BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
	)	
B J	)	OAH No. 15-0062-PER
	)	Agency No. 2014-0926

DECISION AFTER REMAND

I. Introduction

B J twisted or jolted her back when a small dog startled her at her workplace. She had experienced chronic back and knee pain before the incident with the dog. After the incident, she has experienced increased pain, and is now disabled and unable to work. The evidence in the record, however, does not substantiate her claim that her on-the-job injury was a substantial factor in causing her disability. Therefore, the decision of the Administrator of the Public Employee's Retirement System denying her application for occupational disability benefits is affirmed.

II. Facts

B J is 49-year-old former state employee. For many years, she was employed as a Medical Assistance Administrator II in the pharmacy and ancillary services program of the Division of Health Care Services in the Department of Health and Social Services. The program helped Medicaid recipients obtain pharmacy and other covered services, such as durable medical equipment, home infusion therapy, and audiology services. It also worked to ensure that providers are paid for those services.

Over the years, Ms. J had learned the ins and outs of the Medicaid pharmacy program, and become adept at assisting the manager of the program in keeping things running smoothly for clients. She had a very good working relationship with the former manager, E D, who had trained her and taught her the details of the pharmacy program. When things were working well in the office, she greatly enjoyed her work, and was very proud of her expertise, work ethic, and professional accomplishments.[1]

By summer or fall of 2013, however, the job and the office were not as pleasant for Ms. J. She did not enjoy the same working relationship of mutual respect with her new supervisor, D G, that she had established with Mr. D.[2] In addition, the entire Division was under considerable

---

[1] J testimony.

[2] J testimony; G testimony. Mr. G described his relationship with Ms. J as normal in the early summer of 2013, but strained from August 2013 on.

stress as it was preparing to implement a new information-processing program.[3] Because of certain work-place issues, Ms. J, who is African-American, filed a discrimination complaint against supervisory personnel in the Division.[4] Due to office dynamics, Ms. J was moved into a small cubicle located on one end of the office, directly across from Mr. G, and isolated from most of the office. Ms. J found the cubicle cramped and uncomfortable.[5]

By the end of 2013, things were not going well for Ms. J at work. Without going into details, she described Christmas Eve, December 24, 2013, as "horrific." In addition, and central to the issues of this appeal, Ms. J was experiencing physical pain. In 2009, Ms. J had been in a car accident. She injured her knee and broke her wrist. Eventually she had surgery. Her wrist healed well, and the record indicates no recurrence of wrist pain. Her knee, however, continued to bother her, and continues to bother her now.[6]

During this same time, back pain became an issue for Ms. J. In 2012, she saw Dr. L A for back and knee pain, which she related to the car accident.[7] In October 2013, she was referred to H B, a pain specialist, for pain management.[8] On November 20, Dr. B performed an intralaminar epidural steroid injection—a treatment designed to reduce back pain by easing the irritation and inflammation in the lower spine.[9] Shortly after the injection, Ms. J's back pain at first eased up. Later, however, the back pain returned.

Ms. J relates the return of her back pain to the events of Friday, December 27, 2013. The parties do not agree on what happened on that day. They do agree, however, that on that day a dog named Burke was at the office. Burke, a small (about five pounds) white Maltese, is owned by M X, a Health Program Manager whose office was across a central hallway and down a cubicle from Ms. J's cubicle. Burke had undergone surgery a few days earlier, and Ms. X brought him to the office that day to keep an eye on him as he recovered.[10]

---

3 G testimony.
4 J testimony; G testimony.
5 J testimony.
6 J testimony. She also experiences foot pain from plantar fasciitis.
7 Admin. Rec.at 188.
8 *Id.* at 189.
9 *Id.*
10 X testimony. The parties dispute whether dogs were frequently at the office. Ms. X asserted that before December 27, 2013, Burke had only been at the office on rare occasions, and those occasions were only in the late afternoon around quitting time when her dog sitter was dropping off Burke, and sometimes Ms. X's other dog. The issue of the frequency of dogs in the office is not important to this case, and will not be explored further in this decision. The important fact here is that Burke was in the office on December 27, 2013.

Ms. J is not a "dog person." A dog bit her when she was a little girl, and she does not like dogs.[11] Ms. J's aversion to dogs was well known in the office.

Ms. J testified that she was injured in an encounter she had with Burke on December 27, 2013. According to Ms. J, what happened is as follows: Sometime during the late morning, she left her cubicle to go to the printer. Her cubicle exits into a narrow hallway, which runs perpendicular to a large hallway. Exiting her cubicle, Ms. J would turn left into the narrow hallway, and then almost immediately enter the large hallway, in which she could turn either left or right. The printer is located across and down the hallway to the right. In actual practice, Ms. J would walk a diagonal line, angling to the right from her cubicle to the printer.

Ms. J testified that, as she left her office that morning on her diagonal route to the printer, and rounded the corner into the large hallway, she suddenly noticed that Burke was underfoot there in her pathway and that she was about to step on him. She was startled and jumped backwards. She hit her knee and elbow against the wall of the cubicle that was behind her, and twisted or jolted her back. Burke yelped and ran away uninjured.[12]

The Division's witnesses, however, believe that no such encounter ever happened. Ms. X testified that on the day in question, Burke was always in a kennel under her desk or on a leash being led outdoors by herself or perhaps by a coworker who was watching him while she was in the bathroom. She believes Ms. J could not possibly have encountered Burke.[13]

The Division also presented the testimony of Division Director N C. Ms. C did not work in the same immediate area as Ms. J and Ms. X, although she was in the same office complex. On February 24, 2014, in response to a complaint from Ms. J, the Department of Labor asked Ms. C to investigate the allegation that a dog had been loose in the office on December 27, causing a tripping hazard and depositing urine or feces in the office.[14] Ms. C testified that, based on interviews with employees who worked in the area, she concluded that the dog had not been loose in the office on December 27, 2013.[15]

Mr. G also testified on the issue. Both Ms. J and Mr. G testified that around 11:50 that morning, they met in Mr. G's office to review Ms. J's annual evaluation. Both agree that the meeting was short and that Ms. J was not pleased with the evaluation. They disagree, however,

---

11 J testimony.

12 J testimony. Several witnesses confirmed the layout of the office, which the Division established through use of a demonstrative exhibit.

