Adoption

On March 2, 2015, Ms. H filed a proposal for action. Ms. H's proposal for action identified a number of areas she disagreed with the proposed decision. After careful consideration of Ms. H's arguments, the proposed decision is adopted without changes.

The following is a brief response to Ms. H's arguments in her proposal for action. Ms. H requested to supplement the record with information showing that nursing assistants have a higher rate of musculoskeletal injuries than most workers. She also requested consideration of a study on labral tears.

The record closed at the end of hearing. It will not be reopened for consideration of studies not presented during the hearing. The decision here is specific to Ms. H and asks whether her disability (right hip instability) was occupationally caused, not whether there is evidence available to support a finding that it could be. The fact that nursing assistants have higher incidents of muskuloskeletal injuries or that labral tears may be trauma-induced do not necessarily support a finding that Ms. H's 2008 fall or job duties were a substantial factor in her disability. Dr. Holley and Dr. Lessmeier concluded that the cause of Ms. H's right hip instability was her abnormal hip bone, not the fall. Neither doctor denied that labral tears could result from trauma. Likewise, Dr. Holley opined that her right hip instability would have surfaced regardless of her CNA work. He did not deny that CNAs suffer higher instances of on the job injuries.

Ms. H asks that the testimony of Dr. Holley and opinion of Dr. Lessmeier be rejected. The fact that both were hired by the Division was considered, as well as the fact that they reviewed records alone and did not treat or examine Ms. H. Both credibly summarized Ms. H's medical information. Ms. H is correct that the original agency record contained a single page of another patient's medical information. However, Dr. Lessmeier's opinions did not address or appear to rely on anything other than Ms. H's medical records. Ms. H's assertion that Dr. Holley was not truthful is not supported by the record.

As to other provider opinions, the proposed decision considered and addressed Ms. H's concerns with Dr. Lapkass' opinion regarding whether the fall was "a" or "the" factor in her disability. Also noted in the decision, Dr. Lapkass and Dr. Gevaert considered and ruled out a finding that Ms. H's right hip instability was related to the 2008 fall.

Lastly, Ms. H asserts that the statement that she returned to work even after her 2008 back injury is misleading because her right hip dislocated after just four days back at work. Ms. H is correct that her hip dislocated again after just four days. This does not undermine the assertion that she repeatedly returned to work with back pain.

Other than the request to supplement the record, all of Ms. H's concerns were considered prior to the proposed decision's issuance.

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.

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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 distribution date of this decision.

DATED: April 7, 2015.

By: *Signed*
Signature
Bride Seifert
Name
Administrative Law Judge
Title

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

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:	)	
	)	
U H	)	OAH No. 14-1480-PER
	)	Agency No. 2014-010

DECISION

I. Introduction

U H applied for and was approved for non-occupational disability benefits. Ms. H then applied for occupational disability benefits. The Administrator denied Ms. H's application for occupational disability because he determined that her disability was not caused by a work related injury or hazard.[1]

Ms. H appealed the occupational disability benefit denial.[2] A telephonic hearing was held on December 9, 2014. Ms. H represented herself. Joan Wilkerson represented the Administrator's position. Dr. Keith Holley, an orthopedic surgeon specializing in hip bones and joints, and Marla Christenson, benefits process manager, testified on the Administrator's behalf.

Because the evidence does not support a finding that Ms. H's disability is caused by a work related injury, the Administrator's decision is affirmed.

II. Facts

U H, who is now age 51, worked as a Certified Nursing Assistant (CNA) at No Name Medical Center for over 25 years. The CNA job is physical and requires lifting, twisting, and turning while moving patients.[3] Ms. H left her job on November 1, 2013, because a chronic problem of instability in her right hip had increased to the point where she was no longer able to perform the job duties of a CNA.[4] Ms. H was a member of the Public Employees Retirement System, and she applied to the Division of Retirement and Benefits for disability benefits.[5] On the application, Ms. H circled "non-occupational disability" benefits.[6] The Administrator approved Ms. H for non-occupational disability benefits beginning December 1, 2013.[7]

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1 R. 11 – 12.
2 R. 2.
3 H testimony; R. 46 – 49.
4 R. 44 – 45.
5 R. 23.
6 R. 3.
7 R. 3.

