

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS**

In the Matter of )  
 )  
 K L. V ) OAH No. 11-0204-PER  
 ) Div. R&B No. 2011-011  
 \_\_\_\_\_ )

**DECISION**

**I. Introduction**

K L. V appealed the Public Employees Retirement System (PERS) Administrator’s decision of July 27, 2011, denying her application for nonoccupational disability benefits. A hearing was held at which Ms. V testified and provided testimony from her primary care provider. Joan Wilkerson, Assistant Attorney General, represented the Division of Retirement and Benefits in the Alaska Department of Administration (Division). Ms. V represented herself. The documentary record includes extensive medical records and reports.

The preponderance of evidence shows that Ms. V’s employment was not terminated because of a total and permanent nonoccupational disability. The evidence shows that Ms. V could work at her old job at the time she quit, but that she chose to quit rather than seek other ways to mitigate the difficulties she was experiencing at work, including additional treatments. The evidence shows that Ms. V has both physical and mental conditions that created significant challenges at her employment, but that these conditions are not permanently disabling. The administrator’s decision to deny Ms. V’s application is therefore affirmed.

**II. Facts**

When she stopped working, Ms. V was working at the Municipality of No Name’s Memorial Clinic as a receptionist. Ms. V was 56 years-old and had 5.51507 years of credited PERS service.<sup>1</sup>

Ms. V’s job at the No Name Memorial Clinic involved keeping track of phone calls, appointments, and patient records. Ms. V explained that she quit her job because she was missing work, having pain at work, and that it was difficult to do her job due to her pain and the pain medication she was taking.<sup>2</sup> Ms. V explained that she has been treated for fibromyalgia, arthritis in her hand, and lupus. Ms. V also has chronic back pain. Ms. V admitted that at the time she quit her job, fibromyalgia was the only significant condition that led to her separation from employment.<sup>3</sup>

---

<sup>1</sup> Testimony of K L. V & Agency Record at page 8.  
<sup>2</sup> Testimony of Ms. V.  
<sup>3</sup> Testimony of Ms. V.

Ms. V's primary health care provider and the medical director at No Name Memorial Clinic, D C, ANP, was a witness for Ms. V. Nurse Practitioner C is a licensed Registered Nurse as well as a Licensed Nurse Practitioner. Nurse Practitioner C explained that she has treated and continues to treat Ms. V. Nurse Practitioner C explained that Ms. V had consulted her as a patient about her decision to leave her employment due to her chronic pain. Nurse Practitioner C supported Ms. V in her decision to quit. Nurse Practitioner C explained that it was her opinion that Ms. V's medical condition was not going to get better. Nurse Practitioner C explained that she based this conclusion on her extensive experience working with other fibromyalgia patients and her experience treating and working with Ms. V. Nurse Practitioner C also testified that she believes Ms. V's medical condition has improved since she stopped working. Nurse Practitioner C explained that Ms. V is also being prescribed medication for depression and anxiety, which are common problems associated with fibromyalgia.<sup>4</sup>

The Division's expert, Dr. Kim C. Smith, MD, agreed that Ms. V does have fibromyalgia, and he concluded that this medical condition was the only condition that contributed significantly to her current symptoms. Dr. Smith explained that Ms. V's medical records, including the drugs she was prescribed, do not conclusively show that she would be unable to function adequately as a receptionist in a small medical clinic. Dr. Smith explained that Ms. V's medical records indicate that she should be actively seeking more treatment.<sup>5</sup>

Dr. Smith was not persuaded that Ms. V was unable to work. Dr. Smith explained that in his experience patients with Ms. V's medical condition generally benefit from more, rather than less, physical activity. Dr. Smith noted that Ms. V's records do not indicate more than mild permanent damage to her joints or any significant inflammatory illness at the time she quit. Dr. Smith's conclusion was that Ms. V is no longer suffering from lupus or arthritis. Dr. Smith also concluded that there was no structural explanation for Ms. V's chronic back pain. Dr. Smith's opinion was there was still some room for improvement for Ms. V if she engaged in the treatments, such as physical therapy, regimented exercise and behavior modification that she had had success with several years ago, but which it appeared she had abandoned, based from the records that he reviewed.<sup>6</sup>

---

<sup>4</sup> Testimony of Nurse Practitioner C.

<sup>5</sup> Testimony of Dr. Smith.

<sup>6</sup> Testimony of Dr. Smith.

Dr. Smith explained that standard treatment for patients with fibromyalgia included regimented exercise, improving sleep patterns, and treating depression. Depression and pain medications may also be prescribed. Dr. Smith explained that one pain medication Ms. V was prescribed, Vicodin, was not optimal for her condition, and that exercise and counseling would be more optimal. Dr. Smith admitted that the prognosis for someone with Ms. V's condition is not encouraging unless she starts receiving more physical therapy, depression and anxiety treatment, and psychological counseling.<sup>7</sup>

Based on the evidence in the record, the Administrative Law Judge finds that Ms. V did not show that it is more likely than not that at the time she left her employment that she suffered from a medical condition that permanently prevented her from satisfactorily performing her usual duties for No Name Memorial Clinic. While Ms. V's decision to leave her employment may have been a good choice given her medical problems, those problems did not necessitate leaving her employment, nor did her employer require her to leave because of those problems.

