BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
C. M. L.	)	OAH No. 09-0200-PER
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DECISION

I. Introduction

C. L. appealed a decision by the administrator of the Public Employees Retirement System (PERS) that she is not eligible for occupational or non-occupational disability benefits under PERS. The appeal was divided into two parts: (1) determining the cause for termination of employment; and (2) determining whether she is disabled for PERS benefits purposes, if necessary. This is the decision on the first part.

Ms. L.'s medical conditions that she contends disable her, and entitle her to PERS disability benefits, played a role in the termination of her employment by influencing her decision not to return to work and to move out of state. They are not the legal cause of the termination, however. Her decision to move, which was based on factors in addition to her own health considerations, led to her termination. The denial of Ms. L.'s request for PERS disability benefits, therefore, is affirmed.

II. Facts

C. L. began working for the State of Alaska as a certified nurse aide (CNA) at a Pioneers' Home in September 1987.[1] Her employment was terminated effective March 19, 2008, when she did not return to work after her family medical leave entitlement had been exhausted.[2] Three months earlier, in December 2007, Ms. L. and her husband had moved to California, where they first lived with Ms. L.'s sister in Northern California and now live with their son in Southern California.[3] Her husband returned to Alaska to work seasonally in the August-November 2008 period, but Ms. L. did not accompany him and he has not yet been able to return again because she needs his assistance at home in California due to her medical conditions.[4]

Ms. L. applied for PERS disability benefits shortly before she moved.[5] She listed February 26, 2007, as the date the disabling injury or illness first occurred.[6] In describing the

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1 July 14, 2009 Testimony of C. L. (L. Testimony).
2 March 5, 2008 Letter (Division Exhibit L).
3 L. Testimony.
4 L. Testimony.
5 December 5, 2007 Disability Benefits Application (Division Exhibit I); L. Testimony (identifying December 17, 2007 as the date she left Alaska for the move to California).

nature of the disability, she wrote primarily about problems with her back from a series of injuries over the years, with the worst occurring on February 26, 2007, when she helped a Pioneers' Home resident transfer to a chair, but she also mentioned a diagnosis of carpal tunnel syndrome she received in June 2007.[7]

From the time of the February 26 injury until she moved to California on December 17, 2007, Ms. L. suffered a number of medical-related interruptions in her work attendance to consult doctors and adhere to their instructions not to work. These interruptions did not begin immediately. She did not take any sick leave from February 26 until March 12, when she took a single day of sick leave, and she even worked a double shift on March 5.[8] On April 10 she took three-quarters of an hour of sick leave for a doctor's appointment.[9] She worked eight full days and took three sick days in the second half of April and took an hour for a doctor's appointment on May 10, before beginning a long period of leave on May 13 characterized on her timesheets as "workman's comp/family leave."[10]

Ms. L. returned to work from the long leave on July 1, 2007.[11] During the intervening six weeks, she and her husband had traveled to Southern California so that her husband could see his medical specialist.[12] Ms. L. wanted to consult doctors concerning her medical problems as well, because she was dissatisfied with the care available in Alaska, but she did not make any medical appointments for herself until they arrived in California.[13] They also put their Alaska house up for sale at the beginning of this long-leave period.[14]

While in California for her husband's appointment, Ms. L. consulted two doctors. The first, Dr. Thompson, saw her on June 8 and restricted her to not lifting more than ten pounds from May 1 through June 29, 2007.[15] She had already worked eight regularly scheduled days

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6 December 5, 2007 Disability Benefits Application (Division Exhibit I) at 1.

7 *Id*. at 2.

8 July 14, 2009 Notice of Providing C. L.'s Timesheets at sheets for periods ending February 28 & March 15, 2007.

9 *Id*. at sheet for period ending April 15, 2007.

10 *Id*. at sheets for periods ending April 30 & May 15, 2007.

11 *Id*. at sheets for periods ending June 30 and July 15, 2007 (collectively showing that Ms. L. was on "work comp" leave until her regular days off at the end of June and resumed work on July 1); *also* L. Testimony (describing the May-June leave and confirming return to work as of July 1, 2007).

12 L. Testimony.

13 *Id*. (describing dissatisfaction with relying on traveling specialists and explaining that she had not been able to arrange appointments with California specialists while still in Alaska).

