

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of)	
)	
T T. T)	OAH No. 24-0056-PER
_____)	Agency No. 2024-001

DECISION AFTER PROPOSALS FOR ACTION

I. Introduction

On January 28, 2022, T T fractured her right wrist while she was at work. In the months following, she reported experiencing ongoing pain and stiffness. She sought medical treatment that included surgery and occupational therapy, and her treating physician authorized her absence from work for approximately four months. She was covered by Workers' Compensation for approximately six months. In May of 2022 she applied to the State of Alaska Division of Retirement and Benefits (Division) for occupational disability benefits through the Public Employees' Retirement System (PERS), claiming that her 2022 wrist injury was a permanent and totally disabling medical condition that forced her to resign from her position.

The medical evidence in this record, however, does not support Ms. T's contention that her wrist injury renders her disabled as defined by the relevant statute, or that it was the legal cause of the termination of her employment. Therefore, the Division's decision denying PERS occupational disability benefits is **AFFIRMED**.

II. Facts

A. The injury

In January 2022 Ms. T was working as a Special Education Assistant for the Employer A. She was then 59 years old, a resident of City A, Alaska, and had accrued 24 years of service as a Tier II member of the Public Employees Retirement System (PERS). During a physical education outing with students to the local ice-skating rink on January 28, 2022, Ms. T fell and suffered a right wrist distal radius fracture.

B. Medical treatment history for the injury

On February 1, 2022, Ms. T underwent surgery to stabilize the fracture at the Hospital. In the weeks following she had several post-op appointments with either Dr. Gene Falkowski or Shawn Frazier, a physical therapist, at Orthopedic Physicians of Alaska (OPA) in Anchorage. Initially the providers made consistently positive observations in her file regarding her recovery, noting that she was "doing well," the incision was "healing well," and finally, on March 21, 2022,

that she was “well-healed with appropriate wound healing and no signs of complication [.]”¹ As her wrist was significantly stiff due to protracted immobilization, twice weekly therapy was recommended and she was deemed to have “good rehab potential.”² When she advised Dr. Falkowski of her plan to return to work 3 months from the time of injury, he opined that she could potentially return even sooner.³

At the next visit on April 11, 2022, however, it was noted that her progress was “limited,” her range of wrist motion was compromised due to pain and a low tolerance of various therapies to increase movement.⁴ He remarked, “Patient displays moderate learned disuse, favoring away from light use and movement of fingers and hand due to apprehension and fear-avoidance behaviors.”⁵ Due to the complaints of pain, a recommendation was made for a referral to a pain management doctor, but Ms. T declined.⁶ She was advised to continue following a home exercise program to increase mobility.⁷

On April 18, 2022, Ms. T contacted the Division to request a PERS Disability Application and information about the eligibility requirements for benefits.⁸

At visits during the weeks following Ms. T reported worsening symptoms, including pain in both her hand and shoulder, and hypersensitivity of the wrist.⁹ She described a patch of numbness near the original incision, and continued difficulty gripping.¹⁰ At her provider’s recommendation, she agreed to a trial of gabapentin to relieve pain. She was advised to continue attending occupational therapy, although in April her therapist noted that her progress was “limited” due to “moderate learned disuse, apprehension and fear avoidance.”¹¹

At the beginning of May 2022, Ms. T saw Dr. Falkowski for a post-op appointment. She reported pain and stiffness, and the doctor noted her “significant hesitancy performing any motion with her wrist.”¹² Based on a physical exam, Dr. Falkowski detected no pain with shoulder or elbow range of motion, and intact sensation in her hand, but for a small numb area. Her fingers

¹ R. 1690.

² R. 1023.

³ R. 34, 1676.

⁴ R. 1703 – 1704.

⁵ R. 1007.

⁶ R. 1015.

⁷ *Id.*

⁸ R. 18-19.

⁹ R. 1025.

¹⁰ R. 1014.

¹¹ R. 1694.