In an attachment to the application, Ms. H indicated that it had not been determined whether her injury was occupational or non-occupational.[8] In the attachment, Ms. H requested occupational disability benefits because, in her opinion, a 2008 fall at work and its consequences may have contributed to her right hip instability.[9] After obtaining and reviewing statements from her medical providers, the Division determined that Ms. H's 2008 fall did not cause, aggravate, or accelerate her disability.[10] On July 28, 2014, the Administrator denied Ms. H's request for occupational disability benefits.[11] Ms. H appealed the denial. The issue in dispute is whether Ms. H's 2008 work injury caused her disability.

A. Ms. H's Medical History

Ms. H's medical records contain evidence of a long history of back and hip pain.[12] Ms. H received chiropractic treatment intermittently since 2004.[13] She experienced falls outside of work in 2005, 2006, and 2007. Throughout her history, Ms. H followed prescribed treatment plans, performed exercises, and attended physical therapy. Ms. H wanted to work and did what was necessary to return to work following each of her injuries and surgeries.

i. The December 21, 2008, fall at work and low back health

Ms. H's December 21, 2008, fall at work and resultant injury is of primary concern for this decision. Unbeknownst to Ms. H, a patient had spilled water on the floor, which flowed under the patient's safety mat.[14] Ms. H slipped and fell very hard onto her left side while straightening the mat.[15] Ms. H experienced pain in her low back and left hip, which worsened over time.[16] She also began experiencing radiculopathy (tingling, pain, and numbness) radiating to her left foot.[17] X-rays revealed degenerative disc disease.[18] Ms. H was referred to the Alaska Spine Institute.[19] An MRI confirmed disc degeneration and revealed disc herniation in her lower

8 R. 36.
9 R. 32; H testimony.
10 Division's pre-hearing brief.
11 R. 3.
12 R. 126; R. 142; R. 1226 – 1242.
13 R. 1214 – 1242.
14 R. 56 – 57.
15 R. 56 – 57; H testimony.
16 R. 261; Ex. A; H testimony.
17 R. 261.
18 R. 265.
19 R. 267.

back.[20] Dr. Michel Gevaert recommended surgery.[21] On January 23, 2009, Dr. Paul Jensen performed a left L5-S1 partial hemalaminectomy and discectomy surgery.[22]

The surgery improved, but did not relieve, Ms. H's symptoms. Ms. H continued to experience pain after surgery.[23] Four weeks after surgery, Ms. H developed pain and numbness in her left foot.[24] A March 2009 MRI showed a small broad disc bulge and postoperative scar tissue in her lower back.[25] Dr. Jensen recommended two weeks off work and Lyrica for pain.[26] A third MRI in July 2009 showed no significant change since March 2009.[27] In August 2009, Dr. Gevaert diagnosed residual motor and sensory deficits and recommended physical therapy.[28] By September 2009, after six weeks of physical therapy, Ms. H's pain was decreased and she was working part-time.[29]

On November 11, 2009, Dr. Gevaert saw Ms. H for a permanent partial impairment determination for worker's compensation purposes.[30] Dr. Gevaert determined Ms. H's impairment rating was12 percent based on her disc herniation and radiculopathy.[31] Dr. Gevaert released Ms. H back to work and did not recommend any permanent work restrictions.[32] Ms. H had already returned to full time employment, working four 10-hour days per week.[33] Ms. H continued to follow up with Dr. Gevaert regarding her back issues.[34] In June of 2011, Dr. Gevaert found no significant functional or symptomatic change.[35] In 2012, Dr. Gevaert again notes no change in functional status.[36] An August 2014 electrocmyography (EMG), which checks the health of muscles and nerves, showed some improvement to nerve function in the low back.[37]

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20 R. 136 – 138.
21 R. 134.
22 R. 281; H testimony; Ex. A, p. 5. L5 – S1 refers to the location on the spine where the lumbar vertebrae and sacrum meet.
23 R. 112.
24 R. 112.
25 R. 112; Holley testimony.
26 Ex. A, p. 6.
27 R. 112.
28 R. 127.
29 R. 118.
30 R. 112 – 114.
31 R. 112.
32 R. 114.
33 R. 112.
34 R. 88.
35 R. 100.
36 R. 94.
37 R. 1174 – 1176.