14 *Id.* (stating that the house was placed on the market May 15, 2007).

15 June 8, 2007 Work Status Report (by Charles Thompson, M.D.) (Division Exhibit A at 16).

(minus one hour of leave for a doctor's appointment) in the first ten days of May.[16] Dr. Thompson's report does not explain why the restriction was back dated to a point when she was still working, before he had examined her.[17] The second, Dr. Fisher, saw Ms. L. on June 21, primarily about the carpal tunnel problem, and instructed her "to remain off work the remainder of the day and return to regular work [the next day]."[18]

During the approximately five months from her July 1 return through her December 4 last day worked, Ms. L. took "worker's comp" sick leave on eight days in late July/early August; three days at the end of August; five days in late September/early October; and two days in November.[19] She also took sick leave days not noted as workers' compensation-related on October 15 and November 28.[20] A workers' compensation notation is meant to signify that the employee is off work for a work-place injury pursuant to a doctor's note directing the employee not to work for more than three days, or for doctors' appointments related to such an injury.[21] Apart from these absences, Ms. L. worked all of her regularly scheduled days, and even a little extra time, between her return and her last work day.[22]

Ms. L. consulted with several doctors during the period between her return to Alaska and the move to Northern California, and this resulted in her being released from work from time to time. On July 13, 2007 her chiropractor, Dr. Pfeifer, "took her off work until she could see a urologist[.]"[23] The urologist did not place her on work restriction and she was able to return to work before the end of July.[24] She saw a doctor in mid-August who concluded that light duty,

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16 July 14, 2009 Notice of Providing C. L.'s Timesheets at sheet for period ending May 15, 2007.

17 Ms. L. had been released for light duty as of May 1, 2007, by her chiropractor. *See* April 30, 2007 Return to Work/School/P.E. form (instructing Ms. L. to "wear L-S belt" and not to do any heavy lifting or moving of patients by herself).

18 June 21, 2007 Return to Work/Activity Note (by David E. Fisher, M.D.) (Division Exhibit A at 21); June 21, 2007 Report (by Dr. Fisher) (Division Exhibit A at 25 & 27) (recommending surgery for the carpal tunnel but explaining that "patient can continue work at full duty status" in the meantime).

19 July 14, 2009 Notice of Providing C. L.'s Timesheets at sheets for periods ending July 15-November 30, 2007.

20 *Id*. at sheets for periods ending October 15 and November 30, 2007.

21 July 15, 2009 Testimony of Allis May Davis (Davis Testimony).

22 *See generally* July 14, 2009 Notice of Providing C. L.'s Timesheets at sheets for periods ending July 15-November 30, 2007; *also id*. at sheet for period ending August 31, 2007 (showing 5.75 hours work on regular day off).

23 July 13, 2007 Authorization for Absence (Division Exhibit B at 9); August 2, 2007 Physician's Report (Division Exhibit B at 12).

24 July 24 & August 14, 2007 Progress Notes (by W.G. Jones, M.D.) (Division Exhibit B at 10); L. Testimony (confirming that the urologist imposed no work restrictions); August 2, 2007 Progress Report (Division Exhibit B at 12); July 14, 2009 Notice of Providing C. L.'s Timesheets at sheet for period ending July 31, 2007.

rather than temporary disability, most likely would be appropriate to address the carpal tunnel problem.[25] Ms. L.'s chiropractor released her from work for a few days in early October, until she could consult with another doctor regarding medication and a bone scan.[26] She was released to return to work with no restrictions as of October 5.[27] A doctor she consulted in November 2007 directed that Ms. L. could return to work but with a restriction against lifting more than 20 pounds.[28] A few days after the last day Ms. L. worked, her Alaska doctor issued a certification containing a restriction against lifting and "gross or repetitive fine motor movements of upper extremities" through December 21, 2007.[29] She did not return to see this doctor again because she left Alaska to move to California before the restriction ran out.[30]

After moving to Northern California, Ms. L. consulted Harvinder S. Birk, M.D., for a neurological evaluation on January 3, 2008.[31] He identified four diagnoses.[32] In a series of three "Disability Status" reports, Dr. Birk directed that Ms. L. not work from January 3 through June 30, 2008.[33]

Several months later, long after Ms. L.'s employer terminated her employment, she was examined by a neurologist and an orthopedic surgeon in connection with a workers' compensation claim.[34] More recently, she has been consulting a gynecologist regarding the uterine prolapse.[35] Any medical conclusions or recommendations from these examinations could not have contributed to the months-earlier decisions by Ms. L. to move to California and by her

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[25] October 30, 2007 Printout of Office Visit Notes (by Madeline Borhani, M.D.) (Division Exhibit A at 36). Other doctors have recommended surgery for the carpal tunnel problem, but Ms. L. has elected not to undergo the surgery because of poor results members of her family have had with surgery for the same problem. L. Testimony.

