was not determinative; rather, the waiver was denied (even though only 22 days late) because the delay was due to his own neglect.⁶⁴

Ms. W.'s circumstances also are similar to those of the PERS member whose waiver request was denied by the former PERS board. Both were very late in filing—a year for Ms. W. and 15 months for the other member. Both were suffering pain at the time of termination—the rotator cuff tear for Ms. W. and the residual effects of an auto accident for the other member. Each was distressed by the loss of her job. Ms. W. experienced anxiety and depression; the other member experienced depression and suffered from bipolar personality. As to the other member, the board was not persuaded that these circumstances, which contributed to the member's failure to understand the PERS filing requirements, were "extraordinary circumstances" justifying a waiver. The same can be said as to Ms. W..

⁶⁴ *In re L.M.*, OAH No. 07-0153-PER at 12-13 (Mar. 2008) (concluding that the PERS member could have filed on time but did not because his own neglect left him ignorant of the deadline).

In sum, even if Ms. W.'s state of mind immediately after her injury and termination was such that some delay in filing is understandable, a one-year delay is not reasonable under the circumstances. Pain from an injury and distress over a lost job no doubt can adversely affect a person's functioning, but they present ordinary (not extraordinary) circumstances that flow from any workplace injury that diminishes a person's ability to work.

As shown by two of the waiver-granted cases, mental health problems and the medications used to treat them can impede a person's functioning to such an extent as to constitute extraordinary circumstances. Within weeks after her injury and subsequent termination, Ms. W. was able to function well enough to file a worker's compensation claim and apply for the long-term disability benefits from Unum Provident. Her evidence did not establish that in the 90 days after her termination she was formally and contemporaneously diagnosed with a mental health problem, or that she was being treated for one except through the final two of five counseling sessions, the last of which took place a month before the filing deadline. Her evidence did not establish that in that same period, or even after she realized she would no longer be able to care for patients, she was taking medication which could affect her ability to function.

Accordingly, based on the evidence presented, more likely than not Ms. W.'s failure to file for PERS disability benefits within 90 days after her termination was due to a lack of information about the difference between the long-term disability benefits she obtained from Unum Provident and the availability of disability benefits through PERS. This lack of information may have been compounded by the effects of pain and job loss for a time after her termination, but those ordinary circumstances commonly occurring in conjunction with a disabling injury, without more, do not elevate the lack of information to "extraordinary circumstances" under the PERS regulation.

IV. Conclusion

Ms. W. has not met her burden of proving that extraordinary circumstances justified a year's delay in filing for PERS disability benefits. Her ability to file for worker's compensation and for long-term disability benefits from an insurer almost immediately following her injury and termination indicate that she could have filed for PERS disability benefits within 90 days of termination if she had sufficient information to know that a separate application process was required for the PERS benefits. Under the applicable regulation, a lack of information does not constitute extraordinary circumstances for purposes of waiving the deadline. Ms. W.'s request for a waiver, therefore, is denied.

DATED this 1st day of December, 2008.

By: Signed
Terry L. Thurbon
Chief Administrative Law Judge

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