A 2013 MRI again notes Ms. H's mild disc degeneration, most severe at L5-S1.[38] The degeneration progressed, and by April 2014, Ms. H's medical records indicate advanced degenerative joint and disc disease of the lumbar spine.[39]

Ms. H testified, and her medical records confirm, that she experienced an abnormal gait after surgery, which continues to this day. She also continues to have episodic tingling sensation, numbness, and footdrop in the left leg.[40] Ms. H testified that Dr. Jensen admitted he may have nicked a nerve during the surgery. Ms. H argues that the 2008 fall and resulting problems caused her right hip instability.

ii. Right hip issue and disability development

In September 2010, Ms. H began experiencing pain in her right shin, which radiated to her hip.[41] In December 2010, x-rays of the right hip revealed mild osteoarthritis.[42] In February 2011, Dr. John Lapkass diagnosed bursitis in the right hip and administered a cortisone injection.[43] He noted issues with the femoral head and neck, risk of impingement, and a possible labral tear.[44] On June 29, 2011, Ms. H underwent an MR arthrogram (MRA) of her right hip.[45] The MRA showed a labrum tear and degenerative changes consistent with bursitis.[46] Dr. Lapkass performed arthroscopy surgery to repair the labral tear in August 2011.[47] In November 2012, Ms. H fell three times on the ice, and began having pain.[48] However, Ms. H did not fall on her right hip.[49] She followed up with Dr. Lapkass in February 2012.[50] An MRI revealed a bone fragment in the hip socket and a torn labrum.[51] Ms. H was occupied with family issues at the time.[52] She opted to delay treatment, and take a wait-and-see approach for a period.[53] In

38 R. 87; R. 160.
39 R. 1158.
40 R. 85.
41 R. 310; H testimony.
42 R. 311.
43 R. 230.
44 R. 230.
45 R. 226 – 227.
46 R. 226 – 227.
47 R. 217.
48 R. 213.
49 H testimony.
50 R. 213.
51 R. 209.
52 R. 208.
53 R. 208.

September 2012, Dr. Lapkass performed another right hip arthroscopy to repair Ms. H's right labrum tear.[54] Ms. H completed physical therapy, but her right hip pain continued.

In February 2013, Dr. Lapkass diagnosed worsening arthritis in the right hip and recommended hip replacement.[55] Ms. H underwent total right hip replacement in April 2013.[56] After the right hip replacement, Ms. H suffered multiple hip dislocations, two in May and another in June 2013.[57] She also had a slight discrepancy between her leg lengths.[58] On July 11, 2013, Dr. Lapkass performed surgery on the artificial hip, hoping to increase stability.[59] In September 2013, Dr. Lapkass released Ms. H back to work. Four days later, while simply standing and making notes in a chart, Ms. H's right hip dislocated again.[60] After this dislocation and due to her right hip instability, Ms. H determined she was unable to continue with her work as a CNA.[61] She applied for disability benefits in October 2013.[62]

Ms. H followed up with Dr. Lapkass in October 2013.[63] Dr. Lapkass, while trying to determine the source of Ms. H's ongoing hip issues, wondered if her pain "may actually be referred from her lumbar spine."[64] Dr. Lapkass advised Ms. H to ask her provider at the Alaska Spine Institute whether he had any similar concerns.[65] He also suggests getting a lumbar MRI.[66] Ms. H did as directed.