[26] October 1, 2007 Authorization for Absence (Division Exhibit B at 13).

[27] October 3, 2007 Return to Work/School (Division Exhibit B at 15).

[28] November 23, 2007 Virginia Mason Work Status Report and December 5, 2007 Virginia Mason Work Status Report (both by Dr. Hodapp) (Division Exhibit A at 44-45). The first report described the restriction as no lifting of more than 20 pounds without help. The doctor later removed the "without help" portion of the restriction based on a telephone call from Ms. L. L. Testimony.

[29] December 7, 2007 Certification of Health Care Provider (by Dr. Pankow) (Division Exhibit B at 18); December 7, 2007 Release from Work/School (by Dr. Pankow) (Division Exhibit B at 19) (stating that Ms. L. was unable to perform her duties from December 7-21, 2007, and would be reevaluated on December 21).

[30] L. Testimony.

[31] January 3, 2008 Initial Neurological Evaluation at 1 (Agency Rec. 333).

[32] *Id*. at 5 (Agency Rec. 337) (identifying spine, lumbar, carpal tunnel and sleep disturbance problems under the heading "Diagnoses").

[33] January 9, February 20, and April 14, 2008 forms (Division Exhibit B at 20-22).

[34] *See generally* June 24, 2008 Independent Medical Evaluation (Division Exhibit M at 4-25) (reporting on examinations by Drs. Sean Green and Stephen Fuller).

[35] *E.g.*, Gyn Progress Notes (L. Exhibit 1) (noting observations from April 30, 2009 consultation).

employer's to terminate her employment, and thus no findings are made in this decision regarding those examinations.

The PERS administrator denied Ms. L.'s December 2007 application for occupational disability benefits on February 13, 2009, reasoning in part that her employment was not terminated due to a presumably permanent disability.[36] The administrator also considered whether Ms. L. could receive nonoccupational disability benefits from PERS but concluded that she could not for the same reason.[37] Ms. L. appealed.[38]

Ms. L. and the Division of Retirement and Benefits (representing the PERS administrator) agreed to separate the appeal into two parts, so that a hearing on the cause for termination could proceed without delay while additional medical information going to the nature and permanency of her conditions could be gathered through a workers' compensation-related medical examination and from additional doctors' appointments.[39] An evidentiary hearing on the cause for termination was conducted.[40]

Based principally on the hearing testimony of Ms. L. and her former supervisor, Ms. Davis, the following additional findings of fact were established:

- Ms. L.'s employer offered to move her to a different, less demanding CNA duty station within the Pioneers' Home; more likely than not, however, the offer was not made until after Ms. L. had already moved to California[41];

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[36] February 13, 2009 Letter from Shier to L. (Agency Rec. 257-258).

[37] *Id*.

[38] April 1, 2009 Notice of Appeal (Agency Rec. 2-6).

[39] May 11, 2009 Recording of Case Planning Conference; May 12, 2009 Prehearing Order (confirming agreement to separate the case into two parts reached during the May 11 conference).

[40] The telephonic hearing took place in three sessions and three corresponding digital recordings were made. Two sessions were held on July 14, 2009, for opening statements, the testimony of Ms. L. and part of the testimony of A. M. Davis. The hearing adjourned early on July 14 to permit Ms. L. to keep a medical appointment not taken into account when the hearing was scheduled. The hearing was continued to July 15, 2009, for completion of the Davis testimony and closing statements. The recording for the July 15 session contains a gap at minute 53 during which a microphone problem resulted in failure to record part of the judge's remarks during the transition from the testimony to the closing statements. No testimony was lost and no rulings were made during this transition. The only loss was the judge's narrative describing the opportunity for closing statements and the order in which they would occur.