¹² R. 1030.

were noted to be warm, with good blood supply.¹³ Images showed her fracture as completely healed. Due to her continued complaints of pain, he referred her to Dr. Dann Laudermilch for an evaluation of possible complex regional pain syndrome (CRPS). She declined pain management blocks due to a fear of injections and potential for opiate addiction.¹⁴

On May 11, 2022, the Division received Ms. T's incomplete application for disability benefits under PERS.¹⁵

Pursuant to requests from Workers' Compensation, on May 9, 2022, Dr. Falkowski reviewed Ms. T's job description and predicted that while she would have a permanent partial impairment as a result of a her wrist injury, she would eventually have the permanent physical capacity to perform the physical demands of her job as a childcare attendant.¹⁶ He signed a Return to Work Authorization approving her absence from her job through May 28, 2022.¹⁷

On May 26, 2022, Ms. T met with Dr. Laudermilch, who noted that "she guard[ed] heavily with movement."¹⁸ He emphasized the need for her to engage in physical therapy, and work on range of motion, stretching her fingers, hand, wrist, elbow and shoulder.¹⁹ He did not recommend surgery.²⁰ He discussed her concerns regarding injections for pain management, which he deemed far less risky than possibly developing CRPS.²¹ The recommended plan of care following the visit was for Ms. T to attend back-to-back occupational therapy sessions three times a week for 12 weeks, along with splinting, taping and therapeutic exercises. Dr. Laudermilch also advised her to consult a pain management specialist.

On May 31, 2022, Ms. T submitted to Employer A a written resignation effective September 1, 2022, allowing her to rescind her notice if she was deemed physically capable of returning to work before her retirement date.²² The school district accepted her conditional resignation, and also advised her that if her treating physician predicted she would not be able to return to her original job, she would be encouraged to apply for other positions within the school

¹³ *Id.*
¹⁴ 1720
¹⁵ 15-16
¹⁶ 1726-7, 2658-9.
¹⁷ R. 1724-1727.
¹⁸ R. 42-44.
¹⁹ *Id.*
²⁰ *Id.*
²¹ *Id.*
²² R. 819 - 820.

district within her capacity.²³ At the time there was no alternative employment offer available.²⁴ The Division received Ms. T's application seeking early PERS retirement, effective September 1, 2022.²⁵

In the following weeks Ms. T engaged in occupational therapy with few changes. She continued to reject stellate injections for pain, and discussed feeling depressed, with little hope of recovery.²⁶ On July 14, 2022, she had a follow up visit with Dr. Falkowski, who again recommended pain management. Ms. T adamantly refused, did not want any further treatment, and felt she was "maxed out on her potential."²⁷ He authorized her return to work with no specific restrictions, but possible limitations given her compromised range of motion and weakness in her right arm.²⁸

On July 18, 2022, the Division of Workers' Compensation issued a determination letter that Ms. T was not eligible for reemployment benefits.²⁹ Ms. T began contacting Dr. Falkowski's office, anxious about the termination of benefits and asking for a new work note with restrictions.³⁰ She previously had been deemed "medically stable," but during a visit with Dr. Falkowski on August 8, 2022, Ms. T expressed a desire to move forward with pain management treatment, effectively changing her status to "not medically stable."³¹ She also inquired about treatment for anxiety and depression, which Dr. Falkowski advised she would need to discuss these issues with a family practitioner or counselor. He declined to change his previous evaluation regarding her ability to return to work without restrictions, but noted she may have possible limitations due to arm stiffness and pain.³²

On August 17, 2022, Ms. T reported for a requisite Fit for Duty/Return to Work test to determine if she could complete five physical capacity tests associated with the Special Education Assistant position, allowing her to return to work.³³ Ms. T attempted and failed the exercise

²³ R. 817, 2653.

²⁴ R. 2653.

²⁵ R. 844-6.

²⁶ R. 1768.

²⁷ R. 1753.

²⁸ *Id.*

²⁹ R.

³⁰ R. 1773.

³¹ R. 1771.

³² *Id.*

³³ See r. 28-29 Employer A Special Education Assistant job description lists the physical requirements of the position as "Medium," including lifting/carrying/pushing/pulling objects a maximum of 40 pounds in weight. It also notes, "The physical requirements described here are representative of those that must be met by an employee to successfully perform the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions."

involving pushing a sled weighted for 40 pounds.³⁴ However, according to the therapist administering the test Ms. T only used her upper left extremity, guarding her right extremity next to her body the during the entire test.³⁵ The therapist stated that Ms. T declined to attempt any of the remaining four exercises.³⁶ Ms. T then inquired about a modified duty, but she was advised that this was not available to her as Workers' Compensation had fully released her.³⁷

On August 19, 2022, Ms. T provided Employer A her verbal resignation.³⁸

On August 25, 2022, Ms. T had an office visit with Dr. Grissom for a pain management consultation.³⁹ He diagnosed CRPS, prescribed lamotrigine and ordered a series of stellate ganglion blocks. Subsequent medical evaluations were conducted by other providers as listed below pursuant to her Worker's Compensation claim.

