

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS**

IN THE MATTER OF: )

B A. R )

OAH No. 12-0088-PER  
Agency No. 2012-004

**DECISION ON SUMMARY ADJUDICATION**

**I. Introduction**

B A. R is the surviving spouse of Public Employees’ Retirement System’s (PERS) member P E. R. Mr. R was eligible for normal retirement in August 2005. In 2008, Mr. R died after applying for retirement, but before appointment to retirement. Because of the timing of his passing, his election for a 75% survivor option was not effective, and because he died after he was eligible for normal retirement, Ms. R was ineligible for occupational death benefits. She is receiving the statutorily prescribed 50% survivor option. Ms. R appealed, seeking either occupational death benefits or the 75% survivor option.

The PERS statutes are very clear and unambiguous on the issues raised by Ms. R. Recognizing that the questions presented in the appeal were legal and not factual, the PERS moved for summary adjudication. Because it is undisputed that Mr. R was eligible for normal retirement, and at the time of his death he had not yet been appointed to retirement, as a matter of law, Ms. R is not entitled to the benefits sought regardless of whether her husband’s death was proximately caused by his employment. The PERS Motion for Summary Adjudication is GRANTED.

**II. Facts**

In evaluating a motion for summary adjudication, the non-moving party’s facts must be accepted as true without any attempt to weigh the evidence or evaluate witness credibility. The non-moving party need not show that it will ultimately prevail at trial,<sup>1</sup> and all reasonable inferences are drawn in favor of the non-moving party.<sup>2</sup>

For purposes of this motion only, the facts as set forth by Ms. R in her Opposition to the State’s Motion for Summary Adjudication are accepted as true and summarized as follows:

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<sup>1</sup> *Alaska Rent-A-Car, Inc. v. Ford Motor Co.*, 526 P.2d 1136, 1139 (Alaska 1974).  
<sup>2</sup> *Mitchell v. Teck Cominco Alaska, Inc.*, 193 P.3d 751, 757-758 (Alaska 2008).

1. Mr. R was eligible for normal retirement on August 1, 2005 with 20 years of service. He did not retire and was employed with a PERS employer up to the time of his death on November 21, 2008 from work-related lung cancer.<sup>3</sup>
2. On November 17, 2008, Mr. R entered the hospital. That same day he completed his application for appointment to retirement effective December 1, 2008 and elected the 75% joint and survivor option for his wife.
3. Throughout his marriage Mr. R expressed a desire that he not be kept alive on life support. However, once he was informed that his retirement would not become effective until December 1, 2008, Mr. R told his wife “to keep him alive until after December 1<sup>st</sup>, but not a moment longer.”<sup>4</sup>
4. On November 21, 2008, Mr. R went into respiratory failure and required life support.
5. Ms. R had the ability to comply with Mr. R’ desire to remain legally alive until December 1, 2008 by staying on life support, but she elected to remove life support and her husband passes away in peace on November 21, 2008.
6. Ms. R was appointed to a continuing lifetime benefit for PERS in the amount of \$2,863.55 effective December 1, 2008.<sup>5</sup>

### III. Discussion

A dispute, or any portion of a dispute, may be resolved by summary adjudication when there are no material facts in dispute and one party is entitled to prevail as a matter of law.<sup>6</sup>

A. *As a Matter of Law, Mr. R may not Receive Occupational Disability or Death Benefits.*

To be eligible for occupational disability a PERS member’s employment must be terminated:

because of a total and apparently permanent occupational disability . . . *before* the employee’s *normal retirement date*.<sup>7</sup>

A PERS member may receive occupational death benefits if:

1) the death of an employee occurs before the employee’s retirement and *before the employee’s normal retirement date*, and (2) the proximate cause of death is a

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<sup>3</sup> If the matter had proceeded to an evidentiary hearing, Ms. R would have had to establish by a preponderance of the evidence that Mr. R’ cancer was proximately caused by work.

<sup>4</sup> Opposition to Motion for Summary Adjudication at 4.

<sup>5</sup> Agency Record at 199.

<sup>6</sup> 2 AAC 64.250.

<sup>7</sup> AS 39.35.410(a) (emphasis added).

bodily injury sustained or a hazard undergone while in the performance and within the scope of the employee's duties, and (3) the injury or hazard is not the proximate result of willful negligence of the employee, a monthly survivor's pension shall be paid to the surviving spouse....<sup>8</sup>

Mr. R' normal retirement date was August 1, 2005 based on having 20 years of service. Mr. R did not retire and was working up until he entered the hospital on November 17, 2008. Whether Mr. R' death was work-related is of no consequence. The disability and the termination occurred after his normal retirement date. Therefore, Mr. R was not entitled to receive an occupational disability benefit, which means Ms. R' may not receive a benefit under AS 39.35.440, Death After Occupational Disability.<sup>9</sup>

B. *As a Matter of Law, Mr. R Was Not Retired When He Died.*

A "retired member" is a terminated employee who "is receiving a benefit other than disability" from PERS.<sup>10</sup> "Retirement" means the "period of time from the first day of the month following (A) the date of termination and (B) application for retirement, in which a person is appointed to receive a retirement benefit," other than a disability benefit.<sup>11</sup>

It was Mr. R' responsibility to apply for retirement.<sup>12</sup> As acknowledged by regulation, Mr. R' application for retirement was a request to be appointed to retirement effective December 1, 2008.<sup>13</sup> It did not appoint him to retirement, nor did it signify his intent to retire as of the date it was completed. Mr. R knew and understood that he would not be appointed to retirement until December 1, 2008, as evidenced by his specific instruction to his wife that she was to keep him alive until then.

Recognizing that there was an issue with appointment to retirement, Ms. R reasons that because AS 39.35.450(c) provides that an employee may change an option without approval of the administrator before the effective date of the employee's retirement and because subsection (e) of that same statute provides that if the employee dies before appointment to retirement, any

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<sup>8</sup> AS 39.35.430(b) (emphasis added).

<sup>9</sup> AS 39.35.440(b) ("Upon the death of a disabled employee who is receiving or is entitled to receive an occupational disability benefit....").

<sup>10</sup> AS 39.35.680(38).

<sup>11</sup> AS 39.35.680(39).

<sup>12</sup> 2 AAC 35.295(a) provides that:

It is the responsibility of the member to make application for retirement in writing on a form prescribed by the administrator. The effective date of application is the day the application is received by the division or, if mailed, the day the application is postmarked. A member requesting appoint to retirement should apply 30 days before the requested retirement date.

<sup>13</sup> 2 AAC 35.295(a).

election is inoperative, “this tribunal can recognize [Mr. R’] intent to immediately retire.”<sup>14</sup>  
However, Ms. R has failed to identify legal authority that would support her reading and desired application of the statute.

**IV. Conclusion**

Drawing all inferences and viewing all facts in a light most favorable to Ms. R, the PERS has established that it is entitled to summary adjudication. It has established that as a matter of law Mr. R was eligible for normal retirement on August 1, 2005 and he was not retired when he died; therefore, Ms. R is not eligible for occupational death benefits. The PERS has also established as a matter of law that, because Mr. R was not retired at the time of his death, Ms. R is not entitled to the 75% survivor benefit selected on the application for retirement. The PERS’s Motion for Summary Adjudication is GRANTED.

DATED this 21<sup>st</sup> day of June, 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 20<sup>th</sup> day of July, 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.]

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<sup>14</sup> Opposition to Motion for Summary Adjudication at 5.