

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF:)

D F)

) OAH No. 11-0401-PER
) Div. R & B No. 2011-016

Decision

I. Introduction

D F, a Public Employees' Retirement System (PERS) member, challenges the PERS Administrator's decision to deny her request for PERS disability benefits. The Administrator denied her request because he did not find her claim that she terminated her employment because of a disability compelling. Rather, he believed Ms. F resigned her position as a community development specialist with the Department of Labor and Workforce Development because she received poor performance evaluations and was about to be fired. The evidence falls short of establishing Ms. F resigned because of her disability. Therefore, the PERS Administrator's decision to deny Ms. F disability benefits is affirmed.

II. Facts

This is not the first time Ms. F has requested PERS disability benefits. Ms. F suffers from degenerative disc disease. In 2007, Ms. F's disability prevented her from meeting the physical requirements of her recreational therapist position and she was awarded nonoccupational disability benefits.¹

When a PERS member is awarded disability benefits, the member is required to enroll in a rehabilitation program with the Division of Vocational Rehabilitation.² Ms. F worked with the Division of Vocational Rehabilitation to obtain employment within her physical limitation. This goal was achieved when Ms. F obtained employment as a Community Development Specialist I in October 2009.

Ms. F's employment was not without physical challenges. Her office was on the east side of No Name, in a part of town called No Name, and Ms. F lived in a community located over 35 miles from her office. Depending on traffic her commute could last an hour each way.

¹ *In re D.F.*, OAH Case No. 07-0613-PER at 3 (August 15, 2008).

² AS 39.35.415.

Ms. F complained of back pain as a result of the long drive.³ At the request of her chiropractor, Christopher Hogan, her work hours were adjusted so she could avoid peak traffic times.⁴

In addition to a long work commute, as a community development specialist Ms. F was required to travel to remote locations throughout Alaska. While traveling to one location she suffered a fall while stepping into a sled attached to a snow machine.⁵ Her workers' compensation claim has not yet been resolved.

Around this same time Ms. F received the first of several verbal and written evaluations. She was generally rated as low acceptable and was informed that she needed to improve or she would fail her probationary period.⁶ Her interactions with the public received high ratings; her ability to comply with the position's paperwork and procedures was rated as low acceptable. The rating came as a great surprise to Ms. F.⁷ She carefully reviewed the evaluation and provided a written response.⁸ L M, Ms. F's supervisor, considered the written response and did revise the evaluation somewhat, but the overall rating of not acceptable remained the same. Ms. F refused to sign the evaluation and began looking for other employment.

Ms. F applied for a recreational therapist position in Hawaii. Ms. F testified that she understood that the Hawaii position was not as physically demanding as her recreational therapist job in Alaska. She had three telephone interviews but the Hawaii position was given to someone else.

On March 15, 2010, Ms. F wrote a letter to one of her health care providers, Larry Levine, M.D.⁹ In the letter she asked Dr. Levine to support her request for disability benefits. He declined to do so, and Dr. Levine severed their doctor-patient relationship.¹⁰

On March 31, 2010, Ms. F received a memorandum from Ms. M.¹¹ The memorandum informed Ms. F that a pre-determination meeting had been scheduled for the following day. The memorandum hinted at the possibility of termination and advised Ms. F that a union representative could accompany her to the meeting.¹² At the union's request the meeting was

³ F Testimony.

⁴ Div. Exh. X at 2.

⁵ AR at 160.

⁶ M Testimony.

⁷ F Testimony.

⁸ AR at 899 – 905.

⁹ Hearing Exh. 1.

¹⁰ AR 1181 – 1182.

¹¹ Div. Exh. N.

¹² Div. Exh. N.

postponed for a few days. Before the meeting, Ms. F resigned, citing “personal reasons.”¹³ At the hearing Ms. F expanded upon her reason for resigning. She testified that if she had received better performance evaluations she would not have resigned.

III. Discussion

PERS provides its members with two types of disability benefits: occupational and nonoccupational. Both require the member establish that he or she is presumably permanently disabled and that he or she terminated employment *because of* the disability.¹⁴ To receive occupational disability benefits the member must also prove that the disability was proximately caused by work.¹⁵

The principal issue is whether Ms. F resigned *because of* her disability. If she did then it will need to be determined if work was a substantial factor in her disability. The Administrator denied Ms. F’s application on the ground that Ms. F voluntarily left her employment because she did not want to receive a poor performance evaluation.

