BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
	)	
D J	)	OAH No. 16-1087-PER
	)	Agency No. 2016-010

DECISION

I. Introduction

D J has suffered from back pain and sciatic pain for many years, due to chronic lumbar disc disease and a nerve impingement. The pain and her pain medication affected her work in the Human Resources Department of the No Name School District. In 2016, Ms. J lost her job as a Senior Human Resources Technician in part because of her poor performance. Rather than seek alternative employment, Ms. J elected to apply for nonoccupational disability benefits from the Alaska Public Employees Retirement System. The Administrator of the Retirement System denied the benefits, finding that Ms. J had not exhausted all of her treatment options. Ms. J appealed. The Division of Retirement and Benefits asked that the Administrator's decision be upheld. It provided medical testimony that Ms. J did not exhaust treatment options and was not disabled by her back condition. It also argued that she had not been terminated because of a disability.

Ms. J, however, presented evidence from witnesses who knew her work ethic and her capability. She also presented the medical opinion of her own doctor, who disagreed with the Division's expert. The facts proved at the hearing showed that Ms. J would not have been terminated if her performance had been better, and that the reason her performance had deteriorated was due to her disability. She was no longer able to do the duties of a senior HR technician. She had sought many different treatment modalities and was following the reasonable advice of her doctors in her treatment. Although the different possible treatment modalities suggested by the Division's expert may have merit, Ms. J's doctors did not support the modalities and the Division did not show that theses modalities would be successful. Based on this record, Ms. J meets the criteria for nonoccupational disability benefits.

II. Facts

A. Ms. J's employment history with the School District.

D J is a 51-year-old resident of No Name. For over twenty-three years, Ms. J has worked in the human resources field in the public sector. Since 2004, she has worked for the human

resources department of the No Name School District, first as an assistant, and later as a human resources technician and then a senior human resources technician.[1]

Although the record is silent with regard to when Ms. J was first promoted from HR assistant to HR technician, we know that she served in the technician position during school year 2008.[2] When serving as an HR technician, Ms. J was a generalist who would assist the senior technicians. One of her duties was fingerprinting new hires—a requirement for School District employees so that the district could perform a background check. A technician could be called upon to assist in almost all tasks, including entering employee data into the information system, assisting with new hire orientation, or subbing in for receptionist duties.[3]

In 2009, Ms. J was promoted to one of the senior HR technician positions. As a senior human resource technician, Ms. J had primary responsibility for a large group of employees who were assigned to her.[4] Effective July 1, 2012, however, she was demoted back to an HR technician position.[5] Then, in 2015, she was again promoted to a senior HR technician.[6] Once again, this position did not work out. On May 13, 2016, she was given notice that her contract as a senior HR technician would not be renewed.[7] Unlike the previous time, she was not offered a contract as an HR technician, although she was given the opportunity to apply and compete for an open HR technician position.[8]

Although Ms. J was given the opportunity to apply for employment, she elected to not do so. On the same day that she was given notice that her contract would not be renewed, she called the Division of Retirement and Benefits to inquire about her retirement options. Ms. J's memory is that she made the call before she was actually given notice. She remembers that she had a late-morning meeting with her supervisor, L M, but the meeting was delayed. She took a cigarette break, and called the Division.[9] The Division's records, however, show that the call came in at 12:37 p.m.[10] Ms. M testified that her calendar showed that her meeting with Ms. J was scheduled

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1 D. J testimony.
2 Division Exhibit J. The school year is the district's fiscal year, beginning July 1 and running through June 30.
3 M testimony. L M was Ms. J's supervisor from September 2014 – June 2016.
4 M testimony; N testimony; D. J testimony. T N was Ms. J's supervisor for several years up to 2014.
5 Division Exhibit I; N testimony.
6 Division Exhibit G; M testimony; D. J testimony.
7 Division Exhibit A; M testimony.
8 Division Exhibit A; M testimony.
9 J testimony.
10 Division Exhibit M.

for 11:30.[11] She did not recall it being delayed. Therefore, the Division contends that Ms. J did not call the Division until after the meeting with Ms. M.

In the call, Ms. J asked the Division about both early retirement and disability retirement. She learned that she was not eligible for early retirement until she reached age 55. Later, she was given advice on how to apply for disability by the Division.[12]

B. Ms. J's history of back and leg pain.

The reason that Ms. J was inquiring about a disability retirement was because she suffers from severe back pain and sciatic pain from chronic lumbar disc disease and an impingement of a nerve root in the L-5 region of her spine. The pain was a constant for her during her tenure at the School District. In the late 1990s, before coming to the district, Ms. J had two back surgeries in an attempt to deal with the pain. The surgeries were not successful and her pain continued.[13]

To deal with her pain, Ms. J's doctor prescribed narcotic pain medication, in increasing doses over the years. For the past few years, her medication regimen has been relatively stable at 10 mg. of a narcotic called "Norco," four to five times per day, as prescribed by her general practitioner, Dr. O A.[14] Nevertheless, even with this medication, Ms. J has been experiencing significant pain. She described her current pain as similar to the sharp and unbearable pain one feels when a tooth nerve is inflamed and suddenly exposed to cold.[15] She experiences sciatic pain down her left leg, and the damage to the nerve has led to a condition known as "foot drop," which causes her left foot to drag.[16] When fatigued, she has to compensate for her dangling foot by lifting her left leg higher than normal. This condition has caused her to trip and fall.[17]

Over the years, Ms. J has explored different avenues to address her pain. In 2008, she twice saw Dr. B, an orthopedic surgeon. Dr. B did not testify, but three of his chart notes are in the record. In the first visit, in February 2008, he interviewed Ms. J and reviewed a recent MRI. He noted "[r]ecurrent cervical radiculopathy" with "[n]o evidence of impingement."[18] He commented that a trial dose of an oral steroid had resulted in side effects, but noted she was

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11 M testimony.
12 Division Exhibit N; H testimony.
13 D. J testimony.
14 A testimony.
15 D. J testimony.
16 *Id.*; A testimony.
17 D. J testimony; E testimony; K. J testimony; B testimony.
18 Admin. Rec. at 203.

scheduled for an epidural steroid injection, which he hoped would provide significant relief.[19] He did not see any easy surgical solution.[20]

In a follow-up visit in May, Dr. B's notes reflect that the epidural steroid injection was not successful.[21] He prescribed 10 sessions of physical therapy, which he considered appropriate because she had a high level of function and was not currently taking pain medication routinely.[22] Ms. J remembered that she did attend physical therapy, and did attempt to do the prescribed exercises.[23] She also used the "Tens Unit" that was recommended by the therapist—an electrical stimulation device that can sometimes help in pain management.[24] Later, she also tried to do the home stretching regimen provided to her by Dr. A.[25] She did not obtain relief from any of these undertakings. Indeed, her recollection was that some of the physical therapy sessions made her pain worse.[26]

In 2009, Ms. J traveled to Anchorage and saw a neurosurgeon, Dr. C. Dr. C did not testify, but his chart notes reflect "L4-L5 nerve root symptoms, and a dense footdrop, but also nearly [as] disturbing to D is associated mechanical back pain."[27] He noted that Ms. J had a high degree of frustration with her ongoing symptoms. From the chart notes, it appears that he discussed the risks of surgery, including the possibility that the surgery might have to be aborted without achieving its goal. He considered paralysis a possible, but unlikely, risk. He advised that she would have to stop smoking for at least six months before any operation.[28]

Ms. J's testimony indicated that she considered Dr. C's recitations of the risk to constitute a negative assessment with regard to surgery.[29] She did not consult further with Dr. C.