On November 18, 2013, Dr. Gevaert examined Ms. H to determine to what extent, if any, her right hip pain is related to her back pain.[67] Dr. Gevaert noted derangement of the right hip following hip replacement and revision.[68] With regard to her hip, Dr. Gevaert noted disc extrusion with left L5 radiculopathy, after the January 2009 discectomy, with residual motor and sensory deficits.[69] Dr. Gevaert did not think the recurrent hip location had a radicular

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54 R. 203.
55 R. 193.
56 R. 184.
57 R. 174; R. 183; R. 331.
58 R. 175.
59 R. 175.
60 R. 162.
61 R. 45
62 R. 24 – 41.
63 H testimony.
64 R. 162.
65 R. 162.
66 R. 162.
67 R. 85.
68 R. 86.
69 R. 86.

component.[70] In other words, Dr. Gevaert concluded the right hip issue was not related to Ms. H's low back issues.[71] In November 2013, Dr. Lapkass reviewed MRIs of her lumbar spine and right hip.[72] He noted that the MRIs did not identify any explanation for the amount of pain she was experiencing.[73] The lumbar spine MRI did not reveal any significant pathology on the right side.[74] Like Dr. Gevaert, Dr. Lapkass concluded the lumbar issues were not causing her right hip pain and instability. Ms. H requested a second opinion.

In December 2013, Ms. H met with Dr. Prevost for a second opinion regarding her hip pain.[75] Dr. Prevost diagnosed arthritis and a non-spherical femoral head.[76] On February 19, 2014, Dr. Prevost performed another total hip replacement.[77]

B. Disability Causation Opinions

Ms. H has asserted on several occasions that her 2008 fall is responsible or partially responsible for her current disability.[78] The record, however, contains opinions from four medical providers, Dr. Deborah Lessmeier, Dr. Lapkass, Dr. Keith Holley, and Dr. Gevaert, that Ms. H's 2008 fall did not cause her right hip instability, which is the basis for her disability finding. As discussed above, medical records from Dr. Lapkass and Dr. Gevaert indicate that Ms. H's 2008 fall, and subsequent pain, are not related to her right hip instability. Further reviews of medical records by Dr. Lessmeier and Dr. Holley concur.

Dr. Lapkass provides his opinion on causation in a March 24, 2014, letter. The letter, filled out and signed by Dr. Lapkass, states that Ms. H's 2008 fall was not "the" substantial factor of right hip instability and disability.[79] The letter also states that the 2008 fall did not aggravate, accelerate, or speed up her need for hip replacement and subsequent disability.[80] The letter was prepared by attorneys representing No Name Medical Center in Ms. H's worker's compensation claim.[81]

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70 R. 86.
71 Holley testimony.
72 R. 160.
73 R. 160.
74 R. 160.
75 R. 1155.
76 R. 1155.
77 R. 1157.
78 H testimony; R. 24; R. 88 - 89;
79 R. 1517 – 1518.
80 R. 1517 – 1518.
81 R.

In January 2014, Dr. Lessmeier, a consulting physician for the Division, performed a first records review to determine whether Ms. H was eligible for non-occupational disability.[82] Dr. Lessmeier recommended approval for non-occupational disability benefits based on Ms. H's recurring hip problems.[83] In June 2014, Dr. Lessmeier performed a second records review to determine whether Ms. H qualified for occupational disability benefits.[84] Dr. Lessmeier outlined Ms. H's progressive right hip degeneration, from bursitis to mild, then severe, arthritis, accompanied by hip deformity.[85] Dr. Lessmeier stated that Ms. H's hip problems stem from a degenerative joint disease and are not occupationally related.[86] Dr. Lessmeier also responded to Ms. H's concerns that providers "may have missed something." Dr. Lessmeier stated, "It appears that she got excellent thorough medical care and I do not believe anything was missed in her evaluation or treatment."[87]

Dr. Holley conducted an extensive medical record review and concluded that Ms. H's right hip instability was not caused by back issues related to the 2008 fall.[88] Dr. Holley also concluded that Ms. H's back issues did not aggravate, accelerate, or combine with her underlying degenerative condition in causing her disability.[89] Dr. Holley testified that Ms. H's right hip issues followed the natural progression of arthritis. Ms. H's hip problems began with a labral tear and impingement.[90] Bursitis and early osteoarthritis developed into advanced arthritis.[91] Both Dr. Holley and Lessmeier commented that the underlying cause of Ms. H's hip condition was a malformed hip bone.[92]

Dr. Holley also testified and medical records confirm that Ms. H has advanced degenerative disc disease in her spine.[93] Dr. Holley noted that the 2008 fall was the likely cause of her disc herniation and that Ms. H may have been more susceptible to herniation due to her

82 R. 19.
83 R. 19.
84 R. 21.
85 R. 22.
86 R. 22.
87 R. 22.
88 Holley testimony; Ex. A.
89 Holley testimony.
90 Holley testimony.
91 Holley testimony.
92 Holley testimony; R. 22.
93 Holley testimony; R. 1158.

spinal degeneration.[94] However, Ms. H's disabling condition is right hip instability, not lower back pain.

