

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of C. R.)
) OAH No. 08-0385-PER
) Div. R&B No. 2008-009

DECISION

I. Introduction

C. R. appeals a decision of June 24, 2008, by the Division of Retirement and Benefits (“the division”) to terminate her disability benefits.

Ms. R. worked for the State of Alaska as an eligibility technician for the Denali KidCare health insurance program, a position that required a great deal of writing and data entry by keyboard. Ms. R. was granted disability benefits in 2002 after the repetitive hand motion required by her position caused her to suffer from carpal tunnel injuries that were not improved by surgery on both hands. The Division of Retirement and Benefits (“the division”) decided to terminate the benefits June 24, 2008, after reviewing information about Ms. R.’s current position that suggested she is now successfully employed in work that requires the use of similar strengths and abilities as her previous position with the state.

Although the division had been advised that Ms. R.’s current position requires her to frequently use computers and to engage in repetitive hand movements for 70 percent of the time she is at work, the evidence at the hearing showed that in fact Ms. R.’s current job is more in the nature of a watchperson, that it involves very little writing or keyboard use, and that the “computer use” mostly involves watching surveillance monitors connected to video cameras. This evidence shows that, contrary to the information provided to the division, Ms. R.’s current job does not require use of similar strengths and abilities as her previous position, and that she therefore remains eligible for benefits.

II. Facts¹

Ms. R. worked for the State of Alaska Department of Health and Social Services as an eligibility technician for a period of more than five years.² Ms. R.’s principal duty was to make eligibility determinations for the Denali KidCare health insurance program. The repetitive hand motion of this position, specifically the use of keyboards, caused Ms. R. to suffer a carpal tunnel

¹ The Office of Administrative Hearings heard the appeal on October 13, 2008 with additional testimony taken on October 29, 2008. Ms. R. appeared by telephone. Assistant Attorney General Kathleen Strasbaugh represented the division.

² Record 28. The division’s documentary evidence is identified sequentially by page number. Evidence in the written record is identified herein by page numbers as they appear in the written record.

injury that made it impossible for her to continue performing the essential duties of her job.³ In April and May of 2001 Ms. R. underwent surgery on her right and left hands respectively, followed by therapy. The surgery was considered unsuccessful, and Ms. R. was not able to continue her job. Based on a physician's assessment, the division approved Ms. R. for occupational disability benefits in 2002. Ms. R. testified that she continues to suffer from pain, weakness and numbness in her hands and that she still cannot do the kind of work she did for Denali KidCare.

On February 5, 2008, the division asked Ms. R. to provide evidence of her ongoing eligibility for occupational disability benefits. The division requested that Ms. R. complete a questionnaire, provide copies of her 2007 tax documents, and provide evidence of participation in a vocation rehabilitation program.⁴ The division did not request Ms. R. to undergo a medical examination. Ms. R. provided the requested information. Although Ms. R. has earned substantially less at subsequent jobs than she did working for Denali KidCare, the division decided to terminate Ms. R.'s benefits on the grounds that at her current job she is performing work that requires similar strengths and abilities as those used in her previous job, and that Ms. R. is therefore no longer disabled and eligible for benefits.⁵

The position description for Ms. R.'s previous job with the state shows that the position required use of knowledge, exercise of judgment, and independent critical thinking and decision making.⁶ Parts of the position description also show that a writing and computer use was required:

Determine what data applies and differentiate between varying category requirements in making eligibility decisions. Compute financial information and apply prudent judgment to determine eligibility. Access the Eligibility Information System (EIS) to record and code data and authorize benefits. If a determination of ineligibility for a category is made, review situations to determine eligibility for other categories of medical assistance.

Notify customer in writing of information and documents needed to make an eligibility decision; notify customer in writing of the eligibility determination; notify customer in writing of all actions taken on the case affecting eligibility. Develop appropriate notices and authorize these for mailing on EIS.

Write clear and concise explanations of case actions. Provide customers with adequate and timely notices.⁷

³ Record 28, 30; testimony of Ms. R.

⁴ Record 7.

⁵ Record 8.

⁶ Record 31.

⁷ Record 31.