[41] Ms. Davis could not recall when she and Ms. L. had discussed the matter. Ms. L. testified that no offer of alternative employment was made until Ms. Davis raised the idea of reassigning her from the third to the second floor, when she telephoned Ms. Davis on December 31 to follow up on an earlier request for a completed Employer's Statement of Disability form. The form is dated December 31, 2007, was signed by Ms. Davis, and speaks of having discussed assigning the employee to residents with a lower required level of care but does not state when the conversation took place. (Agency Rec. 275.) Ms. L.'s testimony was credible and was not refuted by the form or Ms. Davis' testimony.

- The reduced physical demands at the alternate duty station would have meant less lifting and fewer combative (dementia) patients to deal with, and a goal would have been to manage the lifting work so that Ms. L. would not have to lift more than 20 pounds by herself; more likely than not, however, she could not have performed as a CNA at the alternate duty station totally free from the risk of having to lift more than 20 pounds on occasion[42];
- Ms. L. felt "humiliated" by her employer's decision not to promote her to either of two licensed practical nurse (LPN) positions for which she applied in September and December 2006, after she obtained her LPN license[43];
- Ms. L.'s disappointment with her employer's decision not to promote her was a factor in her decision to move away and not return to work at the Pioneers' Home as a CNA[44];

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[42] Ms. Davis testified that the CNAs on the second floor attend to patients who are generally more mobile than those on the third floor, and that the need to lift patients is far less common on the second floor. She described the staffing levels for the second floor as two CNAs on the day and evening shifts and one on the night shift for 19 residents. She also schedules one registered or licensed practical nurse for each floor on each shift and one "floater" who moves between the two floors as needed. She said that once a resident begins to require lifting, the resident is moved to the third-floor where mechanical lifts are available. She also testified that she would be comfortable hiring a person with a 20-pound lifting restriction for the second floor.

The position description for Ms. L.'s CNA position calls for occasional lifting of more than 50 pounds and frequent lifting of 10-25 and 26-50 pounds. *See* December 1, 2002 State of Alaska Position Description for PCN 027612 at 5. "Frequent" is more than 33% of the time; "occasional" is up to 33% of the time. *Id*. Ms. L. indicated that she would not necessarily always have a co-worker on hand to help, for instance, if a resident were about to fall. The ratio of staff to residents on the second floor, especially on the night shift, coupled with the physical requirements from the position description, makes it likely Ms. L. could not be assured of avoiding lifting in excess of 20 pounds 100% of the time just by transferring from the third to the second floor.

[43] Ms. L.'s testimony indicated that she was not just disappointed by the failure to promote but also by the fact that her employer showed no pride in her accomplishment of obtaining LPN licensure.

[44] Ms. L. testified that if she had been promoted to an LPN position, she believes she would have been able to continue working without aggravating her medical conditions because the LPN position is less physically demanding. This is inconsistent with her subsequent testimony and argument that the LPN job had similar physical job requirements, especially regarding lifting. The vehemence with which Ms. L. described her disappointment with her employer's decision not to promote her when the LPN positions came open a few months before her February 2007 injury, coupled with her testimony that she would not have returned to work to accept an LPN position if one had been offered to her before she moved in December, make it more likely than not that the failure to promote became a factor in her decision to move because of the offense she felt at not being promoted, rather than because of a belief that the LPN position would be less physically demanding.

- Ms. L. was able to return to work after periods of medical work release in the months leading up to her out-of-state move when motivated by financial need (while her children were still in college and she had a mortgage to pay on the Alaska house); however, if the house had sold sooner, relieving her of the financial burden of the mortgage, she would have moved out of state before December[45];
- Because she had moved away from Alaska, Ms. L. did not ask her employer to hold her CNA position for her after her family medical leave entitlement had been exhausted; however, if she had not moved and had asked that the position be held for her, more likely than not, her employer would have held it open if she was seeking treatment that could return her to work[46];
- If Ms. L.'s medical conditions were treated successfully, more likely than not, she would go back to work, but in California not at the Pioneers' Home.[47]

At the conclusion of the hearing, the record was held open five days to allow filing of a complete position description for the CNA position Ms. L. had held and the timesheets providing the detail summarized in the division's Exhibit H.[48] Both were timely filed. In addition, Ms. L. sent in a July 14, 2009 doctor's letter to which the division responded with a motion to strike.[49] Because the doctor's letter relates to an examination that occurred more than a year after Ms.