In April 2015, at Dr. A's suggestion, Ms. J had another MRI. In late April or early May 2015, on her own initiative, Ms. J went to see a pain specialist, Dr. D.[30] Dr. D did not testify and his chart notes are not in the record. The experience at Dr. D's clinic was not fruitful. Ms. J explained that while she was at his clinic, the clinic experienced a meltdown (not involving her), with a staff member dissolving in tears. When she finally saw the doctor, he had no innovative

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19 *Id.*
20 *Id.*
21 Admin. Rec. at 202.
22 *Id.*
23 D. J testimony.
24 *Id.* "TENS" stands for transcutaneous electrical nerve stimulation.
25 *Id.* Dr. A testified that she had provided Ms. J with home exercises. A testimony.
26 D. J testimony.
27 Admin. Rec. at 208.
28 *Id.*
29 D. J testimony.
30 Admin. Rec. at 123; D. J testimony.

ideas and merely suggested continuing the same medication at the same dose as Dr. A had prescribed. She resolved not to return to the pain clinic.[31]

In November 2015, at Dr. A's recommendation, Ms. J went to see Dr. B again. He reviewed her recent MRI.[32] He noted low back pain and leg pain. He commented on her general good health otherwise and that she was active in raising her grandchild.[33] He noted that a third surgery was possible, but did not endorse the surgical option because of the risk of paralysis from a third surgery. Further, he could not predict that surgery would be successful.[34]

Ms. J has also tried other medications. She has taken the antiflammatory medication Celebrex. She has taken Pregabalin, frequently marketed under the name "Lyrica," which, according to Wikipedia, is a medicine used to treat epilepsy, neuropathic pain, and fibromyalgia.[35] She also has tried to quit smoking, but has not succeeded.[36] None of these efforts have helped.

C. Observations of Ms. J's colleagues and supervisors.

Over the years, at least some of Ms. J's colleagues at the School District observed that her back pain was having an effect on her work. T N, who served as the district's assistant director of human resources until mid-2014, supervised Ms. J from 2008-14. Ms. N was aware that Ms. J had back pain. Ms. N considered Ms. J to be a hard worker with a good work ethic. She also believed that Ms. J was thorough, wanted to do a good job, and wanted to remain employed by the district. She promoted Ms. J in 2009 to a Senior HR Technician based in part on the quality of her work, and in part on the need to fill the position with a knowledgeable worker based on changes in the district.[37] Throughout this time, however, Ms. N was concerned about Ms. J's performance, particularly her excessive absenteeism and sick leave use.[38]

Even with these concerns about Ms. J's performance, Ms. N did not support the decision to demote Ms. J to the technician position in 2012. That decision was made by Ms. N's supervisor, the director of HR, and, in Ms. N's view, was based on an incorrect assessment of the situation. Ms. N thought that Ms. J's job performance improved somewhat after the demotion, but not to the extent that she had hoped.[39]

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31 D. J testimony.
32 Admin. Rec. at 200-01.
33 *Id.*
34 *Id.*
35 Wikipedia at "Pregabalin" *available at* https://en.wikipedia.org/wiki/Pregabalin, accessed on December 9, 2016.
36 D. J testimony.
37 N testimony.
38 *Id.*
39 *Id.*

In 2012, after the demotion to HR technician, Ms. N believed that Ms. J could do the essential functions of the job. Ms. N observed, however, that Ms. J was having difficulty with standing, which was often required for long periods of time when fingerprinting. To address this difficulty, as part of an ergonomic study, the district arranged for Ms. J to have a padded mat to stand on when fingerprinting. She also received a special chair, although other HR employees also had that same chair.[40]

Over the next two-and-a-half years, Ms. N observed some deterioration in Ms. J's performance, which she concluded was based at least in part on Ms. J's back condition. She believed that Ms. J was doing as thorough a job as Ms. J was capable of doing under the circumstances. Based on Ms. J's performance and absenteeism, however, Ms. N considered terminating Ms. J. She ran reports on absenteeism, particularly sick leave use, for all employees, and spoke to Ms. J about her concerns with Ms. J's work. Ms. N also considered restructuring the job so that it would not be as taxing for Ms. J. She was not, however, able to do so because the district was short-staffed, and restructuring Ms. J's position would have meant giving additional duties to other employees.[41]

Two of Ms. J's former colleagues agreed that Ms. J's back pain affected her job performance. K B, who worked with Ms. J at the district from 2004-15, suspected early on that Ms. J had problems with pain and discomfort. His suspicion was confirmed when he saw her drop a stack of materials that she needed for a presentation. He also saw her take medication while on the job, and saw her struggling with focusing and doing more physical tasks. He began assisting her in many tasks, including report writing and fingerprinting. When Ms. J was promoted again in 2015 to the senior HR technician position, Mr. B knew she was capable of doing the work, but had concerns about putting her in that position. He did not consider her performance to have merited the promotion, but acknowledged that her knowledge of the district was a reason to promote her. Although he was no longer with the district after Ms. J was promoted in 2015, in his opinion, she was not satisfactorily performing the job for some of the last few years that they worked together. He was relieved when she applied for disability retirement.[42]

Another former colleague, E I-N, served as the benefits coordinator for the School District. She recalled that she and Ms. J discussed Ms. J's back problems in 2014, particularly

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40 *Id.*
41 *Id.*
42 B testimony.

with regard to Ms. J's absences from work. During the four to six months before Ms. I-N left the office in January 2016, the conversations about Ms. J's difficulty with concentration became more frequent. Ms. I-N knew that Ms. J was making errors in keying in employee information because Ms. I-N processed all changes in benefits that were triggered by Ms. J's entries. Two especially significant errors had to do with Ms. J twice accidently entering the wrong employee number when entering terminations into the system. These errors created considerable work for other employees to undo (and likely some consternation for the wrongly-terminated employees). At some point (possibly around the time of the errors), Ms. I-N suggested that Ms. J could call the Division to inquire whether she would be eligible for disability benefits. Ms. I-N made clear that she did not have an opinion on whether Ms. J might be eligible for disability retirement. Given the level of pain, and the level of functioning that she observed, however, she thought it appropriate to mention it as a possible avenue of inquiry.[43]

In contrast, L M, Ms. J's supervisor from September 2014 until Ms. J's termination in June 2016, was not aware of Ms. J's back problems. Ms. M was on the hiring team that made the decision to promote Ms. J in 2015. She explained that of all the applicants for the position, Ms. J was the most qualified. During the year that Ms. J served as a senior HR technician, however, Ms. M was not satisfied with Ms. J's performance. Unlike Ms. N, Ms. M was not concerned about absenteeism. She was concerned about Ms. J's attention to detail, especially in light of the errors that Ms. J made in processing employee information. Ms. M made notes regarding Ms. J's performance. Those notes are not in this record. Ms. M had meetings with Ms. J to discuss Ms. J's performance. She did not keep notes of those meetings or recall what Ms. J said about the cause of her poor performance. With the approaching end of the 2015-16 school year, Ms. J's yearly contract came up for its annual renewal. On May 13, 2016, Ms. M informed Ms. J that the district would not renew Ms. J's contract.[44] Her last day of work was to be June 30, 2016.[45]

In fact, however, Ms. J's last day was not June 30. For May 15-19, the record contains notes from a clinic indicating that Ms. J was unable to work on those days for medical reasons.[46] Later, Ms. J went on leave without pay status. This was a planned vacation so that Ms. J could attend her daughter's wedding. Then, on June 16, 2016, Dr. A filled out a prescription pad with

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43 I-N testimony.
44 M testimony.
45 *Id.*; Division Exhibit A.
46 Division Exhibit B.

the note, "Due to medical issues D will not be able to return to work."[47] The School District accepted that Ms. J was unable to return to work for medical reasons. A note in Ms. J's file from U H, the district's Executive Director of Human Resources, states, "[t]he effective termination date for D J is adjusted from June 30, 2016, as listed on the non-renewal notification dated May 13, 2016, to June 16, 2016, as reflected on the doctor's note.[48]

D. Ms. J's application for disability retirement benefits.

On May 17, 2016, Ms. J had a telephone conversation with Dr. A.[49] The May 17th chart note is the first time that one of Dr. A's chart notes discussed the possibility that Ms. J may not be able to continue working.[50] The note clearly reflects that retirement was Ms. J's idea—"she recently decided she could no longer tolerate full time work at No Name."[51]

On June 7th, Ms. J had an in-person appointment with Dr. A. The chart note from that visit documents that Ms. J will not be returning to work and will be applying for disability retirement benefits and social security disability benefits. It states that "[h]er last day was estimated for 6/30 but she had a fall with L. knee injury and may not be able to return. She is on leave without pay now."[52] Dr. A reviewed Ms. J's treatment history, current treatment, and symptoms as follows:

> 1998 and 1999 – lumbar surgery with Dr. E – did not help
> Epidural injections Dr. F – no help
> PT and TENS unit – minimal help
> Dr. C 2009 – offered surgery but risky
> Dr. B 2015 – new MRI, advised against surgery until newer options in future. – risk of paralysis.
> D Pain Clinic – offered injections 2015
> Treatment: currently uses Norco 10 mg QID or 5x/day to function and sleep.
> Current sx constant left leg pain down to foot and numbness in L. foot, recent fall on left leg, weakness , increasing bladder urgency
> Poor sleep – 2-4 hours and wakes up due to pain
>
> Pt. notes prev trial of Percocet with nausea, pain patches did not go well.