C. Workers' Compensation appeal

Ms. T appealed the determination by Workers' Compensation to end her benefits. While the ultimate resolution of that case has limited applicability to this matter, pursuant to the appeal Ms. T was required to seek two independent medical examinations, both of which offer relevant medical insights.⁴⁰

On September 7, 2022, Ms. T was examined by Dr. Jared Kirkham. He noted she presented with a "high level of subjective disability," and that [her] reported residual pain was "out of proportion to objective findings" and diagnosed "pain-limited weakness, loss of motion due to disuse..."⁴¹ He observed no true objective evidence of CRPS, but rather attributed her pain to disuse.⁴² Dr. Kirkham diagnosed "profound psychosocial influence on Ms. T's current level of pain and disability, "and found evidence of fear avoidance, anxiety, depression, and learned disuse as contributing factors to her pain[.]"⁴³ He anticipated that Ms. T could return to her position as early as three months from the date of the exam "with appropriate motivation and normal use of her right upper extremity."⁴⁴

³⁴ R. 502-503.

³⁵ *Id.*

³⁶ *Id.*

³⁷ R. 836.

³⁸ R. 812.

³⁹ R. 771 – 774.

⁴⁰ Worker's Compensation and PERS rely on distinct definitions of the terms involving the designation of a "disability."

⁴¹ R. 1162.

⁴² *Id.*

⁴³ R. 1163.

⁴⁴ R. 1168.

On November 28, 2023, Ms. T presented for a second examination with Dr. Maria Patten. Ms. T admitted to being overdramatic at times during her wrist recovery period when describing the impact of the loss of use of her hand.⁴⁵ She acknowledged that since the injury she had been writing with her right hand and performing light activities of daily living (ADLs).⁴⁶ Ms. T also reported the weakness in her right hand and arm was improving, and that she could hold 5 pounds.⁴⁷ She denied numbness, tingling, or any neck problems, and was 1 mm shy of being able to make a full fist with the right hand.⁴⁸ The doctor opined that Ms. T had developed CRPS, causing ongoing pain, stiffness and pain-avoidance behaviors.⁴⁹ She expressed an ongoing need for depression treatment by a mental health professional, and noted that at the time of the exam Ms. T could only return to work with limitations or restrictions.

D. Procedural history

The Division received Ms. T's incomplete application for disability benefits under PERS on May 11, 2022. She was advised of the application's deficiencies multiple times over the following months but submitted no additional documentation. Eventually her application was suspended on April 4, 2023. In December 2023 Ms. T asked that her application be reopened despite still being deficient. The Division issued denial letters on December 20, 2023, and January 4, 2024.⁵⁰ Ms. T appealed to the OAH.

On appeal, Ms. T was allowed to supplement the record with the long overdue medical information needed to complete her application. Dr. William Tontz, the Division's independent physician, reviewed Ms. T's complete medical record and on August 21, 2024, and submitted the following determination:

The objective evidence does not support the conclusion that [Ms. T's] condition is likely to be permanent and totally disabling, thus not meeting the criteria for an occupational disability benefit under the applicable statutes.⁵¹

⁴⁵ R. 2418.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ R. 2422.

⁴⁹ R. 2426.

⁵⁰ Incidentally, on March 14, 2024, the Division also sent Ms. T a letter explaining that pursuant to AS 39.35.530(3) an individual may not simultaneously receive a pension under more than one section of AS 39.35.095 – 39.35.680. Beginning October 2022, she began receiving retirement benefits, which were higher than any disability amount she could receive for the months of September 2022-January 2023. Therefore, if appointed to disability, she would owe the Division an overpayment. R. 844-846.

⁵¹ R. 2749.

The Division maintained its original decision to deny her application for disability benefits, and Ms. T indicated she wished to move forward with her appeal. A case planning conference was subsequently held in this matter on September 11, 2024, followed by a final status conference on October 10, 2024. Ms. T participated and represented herself, and the Division was represented by an assistant attorney general from the Department of Law. The parties concurred that an evidentiary hearing was unnecessary, and that a decision could be based on written pleadings. Accordingly, Ms. T and the Department of Law both submitted timely written arguments on October 21 and 30, 2024, respectively. Ms. T also submitted a response on October 31, 2024, which was not considered, as replies are prohibited without express authorization.⁵²

III. Discussion

To prevail in her application for PERS occupational disability benefits Ms. T must establish by a preponderance of the evidence that she became totally and apparently permanently disabled as a result of her January 2022 wrist injury while performing her duties as a Special Education Assistant, and that the disability was the legal cause of the termination of her employment with Employer A prior to August 31, 2022, her normal retirement date.⁵³ For Ms. T to meet her burden, each of the requisite criterion discussed below must be answered affirmatively.

