

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

In the Matter of :)	
)	
M. R. P.,)	
)	OAH No. 09-0424-PFD
<u>2008 Alaska Permanent Fund dividend</u>)	DOR No. 2008-062-5582

DECISION

I. Introduction

M. R. P. filed a timely application for a 2008 Alaska Permanent Fund dividend. Following an informal conference, the Permanent Fund Dividend Division denied the application. Mr. P. filed a timely appeal and the case was referred to the Office of Administrative Hearings.

The assigned administrative law judge conducted a telephonic hearing on September 24, 2009. Mr. P. participated on his own behalf. Pete Scott represented the division.

Because Mr. P. was absent from Alaska for more than the time allowed to maintain eligibility for the dividend, the division's decision is sustained.

II. Facts

M. R. P. is a long-time resident of Alaska. He lives in No Name City. Mr. P. remained a resident throughout 2007, the qualifying year for the 2008 dividend, and through the date of the hearing in this case.

Mr. P.'s brother J., who is also an Alaska resident, is disabled. Mr. P. is his brother's legal guardian; J. P. lives in M.'s home and is completely dependent upon M. P. for his day-to-day needs and care.¹

In 2007, M. P. was absent from Alaska for a lengthy period of time. From January 1-27, M. P. was absent while on vacation in Mexico and traveling. While he was in Mexico, M. P. had dental treatment from January 3-15.²

¹ M. P. testimony.

² M. P. testimony.

M. P. returned to Alaska on the ferry that left Bellingham at 6:00 p.m. on January 26.³ From January 28 until February 28, M. P. was at home in No Name City with his brother. On February 28, M. P. got back on the ferry for Bellingham that left No Name City at 9:15 a.m.

M. P. scheduled the trip that began on February 28 in connection with ankle surgery that he and his brother had scheduled in Boise, Idaho. J.'s surgery was scheduled for April 4, and M.'s for June 5.

J. P. had a pre-operative examination in Boise on March 7. After the operation on April 4, J. P. had further visits with his doctor on April 12, 26 and 30, and May 21.⁴ M. P. had a pre-operative examination in Boise on May 10.⁵ M. P. returned to Alaska on the ferry that left Bellingham on May 18.⁶ He left Alaska on the ferry from No Name City on May 24,⁷ to be in Boise for his surgery scheduled for June 5. The surgery was extensive, and M. had post-operative complications which required him to remain in Boise for continuous treatment through the end of the year.⁸

III. Discussion

AS 43.23.005(a) establishes certain statutory requirements for eligibility for a permanent fund dividend. In addition to Alaska residency, required by AS 43.23.005(a)(2) and (3), AS 43.23.005(a)(6) provides that the individual may be absent from the state during the qualifying year for no more than the period allowed by AS 43.23.008(a). The division argues that M. P. was absent from Alaska during 2007 for more than the time allowed by AS 43.23.008(a).

Mr. P. and the division agree, and the evidence reflects, that he was absent from Alaska for 327 days in 2007. The division and Mr. P. agree that from the time he arrived in Boise on June 3, through the end of 2007, or 211 days, Mr. P.'s absence was allowable under AS 43.08.008(a)(5). Pursuant to AS 43.23.008(a)(17)(C), an individual claiming an allowable absence under AS 43.23.008(a)(5) is entitled to an additional absence of no more than 45 days. Mr. P. was absent, in addition to the time allowed under AS 43.23.008(a)(5), for 115 days: January 1-27 (27 days), March 1-May 18 (79 days), and May 25-June 3 (9 days). In order to be

³ Ex. 3, p. 6.

⁴ Ex. 3, p. 3.

⁵ Ex. 3, p. 4.

⁶ Ex. 3, p. 8.

⁷ Ex. 3, p. 9.

eligible for the 2008 dividend he must show that at least 70 of those days are allowed. The dispositive issue in the case, therefore, is whether the 79 day period from March 1-May 18 is allowable. If it is not, Mr. P. is ineligible, even if his absence during all of the other two time periods is allowed.

From March 1 through May 18, M. P. was absent while accompanying his disabled brother, J., who was obtaining medical treatment in Idaho. For purposes of this discussion, it is presumed that J.'s absence during that time was an allowable absence under AS 43.23.008(a)(5), for the purpose of obtaining continuous medical treatment.⁹

The legislature has specified the circumstances in which an absence while accompanying another who is undergoing medical treatment may be allowed. Those circumstances are described in AS 43.23.008(a)(6), (7), (12) and (13). Subsection (6) creates an allowance for an individual providing care for a parent, spouse, sibling, child or stepchild with a life-threatening illness who is receiving medical care. Because J. P.'s condition was not life-threatening, subsection (6) does not apply. Subsection (7) creates an allowance for an individual providing care for a terminally ill family member. Because J. P. was not terminally ill, subsection (7) does not apply. Subsection (12) creates an allowance for an individual accompanying a minor while the minor is receiving continuous medical treatment. Because J. P. was not a minor, subsection (12) does not apply.

M. P.'s eligibility thus turns on AS 43.23.008(a)(13), which states:

[A]n otherwise eligible individual...remains eligible...if the individual was absent...accompanying another eligible resident who is absent [for specified reasons including obtaining medical treatment] as the spouse, minor dependent, or disabled dependent of the eligible resident.

This provision allows an absence for an individual (M.) who accompanies an eligible resident (J.) while the eligible resident (J.) is obtaining medical treatment, but only if the individual (M.) is absent "as the spouse, minor dependent, or disabled dependent" of the eligible resident (J.). The apparent intent of this paragraph is to enable a spouse, minor dependent, or disabled dependent to accompany their spouse or guardian while the latter obtains out-of-state medical treatment. The allowance does not, however, flow in both directions, except for spouses: the

⁸ Ex. 1, p. 7. M. P.'s medical records show doctor's visits connected with his recuperation on June 29, July 19, 26 and 31, August 21, and September 13, with further visits in 2008. Ex. 3, p. 5.

⁹ This presumption is consistent with the division's treatment of M. P.'s subsequent absence.

statute does not allow an absence for the guardian of a minor dependent or a disabled adult while accompanying the minor or disabled adult while the latter obtain medical treatment. M. P.'s absence is not within the express reach of AS 43.23.008(a)(13).

The legislature may not have foreseen a circumstance such as that presented in this case, in which an individual who is the legal guardian of a disabled adult dependent is absent while providing care to the disabled adult dependent while the dependent receives medical treatment. That situation seems substantially equivalent to the situation of an individual accompanying a minor while the minor receives medical treatment, which is expressly allowed under AS 43.23.008(12), and it may be that the legislature, had it considered the matter, would have provided in AS 43.23.008(a)(12) the same allowance for the guardian of a disabled adult dependent that it allowed for an individual (not necessarily a parent, guardian, or a person otherwise legally obligated to provide care for the minor) who accompanies a minor. However, the terms of AS 43.23.008(a)(13) are clear and are not susceptible of an alternative interpretation, and the differential treatment of the guardian of an adult disabled dependent is not clearly unconstitutional. Accordingly, the administrative law judge must apply the statute in accordance with its express term.

IV. Conclusion

M. P.'s absence from March 1 through May 18 is not allowable. Because that time exceeds 45 days, under AS 43.23.008(a)(17)(C) Mr. P. is ineligible for the 2008 dividend. The division's decision is therefore sustained.

DATED December 10, 2009.

Signed

Andrew M. Hemenway
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 6th day of January, 2010.

By: Signed
Signature
Andrew M. Hemenway
Name
Administrative Law Judge
Title

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