

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

In the Matter of)
)
 D. L.) OAH No. 09-0309-PFD
) Agency No. 2008-052-0336
2008 Permanent Fund Dividend)

DECISION

I. Introduction

D. L. timely applied for a 2008 permanent fund dividend. The Permanent Fund Dividend Division denied his application initially and at the informal appeal level because he was not allowably absent from Alaska during the qualifying year. Mr. L. requested a formal appeal hearing which was held on July 9, 2009. He participated in person. PFD Specialist Peter F. Scott represented the PFD Division and appeared by telephone.

A preponderance of the evidence shows that Mr. L. is not eligible for the 2008 PFD dividend and that the division was correctly applying the law when it made the decision to deny his 2008 application.

II. Facts

The material facts are not in dispute. Mr. L. is an Alaska resident. He is a pilot for no name airline. and his job takes him out of state for a significant period of time each year. He attempts to arrange his vacation and work schedule so he is not absent in excess of 180 days. In 2007 Mr. L. was absent from Alaska in excess of 180 days. His absences were a combination of vacation, work and medical treatment:

D. L.'s Absences¹

Absence Code	Beginning Date	Ending Date	Reason for absence	Days Absent
K(Other)	1/11/07	1/16/07	Work	5
K(Other)	1/25/07	2/3/07	Work	9
K(Other)	2/8/07	2/19/07	Work	11
I(Vacation)	2/20/07	2/26/07	Vacation	6
K(Other)	3/10/07	3/29/07	Work	19
K(Other)	4/7/07	4/18/07	Work	11
K(Other)	5/8/07	5/22/07	Work	14
K(Other)	6/7/07	6/20/07	Work	13

¹ Exhibit 1 at 2.

K(Other)	7/7/07	7/10/07	Work	3
K(Other)	8/5/07	8/23/07	Work	18
K(Other)	9/7/07	9/14/07	Work	7
K(Other)	10/17/07	10/28/07	Work	11
K(Other)	11/4/07	11/30/07	Work	26
D(Medical)	12/1/07	1/23/08	Back Surgery Portland, Oregon	30
Total				183

In 2007, Mr. L. was experiencing back problems. While he was flying home from Atlanta, Georgia his condition became insufferable. When the plane landed in Portland, Oregon he could travel no further. Doctors there diagnosed a ruptured disk and on December 13, 2008, Mr. L. underwent corrective surgery. His surgery and recovery precluded him from returning to Alaska until January 23, 2008.

Mr. L. testified that his absence in December was unplanned and was required for medical treatment. Therefore, he believes he is eligible for a 2008 PFD because his absences that exceeded 180 days were allowable under AS 43.23.008(a)(5), absences for medical treatment, and should not be counted against him. Mr. L. reasons that since his absence in December 2007 was allowable, it “does not lower the threshold of days gone in order to qualify.”²

The division notes that Mr. L. is familiar with the 180 day rule. Since he first received a PFD in 2000, Mr. L. has been denied twice for absences exceeding 180 days.³ The division argues that Mr. L. is ineligible as a matter of law because AS 43.23.008 does not permit an applicant to combine absences in the manner advocated by Mr. L.

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 have been absent only for reasons listed in AS 43.23.008.⁴ The qualifying year for the 2008 PFD is 2007.⁵ The legislature has identified and set forth in AS 43.23.008(a) seventeen reasons 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

² Exhibit 5 at 2.

³ Exhibit 6.

⁴ AS 43.23.005(a)(6).

⁵ AS 43.23.095(6).

as recommended by the physician that treated the illness if the treatment or convalescence is not based on a need for climatic change." Reason number (17) is "for any reason consistent with an individual's intent to remain a state resident...."

Reason number (17) may be used in conjunction with the other specifically identified 16 allowable absences, however, the number of days allowed under number (17) varies from 180 days to 45 days depending on which one of the 15 allowable absences with which it is combined. It is clear that some portions of the absences identified by Mr. L. in 2007 would be allowable under AS 43.23.008(a)(5) and (17).