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[45] Ms. L. testified that she "forced" herself to go back to work during the July-December 2007 period because the children were still in college and the Alaska house did not sell right away after it was put on the market in May 2007. She explained that when the house did not sell quickly, she considered quit claiming the house to a friend or co-worker so that she could move. She added that the house ultimately did sell, with the sale closing January 9, 2008.

[46] Ms. Davis testified that she could use on-call staff and "floaters" to cover the work schedule of an absent employee after the family medical leave entitlement runs out and would be inclined to do so to retain a good employee, as long as the employee is receiving treatment that could return the employee to work within a reasonable period. Both in her testimony and in a letter of reference (Division Exhibit C), Ms. Davis made it clear that she considered Ms. L. to be a very good CNA—an excellent worker with good CNA knowledge, skills and experience, and someone she would rehire as a CNA.

[47] Ms. L. testified that if she were to get better, she would not go back to work at the Pioneers' Home but rather would work in California where there are lots of opportunities.

[48] July 14, 2009 Hearing Recording (ordering that timesheets summarized in hand-written exhibit prepared by Ms. Davis be filed); July 15, 2009 Hearing Recording (ordering the record held open for five days and providing the division the option to file the complete position description, an excerpt of which had been filed as part of Division Exhibit J, in response to a tentative finding that a CNA duty station change offered Ms. L. would sometimes require lifting more than 20 pounds).

[49] July 17, 2009 Facsimile (transmitting July 14 letter from Anna M. David, M.D.); July 17, 2009 Motion to Strike.

L.'s employment terminated, the letter is not pertinent to this part of the case and has not been considered in this decision. The motion to strike is denied as premature.[50]

III. Discussion

To be eligible for PERS occupational or non-occupational disability benefits, an employee must not only be unable to work due to a disability, but also must have left the employment relationship because of the disability and not for some other reason.[51] If the employment relationship is terminated for some other reason, the employee is not entitled to occupational disability benefits.[52] Assuming, without deciding, that Ms. L.'s back, carpal tunnel and uterine prolapse conditions are disabling, the question in this first part of the appeal is whether those conditions caused the termination of her employment.

According to the Alaska Supreme Court, a broad inquiry that goes beyond the employer's motivation is required to determine whether the employment relationship was terminated because of the alleged disability or for some other reason.[53] The statutes "do not require that the employer's action be motivated by a disability, nor even that the employer, rather than the employee, makes the decision to end the employment."[54] The inquiry starts by determining when the employment relationship terminated and then moves to determining why it was terminated.[55]

A. DATE OF TERMINATION

For purposes of the PERS disability statutes, termination of employment occurs upon complete severance of the employer-employee relationship.[56] When an employee remains in

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50 If this appeal proceeds to the disability part, the division will be permitted then to challenge the letter's value as evidence of a disability within the meaning of the PERS laws.

51 AS 39.35.400(a) (stating that "[a]n 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 39.35.410(a) (stating that "[a]n employee is eligible for an occupational disability benefit if the employee's employment is terminated because of a total and apparently permanent occupational disability …"); *also Rhines v. State*, 30 P.3d 621, 625-628 (Alaska 2001) (affirming determination that former employee was not eligible for occupational disability benefits because she had been terminated for non-medical reasons, i.e., due to a reorganization that eliminated her position).

52 *Rhines*, 30 P.3d at 625-628 (illustrating that a disability must be the cause of the termination for the terminated employee to be entitled to disability benefits).

53 *Id.* at 625.

54 *Stalnaker v. M.L.D.*, 939 P.2d 407, 411-412 (Alaska 1997).

55 *Rhines*, 30 P.3d at 625.

56 *Id.*

leave status, and stays in contact with the employer so that the position will be held open for that employee's possible return, complete severance of the relationship has not occurred.[57]

As a practical matter, Ms. L. ended her employment in December, when she moved out of state and was no longer available to work, having decided that she would not return to work at the Pioneers' Home in any event but instead will seek employment in California if she recovers her health. A complete severance of the employment relationship had not occurred at that point. Ms. L. stayed in contact with her employer at least through the end of December 2007, when she followed up about the Employer's Statement of Disability form. The employer continued to report her time (leave status, holidays and regular days off) for payroll purposes through March 19, 2008.[58]

Ms. L.'s employer administratively terminated her employment effective March 19, 2008. Her family medical leave entitlement had been exhausted, she did not ask the employer to hold the position for her when the entitlement was exhausted, and she did not return to work. She did not pursue a grievance of the termination.[59] A complete severance of the employment relationship, therefore, occurred as of March 19, 2008. The facts and circumstances existing on that date, not those occurring since then, are relevant to the cause of termination inquiry.

