

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

IN THE MATTER OF)

D N)

2007 Permanent Fund Dividend)

Case No. OAH 08-0683-PFD

DECISION

I. Introduction

D N timely applied for a 2007 permanent fund dividend. The Permanent Fund Dividend Division (“the division”) determined that Mr. N was not eligible, and it denied the application initially and at the informal appeal level. At Mr. N’s request, a formal hearing was held on January 26, 2009. Mr. N appeared by telephone. Permanent Fund Dividend Specialist Kim Colby represented the PFD Division.

Because he was unallowably absent in 2006, Mr. N is not eligible for a 2007 dividend.

II. Facts

Mr. N was absent from Alaska twice in 2006. The first absence, starting from earlier in 2005 and extending through May 15, 2006, was for a total of 135 days in 2006. The second absence, from November 4, 2006, through the end of 2006 and in to 2007, comes to a total of 57 days in 2006. The total number of days that Mr. N was absent in 2006 is 192 days. Mr. N states that the second absence of 57 days was for vacation.¹ Mr. N has provided a physician’s statement indicating that during the first absence, Mr. N was receiving continuous medical treatment through March 17, 2006, a total of 82 days in 2006.² Mr. N has asserted that the entire 135-day absence from the beginning of the year through May 15, 2006, was for surgery, recovery and therapy.³

After the hearing, the record was left open at Mr. N’s request so that Mr. N could provide additional evidence regarding the medical nature of his absences. Mr. N submitted a letter from his physician in Soldotna stating in its entirety: “To Whom it May Concern: Mr. N has been under my care since June, 2005. Please contact my office if you have any questions regarding this.”

III. Discussion

In order to qualify for a permanent fund dividend, the applicant must have either been present in Alaska all through the qualifying year, or only absent for reasons listed in AS 43.23.008.⁴

¹ Exhibit 4, page 2; Exhibit 8, page 2.

² Exhibit 3, page 1.

³ Exhibit 4, page 2.

⁴ AS 43.23.005(a)(6).

There are sixteen reasons listed that a person may be absent from Alaska and still qualify for a dividend the next year. Reason number (5) is an absence for someone who is “receiving continuous medical treatment recommended by a licensed physician or convalescing as recommended by the physician who treated the illness if the treatment or convalescence is not based on a need for climatic change.”⁵ In addition to a medical absence, a person may be absent for up to 45 days for any reason consistent with Alaska residency, such as vacationing.⁶ In the alternative, a person not claiming a medical absence may be absent up to 180 days for any reason consistent with Alaska residency.⁷ At a formal hearing, the person requesting the hearing has the burden of proving that the division’s decision was in error.⁸

While the division has investigated questions regarding Mr. N’s residency, the division bases its decision to deny Mr. N’s 2007 dividend on the assertion that Mr. N was unallowably absent during 2006, the qualifying year. Specifically, the division asserts that Mr. N absent for more than 180 days, and that he was absent more than 45 days in addition to the time he was receiving continuous medical treatment.

In his appeal, Mr. N stated that he “presented enough evidence to show that I was under medical care from various Drs. and physical therapy,” and that “the subsequent days are spent somewhere that my health is promoted (i.e. Oct. [illegible]) it was -30° at my Hot Springs house.” In his explanation of the issues, Mr. N noted that “I have 4 vertebrae and both knees out,” and wrote:

Here’s my issue. Why would you deny me my rightful benefit. When I have had my No Name and No Name home in No Name, AK 99999 since 1989 as my primary residence. Moreover, having presented my Alaska Dr.’s professional opinion for my having to move to a more climatic environment not so extreme (i.e. last winter I stayed until Feb 15 and saw -60° temps for 5 weeks at my house; 3 weeks it warmed up to 45°. Where is your heart?

In addressing exceptions to the general rule that a person must have been physically present all through the entire qualifying year to be eligible for a dividend, the legislature limited the exception for people receiving continuous medical treatment. Alaska Statute AS 43.23.008(a)(5) only excepts people “receiving continuous medical treatment recommended by a licensed physician or convalescing as recommended by the physician who treated the illness *if the treatment or convalescence is not based on a need for climatic change.*” Thus, even if Mr. N’s physicians had

⁵ AS 43.23.008(a)(5).

⁶ AS 43.23.008(a)(17)(C).

⁷ AS 43.23.008(a)(17)(A).

⁸ 15 AAC 05.030(h).

stated that it would be dangerous or deadly for Mr. N to remain in Alaska during the coldest months of the winter, an absence to accommodate a medical need for climatic change would not be specifically allowable, except that it could be considered along with vacations as an absence for other reasons consistent with continuing Alaska residency.

There is a conflict between Mr. N's statement that the entire duration of his first absence was for medical treatment and his doctor's statement that he was only receiving continuous medical treatment until March 17, 2006. However, Mr. N does not dispute that the second absence from November 4, 2006, through the end of the year, an absence of 57 days, was for vacation. Thus, even if the entire first absence was for continuous medical treatment, Mr. N was absent for more than 45 days during the qualifying year in addition to the time he was absent receiving continuous medical treatment. While Mr. N's doctor in Soldotna affirms that Mr. N has been under the doctor's care since June of 2005, nothing about this fact necessarily suggests that Mr. N's second absence in 2006 was for continuous medical treatment and not for a vacation, as Mr. N states.

While Mr. N's need for climatic change during the coldest months of the winter appears to be genuine, the division's decision to not regard absences to accommodate this need as allowable absences is not a matter of heartlessness, as Mr. N suggests. The division must apply the law as it written. The legislature has specifically stated that a need for climatic change may not be the basis for an allowable absence, other than as an absence for general reasons consistent with Alaska residency.

IV. Conclusion

Although he may have been an Alaska resident at all times, Mr. N was absent for more than 180 days in 2006. Mr. N was absent for more than 45 days in addition to the time he was absent receiving continuous medical treatment. Because some portion of Mr. N's absences was not an allowable exception to the general rule that a person must be physically present in Alaska all through the qualifying year, the division was correctly applying the law when it made the decision to deny Mr. N's application for a 2007 dividend. The division's decision to deny Mr. N's application for a 2007 permanent fund dividend is therefore AFFIRMED.

DATED this 7th day of April, 2009.

By: *Signed* _____
DALE WHITNEY
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 Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 11th day of May, 2009.

By: Signed
Signature
Dale Whitney
Name
Administrative Law Judge
Title

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