

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE DEPARTMENT OF ADMINISTRATION**

IN THE MATTER OF:)
)
 J. A. A.) OAH No. 05-0631-PER
)
 _____)

DECISION AND ORDER

I. Introduction

J. A. A. filed an application for occupational disability benefits with the State of Alaska, Division of Retirement and Benefits.¹ On June 23, 2003, the division director denied Mr. A.’s application for the reason that his medical documentation does not show that he is “suffering from a presumably permanent disabling condition that can be objectively measured.”² On July 21, 2003, Mr. A. filed an appeal.³ A hearing calendared for April 2005 did not go forward because of illness. Following changes to the division’s statutes, Mr. A.’s appeal was referred to the Office of Administrative Hearings on August 18, 2005.⁴

The formal hearing was held on December 12-13, 2005; March 20-21, 2006; April 3, 2006; and June 13, 2006. Mr. A. was represented by his attorney, David R. Edgren, and the Division was represented by Assistant Attorney General Toby N. Steinberger. The hearing was recorded. Kay L. Howard, Administrative Law Judge, Alaska Office of Administrative Hearings, presided over the hearing. Based on the record as a whole and after due deliberation, the director’s decision denying Mr. A.’s application for occupational disability benefits is affirmed.

II. Facts

A. Background

Mr. A. is 51 years old.⁵ He first came to Alaska as a teenager in the early 1970’s.⁶ After arriving in the state he worked alternately in the fishing, construction and logging industries.⁷

¹ Mr. A. is not seeking non-occupational disability benefits. Exh. F at 1.

² Exh. L at 1.

³ Alaska Public Employee’s Retirement Board Notice of Appeal dated July 21, 2003.

⁴ Office of Administrative Hearings Case Referral Notice dated August 18, 2005.

Starting in July, 1983, he began a series of jobs that are eligible for State of Alaska benefits, including work for the following:

City and Borough of Juneau:	July 1983 – October 1985 ⁸
Alaska Department of Corrections:	January 1987 – July 1990 ⁹
State of Alaska:	August 1992 – September 1992 ¹⁰
University of Alaska:	August 1996 – November 1996 ¹¹
Alaska Department of Labor:	September 1998 – October 2001 ¹²

Mr. A. has thus worked in some benefits-eligible capacity for a total of over nine years. He has taken refunds from his Public Employees' Retirement System (PERS) account on three occasions, so when this appeal was initiated he had less than four years of credited employment. The record contains no evidence of Mr. A. working since he was terminated by the Alaska Department of Labor on October 31, 2001, following medical difficulties associated with back problems.

B. Mr. A.'s Injuries

Mr. A. has a history of back trouble that was first documented when he was in his early 30's. On or about June 29, 1988, while employed as a corrections officer for the State of Alaska, he injured his back while carrying a trunk of equipment for target practice.¹³ He was off work for several days.¹⁴ From June 29, 1988 through March 8, 1990, he was treated multiple times by a chiropractor for this injury.¹⁵ The next recorded incident occurred on December 7, 1993, while Mr. A. was working for the City of No Name.¹⁶ Mr. A. was attempting to move a dumpster at the No Name landfill which had been frozen to the ground when he "felt a snap" in his back and

⁵ Mr. A.'s date of birth is June 23, 1955.

⁶ Record of hearing, testimony of J. A.

⁷ *See id.*, Letter from Kristin S. Knudsen dated April 17, 2002.

⁸ Exh. M at 1, 6.

⁹ *Id.* at 1, 5.

¹⁰ *Id.* at 1, 4.

¹¹ *Id.* at 1, 3.

¹² *Id.* at 1, 2.

¹³ Exh. N at 036.

¹⁴ *Id.*

¹⁵ *Id.* at 005.

¹⁶ Mr. A. was the No Name fire department's emergency services director, but he also had a secondary job as a garbage collector. *Id.* at 025.

consequently sought medical attention.¹⁷ He was diagnosed as having a “low back & injured ligament strain,”¹⁸ but a subsequent examination after he moved to Ketchikan revealed he had two cracked vertebrae.¹⁹ A third injury occurred while Mr. A. was employed as a custodian by the University of Alaska in late 1996.²⁰ He was swinging a bag of books into a dumpster when his back was again injured.²¹ Mr. A. terminated his employment with the University because of several episodes of pain after lifting.²²