13 X testimony.

14 C testimony. Ms. C's March 8, 2014, investigative report can be found at Division Exhibit N.

15 Division Exhibit N at 4.

about whether Ms. J mentioned the dog incident. Ms. J recalls that she started to tell Mr. G about the incident, but he declared, "I don't want to hear about it," and ended the meeting.[16] Mr. G testified that the subject of the dog incident never came up.[17]

Ms. J testified that later in the day on December 27, she called the human resource section in the department. She thinks she spoke to D W H, or perhaps another woman. Ms. J recalls that she told the HR representative what happened, and the HR representative asked whether she wanted to file a workers' compensation claim. Thus, Ms. J believes she disclosed the injury on the same day that it occurred.

Ms. J explained that she did not want to file a workers' compensation complaint that day because it would lead to a backlash against her from the dog-centric office in which she worked. She also testified that many of her co-workers heard about the incident, and many of them came back to her cubicle to commiserate with her. She recalls a coworker telling her that day "everybody knows you hurt yourself with the dog."[18]

The Division disputes that Ms. J told anyone about being injured that day. Ms. W H did not testify, but the Division produced a January 23, 2014, email from Ms. W H.[19] In this email, Ms. W H asks E Q, a human resource manager in the Department of Administration (the central state agency for human resources), "E, Did Ms. J have an on the job injury? I never heard about it, do you have details of what happened?"[20] This email supports the conclusion that Ms. J did not tell Ms. W H on December 27, 2013, that she had been injured.

In December 2013, E K supervised the Department of Health and Social Services Human Resource Section. He testified that if Ms. J had told one of his employees that she had been injured on the job, that employee would have filled out a form, and reported it to him, without regard to whether Ms. J was going to file a claim.[21] No employee filled out the injury report form.[22] This supports a conclusion that Ms. J did not say she had been injured when she called the Department's human resource section on December 27.

Ms. Q also testified regarding reports made by Ms. J to her. Ms. Q testified to three different meetings with Ms. J: one on January 6, 2014, one on January 15, 2014, and one on

---

16 J testimony.
17 G testimony.
18 J testimony.
19 Division Exhibit R.
20 *Id.*
21 K testimony.
22 *Id.*

January 22, 2014. Both parties agree that the primary purpose of the first two meetings was to discuss a different human resource matter that has no bearing on this disability appeal. Ms. J believes that she mentioned the dog in each meeting, and that the primary purpose of the January 22 meeting, which occurred after hours at Ms. J's office, was to take pictures relating to the dog incident. Ms. Q was sure that the dog incident was never mentioned at the first two meetings and that the primary purpose of the January 22 meeting was to take pictures related to the other (non-dog) human resource matter.[23]

Ms. Q recalls that the dog incident came up during the January 22 meeting. It was the first time she had heard of the encounter between Ms. J and Burke. Ms. J offered to demonstrate to Ms. Q where and how she encountered Burke on December 27. Ms. Q recalled that Ms. J had described the encounter as taking place in the wide hallway directly in front of Ms. J's cubicle. In order for Ms. J to be in this area, Ms. J would have to turn left when she reached the wide hallway, which would take her away from, not toward, the printer. Ms. Q testified that at no time on January 22, 2014, did Ms. J say that she had been injured in the encounter with Burke.[24]

With regard to what happened after December 27, 2013, the parties agree on the following:

- On December 30, 2013, Ms. J sent an email to Ms. C and Ms. W H, stating that M X brought her dog to work on December 27, and again today, and asking whether it was possible to get approval to bring dogs to work, and, if so, whether someone had such approval.[25]
- Ms. W H responded that day, and quoted an excerpt from the State Standard Operating Procedures, advising that animals other than service animals are prohibited in state offices.[26]
- On January 2, 2014, Ms. X again brought Burke into the office. Ms. J sent an email to Ms. W H advising, "[t]here is a dog in the office again today." Ms. X was copied on the email.[27]

---

23 Q testimony.
24 *Id.*
25 Division Exhibit H.
26 J Exhibit 2 at 2.
27 *Id*. at 1.

- Ms. X asked for an exception to the dog policy for a sick dog; when she did not hear back, she took Burke home.[28]
- On January 23, 2014, Ms. J filed a workers' compensation claim, alleging an on-the-job injury because she tripped over Ms. X's dog on December 27, 2013.[29]
- On January 30, 2014, Ms. J sought medical help for back spasms, eventually obtaining a prescription for a muscle relaxant from a hospital emergency room.[30]
- On February 6, 2014, Ms. J saw Dr. B for back pain. He assessed her condition as "low back pain secondary to lumbar disc disease with acute exacerbation in symptoms after near fall."[31] On February 7, 2014, Dr. B performed a second lumbar epidural steroid injection.
- Ms. J attended eight counseling sessions with therapist L F between February 12, 2014, and July 28, 2014, reporting anxiety, sleep problems, physical pain, and stress.[32]
- Ms. J's back pain continued to worsen. On March 12, 2014, Dr. B performed a third lumbar epidural steroid injection. [33] On May 6, 2014, Dr. B performed a fourth lumbar epidural steroid injection.[34]
- On June 11, 2014, Dr. N C conducted an independent medical examination of Ms. J for her workers' compensation claim proceedings.[35]
- On July 9, 2014, Ms. J applied to the Division for occupational disability benefits. She identified the nature of her disability as "severe low back pain, upper back pain, back muscle spasm daily (mostly severe), right knee pain and swelling, high blood pressure, anemia, & right foot pain (severe)."[36] She described the cause of her disability as "the severe back pain increase[d] when at work on 12/27/13 when another manage[r's] small dog and I had an accident in the office because I did not see the dog. I had just had my 1st back surgical procedure on 11/20."[37]