A. Was Ms. T injured while performing the duties of her job?

Yes, the Division has conceded that Ms. T's wrist injury was work-related, as it occurred while she was taking students to an ice rink during class time.

B. Was Ms. T terminated from her employment with Employer A because of the disability?

The parties agree that on May 31, 2022, Ms. T submitted a written resignation effective September 1, 2022, allowing her to rescind her notice if she was "released to work in [her]

⁵² 2 AAC 64.270(a).

⁵³ See AS 39.35.400 – 39.35.410, 39.35.400(a). The definition of an occupational disability is: 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; however, the proximate cause of the condition must be a bodily injury sustained, or a hazard undergone, while in the performance and within the scope of the employee's duties and not the proximate result of the willful negligence of the employee. AS 39.35.680(27).

Pursuant to AS 39.35.410(a), an employee is eligible for an occupational disability benefit of employment is terminated because of a total and apparent permanent occupational disability, as defined in AS 39.35.680, before the employee's normal retirement date.

position” before her retirement date.⁵⁴ The Division argues that she was not terminated from her position, nor asked to resign, and points out that her treating physician cleared her to return to work in May 2022, albeit with possible restrictions. By Ms. T’s own admission, she “removed herself from the workforce.”⁵⁵

Ms. T interprets the situation differently. She acknowledges that she voluntarily resigned from her position with the school district, effectively making herself ineligible by statute from receiving occupational disability benefits.⁵⁶ However, she seemingly argues that she was constructively fired, as she describes her resignation as including the caveat that she could return to her job once she was “medically stable.”⁵⁷ She asserts that she had to be “100%” to return to her position, and she was not, as evidenced her being “physically unable” to pass the fitness for duty exam on August 17, 2022. Since she was not “medically stable” she claims that she was no longer qualified for her original position as a Special Education Assistant. Therefore, she argues that since she could not return to her job after resigning, she was ostensibly fired, and therefore should not be barred from receiving disability benefits.

Neither the record nor the law supports Ms. T’s contentions. First, the ability to rescind her resignation was contingent on her having the physical capacity to return to her job. She did not pass the physical capacity examination allowing her to return to work. Therefore, she could not rescind her resignation. Secondly, she is seemingly confusing terms associated with distinct programs. Under Worker’s Compensation, the termination of temporary disability benefits is largely driven by when an individual is deemed “medically stable.”⁵⁸ This definition, however, does not appear in the disability benefits provisions under PERS, and is not relevant to the circumstances of Ms. T’s departure from Employer A. The only pertinent question is whether Ms. T was terminated from her position due to her disability, and the answer is no. She, herself, voluntarily resigned and was appointed to early retirement.

C. Is the evidence sufficient to conclude that Ms. T’s wrist injury was a disabling condition?

It is clear from the record that Ms. T has struggled both physically and emotionally since her wrist injury at the skating rink in January 2022. In the aftermath of her fall she has seen

⁵⁴ R. 817.

⁵⁵ R. 1130.

⁵⁶ T, October 21, 2024 closing argument.

⁵⁷ *Id.* Her resignation does not, in fact, mention the phrase “medically stable.”

⁵⁸ See AS 23.30.180, AS 23.30.200, AS 23.30.190. See also AS 23.30.395(28).

multiple doctors for assessments and recommendations regarding pain management, rehabilitation, and later, related depression, which undoubtedly has been frustrating and tiresome. She reports that injury has had a lasting negative impact on her life, as evidenced by her still receiving medical treatment for pain.