Ms. R. testified that her job with Denali Kid Care involved a great deal of typing, both in accessing the program's databases and entering data, and in typing letters and documenting decisions. The position description contains a form listing a number of "physical requirements and potential hazards," with seven of these checked identified as "frequent over 33 percent of time" for eligibility technicians: sitting, repetitive motion of hands/fingers, seeing close work (e.g. typed print), hearing conversations or sounds, hearing via radio or telephone, communicating through speech, communicating by writing/reading."⁸

Tony Brakes is an appeals specialist for the division who evaluated Ms. R.'s case to determine whether she is still eligible for disability benefits. Mr. Brakes testified that in evaluating Ms. R.'s case, he first examined her original position with the state and the nature of her disability. Mr. Brakes determined that Ms. R.'s state job involved "a lot of computer use and keyboarding, working with files, such that any technician or employee of the State of Alaska might be expected to do." Mr. Brakes concluded that Ms. R. could no longer perform her previous job at the time of her termination because her injury involved "particularly severe carpal tunnel syndrome and other aches and nerve, perhaps, problems or damage in her hands that prevented her from using her hands, particularly in repetitive actions or use of her hands."⁹

Mr. Brakes analyzed Ms. R.'s case by comparing her state job to two subsequent positions that Ms. R. had held, one at N. A. and at a firm called A. G. The division's decision was based on this analysis. After the division issued its decision, Ms. R. left A. G. accepted a position with Wackenhut Security. Evidence in the record describes all three jobs, but with a greater emphasis on the position at Wackenhut, where Ms. R. was employed at the time of the hearing.

Ms. R. worked for N. A. as a manifest cargo agent from May 9, 2006, until November 2007. Although N. A. does not maintain an official description for the position, in order to assist the division Ms. R.'s former supervisor sent Ms. R. an email detailing the job's duties:

Hello C.,

The following is in reference to your request of actual job duties performed at N. A. C., in Anchorage Alaska.

C. was a cargo customer service agent, which includes processing outbound airway bills, and delivering inbound freight to our customers.

C. performed weight and balance on freighters arriving from the Lower 48, destined to Asia. This included cross-loading freight between aircraft on our weight and balance

⁸ Record 35.

⁹ Testimony of Tony Brakes.

system, and relaying this information to the crew before departure. This had to be done with accuracy, and in a timely manner.

Also included in her duties was manifesting, which included providing documentation for all freight which was destined to Asia. A manifest for Customs requires knowledge of departure invoices, and requirements of export commerce.

C. also met inbound aircraft, and processed documents pertaining to crew clearance on international flights.^[10]

Although this written description states that Ms. R. “processed documents” and “delivered freight” Ms. R. testified that her principal duty at N. was to take preprinted paperwork for incoming air shipments to planes as they arrived at the airport. Ms. R. would count containers and compare the paperwork she had received from a central control office to paperwork arriving with the cargo. Ms. R. would then take all of the paperwork to a customs office to have it stamped by a customs agent. Ms. R. testified that because she worked on the night shift, she did not do any data entry. While the day shift was responsible for preparing manifests for outgoing cargo, nightshift agents worked entirely with preprinted forms and incoming cargo. Ms. R.’s paperwork for all the incoming flights on her shift was prepared in advance and waiting for her when she arrived at work.

Ms. R. moved from Alaska to Kentucky in December 2007 and went to work for a company called A. G., where she worked for a period of four to five months as a cargo customer service agent.¹¹ Like N., A. G. did not maintain a formal position description, but in response to the division’s inquiries it provided the following statement:

C. R. is employed by A. G. INC. Her job title is front line Cargo Agent. C.’s job duties include accepting domestic and international air cargo, Data entry of customer information, Processing international documents for US customs clearance, operating a pallet jack or forklift for loading and unloading LTL freight shipments.^[12]

Ms. R. testified that this description did not accurately describe what she actually did at A. G. Ms. R. testified that she assisted in the transfer of cargo between trucks and aircraft. For the most part, this job involved counting and checking cargo boxes against shipping manifests when cargo arrived, either by truck or plane. For the most part, other people did the actual lifting and moving of cargo, while Ms. R. ensured that the cargo matched air bills and invoices. The amount of handwriting required by the job was limited to placing checks next to items listed on a

¹⁰ Record 43.

¹¹ Testimony of Ms. R.

¹² Record 14.

manifest or freight bill, and writing a one or two digit number on an air manifest indicating the number of containers arriving on a plane.