---

28 *Id.;* X testimony.
29 Admin. Rec.at 66. Some, but not all, of Ms. J's workers' compensation claims were paid. J testimony.
30 *Id.;* Admin. Rec.at 193-95.
31 Admin. Rec.at 195.
32 *Id.* at 147.
33 *Id.* at 199.
34 *Id.* at 201.
35 *Id.* at 102-20.
36 *Id.* at 22.
37 *Id.*

- Ms. J returned to work for a short time in April, and then again in July around the July 4 holiday. Although she had a good day before the holiday when few other workers were in the office, her experience at work following the holiday was difficult. Ms. J may have returned for a short time in August. After that, she did not return to work.[38]
- On July 12, 2014, Ms. J was admitted to Providence Hospital for treatment for depression. She had reported to her primary physician that she had been abusing her prescription pain medication to a level that appeared suicidal. She was discharged on July 17, 2014.[39]
- On August 11, 2014, therapist F wrote to Ms. J "You have attempted to return to work, but given the severity and worsening of your symptoms, I support your attempts to access your Pers Disability Benefits, as it is highly unlikely that you are able to function on the job."[40]
- On September 19, 2014, Ms. J was separated from state employment.[41]
- On December 30, 2014, the Division approved Ms. J's application for nonoccupational disability benefits. It denied her application for occupational disability benefits.[42] Ms. J appealed.[43]
- On January 23, 2015, Dr. Q D conducted an independent medical examination for Ms. J's workers' compensation proceedings. He issued a report on February 10, 2015.[44]
- On April 5, 2015, Dr. C issued a report to the Division on whether Ms. J was entitled to occupational disability benefits.[45]

III. Discussion

A vested member of the Public Employees Retirement System (PERS) who is terminated because of a disability is eligible for disability benefits from PERS.[46] If the disability meets the

---

38 J testimony; Admin. Rec. at 209. Admin. Rec. at 128 indicates Ms. J may have returned to work for a week of half-days in August.
39 *Id.* at 149.
40 *Id.* at 147.
41 *Id.* at 8.
42 *Id.* at 14.
43 *Id.* at 2.
44 *Id.* at 181-227.
45 Division Exhibit A.
46 AS 39.35.400 – 39.35.410.

definition of "occupational disability," the benefit will be more generous than if the disability is deemed "nonoccupational."[47]

In this case, no one disputes that Ms. J is disabled. Therefore, no matter what the outcome of this case, Ms. J will receive disability benefits. The dispute between the parties is over whether Ms. J's disabling condition was legally caused by her accident at work. If so, then she would be qualified for occupational disability benefits. If not, she is eligible only for nonoccupational disability benefits.[48]

Below, this decision will first address the factual dispute about the encounter with Burke. It will then address the definition of occupational disability as it applies to this case. Finally, it will apply this definition to the facts of Ms. J's case to determine whether she is eligible for occupational disability benefits.

A. Did Ms. J have an encounter with Burke in the office in late December 2013 that resulted in an injury?

The parties dispute whether Ms. J had an encounter with Burke on December 27, 2013. The Division argues that no such encounter occurred. Although the Division agrees that Burke was in the office that day, it argues that the testimony of Ms. X shows that Burke was never loose in the office. Ms. X also testified that even if Burke had been allowed out of her office while not on a leash (which she is confident never happened), he was too sick to wander off and encounter Ms. J down near the printer. The Division asserts that the testimony of Director C, who concluded based on witness interviews that the encounter did not occur, confirms Ms. X's version of the facts.

The only witness to testify to the encounter between Ms. J and Burke was Ms. J. Ms. J, however, did call one witness, Q A, who controverted Ms. X's statement that Burke was never loose in the office during the late December period when he was recuperating from surgery. Ms. A remembers seeing Burke loose in the office wearing his cone (commonly called an "Elizabethan Collar," designed to keep a dog's mouth away from the stitches).[49]

Weighing the evidence leads to the conclusion that more likely than not Ms. J did have an encounter with Burke during late December. Although Ms. X has a strong memory that Burke was very ill and always confined, her testimony was not clear about whether Burke was in a kennel, on a leash, or confined to her office. She admits did not always have custody of Burke.

---

47 *Compare* AS 39.35.410(c) and (d) *with* AS 39.35.400(c).
48 AS 39.35.400 – 39.35.410.
49 A testimony.

She testified that she did not have any meetings outside the office on December 27, 2013, so that her only time away from Burke was when she went to the bathroom, at which time a coworker had custody of Burke.[50] Ms. X, however, would have a bias in favor of being unable to remember Burke running free—otherwise, her dog could be blamed for an alleged injury in a state facility.

In contrast, Ms. A has nothing to gain by testifying about Burke running free. Ms. A did testify that her relationship with Ms. X was strained, but that would not be a reason to give untruthful testimony. Ms. A did testify that Burke was at the office running loose "almost daily," which seems unlikely given Ms. X's testimony that he was only rarely at the office, and the affidavits from other employees, who did not recall Burke being loose. It may be, however, that Ms. A's comment was intended to imply that Burke's presence in the office was not unusual. Although Ms. A's testimony did not mention December 27, 2013, by date, she did remember Burke being loose at the time that he was wearing a "cone." Therefore, Ms. A's testimony provides some corroboration for Ms. J's statement.

