

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
BY THE COMMISSIONER OF REVENUE**

In the Matter of	)	
	)	
R. C. D.	)	OAH No. 07-0396-PFD
	)	Agency No. 06628396-9
<u>2006 Permanent Fund Dividend</u>	)	

**DECISION AND ORDER**

**I. Introduction**

R. C. D. appeals the Permanent Fund Dividend Division’s denial of his application for a 2006 permanent fund dividend (PFD) as untimely filed because Mr. D. believes he qualifies under the disability exception to the filing deadline. The division denied his application initially and at the informal appeal. Mr. D. requested a formal hearing. The hearing took place on August 14, 2007. Mr. D. appeared in person. Thomas Coté appeared by telephone for the division. Kay L. Howard, Administrative Law Judge, Office of Administrative Hearings, conducted the hearing.

Although Mr. D. was under extraordinary emotional strain during the filing period, under the applicable law he does not meet the definition of disabled and therefore is not exempt from the 2006 PFD filing deadline. The decision of the division is affirmed.

**II. Facts**

In this case, the parties do not disagree about the relevant facts, only about their legal implications. Mr. D.’ wife of 48 ½ years and the mother of his six children, C. D., died on April 3, 2006 after a five year battle with cancer.<sup>1</sup> After her diagnosis, initially she responded to the treatment, but the cancer eventually came back.<sup>2</sup> For the last weeks of her life, Mrs. D. was bedridden.<sup>3</sup> With the assistance of hospice personnel, Mr. D. was his wife’s primary caregiver

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<sup>1</sup> The estate of C. M. D., applied for a 2006 PFD for C. D. on May 2, 2006. The division denied the application initially and at the informal appeal level on the basis it was untimely. After a formal appeal and hearing, the division’s denial was reversed because the division’s view that 15 AAC 23.103(b) (that late applications will not be accepted on behalf of deceased individuals unless the person died during the application period) controls over 15 AAC 23.133(d) (the authorized representative of a disabled person may apply on that person’s behalf after the application deadline, if the disability is proven to have prevented the person from applying timely) produced arbitrary results. *In re Estate of C. M. D.*, OAH No. 07-0246-PFD, Agency No. 06628397\_7 (June 29, 2007).

<sup>2</sup> Except where indicated, the facts are taken from Mr. D.’ hearing testimony.

<sup>3</sup> Exhibit 7, p. 5.

and rarely left her bedside.<sup>4</sup> At the end of her life, Mrs. D. was on a morphine drip. Mr. D. had to monitor the drip and occasionally administer additional morphine as needed. Mrs. D. weighed 70 – 75 pounds at her death.

While he was dealing with his wife’s imminent death, Mr. D. was also coping with his sister’s death on March 7, 2006, and his brother’s open heart surgery and subsequent stroke. Because he could not leave his wife, Mr. D. was unable to attend his sister’s funeral. Mr. D.’ brother underwent open heart surgery in December 2005, suffered a massive stroke on February 19, 2006, and was hospitalized for a month before moving to Providence’s long term care facility and then the state’s Pioneer Home. Mr. D.’ brother died on June 23, 2007, from a heart attack.

Mr. D. suffers from cardiac disease and is under the care of cardiologist George S. Rhyneer, M.D., at the Alaska Heart Institute. In May 2006, Mr. D. was seen at the Alaska Heart Institute complaining of shortness of breath and hyperventilation. It was noted by Mary Wepler, MSN, NP, that he “was extremely distressed over the passing of his wife and was finding this quite difficult to adjust to.”<sup>5</sup> The symptoms did not appear to be related to his cardiac disease; rather they were associated with his grief and level of stress.<sup>6</sup>

Mr. D. signed a 2006 PFD application on April 22, 2006 and submitted it to the division.<sup>7</sup> Because it was not filed by the prescribed March 31, 2006, deadline, the division denied Mr. D.’ application as untimely.<sup>8</sup> Mr. D. informally appealed the denial based on his circumstances at the end of March 2006.<sup>9</sup> In response, the division supplied Mr. D. with a document entitled “Physician’s Certification of Disability.”<sup>10</sup> The division addressed the document to “the primary physician of R. C. D.” and asked his primary physician to certify that Mr. D. was disabled during the application period as defined by AS 43.23.095(2), and that the disability prevented Mr. D. from filing an application during the application period.

Mr. D. responded by providing the letter from Mary Wepler, MSN, NP, a nurse practitioner with the Alaska Heart Institute, who explained the symptoms Mr. D. presented in May 2006; his wife’s physician certification of disability; and a letter from the hospice care

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<sup>4</sup> *Id.*

<sup>5</sup> Exhibit 7, p. 6.

<sup>6</sup> Exhibit 7, p. 6.

<sup>7</sup> Exhibit 1, p. 1.

<sup>8</sup> Exhibit 2.

<sup>9</sup> Exhibit 3, p. 1.