The litmus test for disability benefits under PERS, however, is whether Ms. T has proven that her wrist injury was not just irksome, but rather rises to the level of a “disabling condition.” Doing so means showing that she has a “total and apparently permanent occupational disability” and that it “presumably permanently prevents [her] from satisfactorily performing [her] usual duties.”⁵⁹

Not a single doctor consulted during the course of her treatment characterized her injury accordingly or deemed her incapable of ever being able to return to her job. In the weeks following her surgery Dr. Falkowski noted that the fracture was healing well, that she had “good rehab potential,” and that he expected her to be able to return to work in even less time than originally anticipated. When Ms. T expressed concerns regarding ongoing pain and stiffness in follow up visits, he attributed her slow progress to learned disuse, apprehension and fear avoidance. In May 2022, he ultimately signed a return-to-work authorization for her based on his belief that she had the physical capacity to perform the physical demands of her job as a childcare attendant.

The next doctor who evaluated Ms. T was Dr. Laudermilch. He recommended pain management, continued exercises, but no surgery. His notes do not reference a permanent disability.

On August 8, 2022, Ms. T was again seen by Dr. Falkowski who declined to change his previous evaluation regarding her ability to return to work without restrictions. Later that month Dr. Grissom diagnosed Ms. T with CRPS, but not a permanent disability. On September 7, 2022, Dr. Jared Kirkham opined that Ms. T’s continued complaints of stiffness and pain most likely were caused by disuse. Provided she followed through with recommended treatments and exercises, he felt she could return to work in 3 months or less. Finally, in 2023 Dr. Maria Patten noted significant improvements in Ms. T’s healing process, observing that Ms. T was able to hold 5 pounds and make almost a complete fist.

Based on all the medical evaluations in the record, there is not sufficient evidence to conclude that Ms. T has a disabling condition. Doing so means showing that she has a “total and

⁵⁹ AS 39.35.680(27).

apparently permanent occupational disability” and that it “presumably permanently prevents [her] from satisfactorily performing [her] usual duties.”⁶⁰ The record does not support this argument.

IV. Ms. T’s Proposal for Action

Under the administrative appeals process that applies to disability appeals, after receiving the initial proposed decision from the Administrative Law Judge, a party may file a “proposal for action.”⁶¹ The process allows the party to address issues with the proposed decision before the decision is adopted by the final decisionmaker. On January 3, 2025, Ms. T filed a proposal for action asking that the case be returned to the judge to allow for the submission of additional evidence. On January 8, 2025, the Division filed a proposal for action asking that the proposed decision be adopted as final.

In her proposal Ms. T raises several points of contention. First, she avers that the proposed decision is factually inaccurate as it states she refused to participate in a “fitness for duty” exam. She asserts that in truth she did not refuse, but rather was not physically able to complete the exam. Secondly, Ms. T contends that the decision mistakenly finds that she does not have a disabling condition as defined in AS 39.35.680(27). Ms. T attaches several medical reports that are already part of the record.

Regarding her first concern, determining if Ms. T legally qualifies for disability benefits under PERS first requires ascertaining that she was *terminated from her position due to her disability*. The significance of the fitness for duty exam in the proposed decision, therefore, is not Ms. T’s attitude or level of participation, but rather simply the fact it was not satisfactorily completed. As explained on pages 4 and 8, this did not lead to Ms. T being fired due to her injury, it meant she could not rescind her voluntarily proffered resignation.

Regarding her second concern, it is clear Ms. T disagrees with the conclusion that she does not qualify for occupational disability benefits under PERS. Since fracturing her wrist in January 2022 Ms. T has undisputedly experienced pain, discomfort, distress and inconvenience. The record indicates that she has engaged in months of medical visits and therapy appointments that undoubtably have been frustrating and time consuming. However, the relevant question is not whether the injury has negatively impacted her quality of life. As explained on pages 9-10, to be eligible for occupational disability benefits under PERS her injury must be *totally disabling*.

⁶⁰ AS 39.35.680(27).

⁶¹ AS 44.64.060(e).

This assertion is not supported by the medical evaluations in the record, including the most recent, which notes Ms. T's marked and steady progress towards the improved use of her hand and wrist.

Ms. T's objections as raised in her proposal for action are adequately addressed in the body of the proposed decision. After appealing to OAH, she was allowed to supplement her deficient application with significant medical information. Her request that the case be returned and reopened to allow for the submission of additional evidence is denied.

V. Conclusion

Ms. T injured her wrist due to a workplace fall. The record does not establish by a preponderance of the evidence her contention that she was fired because of the injury, or that it resulted in a disabling condition. Therefore, Division's decision denying Ms. T's application for occupational disability benefits under PERS is affirmed.

DATED: January 14, 2025

By: Signed

Danika B. Swanson
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 January 14, 2025

By: Signed
Signature
Danika Swanson
Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]