Ms. C's investigation supported her conclusion that "the evidence shows that the dog was in fact at work but was contained within a kennel in a private office."[51] Ms. C had sworn statements from six witnesses who testified that they had not seen Burke loose in the office. In addition, she had evidence that Ms. J's other allegations—that the dog had deposited feces or urine and was on potentially harmful medication—were unsubstantiated. Ms. C, however, did not have first-hand knowledge of Burke's whereabouts on December 27, 2013. Although she could rely on the witnesses who provided her with affidavits, this decision cannot. Ms. J was not given an opportunity to test the veracity of these hearsay statements. Before these statements can be taken for the truth of the matter asserted, Ms. J should be given an opportunity to explore issues like bias or faulty memory. This is particularly true in a situation where office politics or alliances, concern about pleasing a supervisor, or other sources of bias, might be involved. Therefore, Ms. C's testimony provides only minimal support for the Division's position that Ms. J did not have an encounter with Burke.

That leaves Ms. J's testimony. Were Ms. J's testimony not corroborated by Ms. A, it would not be sufficient conclude that the encounter did not occur. Ms. J has a built-in bias in favor of her own version of events. In addition, many aspects of this record indicate that Ms. J is

---

50 X testimony.

51 Division Exhibit N at 4.

not a reliable historian.[52] Taken as a whole, Ms. J's testimony and her presentation in the hearing showed that she is a "big picture" person. She presented her case with flair and charisma, but she is less attentive to detail.

Yet, the fact that Ms. J's memory is not reliable about detail does not mean that she would invent an encounter with a dog. Taken as a whole, the best conclusion from this record is that more likely than not, Ms. J had an encounter with Burke during the time that Ms. X was bringing Burke to the office to recuperate from his surgery.

Ms. J's failure to report the incident, however, cuts against her description of the incident as resulting in a sudden acute injury and flare-up of pain. At the hearing, she described the pain as "pain like I never had in my entire life."[53] This may be consistent with Ms. J's current memory of the events, but if a severe injury had actually occurred, Ms. J likely would have made an immediate, or at least a sooner-rather-than-later, report of the incident. She did not.

Other testimony given by Ms. J also undercuts her current recollection that the dog incident resulted in serious, immediate injury and pain. She testified that many people in the office heard about the incident and were coming to her cubicle to commiserate. She did not, however, produce testimony or even an affidavit from one person in the office who could confirm that she was injured on December 27, 2013. The two witnesses who testified for Ms. J both testified that they did not learn of the injury until Ms. J filed her workers' compensation claim in late January.[54] In sum, if the circumstances were as Ms. J described—with the news of her injury filtering through the office on the day that it happened—we would expect her to call a witness who could verify the injury. That she did not makes it more likely that the injury on December 27 was not as severe as Ms. J now remembers it.

Ms. J's testimony about why she waited until January 23 to file a workers' compensation claim also hurts her case. She explained that she did not make an immediate workers' compensation claim because she did not want to alienate others in the office, many of whom

---

[52] For example, Ms. J described an incident in which Director C "snatched a chair out from under me." According, to Ms. C, however, what she did was remove the extra chair upon which Ms. J rested her foot from Ms. J's office because the office had been told that the height of the chair was harmful for Ms. J. The office had procured a footstool at the correct height. C testimony. This episode shows that Ms. J embellished and dramatized the facts. Similarly, at the hearing, Ms. J characterized her examination by the Division's independent medical examiner, Dr. C, as lasting five minutes. J testimony. In her appeal letter, however, she said it lasted 10 minutes. Admin. Rec. at 5. After Dr. C checked his log notes, he was confident that his face-time with Ms. J lasted longer than five minutes. Thus, while Ms. J's testimony has a basis in fact, she has a tendency to overlook details in favor of a dramatic presentation. That makes her an unreliable historian.

[53] J testimony.

[54] N testimony; A testimony.

were dog people. Her testimony and actions, however, are inconsistent with this explanation. First, she testified that she did, in fact, report her encounter and injury to Ms. W H or perhaps another woman who worked at the department's HR section. If this were true, it would mean that she was not concerned about a backlash from the office. Second, she did immediately report the presence of a dog in the office to Ms. W H, and obtained direction from her that dogs were not allowed in the office. She followed up this action with a very specific report regarding Burke the following week, which resulted in Burke's removal from the office. All of this happened long before she ever reported any injury from encountering Burke. Her actions of having the no-dogs policy disseminated among the office, and then having Burke specifically removed, were every bit as likely to alienate the dog lovers in the office as a report of injury—indeed, a report of injury from an encounter with Burke might provide some explanation and sympathy for the action she had taken. Thus, because the reason that Ms. J gave for not reporting the injury provides little or no explanation for her failure to report an injury, it makes it more likely that any injury she suffered was not severe.

On the other hand, Ms. J did have a good explanation for why she did not go to the doctor on December 27. She said that she had pain medication in her purse, she doubted that a doctor could do any more for her in the short term, and it made sense to wait and see how bad it really was. This explanation is plausible for a short delay, but not a long one. It does not provide any rationale for waiting until January 23 to file a workers' compensation claim or until January 30 to seek medical attention. If the December 27 injury was as acute as Ms. J described, with no relief over the weekend, we would expect that Ms. J would report the injury and see a doctor. Although she argued at the hearing that she had up to thirty days to file a claim with workers' compensation, Ms. J, who had filed workers' compensation cases in the past, would know that delay would not help her claim. If the injury were as bad as now argued, it would have compelled her to seek medical attention sooner.