B. CAUSE OF TERMINATION

The concept of "legal causation" applies to determine whether employment termination was caused by a disability or something else.[60] The focus of the inquiry is on the time of the termination.[61] The test consists of two parts: actual cause and proximate (legal policy) cause.[62] The actual-cause starting point asks whether the employee would have been terminated "but for" the disability.[63] If the answer is "no," then the inquiry turns to proximate cause, which requires evaluating the significance and importance of the disability's role in causing the termination.[64]

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57 *Id*. at 626 (holding that the employment relationship continued while the employee was on a medical-related leave of absence because she did not cut off ties with the employer and, in fact, called the office several times, and interviewed for the position created through reorganization that eliminated her position, so that the new position would be held open for her).

58 July 14, 2009 Notice of Providing C. L.'s Timesheets at sheet for period ending March 31, 2008.

59 L. Testimony (explaining that she spoke with her union representative about the termination and he told her that because she had moved, nothing could be done about the termination).

60 *Id*. at 625.

61 *Id*.

62 *Stalnaker*, 939 P.2d at 412.

63 *Rhines*, 30 P.2d at 625; *Stalnaker*, 939 P.2d at 412.

64 *Stalnaker*, 939 P.2d at 412.

When an employer terminates employment because the employee does not return to work after medical leave is exhausted, if the employee did not return solely because of doctor's orders not to work, the medical condition is the actual cause of termination. The case referred to as *Stalnaker v. M.L.D.* illustrates this. In that case, the employer issued a letter terminating the employment while the employee was away from his home community, receiving treatment for a mental health condition, when his approved medical leave expired.[65] A few days before the leave expired (but apparently unknown to the employer), the doctor had predicted that the employee "would be disabled and unable to work [in a similar position] for at least twelve months."[66] The court reasoned that because the employee's condition "was the only reason for his unauthorized absence, it was a 'significant and important' cause of the termination."[67]

Ms. L.'s situation is different. When the Pioneers' Home terminated her employment in March 2008, she had already moved to California. The move was motivated in part by her desire to have better access to medical care than she felt she had living in Alaska, but that was not the only reason for the move. Concern for her husband's health and the fact that his medical specialist was in California also played a part in her decision. Another factor in her decision to sell the house and move out of state, and not to return to work at the Pioneers' Home, was the humiliation she felt because she had not been promoted to LPN. Thus, unlike the employee in the *Stalnaker* case, Ms. L.'s failure to return to work was not solely because of the medical conditions she alleges are disabling.

The move to California was the immediate cause of Ms. L.'s unavailability to return to work, but the medical conditions she alleges disable her influenced her decision to move. She moved out of state in mid-December 2007, three months before the employment terminated. The house had been placed on the market seven months earlier and Ms. L. would have moved out of state sooner than mid-December if the house has sold sooner. She testified that she would not have returned to work after December 4 even if the house had not sold. That testimony is not credible because it is inconsistent with Ms. L.'s pattern of returning to work whenever she was released for work by a doctor and with her testimony that she forced herself to work when she had a mortgage to pay and the children were still in college. More likely than not, therefore, Ms.

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65 939 P.2d at 409-410.
66 *Id.* at 409.
67 *Id.* at 412.

L. would have continued working at the Pioneers' Home, except when under doctor's orders not to work, if she had not moved away.

No doctor's order required Ms. L. to move, but she was under a work restriction at the time she moved. Shortly before the move, she was under a 20-pound lifting restriction from a Seattle doctor she had consulted in November. That restriction was superseded by a two-week restriction against any lifting or repetitive fine motor movements from her Alaska doctor. The Seattle doctor had expressed the opinion that "it would be in [Ms. L.'s] best interest to not lift greater than 20 pounds without help at work" and indicated that Ms. L. was to follow up with her own doctor.[68] Ms. L. worked several days after the Seattle doctor issued that restriction.[69] At Ms. L.'s request, the Seattle doctor removed the without-help qualifier from the restriction effective December 5, 2007, the day after Ms. L.'s last day of work.[70] Two days later, she saw her own doctor in Alaska and he imposed the two-week restriction against any lifting. That restriction expired when Ms. L. did not return to be reevaluated on December 21, 2007, because she had left Alaska for Redding, California, on December 17.

