

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of)
)
M J) OAH No. 18-1203-PER
) Agency No. 2018-008
_____)

DECISION

I. Introduction

M J is a State of Alaska employee. In June 2015, she was injured in a fall outside her workplace. She was covered by Workers’ Compensation for a little over a year. She subsequently had several surgeries, after which Ms. J’s physicians limited her work hours. Ms. J was released to work full time by her physician effective August 24, 2018.

Ms. J applied for Occupational Disability benefits with the State of Alaska Division of Retirement and Benefits (Division) on August 13, 2018.¹ Her application was denied. Ms. J then filed this appeal.

Ms. J’s appeal went to hearing on May 24, 2019. Ms. J represented herself. Assistant Attorney General Kevin Higgins represented the PERS Administrator.

The record shows that Ms. J has several significant health issues. However, the relevant issue here is difficulty in using her left arm and hand, her dominant side. While she certainly has some impairment, as observed first-hand at hearing, on July 16, 2018, her doctor released her to work full time effective August 24, 2018, 11 days after she filed her application for disability benefits. There is no subsequent medical evidence that this was erroneous, or that her condition has significantly changed. While the evidence shows some impaired functionality, she remains employed fulltime with the State of Alaska, and the medical evidence does not establish that her condition is permanent or that she cannot satisfactorily perform the duties of her current position. Accordingly, she is not disabled, and the denial of her application for disability benefits is **AFFIRMED.**

II. Facts²

Ms. J was working for the State of Alaska in City A in June of 2015, where she fell outside her workplace and injured herself. She filed a claim with Workers’ Compensation.³ Ms.

¹ The Division made a limited concession in this case, for the purposes of this case only, that Ms. J’s injury was caused by her workplace accident.

² The following facts were established by a preponderance of the evidence.

³ Ex. 8 (Agency Record, p. 83).

J is left-handed.⁴ She had a physical therapy evaluation in September 2015, where she reported, stiffness, left sided neck pain, her left hand going to sleep, and difficulty writing. A January 19, 2016 cervical MRI showed “multilevel degenerative changes . . . severe foraminal stenosis at C3-4, moderate on the right. Advanced facet degenerative changes are present on the left,” a midline protrusion, severe bilateral foraminal stenosis at C4-5, and other significant spinal injury. She had epidural steroid injections in July 2016, which had a short-term effect.⁵ In addition, she had a February 29, 2016 nerve conduction study and an EMG that showed moderate carpal tunnel syndrome on the left, without any signs of radiculopathy.⁶

Ms. J had a Workers’ Compensation independent medical examination on September 8, 2016, which concluded that she had reached medical stability and that she should be “released to full duty without restrictions.”⁷ Ms. J’s Workers’ Compensation claim was then denied.⁸

Ms. J underwent several surgeries thereafter. On December 12, 2017, Dr. N performed a C3-5 ACDF surgery. On January 12, 2018, Dr. N found that Ms. J was developing a frozen shoulder. He subsequently released her to part-time (four hours per day) medium work (lifting/carrying up to 25 lbs. frequently, with a lifting limit of 50 lbs.).⁹

On February 9, 2018, an electrodiagnostic study of Ms. J’s left upper extremity found neuropathy at the wrist and radiculopathy from nerve root compression.¹⁰ Dr. N then recommended additional surgery and continued Ms. J’s work release at 4 hours per day of medium work.¹¹ Dr. S performed a subsequent surgery, a left-sided C4-5 foraminotomy on March 16, 2018. On April 23, 2018, Ms. J reported the following:

continued left upper extremity pain, numbness and weakness. She reports pain radiating from the neck to the left shoulder. At the upper arm, pain presents as muscles spasms and tightness and radiates down the anterior aspect of the left arm. Her first through third digits of the left hand are numb and twitch involuntarily. She reports weakness from the shoulder to the left hand. She reports her left arm often “hangs there” which she feels is weakening the muscles. Patient also reports new onset of pain along the left side of the thoracic spine.¹²

⁴ Ms. J’s testimony; Ex. 9 (Agency Record, p. 342).

⁵ Ex. 8 (Agency Record, pp. 83 – 84).

⁶ Agency Record, p. 429.

⁷ Ex. 8 (Agency Record, p. 93).

⁸ Agency Record, p. 80.

⁹ Agency Record, p. 376.

¹⁰ Agency Record, p. 431 – 432.

¹¹ Exs. 9, 10 Agency Record, pp. 342 – 347).

¹² Ex. 11 (Agency Record, p. 202).