47 Division Exhibit D.
48 Division Exhibit C.
49 Admin. Rec. at 114.
50 Admin. Rec. at 29-195.
51 Admin. Rec. at 114.
52 Admin. Rec. at 42.

Recent Voc Rehab eval – not employable[53]

On May 26, Ms. J filed an application for nonoccupational disability retirement benefits.[54] To evaluate the application, the Division received statements from the School District, Dr. A, and Dr. B, each filling out a form giving his or her perspective of Ms. J's disability.[55] The Division then sent the application, the statements, and Ms. J's medical records from Dr. A and Dr. B to a consultant service to have an independent physician review the medical support for the disability application.[56]

Ms. M filled out the "Employer's Statement of Disability" by noting that the "date disability began" and "effect of disabilities on duties" blanks on the form were not applicable—in her view, there was "no disability date" and, since there was no disability, no effect on duties.[57] In the section that inquired about modifications, changes to job duties, or offers of other positions, Ms. M responded that no modifications, changes, or offers of other positions were made. She noted that "employee has not requested modifications" and that "we were not aware of a disability or need for accommodation."[58] In the section that asked about continuation of employment, Ms. M noted that the district would not be reassigning job duties to accommodate Ms. J's disability. The employee's contract was simply not renewed.[59] In the section asking about the reason for the termination, Ms. M again noted that the employee's contract was non-renewed.[60] She reported that "[e]mployee is not terminating or on leave of absence."[61]

Dr. A filled out the physician statement noting Ms. J's back and leg pain, and diagnoses of disc disease and sciatic nerve pain.[62] She further noted that treatment provided minimal relief and that Ms. J experienced "significant pain with standing, walking, sitting[.] Poor concentration due to pain."[63] As for the inquiry regarding whether any additional treatment modalities could

53 *Id.* (punctuation and spacing in original).
54 Admin. Rec. at 19-20.
55 Admin. Rec. at 22; 28; 199.
56 H testimony.
57 Admin. Rec. at 22; M testimony. The record contains two versions of the Employer's Statement of Disability form. In the first version, Ms. M signed as both the authorized representative and Ms. J's supervisor. Admin. Rec. at 22. The second version is identical except that Ms. M's name is crossed off as the "authorized representative," and Ms. M's supervisor, U H, is substituted. Admin. Rec. at 23.
58 Admin. Rec. at 22.
59 *Id.*
60 *Id.*
61 *Id.*
62 Admin. Rec. at 28.
63 *Id.*

improve the condition so that the patient could return to work, Dr. A replied that the answer "will await significant new surgical options that are lower risk for paralysis."[64]

Dr. B's form also noted low back and left leg pain.[65] With regard to job performance restriction, Dr. B wrote "[m]ay limit her capacity to bend[,] lift[,] carry[,] due to pain."[66] In answer to the question about whether he expected Ms. J to improve and the extent to which Ms. J could return to work, Dr. B wrote, "it is chronic."[67] As for the inquiry about whether other treatment modalities exist that could improve the condition so that the patient could return to work, Dr. B replied, "no."[68]

The Division's consulting firm replied to the Division's inquiry with an independent analysis based on the medical records. The consulting firm noted that its physician reviewer agreed with the diagnoses and treatment.[69] In his view, however, three additional treatment modalities could be effective in treating Ms. J's condition: physical therapy, complete smoking cessation, and an evaluation by a physiatrist.[70] The firm also relied on Dr. B's statement to conclude that Dr. B did not restrict Ms. J from sitting.[71] The firm noted that its physician concluded that desk work was appropriate and that Ms. J could perform the duties of a Senior Human Resources Technician.[72]

On August 25, citing its consultant's review and the Administrator's statement accepting the consultant's report, the Division denied Ms. J's application.[73] Ms. J appealed, asking for a hearing to contest the denial.[74] A three-day telephonic hearing was held on December 6-8, 2016. Because the Administrator's consultant had not had the opportunity to review all of the medical records, a supplemental hearing session was held on December 19, at which the Administrator's consultant testified regarding the records. Ms. J was offered the opportunity to have rebuttal

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64 *Id.*

65 Admin. Rec. at 199.

66 *Id.*

67 *Id.*

68 *Id.*

69 Admin. Rec. at 12; 378-81. The physician was Dr. U G. Dr. G testified at the hearing. Through an oversight, the Division did not provide the consultant with the MRI images that Ms. J had provided to the Division. The Division requested additional time to review the documents and provide a supplement report and testimony. The request was granted over Ms. J's vigorous objection because the importance of having the Administrator review and comment on a complete record outweighed the prejudice caused by the additional process.

70 Admin. Rec. at 13.

71 *Id.*

72 *Id.*

73 Admin. Rec. at 7-8. The Administrator confirmed the earlier decision after receiving the supplemental report from the consulting firm. *Id*. at 377.

74 Admin. Rec. at 2.

witnesses address the supplemental testimony, but declined. The record closed on December 19, 2016.

III. Discussion

A vested member of the Public Employees Retirement System (PERS) who is terminated from public employment because of a disability is eligible for disability benefits from PERS.[75] If the cause of the disability is not work-related, the member will be eligible for nonoccupational disability benefits if the member has five years of service and the member's disability meets the following criteria:

- The disability was the reason the member was terminated from public employment.[76]
- The disability prevents the member from satisfactorily completing the duties of the member's current job or a different job offered to the member for which the member is qualified by training or education.[77]
- The evidence of disability is sufficient to conclude that the member is presumably permanently disabled.[78]

In Ms. J's view, she is eligible for nonoccupational disability because she meets all three of these criteria. In the Division's view, Ms. J meets none of the criteria. The three criteria are discussed below.

A. Was Ms. J terminated because of a disability?

As the Division correctly points out, if Ms. J's termination had nothing to do with a disability, then she would not be eligible for disability retirement benefits, without regard to whether she is disabled. The Division cites an Alaska Supreme Court case, *Rhines v. State, Public Employees' Retirement Board,* in which the court upheld a denial of disability benefits

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75 AS 39.35.400 – 39.35.410.

76 AS 39.35.400(a) ("An employee is eligible for a nonoccupational disability benefit if the employee's employment is terminated because of a total and apparently permanent nonoccupational disability, as defined in AS 39.35.680, before the employee's normal retirement date and after five or more years of credited service."). Ms. J had more than five years of credited service.

77 AS 39.35.680(24) ("'nonoccupational disability' means a physical or mental condition that, in the judgment of the administrator, presumably permanently prevents an employee from satisfactorily performing the employee's usual duties for an employer or the duties of another position or job that an employer makes available and for which the employee is qualified by training or education, not including a condition resulting from a cause that the board, in its regulations has excluded").

