

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

██████████)
)
)
 Appellant,)
 vs.) Case No. 3AN-15-██████████ CI
)
 State of Alaska, Division of)
 Retirement and Benefits,)
)
 Appellee.)
_____)

Order of Remand

The court has struggled with the procedural posture of this case for two reasons, a struggle made more difficult by appellant ██████████’s self-representation. First, the medical opinion of Nandi Than, M.D., the medical consultant for appellee State of Alaska, Division of Retirement and Benefits (DRB), relied on an incorrect legal standard when she stated, “Ms. ██████████’s work-related incident on December 27, 2013 , is not the substantial cause of her ongoing chronic back pain, right foot pain or right knee pain.” [Exc. 12] (emphasis in original). Perhaps if Dr. Than had employed the correct test from *State, Public Employees Retirement Bd. v. Caccioppo*, 813 P.2d 679, 682-3 (Alaska 1991), accurately understood Ms. ██████████’s treatment history, and examined the relationship of Ms. ██████████’s disability to her employment, this case would not have landed with the Office of Administrative Hearings.¹

Second, and more troubling, is that the court cannot discern from the record the actual basis

¹Ms. ██████████ had one, not “multiple epidural steroid injections” before 27 December 2013.” [Exc. 11]. The record does not reflect any physical therapy for back complaints before 27 December 2013, either. [Exc. 11-2].

upon which DRB determined appellant ██████████ was found to be disabled, or whether the disability might actually be sufficiently related to her employment to be considered occupational. AS 39.35.680(24) and (27); see *Hester v. State, Public Employees' Retirement Bd.*, 817 P.2d 472, 475-6 (Alaska 1991) (job-related stress may be cause of occupational disability). Administrative Law Judge Stephen C. Slotnick indicated his own concern about the posture of the case, "What was the basis for the finding that she is disabled, is that . . . in the record?" [Tr. 541]. Counsel for DRB responded, "[I]t is in the record." Counsel might have been referring to this statement by Dr. Than:

Ms. ██████████ has significant anxiety and depression, physical pain, and stress from complex legal issues; an admission to ██████████ Center on July 12, 2014 for recurrent major depression, all of which makes it highly unlikely for Ms. ██████████ to perform her essential job functions.

[Exc. 12]. However, despite the statements of her client's medical consultant, DRB's counsel asserted, "the only allegation that she has steadily addressed is her back as an injury." [Tr. 542]. Counsel then pointed to the Disability Benefit Application, [Exc. 13], to support her contention. [Tr. 543]. Somewhat incongruously, counsel also remarked that DRB is "not disputing disability in this arena at this time." [Tr. 542].

As this court must, it has carefully and very thoroughly reviewed the available record. *State, Dep't of Admin., Div. of Retirement and Benefits v. Shea*, 394 P.3d 524, 530 (Alaska 2017) (*Shea III*). Although ALJ Slotnick found there was an occupational injury, [Exc. 227],² he never truly identified either the actual disability that led to Ms. ██████████'s termination from employment, or the legal cause of such disability. ALJ Slotnick's perception of Ms. ██████████'s testimony, questioning

²By this reference, the court does not, and does not intend to, express a view on the merits of this appeal or the findings set out by ALJ Slotnick's Adoption of the Decision After Remand.

and statements at the hearing may have been that she was not properly focused on what he thought the issue was. But contrary to DRB's counsel's representation, the application does not itself define the basis upon which DRB found Ms. [REDACTED] to be disabled. *See* AS 39.35.680(24) or (27). Nor could it, actually, since it was merely an application and Dr. Than's recommendation, and presumably the Director's decision, went beyond the application.

Ms. [REDACTED]'s perspective could legitimately be construed as that her disability arose from the office milieu, and included her injury of 27 December 2013, and her employer's response to both the injury and the "dog in the workplace" issue. For example, K [REDACTED] G [REDACTED], a licensed marriage and family therapist with [REDACTED] Clinic [REDACTED], treated Ms. [REDACTED]. In the physician's statement of 11 August 2014 provided to DRB, Ms. G [REDACTED] said, "During [the course of treatment] you reported that the work stressors were increasing, accompanied by an increase in depression, anxiety, and physical pain. . . . I support your attempts to access your Pers Disability Benefits, as it is highly unlikely that you are able to function on the job." [R. 151]. In a similar vein, at her visit with Dr. W [REDACTED] on 12 July 2014, Ms. [REDACTED]'s physical condition was unchanged but her emotional state was such that she was referred to the [REDACTED] Emergency Room. [Exc. 58]. There she was admitted, treated and counseled. S [REDACTED] D [REDACTED], a licensed clinical social worker, wrote the discharge summary which observes:

Current stressors include: discrimination at work. [Client] is suing her employer. She has chronic pain issues. . . . [Client] stated bullying and harassment occurred when she returned to work [from FMLA. [Client] reports feeling very overwhelmed by her employment situation. . . . Recovery Center Course: . . . [Client] stated on her second day at [Crisis Recovery Center], she realized she had been using her pain medication to medicate her psychological as well as physical pain.

[R. 154].

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As a self-represented litigant, Ms. [REDACTED]'s pleadings should have been liberally construed in an effort to determine what concerns she was attempting to raise in her appeal of DRB's original determination. *Briggs v. City of Palmer*, 333 P.3d 746, 747 (Alaska 2014). Ms. [REDACTED]'s Notice of Appeal dated 12 January 2015 takes specific issue with DRB's decision as it relates to the back injury allegedly caused on 27 December 2013. [Exc. 1]. However, "consider[ing] Ms. [REDACTED]'s Notice] liberally in an effort to determine what legal claims have been raised," *Tolliver v. Alaska State Com'n for Human Rights*, 279 P.3d 619, 622 (Alaska 2012), the ALJ should have construed it as urging a decision that the montage of physical, psychological and emotional conditions described by Dr. Than were substantially caused by her employment. Thus viewed, Ms. [REDACTED]'s *pro se* Notice describing "retaliation," "discrimination," and "being tortured in that office," and asserting, "I took an overdose of pills not to kill myself. I just needed all the harassment from the State to stop. I just wanted to sleep so the pain could stop. They tortured me in that office," raise a claim that the disability described was occupational. [Exc. 2]; *see* [R. 153-4]. But neither the Director nor the ALJ addressed the claim, and neither appears to have even identified it. *See, e.g.*, [Tr. 22-33].

Identification of the specific disability which caused Ms. [REDACTED]'s termination from employment, and making a determination whether it was, or was not, an occupational disability, are matters that should be addressed in the first instance by the Office of Administrative Hearings – or perhaps even DRB. *Stalnaker v. M.L.D.*, 939 P.2d 407, 412 (Alaska 1997).



This case is REMANDED to the OAH to address the foregoing issues. As necessary or useful, OAH may remand the matter to DRB for a concise description of the disabling condition(s),

and whether, using the appropriate causation test, such condition(s) is(are) a legal cause of disability.

It is so ORDERED this 15th day of August, 2017.

By: 
Superior Court Judge Pro Tem Charles W. Ray, Jr.

I certify that on 8.16.17 a copy
of the following was mailed/emailed to each
of the following at their addresses of record.


Administrative Assistant

Wicherson