The facts that emerge from this record are as follows. Ms. J had an encounter with Burke that startled her and caused her to react physically to Burke's presence. Most likely, this occurred on December 27, 2013. In physically reacting to Burke, she may have twisted or stressed her back, or otherwise felt a pull or strain in her back. The pull or twist suffered on that day was not severe. Since that time, however, her pain has increased. Ms. J has come to focus on the incident with Burke, in part because she feels betrayed by her management whom, she

believes, have rejected her while favoring the dog.[55] She now has a very strong memory that the incident with the dog provoked severe immediate pain, which she associates with the onset of her disabling pain. Her current memory of severe immediate pain, however, is not supported by the record. She has not proved by a preponderance of the evidence that the injury she suffered at work during the dog encounter on December 27, 2013, was more than a moderate injury that did not require medical attention.

With this understanding of what facts have been proven, we now turn to the legal standards. First, this decision will describe the tests for what a person must prove to establish eligibility for occupational disability. Then, applying those tests to the facts and opinions in this record, this decision will determine whether Ms. J has met that burden of proof.

B. What must Ms. J prove to establish that her on-the-job accident was the legal cause of her disability for purposes of occupational disability benefits?

For an on-the-job injury to be considered the legal cause of a disabling condition under PERS, the injury must have been a "substantial factor" in causing the disability.[56] Determining whether an injury was a substantial factor involves two inquiries. First, the injury must have been an *actual* cause of the disability—but for the injury, the disabling condition would not have occurred as it did.[57] A work injury may be an actual cause of the disability if it aggravates, accelerates, or combines with a pre-existing condition to produce the disability.[58]

Second, the injury must have been the *proximate* cause of the disability. This means that the injury was sufficiently important in causing the injury that a reasonable person would consider the employment and the injury responsible for the disability.[59]

C. Was Ms. J's on-the-job incident an actual cause of her disability?

Although Ms. J did not prove that her encounter with Burke caused the degree of contortion that she now believes to have occurred, the magnitude of her physical reaction to Burke does not answer the inquiry on causation. Under the cases on occupational disability, even a mild physical event may be a legal cause of a disability, if medical evidence proves that

---

55 J testimony. *See also* Admin. Rec. at 5.

56 *Shea v. State, Dep't of Admin., Div. of Ret and Benefits,* 267 P.3d 624, 632-33 (Alaska 2011). Occupational disability is defined in AS 39.35.680(27) (disability is occupational if "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.")

57 *Id.* at 633.

58 *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).

59 *Shea*, 267 P.3d at 633-34.

the event is a substantial factor in causing the disability.[60] Therefore, further inquiry is necessary, to determine whether the medical evidence would support a conclusion that Ms. J's physical reaction to Burke caused her current disability.[61]

Here, four different medical providers have given opinions regarding whether Ms. J's encounter with Burke caused her disability. Each of these opinions is based on Ms. J's version of her encounter with Burke. Each will be examined to determine whether, on this record as a whole, Ms. J has proved that an on-the-job injury was a substantial cause of her current physical disability.

1. Dr. E

Dr. E is Ms. J's primary physician. On August 28, 2014, Dr. E provided an opinion regarding Ms. J's symptoms and their cause. Dr. E based her opinion on "seeing [Ms. J] since May 19, 2014, regarding exacerbation of her low back and right knee pain following a work-related incident on December 27, 2013."[62] Dr. E's opinion on causation was as follows: "I believe that her work-related injury on December 27, 2013, was the substantial cause of her exacerbation of pain in both her low back and her right knee."[63] Dr. E did not testify at the hearing.

Dr. E's opinion does not cite any diagnostic medical evidence for her opinion. She does not state the mechanism of the injury or what injury Ms. J experienced on December 27.

The evidence cited by Dr. E in support of her opinion was that Ms. J's back pain was minimal before the accident and that back spasms were a new symptom:

> [Ms. J] had had some chronic knee pain prior to [December 27] and had been seeing Dr. B for that, though back pain had never been a primary complaint of hers. Apparently on review of systems she mentioned it to Dr. B and he did do an injection in her low back prior to the incident in December, but she was not having any pain from that after the injection until the incident in December. Since the incident in December, her back pain has become quite severe, with lots of spasms which she had never previously had, and her right knee pain has been significantly worse as well.[64]

---

60 *See, e.g., Shea,* 267 P.3d at 634 (holding that agency must evaluate under correct test whether evidence proves prolonged sitting may have been substantial cause of applicant's disability).

61 Put another way, this decision concludes that Ms. J had a physical jolt or twisting when she encountered Burke. The factual evidence does not support a finding that the event was as severe as she described. But because something likely happened, we must examine the medical evidence to determine whether what happened was a substantial cause of her current disability.

62 Admin. Rec. at 124.

63 *Id.*

64 *Id.*

Dr. E's belief that Ms. J's back pain was not an issue before December 27, 2013, is not supported by the record. Dr. D's extensive review of Ms. J's medical records shows that Ms. J complained of back pain to medical providers on May 4, 2010, May 28, 2010, and May 11, 2012.[65] The May 11, 2012, chart notes of Dr. L A document "[t]he back [pain] was bad enough that she did not go to work on Monday."[66] On October 29, 2013, Dr. B notes that Ms. J was referred to him for both knee and back pain, and that "[c]urrently she is experiencing pain in lower back."[67] Significantly, Ms. J rated her back pain on October 29 as "8/10," and described it as "continuous" and "aching with radiation into the right lower extremity."[68]

In short, Dr. E's opinion was based on an incorrect belief that Ms. J was not suffering from back pain in October and November 2013. In fact, however, Ms. J's back pain at that time was quite extreme—registering a level of eight out of a possible ten points in November. Dr. E does not provide any medical explanation or diagnosis of the injury, and the Division did not have an opportunity to test her opinion through cross-examination. No weight is given to her August 28, 2014, opinion.