78 *Id.*

based on the fact that the termination was not because of a disability.[79] The Division also cites two administrative decisions, *In re X.B.T.*, and *In re D.F.*, both of which upheld a denial of disability benefits for members whose terminations were not due to a disability.[80] The facts of *In re X.B.T.* are noteworthy. In *X.B.T.*, a teacher became disabled following an accident that occurred after his notice of termination but before the date of the termination. Although the teacher was clearly disabled and unable to work at the time of termination, because the evidence showed that the termination was not affected by the disability, disability benefits were denied.[81]

Given the strength of this precedent, during prehearing proceedings, the Division moved for summary adjudication. Summary adjudication is appropriate when the undisputed facts establish that a party will prevail as a matter of law, obviating the need for a hearing.[82] Below, I will first discuss why the motion for summary adjudication was denied. I will then turn to the issue of whether the facts proved at the hearing establish that Ms. J qualifies for nonoccupational disability retirement benefits.

1. Was the Division entitled to summary adjudication based on the undisputed facts in the record?

In the Division's view, the undisputed facts in the record (before the hearing occured) were indistinguishable from the facts at issue in *Rhines.* In *Rhines*, the member's job was eliminated as a result of a reorganization.[83] Although the member had some health problems that had caused her to be absent long-term from work when the job was eliminated, those health problems were not the reason she lost her job.[84] Therefore, the member was not eligible for disability.[85] Here, Ms. M's affidavit (submitted before the hearing in support of the Division's motion) explained that the School District also went through a reorganization at the end of the 2015-16 school year.[86] Based on this reorganization, new job duties were going to be added to

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79 30 P.3d 621, 630 (Alaska 2001). Although *Rhines* involved a claim for occupational disability benefits, the holding of *Rhines* is fully applicable here because the statutory requirement that the termination be because of the disability applies to both occupational and nonoccupational disability benefits. AS 39.35.400(a).

80 *In re X.B.T.*, OAH No. 14-0420-TRS (OAH 2014); *In re D.F.*, OAH No. 11-0401-PER (OAH 2012).

81 OAH No. 14-0420-TRS at 4.

82 Summary adjudication in an administrative hearing is appropriate when no material facts are in dispute and a decision is based solely on a question of law. In evaluating whether a party is entitled to summary adjudication, all facts are viewed, and inferences drawn, in the light most favorable to the party against whom adjudication may be granted. *See, e.g., In re Skaflestad,* OAH No. 13-0661-GUI at 8 n.68 (Board of Big Game Commer. Servs. 2014); *Samaniego v. City of Kodiak*, 2 P.3d 78, 82-83 (Alaska 2000).

83 30 P.3d at 623 (citing factual record that Ms. Rhines's supervisor's position and two administrative assistant positions were all being eliminated and replaced by two new fiscal officer positions).

84 *Id.* at 625.

85 *Id.* The court also held that Ms. Rhines' injuries were not permanent or disabling. *Id.* at 628-29.

86 M aff. ¶¶ 16-21.

Ms. J's position.[87] The additional duties played a role in the decision to not renew Ms. J's contract.[88] To the Division, these facts made Ms. J ineligible for disability retirement benefits as a matter of law.

Summary adjudication was denied before the hearing began, however, because important facts were in dispute. For example, in addition to noting the reorganization, Ms. M's affidavit testimony also noted that Ms. J's job performance had declined and that the decision to not renew her contract was related to both her struggles and the addition of tasks and duties as a result of the reorganization.[89] Because the law requires that we focus on the actual cause of the termination, not the employer's motivation or stated reason, if an underlying cause of Ms. J's poor performance was her disability, and she would not have been terminated but for her poor performance, then the disability would be a cause of her termination.[90] The questions of whether her poor performance was caused by a disability, and whether poor performance caused her termination, were disputed facts that had to be resolved at an evidentiary hearing. Therefore, summary adjudication was denied.

Moreover, the fact that Ms. J quit her job before her contract expired provided a second reason for denying summary adjudication. As Ms. J argued in her opposition to summary adjudication, if her termination on June 16 was because she could not complete the final two weeks of her contract due to a disability, then she would meet the first criterion for eligibility for disability retirement benefits. Contrary to the Division's argument, the cases support the view that if a person is terminated due to a disability before a contract expires—even if termination is imminent—this could be sufficient to find that the termination was due to the disability.[91] Although the Division argued that Ms. J's early termination was a contrived reaction to her contract termination, this, too, was a fact question that needed to be resolved at the hearing, further supporting the decision to deny summary adjudication.

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87 *Id.* ¶ 18.

88 *Id.* ¶ 21.

89 *Id.* ¶¶ 20-21.

90 *Stalnaker v. M.L.D.*, 939 P.2d 407, 411-12 (Alaska 1997) (holding that inquiry into whether disability caused termination should ignore employer motivation for terminating employer and focus on whether disability had a causal relationship to termination).

91 *See, e.g., in re X.B.T.*, OAH No. 14-0240-TRS at 4 (finding that disabled teacher was not terminated before contract expired).

2. Do the facts proven at the hearing show that Ms. J was terminated because of a disability?

Rhines instructs that the question of whether the termination was because of a disability is distinct from the inquiry into whether the person is actually disabled.[92] The first step in this inquiry is to identify the disability as Ms. J's back and leg pain. The Division's expert witness, Dr. G, admitted that Ms. J has severe chronic back pain. He also acknowledged that she had leg pain and numbness leading to foot drop, although he did not consider these conditions to be as significant.

Under *Rhines* and an earlier disability retirement case called *Stalnaker v. M.L.D.*, the issue of causation is divided into two parts.[93] First, is the disability an actual cause of the termination—would the termination have occurred even in the absence of the disability? This test is sometimes called the "but for" test. Second, is the disability a significant enough factor in causing the termination to consider it a *proximate* cause of the termination—a factor that a reasonable person would consider liable for the consequence?

a. Would Ms. J not have been terminated but for her back and leg pain?

On the issue of the district's decision to not renew Ms. J's contract, the actual cause question has two parts. First, but for the low job performance, would Ms. J's contract have been renewed? Second, but for her disability, would Ms. J's job performance have been substandard?

With regard to the first question, although the Division has argued that this case is just like *Rhines*, in fact, it is not. In *Rhines*, the member's job was eliminated. The member had to apply and compete for one of two new jobs, which merged three previous jobs and had substantially different duties from her previous job. Here, Ms. J's job was not eliminated or significantly reclassified. It was simply given additional duties. When asked whether Ms. J would have been offered a contract renewal at the start of the new school year if her performance had been at a high level, Ms. M acknowledged that it would have "impacted the decision."[94] In previous years, Ms. J had been offered a contract renewal without having to compete for a new job. That was true even when she was demoted in 2012—she was offered the lower-level job of an HR

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92 30 P.3d at 626-27 (rejecting argument that member would qualify for disability benefits based solely on existence of occupational disability). The question of whether the disability prevents Ms. J from performing her job duties will be addressed in the next section of this decision. Here, the issue is whether her disability caused her termination.

93 *Stalnaker v. M.L.D.*, 939 P.2d at 412 ("legal cause encompasses both an actual causation or 'but for' prong and a proximate causation or 'legal policy' prong").

94 M testimony.

technician.[95] I conclude that but for her low job performance in 2015-16, Ms. J would have been offered a contract renewal in May 2016.

Whether Ms. J's leg and back pains were an actual cause of her deficient performance, however, was an area of dispute.[96] Ms. J agrees that her performance was substandard, but attributes that to the effect of the pain and the narcotic pain medication, particularly with regard to her ability to concentrate. Three witnesses who worked closely with Ms. J in the past all agreed that her disability affected her job performance.[97] Her sister, U E, and her husband, K J, both testified to observing a worsening of Ms. J's symptoms that led to lapses of concentration.[98] Although these lapses were outside of the office, Ms. J argues that this evidence corroborates the testimony of her colleagues.

In response, the Division argues that the evidence as a whole paints a different picture than does the testimony of Ms. J's colleagues and relatives. The Division sees a generally healthy employee who for years had been able to cope with a serious, but non-disabling, condition—indeed, cope so well that in 2015 she applied for, and received, a promotion. The Division cites to the testimony of Ms. M, who observed no physical expressions of pain. Ms. M observed Ms. J perform the duties of an HR technician from September 2014 until her promotion in June 2015. Then, in school year 2015-16, Ms. M saw Ms. J fail in the job of a senior HR technician, without ever requesting an accommodation for a disability. Because Ms. J did not have the skill set to perform the new job, however, when told that her contract would not be renewed, she elected to withdraw from the workforce rather than pursue employment. Therefore, the Division concludes, the termination had nothing to do with her medical condition.