Dr. S returned her to work for five hours per day, that same day.¹³

Ms. J had another EMG performed on July 16, 2018, which showed left wrist carpal tunnel syndrome and a “sub-acute left C5 radiculopathy.”¹⁴ Ms. J met with Dr. S that same day, July 16, 2018. Dr. S’s exam notes provide:

Patient is clear to increase hours at work. I provided a note for patient explaining a gradual increase in hours worked going to 6 hours a day on 7/24/18 and fulltime capacity on 8/24/2018. She relates she is having a difficult time with her supervisor(s) at work for not returning to full time.¹⁵

In addition, Dr. S’s assessment notes from July 16, 2018 provide that “[n]eurologic examination demonstrates persistent but significant improvement in left deltoid weakness.”¹⁶ Ms. J testified that she was having significant difficulties at work due to not working fulltime. She attempted to work those out with her supervisor, including an attempt to move to a more flexible schedule, and was not able to do so. She testified that Dr. S’s returning her to work fulltime was at her insistence, due to her work difficulties.¹⁷

Ms. J works as a Technician where her job is primarily clerical work: typing, correspondence, and filing. 75% percent of her workday is spent typing. The other 25% of her workday involves filing. She frequently handles files that range in weight from 2 lbs. up to 9 lbs. She infrequently has to work as a backup to the evidence custodians, where she has to retrieve and return evidence contained in banker’s boxes from the evidence storage room. Since she went back to work fulltime in August 2018, she has had to retrieve evidence boxes five times or less. The last time she had to retrieve a box, it weighed between 28 to 30 lbs. The last time she needed to act as a backup evidence custodian was in the first part of April 2019. Ms. J testified that she is far behind in her work because she is so slow and is working at much less than full capacity.¹⁸

Ms. J’s job description provides that she has to reach above and below the shoulder level frequently, frequently engage in repetitive hand/finger motion (keyboarding, for example), frequently engage in grasping and gripping with the hand, occasionally lift/carry/push/pull up to

¹³ Ex. 11 (Agency Record, p. 207).

¹⁴ Ex. 12 (Agency Record, p. 172).

¹⁵ Ex. 13 (Agency Record, p. 178).

¹⁶ Ex. 13 (Agency Record, p. 178).

¹⁷ Ms. J’s testimony.

¹⁸ Ms. J’s testimony.

25 lbs., and may have to, but it is not essential, lift/carry/push/pull up to 50 lbs. Lifting/carrying/pushing/pulling over 50 lbs. is not a requirement of the position.¹⁹

Ms. J is frequently out of work for medical appointments, to the point where she has exhausted her leave and is often in a leave without pay status. However, except for approximately three follow-up appointments with Dr. S, her medical appointments since August of 2018 have been for her other complex medical conditions, which include diabetes, Hashimoto's disease, and glaucoma.²⁰

Mr. J, Ms. J's husband, has observed a decline in Ms. J's ability to use her left arm since the first surgery, which was with Dr. N. He has seen that she is limited in her ability to lift things, and with basic functions like combing her hair and putting on makeup. He sees her come home from work in some degree of pain almost all the time. When he must be away from home for his work, he plans in advance by going shopping for heavier items so that she does not have to lift them herself during his absence.²¹

In conjunction with her disability application, Ms. J submitted two physician's statements. One was from Dr. F, M.D., an orthopedist who Ms. J saw one time in January of 2018.²² That July 10, 2018 statement provided that her diagnosis was C5 radiculopathy, that he recommended surgery, and that it was difficult for her to use her arm. Dr. F's response to the question as to whether he expected her to improve was equivocal and indicated a possibility for improvement: "no, needs to be monitored, may improve in a year – 2 years."²³ The other statement is completed by Mr. D, PA-C/Dr. N. That August 2, 2018 statement also provides that her condition could possibly improve: "She has not had much improvement, there is some potential for improvement during the next 6 months." In addition, Mr. D/Dr. N stated that Ms. J needed to avoid lifting more than 10 lbs. and repetitive overhead lifting.²⁴

Dr. K performed a disability peer review of Ms. J's application. That review consisted of a review of her medical records, and did not involve speaking to Ms. J's physicians, nor did it involve him speaking to or examining Ms. J.²⁵ Dr. K's report concludes that while Ms. J had cervical radiculopathy and carpal tunnel syndrome, she is not precluded from "performing the

¹⁹ Agency Record, pp. 60 – 61.

²⁰ Ms. J's testimony.

²¹ Mr. J's testimony.

²² Ms. J's testimony; Agency Record, p. 270.

²³ Agency Record, p. 270.

²⁴ Agency Record, p. 271.

²⁵ Dr. K's testimony.

job duties of Technician I.”²⁶ He opined that she has slight limitations but was not disabled as defined by the Alaska statute.²⁷

Ms. J’s hearing was held on May 24, 2019. During that hearing, she was noticed using her left arm and hand guardedly. Her range of motion in her left arm and hand decreased over the course of the hearing, and she began displaying facial and body posture (pinched expression and hunching over) behaviors consistent with pain. She also was noticed trying to open a water bottle with her left hand and having difficulty doing that.