The difficult part of this case and what has been described in prior decisions as "counterintuitive"⁶ comes in understanding the interplay between the many categories of absences for purposes of PFD eligibility.⁷

An absence for vacation, work, or medical treatment of less than 180 days is not necessarily an allowable absence, but it can fall within three kinds of absence allowed for any reason at all, so long as the absence is consistent with continuing Alaska residency. These three absence types are listed together in the statute as reason number (17) which provides that an absence is allowable:

provided the absence or cumulative absences do not exceed

(A) 180 days in addition to any absence or cumulative absences claimed under (3) of this subsection if the individual is not claiming an absence under (1), (2), or (4) - (16) of this subsection;

(B) 120 days in addition to any absence or cumulative absences claimed under (1) - (3) of this subsection if the individual is not claiming an absence under (4) - (16) of this subsection but is claiming an absence under (1) or (2) of this subsection; *or*

(C) 45 days in addition to any absence or cumulative absences claimed under (1) - (16) of this subsection if the individual is claiming an absence under (4) - (16) of this subsection.⁸

It should be noted that these three choices are conjoined with the word "or" at the end of subparagraph (B). This means that an applicant may choose an absence under any one of these

⁶ *IMO S.H.*, OAH No. 08-0113-PFD at 3 (2008); *IMO C.S.*, OAH No. 05-219-PFD at 3 (2005).

⁷ *See also IMO J. and D.H.*, OAH No. 06-0859-PFD (2007); *IMO R.L.H.*, OAH No. 07-0243-PFD (2007); *IMO P. and E.E.*, 08-0668-PFD (2009).

⁸ AS 43.23.008(17) (emphasis added).

choices, but the three choices may not be combined. Applicants must decide under which one of these three categories they will claim an absence.

Subparagraph (A) allows a person up to 180 days for any reason in addition to any days the person may have claimed for a military absence, so long as no other kind of absence is claimed. Since Mr. L. was not in the military, this option allows him to claim up to 180 days during the year for any reason, but not in combination with a medical absence under (5). Mr. L. was absent in excess of 180 days during the qualifying year, claiming an absence under this option will not make him eligible for a 2008 dividend.

Subparagraph (B) allows the applicant up to 120 days for any reason in addition to any time the person was absent for educational reasons under (1) or (2), so long as the person is not claiming any other kind of absence. Since Mr. L. was not absent for educational reasons, this choice allows only 120 days, and is less favorable than choice (A).

Subparagraph (C) allows absences of up to 45 days in addition to any other claimed absences, including a medical absence claimed under (5). Because the time Mr. L. was absent working was in excess of 45 days in addition to any allowable time, his nonmedical absences in excess of 45 days are not allowable under this provision either. However one looks at the case, some portion of Mr. L.'s absences in 2007 are not allowable.

Under the law, a person could be absent from the state on vacation for 180 days, and the entire absence would be allowable. A person could be absent from the state for 365 days for medical reasons, and the absence would be allowable. But a person who takes a 46-day trip early in the year for a vacation or other non-allowable reasons, and then suffers an unforeseen accident or illness requiring an absence of more than 135 days later in the same year would not be eligible. The total absence in that case would be 181 days, and would include 46 days in addition to the medical absence.

In this case, Mr. L.'s combined absences exceed 180 days. He spent more than 45 days vacationing and working out of Alaska in addition to his absences for medical reasons. Therefore, Mr. L. is precluded by law from receiving a 2008 PFD.

IV. Conclusion

L. was absent from Alaska 183 days in 2007. Thirty of those days were for continuous medical treatment. Therefore, he was absent in excess of 45 days in addition to the time he was receiving continuous medical treatment. The division is correct that some part of his cumulative

absences in 2007 is not allowable, and therefore, Mr. L. is not eligible for a 2008 PFD. The decision of the Permanent Fund Dividend Division to deny the application of D. L. is affirmed. This decision does not affect his status as an Alaska resident or his eligibility for future PFDs.

DATED this 28th day of July, 2009.

By: Signed
Rebecca L. Pauli
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 Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 24th day of August, 2009.

By: Signed
Signature
Rebecca L. Pauli
Name
Administrative Law Judge
Title

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