The problem with the Division's argument is that Ms. M testified that Ms. J did not pay attention to details. She cited Ms. J's errors in entering data. She said that the deficiencies occurred on a weekly basis. Yet, Ms. M denied that Ms. J had difficulty concentrating. This suggests that Ms. M believed that Ms. J was incapable of paying attention to detail, even though concentrating. Given Ms. M's own action in promoting Ms. J, however, and the testimony of Ms. N, who was generally satisfied with Ms. J's ability (although dissatisfied with her absenteeism), I cannot accept the view that Ms. J never had the intellectual ability to properly enter data into the

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95 Division Exhibit I.

96 The question being asked here is not whether Ms. J had a "disability" or whether she could perform her job in spite of the disability. The issue here is whether her admitted leg and back pain was a substantial factor causing her job performance.

97 N testimony; B testimony; I-N testimony.

98 E testimony; K. J testimony.

system or otherwise satisfactorily perform the duties of her job. Although the Division asks for an inference that Ms. J's demotion in 2012 is evidence that she never was capable of doing the duties of a senior HR technician, Ms. N's testimony that the 2012 demotion was not warranted by a lack of ability refutes that argument.

Notably, Ms. M was unaware that Ms. J suffered from pain. She did not know that Ms. J took pain medication.[99] It follows that Ms. M's failure to make the connection between pain and job performance was because she did not know that Ms. J was in severe pain. The Division's expert witness, however, conceded that Ms. J was in severe pain. Given that Ms. M's testimony was based on the false premise that Ms. J had no pain, her testimony cannot be relied upon to conclude that pain was not a substantial factor in causing Ms. J's inability to pay attention to detail.

The Division has also argued that the circumstantial evidence does not support a finding that Ms. J's pain caused her poor performance. It notes that Ms. J held the job for a long time, and was even promoted in 2015. Yet she had pain throughout this time and used the narcotic pain medication since at least 2006, the first year for which the record contains notes from Dr. A. In the Division's view, nothing changed with Ms. J's physical condition or ability to keep working. It concludes that the only thing that changed was her desire to stay at home rather than keep working.

Careful review of the record, however, reveals a gradual increase in Ms. J's use of narcotic pain medication, from two Vicodin ES per day in 2008 to 4-5 Norco per day by 2013.[100] This is consistent with Ms. J's testimony that her pain has gradually worsened over the years. In addition, although the Division interprets the record to conclude that Ms. J was coping without significant problems at work until she received notice that her contract would not be renewed, that interpretation is not consistent with the testimony of Ms. J's former supervisor and colleagues regarding Ms. J's deficiencies in performance, and need for assistance from colleagues, for several years.[101]

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99 M testimony.

100 The record indicates that in 2008 Ms. J was taking two Vicodin ES (one-half tablet four times per day). Admin. Rec. at 203. At some point, she increased the frequency of the Vicodin ES to up to four per day. *See, e.g.*, Admin. Rec. at 77 (June 2010). Later, she was prescribed a higher dosage of Vicodin (Vicodin HP) at a maximum of three times per day. Admin. Rec. at 72 (Dec. 2011). This was changed to Norco 10 mg., which apparently had the same narcotic potency as the Vicodin HP. Admin. Rec. at 147 (Nov. 2012). The frequency then increased over time to the current 4-5 per day.

101 N, B, and I-N testimony.

In short, the Division's argument is essentially that Ms. J was incapable of doing her job, without regard to her disability, and that she would have lost her job even if she did not have back pain. The weight of the evidence, including consistent contract renewals over the years, and the testimony of her former supervisor and colleagues, is strongly against that view. In order for the Division to prevail, it would have to come forward with significant evidence that Ms. J was otherwise unable to perform. Nothing in the record supports that view other than Ms. M's testimony, which cannot be relied upon because Ms. M did not have complete information.[102] Therefore, Ms. J has met her burden of proving that her disability was an actual cause of the district's decision to terminate her contract.

b. Was Ms. J's back and leg pain a significant enough factor to consider it the proximate cause of her termination?

With regard to whether Ms. J's disability was a proximate cause of the district's decision to not renew her contract, the Division argues that even if Ms. J's disability was a substantial enough factor to satisfy the actual cause test, the real reason for the termination was the reorganization. It notes that Ms. J was not the only senior HR technician who was not offered a contract. In addition, the Division cites the relatively few in-person visits that Ms. J made to see Dr. A—about twice per year—to argue that Ms. J's pain was not debilitating and easily managed. It finds corroboration for this conclusion in Ms. J's general activity level, which included occasional trips to a remote cabin, and a trip to Seattle in 2013. Thus, even if her pain did diminish her performance, the Division believes that with minimal effort she could have ignored the pain and performed her duties, as she did when she traveled.

Ms. J cites the evidence to conclude that not only was her disability a substantial factor in her poor performance (and therefore in the decision to terminate her), in her view, it was the only factor. She does not give any credence to the theory that the reorganization was the real reason for the termination.

The fact that a senior HR technician other than Ms. J was terminated as a result of the reorganization lends some support to the Division's argument that the reorganization was significant. That other senior HR technicians were not terminated, however, lends even more support for Ms. J's view that performance was more important than the reorganization. As for the argument that Ms. J's relatively few in-person consultations with Dr. A shows that her pain was a nuisance rather than a significant factor, in fact, the record as a whole shows significant medical

[102] Although I inquired about past performance evaluations because they might be informative on precisely this issue, the Division did not submit any evaluations into the record.

consultation, including visits to an orthopedic surgeon and a pain clinic within the two years immediately preceding her termination. With regard to Ms. J's general activity and travel outside of the office, I agree with the Division that this activity shows some ability to put the pain aside. Yet, the testimony of Mr. J and Ms. E also establish that travel was very difficult and painful for Ms. J, and that both her travel and activity significantly decreased in recent years.[103] Therefore, Ms. J has met her burden of proof that her disability was the proximate cause of the district's decision to terminate her contract.

c. Was Ms. J's back and leg pain the actual and proximate cause of her decision to request an early termination date of June 16?

Ms. J's actual termination date was June 16, 2016, not June 30, 2016. Above, I first addressed the district's decision to terminate her on June 30, 2016, and asked whether her back and leg pain was a cause of that decision. I now turn to the question of whether Ms. J's pain was also a cause of her decision to terminate early.[104]

Given that June 16th was her actual termination date, it may be puzzling that I address the June 16th termination *after* discussing the June 30th proposed termination. The reason for doing so, however, is that the Division made a very powerful argument that the June 16th termination was contrived. In its view, the real reason she terminated early was that her contract was not going to be renewed. Because I found this argument troubling, and difficult to prove or disprove, I chose to first explore the underlying cause for the district's decision before turning to the underlying cause for Ms. J's decision.

Having already determined that the June 30th termination was caused by her poor performance, however, I can now accept Ms. J's testimony that she had anticipated that her contract would not be renewed, and had been planning to make the decision to retire and apply for disability benefits for quite some time.[105] Moreover, her testimony that she loved her job, and would never have voluntarily left it if not for pain, was heartfelt and convincing testimony. I have

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103 E testimony; K. J testimony.

104 Although the finding that her disability caused the district to terminate her employment is sufficient, I address this alternative argument in order to have a complete record.

105 Although Ms. J acknowledges that she did not call the Division to request information about disability retirement until the same day she was given notice of the nonrenewal of her contract, she disputes the Division's assertion that she called after being notified of the termination. She thinks that the meeting with Ms. M was delayed and she called the Division before the meeting actually occurred. The Division disputes Ms. J's version, and insists that the meeting occurred before the 12:37 call. The parties believe this factual dispute is material to determining whether Ms. J's decision to terminate on June 16th was caused by a disability.