While living in Ketchikan in December 1996, Mr. A. began to seek regular medical attention for his “chronic back complaints.”²³ His physician, Dr. Bruce Schwartz, noted that Mr. A. reported he had “difficulties holding a job because of his back pain.”²⁴ Dr. Schwartz diagnosed Mr. A. with degenerative disk²⁵ disease at L5-S1, the fifth vertebrae of the lumbar segment of the spine and first vertebrae in the sacrum portion of the spine, with mild degenerative changes and probable herniated nucleus pulposus, L5-S1.²⁶ Dr. Schwartz’ notes from their initial visit surmised that Mr. A.’s present condition was a result of the injury he received at the landfill and was work-related.²⁷ Dr. Schwartz commented that “[t]his gentleman seems quite since [sic] and is very believable.”²⁸ Dr. Schwartz saw Mr. A. on at least 6 occasions between December 1996, and October 1997, treating him for back pain and on multiple occasions either authorizing time off of work or ordering that he perform only light-duty tasks while working.²⁹ On February 12, 1997, Mr. A. told the doctor he wanted to be retrained or have surgery. An MRI performed on May 30, 1997, confirmed the doctor’s diagnosis of

¹⁷ *Id.*

¹⁸ *Id.* at 030.

¹⁹ *Id.* at 034.

²⁰ Record of hearing, testimony of J. A.

²¹ *Id.*

²² *Id.* at 036.

²³ *Id.*

²⁴ *Id.*

²⁵ Other medical records quoted herein use “disc,” the alternate spelling of the word disk.

²⁶ Exh. N at 036-37.

²⁷ *Id.* at 037.

²⁸ *Id.*

²⁹ *See* Exh. N at 036, 042, 051, 073, 081, 083.

degenerative disc changes at L1-2, L4-5, and L5-S1, with a “small posterior disc protrusion” at L5-S1 that “is in contact with the left S1 nerve root.”³⁰

On June 23, 1997, Dr. Schwartz issued a letter stating that Mr. A.’s condition warranted a permanent impairment rating of 5%.³¹ On June 4, 1997, Dr. Schwartz cleared Mr. A. for medium duty work,³² but on August 19, 1997, he reduced the difficulty level to light duty in order to limit the number of pounds Mr. A. could lift at one time.³³

Mr. A. returned to No Name and began working at the A&P on July 17, 1997.³⁴ He was initially working in the deli, but experienced pain while having to bend over washing dishes for long periods of time; he was also lifting freight weighing up to 40 pounds.³⁵ On September 1, 1997, he suffered a back strain while bending over and lifting a box.³⁶ Dr. Schwartz released him for light duty work with a restriction on repetitive physical movements,³⁷ but Mr. A. was still complaining of severe pain more than one month later.³⁸

Mr. A. moved from Ketchikan to Juneau in early 1998, and he was first seen by Dr. John Bursell on April 27, 1998.³⁹ Dr. Bursell’s initial impression was that Mr. A.’s chronic low back pain was the result of work injuries and also was associated with degenerative disk disease.⁴⁰ He recommended that Mr. A. begin a program of vocational rehabilitation directed at attaining light duty employment.⁴¹ Between May 1998, and April 2000, Mr. A. attended physical therapy and engaged in a walking program. On November 25, 1998, Dr. Bursell also discussed lumbar fusion surgery with Mr. A., who said no to the proposal because he was recovering from abdominal surgery at the time.⁴² Mr. A. declined the surgical option again on July 1, 1999, but two months later he agreed to be referred to Dr. Jens Chapman, an orthopedic surgeon, for

³⁰ *Id.* at 066.

³¹ *Id.* at 074.

³² *Id.* at 073.

³³ *Id.* at 080.

³⁴ *Id.* at 081.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 083.

³⁹ *Id.* at 088.

⁴⁰ *Id.* at 090.