2. Dr. B

Dr. B did not prepare or express an opinion regarding causation. The first time he saw Ms. J after the December 27, 2013, incident, was on February 6, 2014. In notes made during follow up visits, he generally described Ms. J's condition as "a marked exacerbation in pain symptoms after a work-related incident where she tripped over a dog."[69] His only diagnosis of the underlying source of the back pain is "secondary lumbar disc disease."[70]

Dr. B's notes do not state an opinion that the December 27, 2013, incident was a cause of her current disability. They document an increase in pain symptoms, which is correct—Ms. J's pain had increased during the time since he had last seen her, when she showed improvement after her first epidural injection. Although Dr. B ordered a second MRI, which was performed,

---

65 *Id.* at 185-88. The summary also mentions chiropractic treatments, which are not included in the summary. The physical therapy notes of February 10, 2014, record that "[p]atient reports history of back pain that started after an MVA in 2009 and gaining nearly 100#." *Id.* at 197.

66 *Id.* at 188. The record also documents that on December 2, 2013, Dr. E saw Ms. J again, for a variety of issues. Dr. E noted that Ms. J "had an epidural steroid injection on the 20th and she says her back pain is improved." Admin. Rec. at 141. Noting an improvement in back pain acknowledges that there was, in fact, back pain before the procedure.

67 *Id.* at 189-90.

68 *Id.* at 190.

69 *Id.* at 198; *see also id.* at 199, 203.

70 *Id.* at 199, 203.

his notes do not reflect any opinion about how that MRI should be interpreted regarding the cause of Ms. J's symptoms.

Dr. B did not testify at the hearing. His notes are consistent with a theory that Ms. J suffered an injury on December 27, 2013, that was a substantial cause of her disability. They are also consistent, however, with a theory that her symptoms returned because the relief she experienced from the first epidural injection was not sustainable, and that the December 27, 2013, incident was irrelevant to her subsequent disability. Dr. B's notes do not help or hurt Ms. J.

3. Dr. D

Dr. D prepared an independent medical evaluation for workers' compensation purposes. He reviewed medical documentation. He compared the results of the MRI of Ms. J's back taken before the incident with the MRI taken after the incident. He conducted an in-person physical examination of Ms. J. He issued a report expressing an opinion on causation of her symptoms.[71] He did not testify at the hearing.

Dr. D summarized the evidence as follows: "Repeat MRI scanning did not show any progression of the previously documented disc pathology, nor did it show evidence of any significant acute worsening. Clinical examination also does not show any progression of the radicular findings."[72] He concluded "[i]n summary, the examinee has had a subjective worsening of a pre-existing discogenic, chronic low back problem, but has no objective evidence of worsening of the underlying condition."[73] This conclusion generally supports the Division's theory that Ms. J's physical condition was not exacerbated by the December 27, 2013, incident.

Dr. D's report then answered a series of questions. These questions are specific to workers' compensation law. Because the test for causation in a retirement disability case is not the same as the test in workers' compensation law, great care must be taken in trying to apply his answers to this case. Specifically, under workers' compensation law, the question is whether the work-related injury is *the* cause of the injury. Under retirement law, the question is whether a work-related injury is *a* cause of the injury. Only those of Dr. D's answers to the questions posed by the workers' compensation commission that are applicable to the retirement system's test for occupational disability will be discussed.

The opinions expressed by Dr. D include the following:

---

71 *Id.* at 181-226.
72 *Id.* at 219.
73 *Id.* at 219.

- "The causes of the disability and need for medical treatment would include the 2009 motor vehicle accident and chronic L4-5 discogenic pain, as well as the subject injury of 12/23/13 [sic]."[74] Under this statement, it is not clear whether Dr. D considers the dog incident to be a cause of the disability, or just a cause of the need for medical treatment.
- "[T]o a reasonable degree of medical probability, the subject injury produced a symptomatic aggravation, without accelerating or incrementally anatomically aggravating the pre-existing condition. It did, however, combine with the pre-existing condition to cause disability and the need for treatment."[75] This statement tells us that the incident with Burke caused a symptomatic aggravation that, in combination with the pre-existing condition, caused the disability. The incident did not, however, cause any physical aggravation. The lack of physical aggravation tends to favor the Division's theory that the incident with Burke did not cause any lasting physical injury that resulted in the current disability. Without further explanation from Dr. D regarding what he meant by "symptomatic aggravation" and "combin[ing] with the preexisting condition to cause disability," however, this opinion is not conclusive evidence for either side.
- "The 12/27/2013 injury produced a subjective change in the pre-existing condition. She has not returned to pre-injury status from a subjective point of view."[76] This opinion implies that the incident with Burke did not make Ms. J's pre-existing physical condition any worse, even though it led to an increased sense of pain. It provides some support for the Division's theory.
- "It would be reasonable, however, to state that a soft tissue injury of the lumbar spine superimposed on a pre-existent discogenic problem would likely resolve within a 3-month time frame in the absence of further injury to the disc."[77] This opinion supports the Division's theory that any discomfort caused by the incident with Burke would have resolved in a short time period. Yet, although this

---

74 Admin. Rec. 219.

75 *Id.* at 220.

76 *Id.* The opinion continues "The current examination demonstrates some positive Waddell's findings." *Id.* Dr. C explained that Waddell's findings relate to pain-related behaviors or symptom magnification disproportionate to the degree of physical injury. Because Dr. D's statement on Waddell's findings is inconclusive, it will not be factored into the conclusion reached in this decision.

77 *Id.* at 221.

opinion appears applicable to whether the incident was "a cause" of Ms. J's disability, because this opinion is given in answer to a question asking about "the cause," it will not be given conclusive weight.[78]

In sum, Dr. D's report provides some support for the Division's theory that the incident with Burke was not a substantial factor in causing Ms. J's disability. Dr. D's report does not help Ms. J meet her burden of proving that the workplace injury was a substantial factor in causing her current disability.