### **III. Discussion**

“An employee is eligible for a nonoccupational disability benefit if the employee's employment is terminated because of a total and apparently permanent nonoccupational disability, as defined in AS 39.35.680 . . .”<sup>8</sup> A nonoccupational 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 position or job that an employer makes available and for which the employee is qualified by training or education,” not including a condition resulting from a cause that has been excluded by regulation.<sup>9</sup>

The issues in this case are whether Ms. V suffers a total and apparently permanent nonoccupational disability, and if so, whether that is the reason she terminated her employment. Ms. V, as the applicant for these benefits, has the burden of proving that the requirements of the statute have been met.<sup>10</sup>

Ms. V argued that the greatest deference should be given to the opinion of Nurse Practitioner C, because she is the only medical professional that has recently seen Ms. V on a

---

<sup>7</sup> Testimony of Dr. Smith.

<sup>8</sup> AS 39.35.400(a).

<sup>9</sup> AS 39.35.680(24).

<sup>10</sup> *Rhines v. State*, 30 P.3d 621, 628 (Alaska 2001).

regular ongoing basis. With the exception of Nurse Practitioner C, none of the care providers who treated Ms. V or reviewed her records recommended that she stop working permanently. Nurse Practitioner C's testimony was impressive. Nurse Practitioner C admitted that she saw herself as an advocate for her patients, but she was careful to answer each question accurately. Nurse Practitioner C's testimony on Ms. V's medical records and her condition was very helpful and demonstrated that Nurse Practitioner C has a thorough understanding of those records and Ms. V's medical condition. However, Nurse Practitioner C's testimony shows only that she honestly believed that Ms. V was making a reasonable decision when she decided to stop working, rather than showing that her medical condition had permanently rendered her unable to do her job. Nurse Practitioner C did not indicate that she suggested Ms. V quit either for Ms. V's benefit or the clinic's. Rather, Nurse Practitioner C supported Ms. V's decision to quit and apply for disability.

The statutes establishing PERS disability benefits are designed to compensate PERS members who are no longer able to perform their jobs.<sup>11</sup> In order to be nonoccupationally disabled, the employee must show that the permanent disability prevents the employee from "satisfactorily performing the employee's usual duties for an employer or the duties of another position or job that an employer makes available and for which the employee is qualified by training or education." Since the No Name Memorial Clinic had not indicated that Ms. V was not able to continue working for them, or that Ms. V had not been able to perform her duties to her employer's satisfaction, Ms. V would not be nonoccupationally disabled, even if she could show that she could no longer perform the kinds of work she used to do. Ms. V did not show that the No Name Memorial Clinic was not willing to continue to employ her. Ms. V did not show that she could no longer perform the kinds of work she used to do for the No Name Memorial Clinic.

The evidence in the record did not show that it was more likely than not that Ms. V's medical condition permanently prevented her from satisfactorily performing her usual duties for No Name Memorial Clinic. Both Dr. Smith and Nurse Practitioner C discussed Ms. V's medical records in detail at the hearing.<sup>12</sup> Many of these records are not related directly to Ms. V's medical condition at the time she left her employment because there was a general agreement

---

<sup>11</sup> See *Stalnaker v. M.L.D.*, 939 P.2d 407, 413 (Alaska 1997).

<sup>12</sup> Ms. V's medical records are found at pages 18 through 293 of the Agency Record.

that fibromyalgia was the source of the problems that caused her to quit, rather than lupus or arthritis, which she had received treatment for in the past. As Dr. Smith explained at the hearing, while the tenderness, pain, and associated depression and anxiety caused by Ms. V's fibromyalgia are very real, these symptoms are not indicative of a degenerative disease that is causing permanent damage to Ms. V's joints or organs the way that lupus or arthritis might. Dr. Smith's testimony and the evidence that the Division provided about fibromyalgia indicates that there are treatments such as exercise, counseling, and stress and sleep management that Ms. V did not fully explore before she decided to terminate her employment.<sup>13</sup>

The real dispute between the medical witness was between Nurse Practitioner C's support of Ms. V's conclusion that she should quit because her ability to perform her duties would probably continue to deteriorate and Dr. Smith's opinion that Ms. V was not disabled at the time she quit and that there was a significant possibility that her condition would improve if she took full advantage of her treatment options. Dr. Smith's testimony on these points was more persuasive than Nurse Practitioner C's.

#### **IV. Conclusion**

Ms. V has not met her burden of proving that she suffers from a permanent nonoccupational disability or that her termination was the result of a permanent nonoccupational disability. The PERS Administrator's decision to deny Ms. V's application for nonoccupational benefits is AFFIRMED.

DATED this 5<sup>th</sup> day of July, 2012.

By: Signed  
MARK HANDLEY  
Administrative Law Judge

---

<sup>13</sup> The information on fibromyalgia from the National Institute of Health and the National Institute of Arthritis and Musculoskeletal and Skin Diseases is found at Exhibit 1.

**Adoption**

The undersigned, 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 6<sup>th</sup> day of August, 2012.

By: Signed \_\_\_\_\_  
Mark T. Handley  
Administrative Law Judge

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