III. Discussion

A. Legal Standards

An employee is eligible for occupational disability benefits under AS 39.35 if the employee's physical or mental condition prevents the employee from performing her usual duties and "the proximate cause of the condition [is] a bodily injury sustained, or a hazard undergone, while in the performance and within the scope of the employee's duties."[95] "An employee claiming occupational disability benefits bears the burden of proving by a preponderance of the evidence that the disability was proximately caused by an injury which occurred in the course of employment."[96] "If one or more possible causes of a disability are occupational, benefits will be awarded where the record establishes that the occupational injury is a substantial factor in the employee's disability regardless of whether a nonoccupational injury could independently have caused disability."[97]

A work injury may be a substantial factor in the disability if it aggravates, accelerates, or combines with a pre-existing condition, even if the pre-existing condition could independently have caused the disability.[98] A work injury may be a substantial factor in a disability if it aggravates the symptoms of a pre-existing condition (*e.g.*, pain), even if it does not aggravate the underlying physical condition.[99] Determining whether an injury is a substantial factor includes both actual and proximate cause. Actual cause requires a finding that the disability would not exist "but for" the injury.[100] Ms. H must show that she would not be disabled but for her 2008 fall and injury. Proximate cause requires proof that reasonable persons would regard the work injury as a cause and attach legal responsibility to it.[101]

B. Ms. H's hip injury, not her back injury, is the reason she cannot return to work.

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94 Holley testimony.

95 AS 39.35.680(27).

96 *Shea v. Dept. of Admin. Div. of Retirement and Benefits*, 267 P.3d 624, 631 (Alaska 2011) (citing *State, Public Employees' Retirement Board v. Cacioppo*, 813 P.2d 679, 683 (Alaska 1991)); internal citations omitted.

97 *Id.*

98 *Hester v. Public Employees' Retirement Board*, 817 P.2d 472, 475 (Alaska 1991) (adopting test identical to that applied in workers' compensation cases); *State, Public Employees' Retirement Board v. Cacioppo*, 813 P.2d 679, 683 (Alaska 1991).

99 *Hester v. Public Employees' Retirement Board*, *supra*, 817 P.2d at 476, n. 7. *See Shea*, 267 P.3d at 631, n. 18; *Lopez v. Administrator, Public Employees' Retirement System*, 20 P.3d 568, 573-574 (Alaska 2001).

100 *Shea*, 267 P.3d at 633.

101 *Id.*

Ms. H's disabling condition is her right hip instability. If Ms. H did not have right hip instability, it is very likely she would still be able to perform her work as a CNA. Ms. H was diagnosed with twelve percent total impairment as a result of her 2008 fall and 2009 surgery. However, Ms. H performed her job duties even with the foot drop, pain and tingling from her 2008 fall and resultant surgery. Prior to the development of pain in her right hip and after each right hip intervention, Ms. H returned to work and was able to work, in spite of the lingering effects from the 2008 fall. The medical records and testimony of Dr. Holley support a finding that the 2008 fall is not the cause of Ms. H's disability.

C. Ms. H's fall and back injury was not a substantial factor in causing her hip injury.

The evidence does not support a finding that the 2008 fall is a substantial factor in Ms. H's disabling condition, the right hip instability. Turning first to Dr. Lapkass, his letter states that Ms. H's fall was not "the" substantial factor in her disabling condition.[102] This sentence in his letter is not dispositive, however, because under the law governing occupational disability, an injury need only be "a" legal cause, not "the" legal cause.[103] Yet, Dr. Lapkass specifically inquired whether "some or all" of Ms. H's pain and hip issues were related to her low back issues and ruled this out.[104] He agreed that the 2008 fall did not speed up, aggravate, or accelerate Ms. H's right hip repair and disability. Therefore, Dr. Lapkass's letter supports a finding that Ms. H's disabling condition is not an occupational disability.

