

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HENRY T. SWANN, III,)
)
 Petitioner,)
)
 vs.) Case No. 08-3690
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF STATE)
 GROUP INSURANCE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on October 15, 2008, in St. Augustine, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Dennis R. Schutt, Esquire
Michael J. Childers, Esquire
Schutt, Schmidt and Noey
2700-C University Boulevard, West
Jacksonville, Florida 32217

For Respondent: Sonja P. Mathews, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

The issue is whether Petitioner is eligible to receive disability income payments under the State Group Disability Income Self-insurance Plan (DISP).

PRELIMINARY STATEMENT

By letter dated July 1, 2008, Respondent Department of Management Services, Division of State Group Insurance (Respondent) advised Petitioner Henry T. Swann, III, (Petitioner) that his claim for DISP payments was denied because he was no longer a state employee.

On July 14, 2008, Petitioner filed a Petition for Evidentiary Proceeding. On July 28, 2008, Respondent referred the petition to the Division of Administrative Hearings.

A Notice of Hearing dated August 11, 2008, scheduled the hearing for October 15, 2008.

During the hearing, Petitioner testified on his own behalf. Petitioner offered three exhibits that were admitted as evidence. Respondent presented the testimony of five witnesses and offered four exhibits that were admitted as evidence.

The parties did not file a transcript of the proceeding.

On October 23, 2008, Petitioner filed Factual Findings, Conclusions of Law, and Recommendations.

On October 24, 2008, Respondent filed an unopposed Motion to Extend Time for Filing of Proposed Recommended Orders. On October 27, 2008, the undersigned issued an Order Granting Extension of Time.

On November 3, 2008, Respondent filed a Proposed Recommended Order.

FINDINGS OF FACT

1. On or about February 1, 2005, James S. Purdy, Public Defender for the Seventh Judicial Circuit, State of Florida, hired Petitioner as a "part-time" appellate attorney. Petitioner's duties included representing indigent criminal defendants on appeal.

2. As a "part-time" attorney, Petitioner worked the same number of hours as full-time attorneys. His workload was equivalent to the workload carried by all part-time and full-time appellate attorneys. However, except to attend weekly staff meetings, Petitioner did not perform his duties at the Public Defender's Office. Petitioner and other "part-time" attorneys were free to work from home and/or to maintain a private law office.

3. During Petitioner's employment with the Public Defender's Office, Craig S. Dyer, Deputy Public Defender, was in charge of personnel. James Wulchak, Chief of the Appellate Division, was Petitioner's direct supervisor.

4. Petitioner has been under the continuous care of a physician for Parkinson's disease since his diagnosis in 1997. Parkinson's disease is a neurological degenerative movement disorder for which there is no known cure. The disease's symptoms initially are responsive to medication but become less responsive over time as the disease progresses.

5. Despite the slow progressive nature of Parkinson's, Petitioner always was able to compensate for his disability by typing his briefs during the periods of time that his medications were effective in relieving his symptoms. Sometimes he worked before dawn, during the evening hours, or on weekends.

6. Petitioner never informed Mr. Purdy, Mr. Dyer, or Mr. Wulchak that he was unable to perform his duties due to a physical disability. Petitioner never requested or advised his employer of a need for special accommodation to perform his assigned tasks.

7. Petitioner continued to perform the duties required of him as an appellate attorney up through the last day of his employment. Petitioner's employer never contemplated dismissing Petitioner due to his inability to perform satisfactory work.

8. In a meeting on March 25, 2008, Mr. Purdy requested Petitioner's resignation due to an incident unrelated to his disability. Petitioner responded that he needed time to ascertain the status of his insurance benefits.

9. Several days later, Mr. Dyer placed a telephone call to Petitioner. Petitioner again refused to resign.

10. On April 15, 2008, Petitioner attended a routine weekly staff meeting. After the staff meeting, Mr. Dyer and Mr. Wulchak had a private meeting with Petitioner. When Petitioner refused to tender his resignation, Mr. Dyer

terminated Petitioner's employment effective immediately. But for the incident unrelated to Petitioner's physical condition, Petitioner's employer would have allowed him to continue to work after April 15, 2008.

11. The next day, Petitioner met with representatives of the Public Defender's Office to surrender files. The Public Defender's Office denied Petitioner's request to be paid for work performed on April 16, 2008.