4. Dr. C

Dr. C testified at the hearing. He is a practicing orthopedic surgeon, and was qualified as an expert witness in orthopedic surgery. He reviewed Ms. J's records in 2015 for this proceeding and had conducted a physical examination of her in June 2014 as part of an independent medical examination for workers' compensation purposes. For the 2015 report, he also reviewed Dr. D's independent medical examination.

In his testimony, and his 2015 report and opinion, Dr. C applied the test for causation for retirement occupational disability inquiry. He described her history of back pain and the steroid injection in November 2013. He described the motor vehicle accident in 2009 as notable. He reviewed the MRI of Ms. J's back that Dr. B had ordered in October/November 2013, and the follow-up MRI from May 2014. He identified some arthritis and central disc protrusion at the L4-5 level, slightly more to the left than to the right. He referred to this as "lumbar spondylosis," which he described as arthritis or degenerative disc disease. When asked about the cause of this condition, he said it was generally age-related, often has a genetic component, and that it was slightly associated with obesity. Symptoms, including pain, can vary. Surgery is not appropriate for the degree of deterioration seen with Ms. J.[79]

Dr. C testified that the jolt experienced by Ms. J on December 27, 2013, could have led to a strain of the lumbar muscle or a mild aggravation of her existing condition. He would expect that an injury from this "low-energy" mechanism would heal within a "couple of weeks." Three months would be the upper limit for a soft-tissue injury of this type. He distinguished Ms. J's injury from an injury caused by a "high-energy" mechanism, such as a fall from a height.[80] He noted that the back pain before the injury was significant enough to lead to an MRI and a steroid

---

78 Dr. D's report expresses other opinions, some of which would help the Division. Because of the emphasis on finding "the cause," however, this decision will not rely on those other opinions.

79 C testimony

80 *Id.*

injection. In his opinion, this back pain would recur over time, without regard to a low-energy twist or jolt, such as that experienced by Ms. J on December 27, 2013.[81]

Dr. C disagreed with Dr. E's opinion on causation. He did not believe that any of Ms. J's ongoing symptoms were related to the December 27, 2013, incident. He considers Ms. J's right knee pain to be chronic pain unrelated to the December 27, 2013, injury. He was not aware that anyone considered the right knee pain to be disabling. He controverted Dr. E's statement that the December 27, 2013, injury combined with a pre-existing condition to cause Ms. J's disability. In his view, at most, the December 27, 2013, incident was a temporary aggravation of the pre-existing condition. He supported his opinion by comparing the two MRIs, which reveal no change in Ms. J's physical condition and no significant injury to the structures in the lumbar spine. He concluded that the December 27, 2013, injury was not a cause of Ms. J's disability. In his opinion, she would have had increased low-back pain even if she did not have an encounter with Burke on December 27, 2013.[82]

Ms. J raised several arguments in opposition to Dr. C's conclusion. She argued that his supposition that her back pain may be caused by a genetic predisposition to back pain was not supported by the evidence because he did not ask her about her relatives, and her relatives do not have back pain.[83] She asserted that he put insufficient weight on the treating physician's opinion. She argued that he was racist because he gave her little time and attention during his examination.

Ms. J's assertion that her back pain is not genetic because her relatives have no back pain is a relevant argument, and was given consideration. The argument does not, however, refute Dr. C. Dr. C did not assert that Ms. J's back pain was genetic—he merely explained that in the general population, back pain may have a genetic component.

With regard to Dr. C's controversion of Dr. E's opinion, Ms. J again raises a good point that a treating physician's opinion can be given consideration. Deference to the treating

---

81 *Id.*

82 *Id.*

83 J testimony. In answer to Ms. J's cross-examination, Dr. C explained that the scientific basis for finding that back pain may have a genetic component was in part based on twin studies—a twin in sedentary occupation often had back pain similar to the other twin who had a physically-demanding occupation. C testimony. Ms. J argued that relying on this research was a fallacy because she was not a twin. Ms. J's argument, however, does not undercut Dr. C's testimony. The point of the twin study is to compare two people with similar genetics, and then extrapolate the result to the population as a whole. Therefore, Dr. C may rely on a twin study as valid scientific research, even though Ms. J is not a twin.

physician, however, is not required.[84] Here, Dr. C considered Dr. E's opinion, and disagreed with her conclusion on causation.[85]

With regard to the alleged bias and racism, Ms. J explained that when she went to see Dr. C, she was in the waiting room for a long time. She could hear through the wall that Dr. C was having an in-depth conversation with his patient. She said that based on this, she felt hopeful going in to see Dr. C. Once in the exam room, however, he made her feel like he was racist because she did not get that kind of treatment.

Yet, Dr. C testified that he treated her in the same way that he treated other patients for whom he does independent examinations. For these patients, Dr. C does not establish a doctor/patient relationship. At the hearing, Dr. C presented in a very business-like, scientific manner. Ms. J may have interpreted his demeanor as cold and distant, which she may have attributed to a bias against female African-Americans. A cold and distant manner, however, does not prove racism, even when coupled with a short and directive examination.[86]

As for the contrast to the previous patient, with whom Ms. J apparently thought Dr. C was more solicitous, many possible explanations can be given for this perceived difference other than racism. To name just two, Ms. J may have been mistaken about what she thought she detected from hearing the murmur of voices on the other side of the wall. Or the patient may have been a long-term patient, with whom Dr. C felt comfortable. In short, a witness's perception of the nature of a conversation detected, but not actually heard or understood, through a wall is not sufficient evidence for a finding of bias.