Dr. Holley also provided credible testimony that the 2008 fall was not a substantial factor in Ms. H's disability. He described Ms. H's 2008 fall, back injury, and right hip issues. Dr. Holley, an orthopedic surgeon specializing in the hip, outlined the progressive nature Ms. H's disc degeneration and hip instability. He explained that impingement and bursitis lead to arthritis, with the condition worsening over time. Like Dr. Lessmeier, Dr. Holley determined from a careful review of Ms. H's medical records that her right hip issues are independent of her 2008 fall and injury.

Furthermore, Ms. H's injury meets neither the actual "but for" nor the proximate "attach legal responsibility" prongs necessary for an award of occupational disability benefits.

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102 R. 1517 – 1518.

103 *Shea*, 267 P.3d at 632. *See also Shea v. Dep't of Admin., Div. of Retirement and Benefits,* 3AN-13-06927CI, at. 3 (Alaska Sup. Ct., Nov. 21, 2014).

104 R. 160 – 162; R. 1517 – 1518.

Dr. Holley's testimony was clear – Ms. H's right hip issues would have developed regardless of the 2008 fall. In his opinion, the 2008 fall did not accelerate or aggravate her right hip disability. Nor does Dr. Holley believe that injuries resulting from the 2008 fall combined with and contributed to Ms. H's pre-existing hip issues. Dr. Holley's testimony is supported by medical records from two treating physicians, and another reviewing physician. In sum, the medical testimony shows that Ms. H's 2008 fall was not the actual cause of her disabling condition.

D. A reasonable person would not consider Ms. H's 2008 fall and back injury legally responsible for her disability.

Proximate cause requires a finding that reasonable people would regard the 2008 fall and injury as a cause and attach legal responsibility to it. Ms. H's medical providers and records simply do not indicate a link between the 2008 fall and her right hip instability. Because the medical records show no causal link, legal responsibility cannot be attached.

The only evidence in the record to support Ms. H's occupational disability benefits claim is her personal belief that the 2008 fall contributed to her right hip issues. Ms. H testified that she believes her body compensated for injuries that resulted from the 2008 fall. She states this compensation may have contributed to her right hip condition. Ms. H also believes that perhaps her providers missed something. Ms. H testified that she is in pain every day and she has to live with that pain.

Ms. H's beliefs are understandable, but not supported by medical evidence. Ms. H expressed her causation theory to multiple providers. Providers followed up on her concerns, but they did not find causation between the 2008 fall and the right hip instability. Ms. H asked Dr. Holley specifically whether her CNA work, twisting and bending, could have contributed to her right hip instability. Dr. Holley explained that this is a relatively common belief, but not supported by medical studies. Dr. Holley testified that even without the rigors of CNA work or her 2008 fall, Ms. H would have developed hip issues.

Dr. Lessmeier was retained by the Division to determine whether Ms. H should be approved for disability benefits, initially for non-occupational, then for occupational benefits. Dr. Holley was retained by the Division as an expert witness for the hearing. Their evidence was accurate and well-reasoned. The medical records and opinions of Ms. H's actual providers, Dr. Gevaert and Dr. Lapkass, are even more persuasive in concluding that the cause of the disability, right hip instability, is not the 2008 fall and injuries.

IV. Conclusion

In order to qualify for occupations disability benefits, Ms. H must show by a preponderance of the evidence that her occupational injury caused her disability.[105] Ms. H's disability is based on right hip instability. Ms. H did not establish that it was more likely than not that her 2008 fall or work as a CNA was the proximate cause of her disability. Accordingly, the Administrator's decision to deny Ms. H occupational disability benefits is affirmed.

DATED this 6th day of February, 2015.

Signed
Bride Seifert
Administrative Law Judge

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

[105] *State, Public Employees' Retirement Board v. Cacioppo*, 813 P.2d 679, 683 (Alaska 1991). *See generally*, *Shea v. Dep't of Admin., Div. of Retirement and Benefits*, 267 P.3d 624, 631 (Alaska 2011).