12. As of April 15, 2008, Petitioner had accumulated 228 hours of annual leave and 242.59 hours of sick leave. Respondent paid Petitioner for 120 hours of annual leave, the maximum allowed. Petitioner did not receive payment for accumulated sick leave because he had not worked six years for the state.

13. At all times relevant here, Petitioner's employment was classified as Select Exempt Service (SES). The DISP is one of the employment benefits that Respondent provides to SES employees under Florida Administrative Code Rules 60P-6 and 60P-9. The purpose of DISP is to provide employees who are on leave with income once their accumulated leave is depleted.

14. In April 2008, Petitioner filed a claim for disability benefits with the Social Security Administration.

15. On May 5, 2008, Petitioner filed a Notice of Intent to file a claim for benefits under the DISP. In the notice,

Petitioner asserted that he was disabled as of April 15, 2008, the last day he was a paid employee. Within 90 days thereafter, Petitioner filed his completed claim for disability income payments under DISP.

16. In a letter dated July 1, 2008, Respondent advised Petitioner that he was not eligible to receive DISP payments because he was no longer a state employee.

17. A letter dated July 5, 2008, advised Petitioner that he would receive Social Security disability income in the amount of \$2,060 per month commencing October 2008.

18. Petitioner offered the deposition testimony of Richard Boehme, M.D. in lieu of testimony at hearing. Dr. Boehme, a board-certified neurologist, treated Petitioner several times in 2003 and again in January 2004. Thereafter, Dr. Boehme did not see Petitioner professionally until August 2008.

19. Dr. Boehme's medical opinion was that Petitioner was totally disabled and unable to perform the duties pertaining to his employment as of January 1, 2008. Dr. Boehme's testimony is not persuasive in light of Petitioner's continued productivity up through April 15, 2008.

20. Dr. Boehme did not place any specific limitations on the physical activities of Petitioner. According to Dr. Boehme, there was no medical reason to keep Petitioner from continuing to perform the same duties he performed on his last day at work.

The greater weight of the evidence indicates that Petitioner was performing satisfactorily on April 15, 2008.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

22. Petitioner has the burden of proving by a preponderance of the evidence that he is eligible to receive future DISP payments. See Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

23. Florida Administrative Code Rule 60P-9.001 contains the following relevant definitions:

(3) "Employee" means an individual holding a salaried Senior Management Service or Selected Exempt Service position with any state agency.

* * *

(6) "Totally disabled" means that the employee is completely unable, due to sickness or injury or both, to perform the duties pertaining to his or her employment and is under the direct care of a physician.

24. Regarding entitlement to benefit payments, Florida Administrative Code Rule 60P-9.005 reads as follows in pertinent part:

60P-9.005 Benefits.

If an employee, while insured under the Plan and as a result of sickness or injury, becomes totally disabled, the Plan will pay biweekly benefits to the employee for the period of such disability. Such benefits are payable in an amount of sixty-five (65) percent of the employee's basic daily earnings at the date of disability. Benefits are payable from the first benefit day of any one continuous period of disability up to a maximum of one year (364 days) subject to the following:

(1) The "first benefit day" shall be the latter of:

(a) The thirty-first (31st) day if continuous disability;

(b) The date following the day that an employee exhausts all accumulated leave credits including annual leave, sick leave, sick pool leave and personal holiday leave.

* * *

(4) Plan benefits will be suspended at the employee's anniversary date and will recommence on the date following the day that an employee exhausts all accumulated leave credits including annual leave, sick leave, sick pool leave and personal holiday leave.

25. As to termination of coverage, Florida Administrative Code Rule 60P-9.009 provides as follows:

60P-9.009 Termination of Coverage.

The date of termination of coverage will be as follows:

(1) In the event of termination of employment, the employment termination date;

(2) In the event the employee requests to cancel coverage, the last day of the month in which the Department receives a signed waiver of coverage;

(3) In the event an employee terminates his or her position in Senior

Management or Select Exempt status but remains a state employee, the last day of the month for which premiums have been paid.

26. In this case, Petitioner may have been impaired but he was not completely unable to perform his duties on his last day of employment. On April 15, 2008, Petitioner had not exhausted all of his accumulated leave. After April 15, 2008, Petitioner was no longer an employee holding a salaried position. In any event, Petitioner's eligibility to receive future DISP benefits terminated on April 15, 2008, his employment termination date.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That Respondent enter a final order finding that Petitioner is not entitled to DISP benefits.

DONE AND ENTERED this 13th day of November, 2008, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of November, 2008.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.