As the person requesting the hearing it is Ms. F’s burden to prove that she separated from employment because of her disability.¹⁶ In support she presented her own testimony as well as the testimony of her treating chiropractor, Dr. Hogan. Dr. Hogan has treated Ms. F for many years, including for her recent fall from the sled. Dr. Hogan testified that if he had a concern that performing her job was beyond her capabilities, he would have removed her from work. He did not. Moreover, Dr. Hogan testified that he had never advised her she could not physically perform her job as a community development specialist.

The Alaska Supreme Court has instructed that when assessing whether an employee terminated *because of* a disability, the fact finder should focus on the causal relationship between the termination of employment and the disability, not on the reason for the termination.¹⁷ This distinction is demonstrated in the case of *Stalnaker v. M. L. D.* In *Stalnaker* the employee suffered from major depression caused by work-related stress, and was eventually hospitalized for depression. While hospitalized, the employee was absent without authorization. The employer, citing a clause in the employment contract, terminated the employee for the

¹³ Div. Exh. P.

¹⁴ AS 39.35.400; AS 39.35.410; AS 39.35.680(24), (27) (emphasis added).

¹⁵ AS 39.35.410; AS 39.35.680(27).

¹⁶ 2 AAC 64.290(e).

¹⁷ *Stalnaker v. M.L.D.*, 939 P.2d 407 (Alaska 1997).

unauthorized absences.¹⁸ The PERS board found that the employee was not terminated because of his disability, but rather under the terms of his employment contract. The court reversed the PERS board's decision and focused its analysis on the cause of the actual termination. The court concluded the employee was terminated because of a disability (depression) because the depression caused the unauthorized absence.¹⁹

Applying this analysis to Ms. F's situation, it is apparent that she did not resign because of her disc disease. Ms. F was asked if she had received a better evaluation, and believed she was not going to be terminated by her employer, would she have not resigned; she emphatically answered "yes." Therefore, her own testimony establishes that the cause of her resignation was her concern that she would be terminated for poor performance, not her disability.

While the inquiry could stop here, it is important to look beyond Ms. F's statement to other facts and see if they may support her request for disability benefits. For example, if she had presented evidence that her poor job performance was caused by her disability, then depending upon the evidence as a whole, it is possible that she could make the case that she terminated because of her disability. However, the evaluations are low in areas that would not be influenced by her degenerative disc disease, such as the ability to follow direction and internal procedures.

Additionally, Ms. F's attempts before and after her resignation to obtain other employment detract from her claim. The Hawaii position could have been more physically demanding than her employment as a community development specialist. If Ms. F resigned because her degenerative disc disease interfered with her ability to perform her job, it is unlikely that she would have been searching for employment as a recreational therapist in Hawaii.

Finally, Ms. F's treating physician, Dr. Hogan, testified that at no time before or after her resignation did he advise her that she could no longer perform her duties because of her degenerative disc disease or that she required further accommodation to perform her duties. Also, when Ms. F was asked to identify evidence in the record advising her not to return to work or that she could not perform the duties of her position, she could not. In fact, Dr. Levine's letter stated the opposite, that she could perform her duties.

¹⁸ *Id.* at 410.

¹⁹ *Id.*

Therefore, the weight of the evidence does not support Ms. F's contention that it is more likely than not that she resigned her position because of her disability. The Administrator's decision to deny Ms. F's request for occupational or nonoccupational disability benefits is affirmed.

IV. Conclusion

D F did not establish that it is more likely than not that she resigned her position as a community development specialist because of her degenerative disc disease. Rather, the preponderance of the evidence is that Ms. F resigned because she did not want to be terminated for poor performance. Therefore, she is ineligible for PERS disability benefits.

DATED this 17th day of April, 2012.

By: Signed
Rebecca L. Pauli
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 39.35.006. The undersigned, in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 14th day of May, 2012.

By: Signed
Signature
Rebecca L. Pauli
Name
Administrative Law Judge
Title

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