<sup>10</sup> Exhibit 4, p. 2.

nurse certifying that Mrs. D. required around the clock care from her family and that Mrs. D. was unable to complete the required paperwork for her 2006 PFD application.<sup>11</sup>

The division denied Mr. D.’ informal appeal because he did not provide a statement confirming that he was disabled on March 31, 2006, and how that disability prevented him from timely filing an application during the application period (January 2<sup>nd</sup> through March 31<sup>st</sup> of 2006.<sup>12</sup>

Mr. D. requested this formal appeal arguing that his late filing should be excused as he was under an inordinate amount of stress and grief which resulted in him “experiencing a serious type of emotional disturbance under AS 43.23.095.”<sup>13</sup>

### **III. Discussion**

This case begins with AS 43.23.011, the Alaska statute that states the application period for a Permanent Fund dividend ends on March 31<sup>st</sup> of the dividend year.<sup>14</sup> The statute itself provides only two exceptions: the applicant has to be a member of the armed services and eligible for hostile fire or imminent danger pay.<sup>15</sup> Mr. D. was not in the armed forces, so this exception would not apply to him.

There is an additional exception in a division regulation, 15 AAC 23.133(d), that permits an individual (or his authorized representative) to file a late application if the individual was prevented from filing on time by a disability. To qualify for that exception, the applicant must provide a certification from a licensed health care provider that includes:

- (1) confirmation that the individual was disabled on March 31 of the dividend year for which the individual is applying; and
- (2) a statement explaining why the disability prevented the applicant from timely filing an application during the application period . . . .<sup>16</sup>

“Disabled” is defined by statute as “physically or mentally unable to complete and sign an application.”<sup>17</sup> The statute goes on to list several possible causes of the disability, one of which is “a serious emotional disturbance.”<sup>18</sup>

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<sup>11</sup> Exhibit 7.

<sup>12</sup> Exhibit 6, p.2.

<sup>13</sup> Exhibit 7, p. 2.

<sup>14</sup> AS 43.23.011(a).

<sup>15</sup> AS 43.23.011(b), (c).

<sup>16</sup> 15 AAC 23.133(d)(1)-(2).

<sup>17</sup> AS 43.23.095(2).

<sup>18</sup> *Id.*

The regulations require an applicant to provide the certification discussed above from “a licensed health care provider.”<sup>19</sup> The division sent a certification form to Mr. D. for his use. It was entitled “Physician’s Certification of Disability” and it was addressed to his primary physician with directions for completion.<sup>20</sup> By emphasizing and being addressed to Mr. D.’ primary physician rather than to “a licensed health care provider,” as allowed by 15 AAC 23.133(d), the division’s form is potentially misleading. However, any error in this particular case would be harmless because Mr. D. did provide a statement from Ms. Wepler, a nurse practitioner who would qualify as a licensed health care provider. Although Ms. Wepler indicated Mr. D. “had been extremely distressed over the passing of his wife and ... these symptoms were having a significant impact on his ability to manage day to day[,]”<sup>21</sup> she was not able to certify that Mr. D. was disabled on March 31, 2006, and that the disability prevented him from completing an application. Thus, Mr. D. does not have the necessary certification of disability as required by the division’s regulations.

The period from January 2<sup>nd</sup> through March 31<sup>st</sup> of 2006 was an extraordinarily difficult time for Mr. D. His wife’s impending death weighed heavily on his mind and caused him a great deal of stress. This was multiplied exponentially by his sister’s death and his brother’s stroke. All of these events took a toll on Mr. D., ultimately bringing about his own physical symptoms. Mr. D.’ failure to timely file is understandable, and, some would say, to be expected under the circumstances. However, according to Alaska law, the losses in his life did not render him incapable of completing and signing the 2006 PFD application. Thus, Mr. D. was not disabled as defined by the PFD statute and regulations.

#### **IV. Conclusion**

Mr. D. was not disabled as defined by AS 43.23.095(2) during the January 2<sup>nd</sup> – March 31<sup>st</sup> application period for the 2006 PFD, nor did he provide a licensed health care provider’s certification that he was disabled during the application period. Therefore, his application for the 2006 PFD is not timely and he is thus not entitled to the dividend that year. The PFD division correctly applied the law when it denied his application for a 2006 Permanent Fund dividend.

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<sup>19</sup> 15 AAC 23.133(d) (emphasis added).

<sup>20</sup> Exhibit 4, p. 2.

<sup>21</sup> Exhibit 7, pg. 6.

**V. Order**

IT IS HEREBY ORDERED that the decision of the Permanent Fund Dividend Division to deny the application of R. C. D. for 2006 PFD is AFFIRMED.

DATED this 10<sup>th</sup> day of December, 2007.

By: Signed  
Kay L. Howard  
Administrative Law Judge

**Adoption**

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 25.27.210 and Alaska Rule of Appellate Procedure 601(a)(2) within 30 days after the date of this decision.

DATED this 8<sup>th</sup> day of January , 2008.

By: Signed  
Signature  
Jerry Burnett  
Name  
Director, Admin Services  
Title

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