Ms. R. testified that she was also given minimal training in the use of a forklift, in case cargo arrived by truck when a forklift operator was not around, but she was not certified as an equipment operator. In the entire time she worked at A. G., it was only necessary for Ms. R. to use a forklift on one occasion to remove a single pallet from a truck when no certified operators were around. Ms. R. testified that in spite of the written description, she never used a pallet jack, a tool that requires gripping and hand strength. Ms. R. also testified that she did not enter data at all because she had not been “airline trained” to use the computers that the A. used to track cargo.

Ms. R. began working for Wackenhut Security on July 21, 2008. Like N. and A. C. Inc., Wackenhut does not maintain a formal job description for the position Ms. R. serves in, but prior to the hearing B. S., Wackenhut Area Operations Manager, did prepare a letter to the division describing the position:

This letter is in reference to C. R. who is an employee with The Wackenhut Corporation. Miss R. has been employed since July 21, 2008 and her working schedule is Monday through Friday from 0700 to 1500 hours.

Miss R. duties include operating and care for the Security Communication Center, including responding to incoming message traffic, assignment of resources, maintenance of logs, etc. Use a multi-channel radio network, in accordance with Standard Operating Procedures, to receive and transmit message traffic, allocate resources and direct the assignment of Security officers and other department teams members on missions and tasks. Miss R. also receive and record all radio and telephone message traffic; monitor multiple alarm panels and close circuit cameras; receive and acknowledge alarms, validate alarms as real or false and task prescribed actions such as initiation of response teams. Initiate request for and direct off-property emergency response resources to include police, medical and fire agencies. Maintain and safeguard communication center equipment.¹³

In a follow-up letter, the division provided a list of activities and asked Mr. S. to rate each activity as not applicable to the position, present but not essential to the position, occasionally required in the position up 33 percent of the time, or necessary more than 33 percent of the time. This categorization reflects a table in the position description of Ms. R.’s previous job with the state, such that a person could compare the two jobs.¹⁴ Rather than responding with the state’s rating system, Mr. S. rated each listed activity on a percentage basis as follows:

¹³ Letter of August 11, 2008, from B.S. to Tony Brakes, submitted by Ms. R.

¹⁴ Record 34-36.

1. Sitting - **85 - 90% of time**
2. Walking - **5 -10%**
3. Standing - **2 -3 %**
4. Bending or twisting - **none**
5. Reaching above shoulder level - **none**
6. Repetitive motion of hands/fingers - **70%**
7. Lifting/carrying 10 - 25 pounds - **none**
8. Seeing close work (e.g., typed print) - **70 - 80%**
9. Hearing conversations or sounds -**100%**
10. Hearing via radio or telephone - **100%**
11. Communicating through speech -**100%**
12. Communicating by writing/reading - **60 - 70%**
13. Exposure to aggressive/angry people - **5%**

Mr. S. also answered a list of questions about the job, the final one of which reads as follows:

How much repetitive motion is involved in the tasks that Ms. R. performs? **Quite a bit. Works on 2 -3 computers, one of them being an alarm response computer.**^[15]

Mr. S. testified at the hearing by telephone. In the course of his work as operations manager for a larger area, Mr. S. sees Ms. R. or one of the other radio operators on duty at the particular building where she works about once per week. In his testimony, Mr. S. described Ms. R.'s duties as follows:

She is a radio operator on first shift Monday through Friday. Scope of the duties is essentially control all radio communications, via radio or land line throughout the entire plant. In the event that there is an emergency situation she would be the liaison with the patrol officers via radio or land line, pretty much on that situation would be via radio. She also records all conversations and records all alarms that come in on a computer system in there.

Mr. S. answered questions about his earlier assessment by email that Ms. R. spends 70% of her time engaged in repetitive motions of the hands and fingers. Mr. S. testified that he considered this activity to include "writing, keyboard strokes, operating the radio, and so on." Mr. S. explained that the position requires handwritten entries into logs, and operating several different computer systems in the security office. Asked specifically what computer work was required, Mr. S. stated, "she would be using a computer for email purposes, alarm monitoring and so on." Asked about data entry, Mr. S. answered, "data entry into the computer, um, from what I've seen there is limited, not much at all." Mr. S. went on to explain that while there are several computer systems and three or four monitors, only one of these systems has a keyboard. The remaining screens are part of a computerized video monitoring system with a number of cameras. The

¹⁵ Record 39.
OAH No. 08-0385-PER

operator uses a mouse to control the different screens, which are not data screens but rather video monitors showing views from cameras placed around the plant.