In my view, the exact time of the call is not important. Regardless of when the call occurred, I agree with the Division that Ms. J's conduct—not pursuing disability retirement until an ominous meeting with Ms. M either was about to occur or had occurred—raises substantial doubt about whether her subsequent action to retire early was due to her disability. After a thorough review of all the facts, however, Ms. J has overcome that doubt.

no doubt that she would prefer to be working than to be retired because of a disability. Therefore, this decision finds that Ms. J's decision to terminate her employment on June 16th, was, more likely than not, caused by Ms. J's back and leg pain. These facts meet both the actual and the proximate cause tests. The Administrator's finding that Ms. J was not terminated because of a disability is reversed.

B. Did Ms. J have a disability that prevented her from satisfactorily completing the duties of any of the available jobs in the human resources department of the School District?

Above, this decision has already addressed whether Ms. J's termination was because of her leg and back pain. I found that her lapses of concentration on the job were a substantial factor in her termination, and that her leg and back pain were substantial factors in causing her lapses of concentration. I now address a different question: whether her leg and back pain was disabling.

To understand the distinction, consider this simplistic hypothetical. Say an employee has a minor chronic medical condition that is both painful and annoying—for this example, imagine a "permanent hangnail." The employee becomes fixated on the condition, is distracted at work, and, consequently, loses her job. The hangnail is both the actual and the proximate cause of her termination. It is not, however, disabling—there is no medical reason why the hangnail should prevent a reasonable person from satisfactorily completing her job duties. To answer the question of whether a medical condition caused the inability to perform the job duties, I turn first to the medical experts, with reference to the factual testimony of the lay witnesses as necessary to flesh out the findings.

Before analyzing the medical testimony, however, I note that the definition of nonoccupational disability does not require that a person be incapable of satisfactorily performing sedentary work. It requires that a person be unable to satisfactorily perform the person's usual duties or the duties of another position made available by the employer.[106] Here, the district did

[106] Unlike the case with occupational disability, the offered alternative job does not have to be comparable to the existing job in nonoccupational disability cases. *Compare* AS 39.35.685(24) *with* AS 39.35.680(27). Note that the Division's regulation, 2 AAC 35.291(b), requires that nonoccupational disability benefits cease when the member is able to work at any job. The standard set out in the regulation for when benefits cease is different from the standard set out in statute for when a member becomes eligible for benefits. The standard in the regulation for retaining benefits requires that the member be disabled from any sedentary job. Although the issue was not addressed by the parties, this standard would appear to be similar to the requirement of the supplement security insurance disability program, for which a member must qualify after one year. AS 39.35.400(e). How the Division interprets these standards was not addressed at the hearing. The Division was asked whether the standards for SSI disability applied in this case and did not assert that those standards applied here.

not offer any alternative job other than the opportunity to apply for the HR technician position. The analysis of disability here applies to both the senior and the regular technician duties.[107]

The job duties of a senior HR technician included giving presentations to employees, updating employee information, and generally being in charge of managing the human resources issues for a group of employees.[108] For Ms. J, the group that she had charge over was a mixed group of support staff, which included nurses, custodians, and paraeducators—a group with diverse human resources issues. These job duties required sustained effort and concentration. The duties of an HR technician were similar, with less responsibility but also with considerable long periods of standing while fingerprinting new hires.[109]

Dr. A testified that lapses of concentration would be consistent with a patient who was in this much pain and who was taking narcotic pain medication. Based on both her personal knowledge of Ms. J, and her medical knowledge of Ms. J's physical condition, Dr. A attributed Ms. J's poor job performance to her disability.[110] Dr. A testified that the objective evidence of the medical images and past failed surgeries warranted a conclusion that Ms. J could not satisfactorily perform the job duties of an HR technician.

To summarize, Ms. J's case is that she was unable to satisfactorily complete tasks that required continuous concentration during periods of sitting or standing.[111] The job description for a senior HR technician required "a wide variety of technical and complex duties."[112] Dr. A confirmed that Ms. J's inability to satisfactorily complete these job duties had a medical basis because it was due to her pain and her use of narcotic pain medication.

The Division argues that the only reliable medical testimony is that of its independent expert, Dr. G, who opined that Ms. J's back and leg pain did not prevent her from doing a job that required concentration. He explained that if she could concentrate sufficiently to drive herself to work—which she could—then she could concentrate sufficiently to do the work of a senior HR

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107 Although the district asserts that it was not aware that Ms. J was disabled, the Division did not argue that Ms. J violated a duty to alert the district to her disability in advance of termination so that the district could offer her another position other than the senior HR technician. In finding that there is no need to discuss job duties other than that of the senior HR technician because the district did not offer any alternative job, this decision does not address whether the employee has a duty to disclose the disability before the termination occurs.

108 M testimony; D. J testimony; Admin. Rec. at 24-25.

109 D. J testimony; N testimony.

110 A testimony.

111 D. J testimony; N testimony; B testimony. Ms. M testified that Ms. J's unsatisfactory performance was due to a lack of attention to detail. The other witnesses testified to lapses in concentration. They could all well be talking about the same thing.

112 Admin. Rec. at 24. The description provided nine examples of duties of varying degrees of complexity.

technician.[113] The Division also cites to the relative ease with which Dr. A managed Ms. J's condition with very few office visits.

Dr. G testified that Ms. J's medical condition did not prevent her from giving continuous concentration sufficient to complete her tasks. He viewed her degenerative disc disease as no worse than that suffered by 20-25 percent of the population. He acknowledged the nerve impingement and the associated foot drop, but testified that foot drop is not a disabling condition.

Dr. G also testified about Dr. A's statement that Ms. J experienced "significant pain with standing, walking, sitting."[114] He explained that if this were true, it would mean that Ms. J was, essentially, bedridden at all times. He made clear that nothing in the medical record here would support a conclusion that this patient was or should be bedridden. Dr. G contrasted Dr. A's statement to Dr. B's statement that her disability "[m]ay limit her capacity to bend[,] lift[,] carry due to pain."[115] Dr. B did not document a limit on her ability to sit or stand. Dr. G's ultimate point is that Ms. J can deal with her pain by changing position from sitting to standing as needed to complete the job.

Although I do not agree with Dr. G's characterization of Dr. A's statement, his testimony is persuasive to the extent that no medical condition prevents Ms. J from alternating between sitting and standing. He is also persuasive when he opines that most patients who have the same degree of disc degeneration and nerve impingement as Ms. J will be able to work, even though some will experience leg and back pain.

The problem for the Division, however, is with Dr. G's testimony that "with the chronic pain, that's not going to impair your ability to do a sedentary job."[116] In making this testimony, Dr. G was distinguishing between acute pain and chronic pain. He explained that acute pain can interfere with cognitive function—as an example, he noted that a person who had been stabbed in the arm would not be able to do a math test. He stated that

> as a medical person, I will tell you that someone who's on pain medication—just because a patient has low back pain, some discogenic findings on the MRI, [] and is on narcotics—that would not be enough to immediately qualify them for total disability, especially from a light-duty job. In another setting, such as a workman's compensation setting or a private-payer disability setting, no physician is going to go and testify

113 G testimony.
114 Admin. Rec. at 28.
115 Admin. Rec. at 199.
116 G testimony.

under those circumstances.[117]

He further explained that, "with the constellation of findings that we have here, I don't think another physician would be able to testify that the patient is totally and completely disabled from all types of labor."[118]

Dr. G's testimony raises two issues. First, he may have applied the wrong standard. He references worker's compensation and private-payer disability insurance standards. He also discusses the evidence that it takes to qualify someone as being completely disabled from all types of labor or a general sedentary job. The initial question in this proceeding, however, is whether her disability prevents her from satisfactorily performing the duties of the job from which she was terminated or another job made available by the district.[119]

Second, and more troubling, Dr. G's view that severe and chronic pain cannot impair a person's ability to do a sedentary job is contrary to the well-established law in this state. The Alaska Supreme Court has held that pain can be disabling for a person in a sedentary job.[120] The Administrator has granted disability status to members whose disabling condition is discogenic pain or similar chronic pain.[121] Dr. G's general opinion about chronic pain is therefore not consistent with the law on disability retirement and cannot be adopted here.[122]

I acknowledge that in addition to his general observation about chronic pain, Dr. G also gave an opinion with regard to Ms. J's specific condition as related to her specific job duties. Not surprisingly, that opinion was that she could do those duties in spite of her disability. The value

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117 *Id.*

118 *Id.*

119 AS 39.35.680(24). As explained above, the question of when a person ceases to be eligible for nonoccupational disability benefits is a different question. *See* 2 AAC 35.291(b) ("Nonoccupational disability benefits cease when a member recovers from an injury or illness or is capable of working in any full-time position.").