When her employment was terminated three months later, a "may not work" instruction issued by a Redding neurologist in February was in effect. It had an end date of April 30, 2008.[71] The underlying, detailed report of the initial neurological evaluation from January 3 did not set out a work restriction, noting only that Ms. L. was not working at that time.[72] The treatment plan was to seek authorization for further studies and for Ms. L. to continue using the same medication she was already taking.[73] The record leaves unanswered whether the neurologist would have instructed Ms. L. not to work if she had not already stopped working to make the move to Redding. Most likely, she would not have consulted this particular neurologist but for the move to Redding.

In February, a month before the termination, the neurologist's follow-up report included a work restriction to the effect that Ms. L. would "be kept off of work for another couple of

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68 November 9, 2007 Virginia Mason Physical Medicine and Rehabilitation Clinic Note (by Dr. Hodapp) (Division Exhibit A at 43).

69 *Compare* July 14, 2009 Notice of Providing C. L.'s Timesheets at sheets for periods ending November 30 and December, 2007, *with* November 23, 2007 Virginia Mason Work Status Report (Division Exhibit A at 44).

70 L. Testimony; December 5, 2007 Virginia Mason Work Status Report (Division Exhibit A at 45).

71 February 20, 2008 Disability Status (by Dr. Birk) (Division Exhibit A at 63).

72 January 3, 2008 Initial Neurological Evaluation at 6 (Division Exhibit A at 60).

73 *Id.*

months" and explained that her carpal tunnel symptoms were persisting.[74] The treatment plan called for Ms. L. to continue with medications previously prescribed and with physical therapy.[75] About a month after the termination, the neurologist extended the "may not work" instruction through June 30, 2008.[76] Ms. L. had completed twenty physical therapy sessions by this point.[77] The neurologist's follow-up report states, under "Work Restrictions," that "[t]he patient will be kept off of work for another couple of months."[78] The neurologist explained that Ms. L.'s symptoms seemed to be persisting at that time and indicated she would be kept on medication.[79] By July 7, 2008, however, the neurologist's report no longer included a work restriction.[80]

On the March 19, 2008 termination date, the carpal tunnel-based "may not work" instruction from the neurologist was the only doctor's order restricting work still in effect. The lifting restriction had expired three months earlier. Ms. L. did not ask her employer to hold the position for her when she was notified that her leave entitlement was running out. Her supervisor could have held the position open by continuing to cover Ms. L.'s work schedule with on-call personnel, and likely would have done so if satisfied that Ms. L. was pursuing treatment because the supervisor considered Ms. L. to be an excellent CNA.

Ms. L. made a number of choices partly, but not solely, based on the medical conditions she alleges are disabling. She chose to sell the Alaska house and move to California. She chose not to ask her employer to hold the CNA position for her because she had moved out of state and has no intention of returning to the job in any event. She chose not to try the reassignment to the potentially less demanding CNA duty station because she had moved. She chose not to try surgery for the carpal tunnel problem. She had what may be good reasons for these choices and she was free to choose. These choices, especially to move out of state, made her unavailable to return to the job when her leave ran out and would have kept her from being available for work at the Pioneers' Home after the neurologist's restriction lapsed in July if the employer had held

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74 February 20, 2008 "To Whom It May Concern" letter (by Dr. Birk) (Agency Rec. 330).

75 *Id.*

76 April 14, 2008 Disability Status (by Dr. Birk) (Division Exhibit A at 64).

77 April 17, 2008 Anderson Physical Therapy note (Agency Rec. 323) (showing completion of eighth session of eight and no longer having symptoms); February 15, 2008 Anderson Physical Therapy Progress Report (Division Exhibit A at 62)(stating that Ms. L. had completed twelve physical therapy visits for the carpal tunnel syndrome).

78 April 14, 2008 "To Whom It May Concern" letter (by Dr. Birk) (Agency Rec. at 326).

79 *Id.* at 325.