Mr. S.'s testimony reveals that in his written description of the job, the percentages of time that he attributes to any particular activity are not the percentages of time that the employee is actually engaged in that activity, but rather the percentage of time during which an employee could be called on to engage in that activity, or must be ready to engage in that activity if needed. Thus, when Mr. S. wrote that Ms. R. is engaged in hearing conversations or sounds 100 percent of the time, hearing via radio or telephone 100 percent of the time, and communicating through speech 100 percent of the time, he did not mean that Ms. R. is always on the phone or talking on the radio. Rather, he meant that Ms. R. must always pick up the phone if it rings at any time during her shift or answer any call on the radio. But there are frequently long periods of time, most of the day in many cases, when the phone and the radio are silent, and Ms. R. is simply sitting and waiting for a call.

Mr. S. was somewhat vague about his specific knowledge of Ms. R.'s routine daily activities and specifically how much hand motion was required. Mr. S. stated that he observed Ms. R. or the person in her position once per week, but he did not say how much time he actually spent observing on each occasion. Ms. R. questioned Mr. S. about the amount of hand motion during a specific incident when she had responded to an alarm while he was present, but Mr. S. could not remember this or any other specific incidents.

Mr. S. stated that most of the handwriting and typing involved in the job was related to incoming calls and alarms. Asked how many alarms per day Ms. R. was required to answer, Mr. S. answered that the number of alarms varied by day: "some days it might be quite a few, other days it might be less than that." Mr. S. said that it was difficult for him to answer exactly how many alarms would be typical, but he knew that there had been occasions when there were thirty alarms in one day, but it was also common that there might be no more than two alarms in an entire day. Ms. R.'s testimony indicates that two alarm days are more common than thirty alarm days, and that these "alarms" often consist of non-emergency situations, such as employee being locked out of an office by accident.

Mr. S. stated that most of the writing, either by keyboard or in handwriting, involved taking notes while a person was calling in an alarm or situation, and documenting the call. Mr. S. stated that most of the keyboarding required in the job was responding to alarms or inquiries that came by email. Regarding the specific amount of keyboarding required, Mr. S. stated, "if

you were, the amount of typing, if it's via email a lot of times it's a one-sentence response back via email." Mr. S. stated that most of the alarms would come in by radio or telephone, and the handwritten notes taken for such an alarm would be "real short. Real short, 'alarm such and such received, communications with,' etc. They're very short." Mr. S. stated that in a very busy day, with thirty alarms, over the course of an entire day a person in Ms. R.'s position would write a total of about one page of handwritten notes "at the most." Mr. S. agreed that on a quiet day Ms. R. would spend almost the entire shift sitting and watching the monitors and waiting for a phone or radio call, with little or no typing or handwriting being done at all. Mr. S. agreed that on quieter days the greater part of Ms. R.'s job involved simply sitting and waiting in case there was an alarm.

III. Discussion

Employees are "eligible for an occupational disability benefit if employment is terminated because of a total and apparently permanent occupational disability."¹⁶ Disability payments end when the employee reaches normal retirement age, dies, is no longer incapacitated as shown by a medical examination, or when the employee recovers from the disability.¹⁷ Proof that an employee has recovered may include "proof of capability to work in a comparable position offered to the member by an employer as defined in AS 39.35.680."¹⁸ A "comparable position" may include a position that requires similar strengths and abilities to the position held by the member at the time of termination of employment.¹⁹

The division asserts that Ms. R.'s subsequent jobs require similar strengths and abilities as her position with the state as an eligibility technician for the Denali Kidcare health insurance program, and that she is therefore no longer eligible for disability benefits because she has recovered.

The division's position initially appears correct when one examines the written descriptions of the three post-state jobs. The written descriptions all indicate that Ms. R. has been required to engage in activity that would seem, at least to a medical layperson, to be

¹⁶ AS 39.35.410(a).

¹⁷ AS 39.35.410(b).

