

BEFORE THE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF)
) OAH No. 13-1266-PER
 M H)
)
_____)

ORDER GRANTING MOTION TO DISMISS

On February 20, 2014, the Division of Retirements and Benefits (Division) filled a motion to dismiss. This motion was timely filed within the deadlines set in a briefing schedule issued on February 18, 2014. That schedule was issued after M H, who filed the appeal in this case, failed to appear at a pre-hearing conference on February 12, 2014. That schedule gave Ms. H until March 7, 2014 to file a response to the Division’s motion to dismiss. Ms. H did not file a response.

In this motion to dismiss, the Division explains that, in addition to her failure to participate in the scheduled pre-hearing conference on February 12, 2014, Ms. H has also failed to provide the Division with the current medical reports the Division had requested in order to process her claim. It was the Division’s decision not to grant her claim without these reports that led to Ms. H’s appeal.

Ms. H had requested that the Division grant her claim for nonoccupational disability benefits from the Public Employees’ Retirement System (PERS). Ms. H’s claim was based on her hearing loss. Ms. H underwent cochlear implant surgery for her hearing loss on January 24, 2013. The Division’s consultant had recommended that a determination on Ms. H’s claim be deferred until six to eight months after her surgery, so that an evaluation could be made of her hearing limitations after her recovery. The Division deferred its determination, but Ms. H did not provide the requested post-recovery medical report.

In June of 2013, Ms. H again requested PERS nonoccupational disability benefits, and the Division again deferred making any determination on Ms. H’s request until she filed the requested post-recovery medical report.

On September 4, 2013, Ms. H filed the present appeal. The Office of Administrative hearings was unable to schedule a prehearing conference until February 12, 2014 because of Ms.

H's repeated failures to respond to scheduling contacts, and difficulty getting Ms. H to agree to a date and time.

On February 12, 2014, a pre-hearing conference was finally held in accordance with a notice issued January 22, 2014. Ms. H was not available at her phone number of record at the time set for the conference. A message was left at that number but she did not contact the Office of Administrative Hearings until February 14, 2014, two days after the scheduled pre-hearing conference. Prior to the scheduled pre-hearing conference, Ms. H apparently contacted the Office of Administrative Hearings by phone in an attempt to further postpone the pre-hearing conference without filing a written motion and copying the other party. Ms. H was therefore aware of the scheduled pre-hearing conference, but chose not to be available for it.

At the prehearing conference, a schedule was set for filing briefing on the Division's motion to dismiss. As discussed above, a briefing schedule was issued; the Division filed its motion; Ms. H did not respond. The briefing schedule also provided notice that Ms. H's appeal could be dismissed under Alaska Regulation 2 AAC 64.320(a).¹

In its motion, the Division request that Ms. H's appeal either be dismissed with prejudice, which would prevent Ms. H from being able to file a new claim for PERS nonoccupational disability benefits, or to dismiss the appeal without prejudice, but require that any new claim be filed within three months.

The problem with the Division's request is that Alaska Regulation 2 AAC 64.320(a) does not specify whether a dismissal made for failure to participate is with or without prejudice. It may be that the effect of such a dismissal depends on the nature of the appeal being dismissed. In this case, the appeal is of the Division's decision to defer making a determination of Ms. H's claim for PERS nonoccupational disability benefits until she provides the Division with a medical report evaluating her post-recovery hearing limitations. That decision certainly stands as a result of this dismissal. The parties will have to take up any additional ramifications of this dismissal in the appropriate forum. Alaska Regulation 2 AAC 64.320(a) does not give the Office

¹ Alaska Regulation 2 AAC 64.320(a) provides:

Failure to participate

(a) If a party who filed a notice of appeal or request for hearing fails to participate in a proceeding, the administrative law judge may order or propose the dismissal of the case or the affirmation of the decision contested.

of Administrative Hearings continuing jurisdiction over this appeal once the dismissal is issued as a final order.

DATED this 2nd day of April, 2014.

By: Signed
Mark T. Handley
Administrative Law Judge

Adoption

Ms. H, through her attorney, JB Brainerd, filed a proposal for action on April 25, 2014. Ms. H asks that her appeal be brought back to the Administrative Law Judge. Ms. H alleges that her hearing problems are responsible for her failure to effectively participate in her appeal. The record, however does not support this allegation. Ms. H had months to obtain counsel or other assistance before her appeal was dismissed. Furthermore, this appeal was an appeal of the Division's decision not make a final decision in her case until she had provided the medical records needed to support her claim, namely a post-surgery, post-recovery evaluation of her hearing. That is the decision that will stand as a result of this order. Ms. H now has an attorney. Perhaps he can help her work with the Division to provide what is needed.

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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 6th day of May, 2014.

By: Signed
Signature
Mark T. Handley
Name
Administrative Law Judge
Title

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