80 July 7, 2008 "To Whom It May Concern" letter (by Dr. Birk) (Agency Rec. at 314-315).

the position open for her. She made the choices partly because of her understandable frustration with the lack of progress resolving her health issues but also because of her concern about her husband's health and disappointment with her employer's decision not to promote her to LPN.

When, as here, an alleged disability is but one of multiple factors leading the employee to choose to permanently move away from a job's location, it may not be the actual cause for termination of the employment. It is not the actual cause if it cannot be said that the termination would not have occurred "but for" the alleged disability. Having put the house on the market in May, Ms. L. probably would have moved to California as soon as it sold regardless of whether she was medically able to work or not, because of her husband's health issues or to pursue better job opportunities in the face of her Alaska employer's decision not to promote her.

In sum, the "but for" cause of the termination was Ms. L.'s failure to return to work when her leave was exhausted. She could not return to work because of the out-of-state move. The move was only partly due to her desire to seek medical care for herself in California. Her decision not to return to work, therefore, was not dependent upon her medical status.

IV. Conclusion

Ms. L. has not shown that her employment with the Pioneers' Home was terminated because of the medical conditions she alleges are disabling. Though it was a contributing factor in the decision to move, Ms. L.'s alleged disability is not the legal cause of her employment termination under the laws applicable to PERS disability benefits. The PERS administrator's denial of Ms. L.'s application for PERS disability benefits, therefore, is affirmed and Ms. L.'s appeal is denied. A hearing on whether Ms. L. is disabled for PERS purposes is not necessary.

DATED this 7th day of August, 2009.

By: *Signed*
Terry L. Thurbon
Chief Administrative Law Judge

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
C. M. L.	)	OAH No. 09-0200-PER
_____	)	Agency No. 2009-0003

ADOPTION ORDER

Having considered the proposal for action filed by and on behalf of appellant, C. L., the undersigned, in accordance with AS 44.64.060, adopts the August 7, 2009 proposed decision as the final administrative determination in this matter. That decision is adopted unchanged, and the requests for further proceedings and for an award of attorney's fees are denied.

On August 28, 2009, in response to the proposed decision, Ms. L. filed a letter transmitting a copy of an August 21, 2009 letter she had directed to her attorney in which she explained factually why she disagrees with the decision. On September 3, 2009, her attorney filed a document styled "Notice of Objection to Proposed Findings" requesting that the record be reopened for additional unspecified evidence and argument; that the interpretation of an unspecified statute or regulation be rejected, modified or amended; and that attorney's fees be paid to Ms. L.'s attorney. Collectively, these two filings are being treated as Ms. L.'s proposal for action. The Division of Retirement and Benefits did not file a proposal for action.

Ms. L.'s requests are denied. The factual arguments in the letter to her attorney are substantially similar to the ones she made during the hearing and thus have already been considered. The proposal for action provides no support for changing an interpretation of a statute or regulation. It does not identify which statute or regulation has been interpreted in a manner with which Ms. L. disagrees or set forth another interpretation and the reasons for it. As to the attorneys fees request, unlike workers' compensation proceedings, in a Public Employees'

Retirement System (PERS) appeal before the Office of Administrative Hearings, fees are not routinely awarded but instead may be awarded only as a sanction.[81]

This decision is issued under the authority of AS 39.35.006. 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 of this decision.

DATED this 21st day of September, 2009.

By: *Signed*
Terry L. Thurbon
Chief Administrative Law Judge

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

[81] Under AS 44.64.040(b)(2), the administrative law judge may "order a party, a party's attorney, or another authorized representative of a party to pay reasonable expenses, including attorney fees, incurred by another party as a result of actions done in bad faith or as a result of tactics used frivolously or solely intended to cause unnecessary delay[.]" From the notice's content, it appears the request for attorneys fees may have been a scrivener's error resulting from use of a workers' compensation form of notice. In addition to asking for fees to be awarded, the notice filed by Ms. L.'s attorney also states: "The parties jointly petition the Board to approve [the attorney's] receipt of attorney's fees as soon as possible." Ms. L.'s PERS appeal is not a board proceeding, but a workers' compensation claim would be. Absent bad faith or frivolous conduct, fees are not awarded in PERS appeals, but they would be routinely awarded in a workers' compensation claim.