¹⁸ 2 AAC 35.291(a). "An employer as defined in AS 39.35.680" includes only PERS employers such as the state or a political subdivision. Although the argument has not been raised by the parties, this regulation might not have been intended to mean that a comparable position offered by a non-PERS private sector employer could be considered proof of recovery. In *State v. Morton*, 123 P.2d 986, 989 (Alaska 2005), the Supreme Court held that "a person who is able to perform a comparable job outside the PERS system, but who is unable to perform a PERS job, would still fall within the definition of occupational disability...." Because the evidence shows that the jobs Ms. R. held after termination of her state job were not comparable to her state job, this question is not addressed.

¹⁹ 2 AAC 35.291(a).

inconsistent with someone suffering from carpal tunnel syndrome. But the evidence taken at the hearing shows that for all three of Ms. R.'s subsequent jobs, the written descriptions overstate the work that Ms. R. was or is actually doing in those jobs. For each of these jobs the supervisor statements contain a kind of "puffing" that lends an air of seriousness to jobs that while, while important to the employers, consist of work that is not strenuous and does not involve extensive use of the hands.

As Mr. Brakes observed, Ms. R.'s state job involved "a lot of computer use and keyboarding, working with files, such that any technician or employee of the State of Alaska might be expected to do." The job also require independent thinking and judgment on complex subjects. In contrast, the principal requirement of each of the three subsequent jobs is that the employee simply be present, either when freight is delivered or when someone calls the security office.

N. A. told the division that Ms. R.'s job required "documentation," manifesting, and "processing documents." But Ms. R.'s testimony clarified that this work involved nothing more than carrying preprinted documents to various places to be signed or stamped, and checking off cargo against preprinted bills or invoices.

A. G. told the division that Ms. R. was required to perform "data entry of customer information, processing international documents for US customs clearance, operating a pallet jack or forklift for loading and unloading LTL freight shipments." But evidence at the hearing shows that in fact Ms. R. did not perform any data entry. She never used a pallet jack, she did not do any significant lifting or loading of cargo, and she only used a forklift one time. This job appears no different than that of a typical shipping and receiving clerk, who checks cargo against invoices when it comes in or out of warehouses, but does no significant amount of work requiring strenuous or repetitive use of the hands. The principal requirement is to count and sign for freight when it arrives, and to hand over air bills when freight is shipped. This work is very different from Ms. R.'s state job, where she was required to actually prepare documents, including writing letters with a keyboard and entering data.

The most remarkable evidence at the hearing was the discrepancy between the written description provided by Ms. R.'s current employer and the more thorough description of what she actually does. The written description states that Ms. R. is engaged in repetitive motion of her hands 70 percent of the time she is at work, that she is communicating by writing or reading 60 to 70 percent of the time, that she is communicating by radio or telephone 100 percent of the

time, and that she does “quite a bit” of computer work on two or three different computers systems simultaneously. Given this description, it is unsurprising that the division found Ms. R.’s current work to be comparable to her state job. The impression that is giving is fast-paced work in a busy emergency call center, similar to what a 911 dispatch operator might be engaged in.

The testimony of Ms. R.’s current employer painted a very different picture. Ms. R. spends her time at work watching video monitors and occasionally using a mouse to click between screens. Occasionally she must pick up the phone and dial it or make a call on a radio. On a very busy day, she does not write more than one page of text, and most of this is short one-line handwritten entries in a logbook. Occasionally she sends a one- or two-sentence email. On a slow day, which is not uncommon, she spends most of her time sitting in a chair without moving her hands at all.

IV. Conclusion

None of the jobs Ms. R. has held since her separation from the state require similar strengths and abilities as the state job. A preponderance of the evidence shows that Ms. R. has not recovered from her disability, and she therefore remains eligible for occupational disability benefits.²⁰

DATED this 17th day of December, 2008.

By: *Signed* _____
DALE WHITNEY
Administrative Law Judge

²⁰ After the close of the record, Ms. R. attempted to provide additional medical evidence, and the division suggested as an alternate argument in its closing brief that the case be remanded for a medical examination. Under AS 39.35.410(g), the administrator may schedule a medical examination at any time, at the administrator’s expense, and such an examination could result in a new decision. The evidence currently in the record is sufficient to resolve by a preponderance the issues raised in this case.

Adoption

This Decision 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 13th day of January, 2009.

By: *Signed* _____
DALE WHITNEY
Administrative Law Judge

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