120 *See, e.g., Shea v. State, Dep't of Admin., Div. of Ret. and Ben.,* 267 P.3d 624, 629 (Alaska 2011) (recognizing that pain can be disabling); *see also Hester v. State, Pub. Employees' Ret. Bd.,* 817 P.2d 472, 476 n.7 (Alaska 1991) ("We believe that increased pain or other symptoms can be as disabling as deterioration of the underlying disease itself.").

121 *E.g., In re D.F.,* OAH No. 07-0613-PER at 1 (OAH 2008) (Administrator granted nonoccupational disability benefits on basis of employee's degenerative disc disease); *In re J.M.J.*, OAH No. 10-0324-PER (OAH 2012) (Administrator granted nonoccupational disability benefits on basis of employee's pain symptoms and degenerative disc disease); *In re E.E-T.*, OAH No. 10-0082-PER (OAH 2012) (Administrator granted nonoccupational disability benefits on basis of employee's chronic pain); *Lopez v. Adm'r, Pub. Employees' Ret. Sys.,* 20 P.3d 568, 570 (Alaska 2001) (noting that Administrator had granted member non-occupational disability benefits on the basis of degenerative arthritis in her hip); *Shea,* 267 P.3d at 629 (Administrator granted nonoccupational disability benefits on basis of employee's chronic pain).

122 Nothing in this decision should be read to imply that chronic pain is necessarily disabling—indeed, this decision clearly requires that a member must prove that chronic pain is disabling in the member's particular case. This decision merely holds that an expert opinion that is based on the view that chronic pain is never disabling will not be given as much weight as an opinion given by an expert who recognizes that in some circumstances chronic pain can be disabling.

of this opinion, however, is significantly undercut because it inevitably follows from his opinion that chronic pain can never disable a person from sedentary work.

Although I cannot rely on Dr. G's opinion testimony regarding the effect of chronic pain on ability to work, based on his independent examination of the medical images in the record, and Dr. B's physician statement, I agree that Ms. J could engage in the activities of sitting and standing, or alternating between the two, without exacerbating her injury or her pain. This conclusion, however, does not address whether Ms. J's ongoing chronic severe pain, and use of narcotic pain medication, prevents her from satisfactorily completing her job duties. Nothing in Dr. B's statement addresses the issue of her constant pain and its effect on her ability to concentrate. Dr. G did opine that her use of 10 mg. of Norco five times per day would not normally lead to lapses in concentration in a patient—for example, a patient could drive a car with this level of narcotic medication, and Ms. J does, in fact, drive herself. Dr. G also testified that before he could accept that Ms. J's severe chronic pain could cause lapses in concentration, he would need two things. First, an analysis by a neuropsychology specialist, who could determine whether there was a genuine connection between the pain and the lapses in concentration. Second, she would have to undergo special therapy sessions called "work hardening," conducted by a physical therapist. This process would involve a series of exercises designed to condition the employee to the work process so that the pain symptoms no longer interfered with work.

Dr. G's testimony that additional evidence would be helpful is reasonable. I agree with him that the evidence here is slim. The most reliable evidence in the record, however, is that both he and Dr. A testified that Ms. J experiences severe chronic pain. Both testified that the pain is due to structural abnormalities. Dr. A reached a firm opinion that Ms. J was unable to satisfactorily complete her job duties because of her disability. That opinion is consistent with the evidence in the record that Ms. J had the ability to complete her job duties at one time, but became unable to do so as her condition gradually worsened. Further support for that opinion is found in the evidence discussed above—that she had a good work ethic, and would have strongly preferred to keep working. All of these factors were taken into account by Dr. A, who testified that she knew Ms. J's character well from years of a doctor/patient relationship. Thus, here, the medical evidence favors Ms. J's view that her disability prevented her from satisfactorily completing her job duties. Therefore, although I agree with Dr. G about the benefit of additional evidence, the burden now is on the Division to produce evidence to refute the case that Ms. J has otherwise proved—whether it be testimony from a neuropsychologist or a physical therapist, or

some other evidence that the disability was not the cause of her failure to perform. Because it did not, I find that Ms. J has met her burden of proving that her disability prevents her from satisfactorily completing the duties of her job. Therefore, the Administrator's finding that Ms. J's disability did not prevent her from satisfactorily completing the duties of her job or an alternative job offered by the district is reversed.

C. Is Ms. J presumably permanently disabled?

The question of whether a disability is presumably permanent can be addressed by relying on the testimony of consulting physicians that the member could return to work.[123] Here, however, as explained above, I do not find Dr. G's testimony regarding Ms. J's ability to return to work to be persuasive. His testimony was general in nature about the effect of pain. It disregards the previous decisions of the Administrator and the Alaska Supreme Court on whether pain can disable a worker from a sedentary occupation.

Much more persuasive than his general opinion regarding the effect of pain on ability to work, however, was Dr. G's opinion that Ms. J could have, and should have, explored additional treatment modalities to alleviate her pain. The existence of unexplored treatment modalities could be an alternative route to determining permanence.[124] The issue is not whether the disability could be *cured*; the issue is whether the disability could be sufficiently ameliorated by further treatment so that the member can go back to work. If yes, the member would not be presumed to be permanently disabled, and the member would not be eligible for nonoccupational disability benefits.

1. How should a dispute regarding other possible treatments be analyzed?

This record raises a question regarding how to analyze the argument that the availability of alternative treatment modalities means that a disability is not presumably permanent. Here, a nontreating physician has suggested that further treatments could have been tried and might have been successful. The question is, when will a post-hoc suggestion of additional potential treatment modalities be persuasive enough to conclude that the disability was not presumably permanent? This question is important here for two reasons. First, the Division has made a strong case that Ms. J could have tried additional treatment modalities—particularly physical

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123 *See, e.g., McKitrick v. State, Public Employees Retirement System*, 284 P.3d 832, 833, 840-41 (Alaska 2012) (affirming decision of administrative law judge that mental condition was not permanent based on testimony of physicians).

124 *Cf., e.g., In re R.M.*, OAH No. 05-0811-PER at 7 (OAH 2006) (affirming denial of disability benefits because evidence showed that changing treatment would allow member to return to work); *In re K.L.V.*, OAH No. 11-0204-PER at 5 (OAH 2012) (affirming Administrator's finding of noneligibility for disability retirement benefits in part because member did not pursue treatment before terminating employment).

therapy. Second, it appears that the failure to undertake these additional modalities was the primary reason that the Administrator rejected Ms. J's application.[125]

The parties did not cite any past cases that provide a framework for analyzing the issue of post-termination treatment suggestions. My own research has not identified any.[126]

To determine the proper framework for analysis, I turn to the statutory language. The two statutes that address the issue of permanence, AS 39.35.400(a) and AS 39.35.680(24), use the modifiers "apparently" and "presumably" to modify the word "permanent."[127] These modifiers indicate that the term permanent should be applied reasonably, taking into account the effort made by the member to ameliorate the disability while at the same time asking whether additional effort would have been effective. If a member has made considerable effort to treat the disability with reasonable treatment modalities—to no avail—then the disability is more apparently and presumably permanent. On the other hand, if the evidence is strong that an additional reasonable modality would have ameliorated the member's disability, the disability appears to not be permanent. To implement these competing requirements, this decision will adopt a sliding scale approach to the issue of permanence.