III. Discussion

Ms. J has the burden of proof.²⁸ As a public employee, to qualify for occupational disability, among meeting other criteria, she must prove that her “employment is terminated because of a total and apparently permanent occupational disability . . . before [her] normal retirement date.”²⁹ The term “occupational disability” is defined by statute:

“occupational 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 comparable position or job that an employer makes available and for which the employee is qualified by training or education;³⁰

In addition, the underlying condition must be proximately caused by a bodily injury or hazard “while in the performance and within the scope of the employee’s duties.”³¹

For the purposes of this case only, the Division has conceded that Ms. J’s condition is work-related. This leaves three questions, each of which must be answered “yes”, for Ms. J to qualify for occupational disability benefits:

- Has Ms. J been terminated from her employment?
- Does Ms. J have a presumably permanent condition?
- If so, does that condition prevent her from satisfactorily performing her usual duties?

²⁶ Ex. 2 (Agency Record, pp. 25 – 27).

²⁷ Dr. K’s testimony.

²⁸ *State Department of Administration, Division of Retirement & Benefits v. Shea*, 394 P.3d 524, 529 (Alaska 2017).

²⁹ AS 39.35.410(a).

³⁰ AS 39.35.680(27).

³¹ AS 39.35.680(27).

A. Has Ms. J been terminated from her employment?

The answer to this question is an unequivocal no. Ms. J, as of the hearing date of May 24, 2019, was still employed with the State of Alaska as a Technician I. This is a threshold issue. Because Ms. J is still employed in her position, she is not eligible for occupational disability benefits.³² If she had quit her job,³³ been terminated based upon job performance, or a failure to return to work based upon her condition, then the answer to this question would be a “yes.”³⁴ As a result, Ms. J is not eligible for occupational disability benefits.

B. Does Ms. J have a presumably permanent condition?

The answer to this question is also no. Ms. J undoubtedly, as observed during hearing, has impaired functionality with her left arm and hand. However, the lay observation of this administrative law judge does not and cannot substitute for medical evidence. The medical evidence, per the statements of Dr. F and Mr. D/Dr. N, shows that there is potential for recovery. In addition, Dr. S’s assessment notes from July 16, 2018 provide that “[n]eurologic examination demonstrates persistent but significant improvement in left deltoid weakness.”³⁵ This means that there is insufficient medical evidence to establish, by a preponderance of the evidence, that Ms. J’s condition is presumably permanent. This also means that Ms. J is not eligible for occupational disability benefits.

C. Does Ms. J’s condition prevent her from satisfactorily performing her usual duties?

As with the other questions, the answer to this is also no. The clearest evidence of this is Dr. S’s July 16, 2018 exam notes:

Patient is clear to increase hours at work. I provided a note for patient explaining a gradual increase in hours worked going to 6 hours a day on 7/24/18 and fulltime capacity on 8/24/2018. She relates she is having a difficult time with her supervisor(s) at work for not returning to full time.³⁶

Based on these exam notes, Dr. S’s medical opinion was that Ms. J could return to work fulltime on August 24, 2018. Even though Ms. J testified that she asked Dr. S to release her to work

³² See *Rhines v. State*, 30 P.3d 621,627 (Alaska 2001) (Employee lost her job when the position was eliminated due to a reorganization. Because she did not lose her position due to her disability, she was not eligible for occupational disability benefits).

³³ *State, Public Employees Retirement Bd. v. Cacioppo*, 813 P.2d 679 (Alaska 1991).

³⁴ See *Stalaker v. M.L.D.*, 939 P.2d 407 (Alaska 1997) (An employee was on authorized leave and was terminated when he did not return to work due to at the end of his authorized leave. However, his failure to return to work was because he was hospitalized due to his disability. The Court held that his termination was due to his disability).

³⁵ Ex. 13 (Agency Record, p. 178).

³⁶ Ex. 13 (Agency Record, p. 178).

fulltime due to employer pressure, which is referenced in his exam notes, presumably Dr. S would not have medically released her to fulltime work if he felt she was not medically capable of it. If there had been a significant change between July 16, 2018 and August 13, 2018, the date of the disability application, that should be reflected in the medical records. No information reflecting such a change is contained in the record. As a result, the weight of the evidence shows that Dr. S, who was Ms. J's treating physician, felt that Ms. J was medically capable of performing her job on a fulltime basis effective August 24, 2018. This also means that Ms. J is not eligible for occupational disability benefits.

IV. Conclusion

Ms. J has the burden of proof by a preponderance of the evidence. In order to qualify for occupational disability benefits, she must prove each of the following: first, she must have been terminated from her job due to her disability; second, she must have a presumably permanent condition; and third, that presumably permanent condition must prevent her from satisfactorily performing her usual job duties. As discussed above, the answer to each of these questions is no. She is still employed. While she undoubtedly experiences pain and functional limitations, there is insufficient medical evidence to show that her condition is presumably permanent. Finally, she did not prove that she cannot satisfactorily perform her job duties. She therefore does not qualify for occupational disability.

DATED this 24th day of June, 2019.

Signed

Lawrence A. Pederson
Administrative Law Judge

Adoption

This Decision is issued under the authority of AS 39.35.006. The undersigned, in accordance with AS 44.64.060, adopts 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 Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 18th day of July, 2019.

By: Signed _____
Signature
Lawrence A. Pederson _____
Name
Administrative Law Judge _____
Title

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