Here, Dr. C had an objective basis for his opinion. He had the two MRIs, which showed no change in the lumbar structure that would account for an increase in pain following the December 27, 2013, incident. He had a factual record that indicated the presence of severe back pain before the incident. In addition, based on his expertise, he knew that the injury sustained by Ms. J would have healed in a short time without further complication.

---

[84] *See, e.g.*, *Hester*, 817 P.2d at 477 (rejecting argument that retirement board "inappropriately discredited the testimony of Dr. Doolittle, Hester's treating physician").

[85] C testimony.

[86] Because she waited for some time in the waiting room, Ms. J believes that Dr. C spent a long time with the previous patient, whereas she felt that she received only a cursory, uncaring examination. This, too, suggests to Ms. J that Dr. C may be biased. Again, however, Dr. C testified that his time with Ms. J—in addition to being more lengthy than she remembered—was typical for what he would spend with a patient for whom he was conducting an independent medical examination. That an orthopedic surgeon spent more time with one patient than another is not unusual and does not imply bias.

Dr. C's testimony is persuasive. Ms. J would need considerable evidence refuting his testimony to meet her burden of proof. As explained above, the other medical evidence in the record does not refute or undercut his testimony. Based on the record as whole, Ms. J has not met her burden of proving that the December 27, 2013, workplace incident was a substantial factor in causing her current disability.

D. Arguments raised by the parties in their Proposals for Action

Under AS 44.64.060(e), each party is allowed to submit a proposal for action after distribution of a proposed decision. Here, both parties submitted proposals for action.[87]

In its proposal for action, the Division argued that the evidence does not prove that Ms. J encountered Burke on December 27, 2013. The Division argues that M X was a credible witness, and that her testimony that Burke was too sick to be out in the common hallway should be given more weight. The Division asks that Q A's testimony be disregarded because she had a strained relationship with Ms. X and exaggerated the frequency that Burke was allowed to roam in the office.

The Division is correct that Ms. X was sincere in her testimony. So, however, were Ms. A and Ms. J. Contrasting Ms. X's testimony—that Burke was too sick to move—with Ms. A's—that she saw Burke loose wearing an Elizabethan collar—I chose to rely on Ms. A. Ms. X's testimony was about a general state of being (illness) and a generalized lack of opportunity for Burke to roam, from which I was asked to draw an inference that Burke never strayed from under Ms. X's desk. Yet, dogs can revive and seize opportunities to roam without their owners being aware. Ms. X may have overestimated Burke's illness, and may have overestimated how vigilantly she or her coworkers guarded Burke. In contrast, both Ms. J and Ms. A testified to the occurrence of an event, not a generalized state of being. This is a close call, but given that Ms. J had no reason to make up the encounter with Burke (falling or twisting her back while in the office would establish a work-related injury, without regard to Burke's presence), I concluded that more likely than not Ms. J did encounter Burke during the time that he was in the office in late 2013. Nothing in the Division's proposal for action undercuts this conclusion.

[87] This decision is treating Ms. J's July 27, 2015, email in the same manner as it would treat a proposal for action, even though the email was received after the statutory deadline for proposals for action. On July 13, 2015, in response to a timely email by Ms. J detailing the problems she was having with listening to the recording of the hearing, this case was remanded to the Office of Administrative Hearings, in part to allow Ms. J additional time to file her objections to the proposed decision.

For Ms. J's part, in her July 27, 2015, email, she makes several allegations that portions of the recording of the hearing were deleted. For example, she asserts that

- "Dr. C referring to my physicians E and B including Dr. D as incompetent. That part is missing."[88]
- "All of my questions were deleted from M's testimony recording."[89]
- "on 5/1/2015 under oath N C said she gave several people permission to bring their sick dog to work and she named names. Her testimony was deleted but they forgot to delete a name L S."[90]

I have listened to the recording of the identified testimony. It accords with my recollection of the hearing, and omits nothing. I note the following:

- Dr. C did not testify that Drs. E, B, and D were incompetent. He testified to the extent to which he disagreed with Drs. E and D, and the extent to which he agreed with Dr. D.[91]
- The recording includes several minutes of Ms. J's cross-examination of M X.[92]
- Ms. C did not testify that she gave several people permission to bring dogs to the office. During cross-examination, Ms. J stated that "you know there was several dogs," but Ms. C did not respond. In response to Ms. J's question "are you aware that other people were bringing their dogs to the office?", Ms. C named two people who had brought dogs. For one of them, she stated that she had banned that practice.[93]

Based on this review, Ms. J has not identified any evidence that the recording of the hearing was inaccurate or tampered with. She has, however, asserted as fact events that did not happen. She makes inferences and reaches conclusions that are not supported by the evidence. If I were to reconsider her testimony in light of the July 27, 2015, email, I would almost certainly have to question the reliability of her testimony to a greater extent than I originally did. I will not, however, reconsider the findings of fact at this time. I hesitate to draw inferences based on an email document for which I do not know the circumstances surrounding its creation, and that the

88 Email from B to OAH at 3 (July 27, 2015, 7:40 AM).
89 *Id.* at 4.
90 *Id.*
91 C testimony.
92 X testimony.
93 C testimony.

parties have not had an opportunity to address. Further, even if I were to reconsider the original evidence in light of this new evidence that Ms. J may be less credible than I had originally concluded, it would not change the outcome of the decision.

IV. Conclusion

The evidence in this record does not prove that Ms. J's workplace encounter with a dog on December 27, 2013, and subsequent jolt or twisting of her back, was a substantial factor in causing her ongoing pain and disability. The Division's decision denying her application for occupational disability benefits is affirmed.

DATED this 3rd of August, 2015.

By: *Signed*
Stephen C. Slotnick
Administrative Law Judge

Adoption

I adopt this Decision 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 3rd day of August, 2015.

By: *Signed*
Name: Stephen C. Slotnick
Title: Administrative Law Judge
Department of Administration

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