Under this sliding scale, the more thorough a member's pre-termination exploration of treatment modalities has been, the more convincing the evidence for a different modality must be. Thus, if a member has made a significant effort—which might include, for example, seeking different opinions, and trying reasonable treatment modalities as recommended by some of those consulted—then the Division would have to make a stronger showing that its post-termination suggestions would have been successful. On the other hand, when a member has not sought significant treatments for his or her disability, or has refused to pursue a recommended reasonable and safe treatment, the Division's expert's suggestions of reasonable possible alternative treatments that could have been tried will be given weight even if there may be some uncertainty that the suggested alternatives will be effective in the member's case.

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125 Admin. Rec. at 7-13.

126 *In re M.M.* held that "a member could meet the burden [of proving presumed permanence] by establishing by a preponderance of the evidence that he or she has a condition which precludes performance of work duties and, while the condition may be treatable it is unknown whether recovery will occur." OAH No. 07-0524-PER (OAH 2009) at 48, *aff'd on other grounds, McKitrick,* 284 P.3d 832 (Alaska 2012). The framework adopted in this decision expands on that holding by explaining when unexplored treatment modalities could demonstrate that a disability is not presumably permanent.

127 AS 39.35.400(a) ("An employee is eligible for a nonoccupational disability benefit if the employee's employment is terminated because of a total and ***apparently*** permanent nonoccupational disability" (emphasis added)); AS 39.35.680(24) ("'nonoccupational disability' means a physical or mental condition that, in the judgment of the administrator, ***presumably*** permanently prevents an employee from satisfactorily performing the employee's usual duties" (emphasis added)).

2. How does the sliding scale apply here?

Applying the sliding scale to the facts of this case, I find that Ms. J has made a considerable effort to seek alternative treatment modalities, and has followed the reasonable recommendations of her doctors. The treatment modalities she has pursued include surgery, steroid injections, pain medications, anti-inflammatories, and physical therapy. For some of these modalities, such as surgery and a pain clinic, Ms. J has made a second attempt or consulted with additional doctors. Ms. J notes that her two doctors, Dr. A and Dr. B, both informed the division that currently no treatment modalities existed that could improve Ms. J's condition to the extent that she could return to her former work.[128] Given Ms. J's relatively significant attempt to address her disability pre-termination, the Division cannot just hypothesize that a different treatment or another attempt at a previously-failed treatment *might* work in a general case. It must come forward with evidence that a different treatment modality is likely to be effective in Ms. J's actual case.

Turning to the Division's evidence of alternative treatments, Dr. G initially identified three treatment modalities for Ms. J that he believed might enable her to return to work:

- Physical therapy
- Stop smoking
- Treatment by a physiatrist.

At the hearing, he confirmed these three, and identified three additional modalities:

- Consult with a neuropsychologist
- Work-hardening therapy
- Increasing or adjusting pain medication.

Dr. G strongly recommended physical therapy for Ms. J. He noted that physical therapy can be very effective in increasing range of motion and strength. When asked about whether physical therapy must be tried again when it has failed in the past, he urged a second trial, noting that the success of physical therapy can be "operator-dependent."[129] Where one physical therapist has failed, another might succeed.

When asked about Dr. B's "no" answer to the question of whether other treatment modalities might succeed, Dr. G explained that in his view, Dr. B was saying "no" only to

[128] Admin. Rec. at 28, 199.
[129] G testimony.

surgery. Dr. B was not rejecting other treatment modalities. Therefore, in Dr. G's opinion, Dr. B's "no" response was irrelevant when considering the efficacy of physical therapy.

Dr. G's testimony on what Dr. B meant has no foundation and is not credible. In May 2008, *Dr. B* prescribed 10 sessions of physical therapy for Ms. J.[130] Dr. A's October 7, 2008, chart note documents that Ms. J had completed the physical therapy, that the sessions helped a little, but that Dr. B did not renew the prescription for physical therapy.[131] Thus, Dr. B's sphere clearly includes *both* surgery and physical therapy. Contrary to Dr. G's testimony, a better inference from this record is that Dr. B's "no" answer expresses his view that neither surgery nor physical therapy are recommended modalities for Ms. J.[132]

When asked about physical therapy, Dr. A agreed that there is a remote chance that physical therapy might provide some relief for Ms. J. She estimated the likelihood of physical therapy enabling Ms. J to return to work as very slight—about five percent.[133] Although Dr. G's testimony that physical therapy can generally be operator-dependent is persuasive, here, the specific testimony and statements of Ms. J's two treating physicians regarding the efficacy of physical therapy are entitled to considerably more weight. On this record, Ms. J's failure to pursue additional physical therapy is not a bar to a finding of disability.

With regard to the treatment modality of stopping smoking, Dr. G explained that smoking is highly correlated with back pain. Patients are required to stop smoking before back surgery because smoking causes vaso-constriction, which inhibits healing. A very high number of those patients—33 to 40 percent—find that stopping smoking alone is so beneficial to their back pain that they no longer wish to pursue surgery.[134]

Ms. J testified that she has tried to quit smoking but was not able to do so. Dr. A's chart notes document that in 2008, Ms. J used a smoking-cessation medication, and was able to quit for two months.[135] After running out of the medication, however, she resumed smoking.[136]

Smoking cessation is a troubling issue—against Dr. G's unrefuted testimony about the link between smoking and back pain, we have a patient who has tried to stop using an addictive

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130 Admin. Rec. at 202.

131 Admin. Rec. at 99.

132 Because this document is hearsay, and I do not know what Dr. B would say if he was testifying under oath, the inference is entitled to only moderate weight. I note, however, that the Division strongly urged me to give great weight to its inference from Dr. B's hearsay statement that Ms. J was not limited in sitting or standing.

133 A testimony.

134 G testimony.

135 Admin. Rec. at 99.

136 *Id.*

drug (nicotine) but has failed. On a different record, a failure to quit smoking might well open the door for a ruling that a smoker is not disabled by back pain until he or she quits. On this record, however, I would require more proof that it is possible for Ms. J to quit and that quitting would ameliorate her specific back pain before I could rule that her failure to quit smoking means that her disability is not apparently and presumably permanent.

The other treatment modality for which Dr. G gave specific first-hand testimony was the type of pain medication used by Ms. J. He opined that the 10 mg of Norco was not the best option, and suggested that a time-release narcotic with a higher dosage would be more appropriate. Yet, this testimony illustrates precisely the problem with post-termination suggestions of different treatments. Here, Ms. J had specifically sought out a pain clinic, in the hopes of obtaining a better pain-medication regimen. That attempt was not successful—indeed, her testimony indicated that the pain doctor did not agree with Dr. G, and would have continued exactly the same medication at exactly the same dose. Moreover, the record indicates that Ms. J has some difficulty with side effects with many medications, so finding the proper pain medication for Ms. J may not be an easy matter.[137] On this record, it would take considerably more evidence that a different pain medication would be effective in Ms. J's case to find that her condition is not apparently and presumably permanent based on her continued adherence to the pain medication actually prescribed by her doctor.

With regard to the other post-termination suggestions made by Dr. G—a consultation with a physiatrist, a consultation with a neuropsychologist, and work-hardening therapy—these were all good thoughts, with some support, but they were all speculative and general treatment modalities. None of these ideas were fully developed or shown likely to be effective in Ms. J's particular case. Given the significant effort Ms. J has made in the past to obtain medical treatments to address her disability, the evidence supporting these three potential treatment modalities is not sufficient. Therefore, the Administrator's finding that Ms. J's disability is not apparently and presumably permanent is reversed.

IV. Conclusion

Ms. J was terminated from her position as a senior human resources technician because of a total and apparently permanent nonoccupational disability. She has proved that she has a physical condition that presumably permanently prevents her from satisfactorily performing her former usual job duties. She was not offered any alternative employment by her employer.

[137] Admin. Rec. at 42-195.

Therefore, she is qualified for nonoccupational retirement benefits. The decision of the Administrator denying her nonoccupational retirement benefits is reversed.

DATED this 29th of December, 2016.

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

Adoption

Under the authority of AS 44.64.060(e)(1), 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 26th day of January, 2017.

By: *Signed*
Signature
Stephen C. Slotnick
Name
Administrative Law Judge
Title

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