⁴¹ *Id.*

⁴² *Id.* at 104.

evaluation and consideration of surgery.⁴³ Mr. A. regularly began taking pain medication for his back in January 2000, after receiving a prescription for Vioxx and Tylenol #3.⁴⁴

Dr. Chapman evaluated Mr. A. on February 22, 2000. Dr. Chapman found:

significant degenerative disk disease at L5-S1 with essentially complete disk space collapse and significant foraminal stenosis, left worse than right. The patient also has moderately severe degenerative disk disease at L4-5, with disk desiccation, foraminal stenosis (this time on the right), and facet hypertrophy.^[45]

Dr. Chapman recommended an L4-S1 spinal fusion, but with the caveat that Mr. A. might not experience complete pain relief or that degenerative changes might progress higher up into his spine.⁴⁶ Mr. A. was informed at the time that there were no guarantees for relief of pain or specific symptoms of back pain, and that certain activities would probably always bother him. Dr. Chapman also told him that future disk surgery or fusions might be necessary.⁴⁷

Dr. Chapman performed a spinal fusion surgery on Mr. A. on April 24, 2000, at the University of Washington Medical Centers in Seattle.⁴⁸ Following surgery Mr. A. returned to Juneau, where Dr. Bursell continued to be his primary care physician. Mr. A.'s back showed some improvement after the surgery, but the back pain did not cease entirely and he experienced pain in his left leg.⁴⁹ He continued on pain medications and restarted physical therapy.⁵⁰ A September 12, 2000, letter from Dr. Bursell projected that upon achieving medical stability Mr. A. would have a permanent partial impairment rating of 14% using the American Medical Association Guides to the Evaluation of Permanent Impairment.⁵¹

Dr. Bursell authorized Mr. A. to return to half-time work with restrictions on May 25, 2000, then to return to full-time work on June 12, 2000.⁵² The record is unclear as to the extent to which Mr. A. worked between June 2000, and February 2001, but a physical therapist reported

⁴³ *Id.* at 113.

⁴⁴ A review of the record suggests that, in general, Mr. A. has been on increasingly larger doses of progressively more potent pain medications from January 2000 until the present. *Id.* at 114.

⁴⁵ *Id.* at 116.

⁴⁶ *Id.*

⁴⁷ *Id.* at 117.

⁴⁸ *Id.* at 170.

⁴⁹ *Id.* at 268.

⁵⁰ *Id.*

⁵¹ *See id.* at 272.

that Mr. A. had experienced “multiple lost days” of work.⁵³ Also, Dr. Bursell released him from work due to a “medical condition” from November 20, 2000 through November 23, 2000.⁵⁴

Mr. A. received the injury that gave rise to this appeal on February 12, 2001, while working for the Alaska Department of Labor as an Employment Security Specialist in the Juneau Call Center.⁵⁵ While seated, he was twisting and moving a file from a rolling file tub to his desk when he felt a sudden onset of low back pain.⁵⁶ The next day, Mr. A. saw Dr. Bursell, who assessed the situation as “increased low back pain, most likely related to the disk above his surgery.”⁵⁷ Mr. A. was also evaluated by physical therapist Sharon Buis on February 21, 2001. She wrote:

This 44 y.o. male presents with c/o constant low back and leg pain ongoing since and prior to his fusion in April '00. He reports intermittent episodes of his back "going out" with severe pain which can prevent him from working for several days. He has had multiple such incidents over the last four months. He reports an improved sense of stability in his back since his surgery, but little change in his pain. He has been through pre-and post-op therapy and reports only aggravation of his pain with resultant loss of work when he increases his activity through therapy. He reports ability to continue work only due to the benefit of his medications. He reports increasing frustration with his pain with increasing difficulty continuing work and dealing with his family due to the pain.^[58]

Mr. A. filled out a State of Alaska Report of Occupational Injury or Illness on February 26, 2001, in which he described how his injury occurred as follows:

Doing match up bent over the suspense tub turned to my left, felt a sharp back pain, then numbness in L leg & foot, hung on till the end of the day. Saw the doc next day.^[59]

The report of occupational injury Mr. A. completed also contained a section for his employer to fill out. Jason Hayes, the manager of the Juneau Call Center, wrote in the section asking for

⁵² *Id.* at 266-267.

⁵³ *Id.* at 277.

⁵⁴ *Id.* at 274.

⁵⁵ Appellant’s Hearing Brief at 2.

⁵⁶ *Id.*; *See also* Exh. N at 276.

⁵⁷ Exh. N at 276.

⁵⁸ *Id.* at 277.

⁵⁹ Exh. B.

details of the accident that [Mr. A.] “stated he aggravated a preexisting condition doing office work.”⁶⁰

Following his injury of February 12, 2001, Mr. A. was able to return to work and perform his duties, but with some limitations established by his doctor. On March 2, 2001, Dr. Bursell wrote a letter to Jason Hayes, the manager of the Juneau call center where Mr. A. worked. Dr. Bursell stated:

I have been working with J. A. regarding his back injury and subsequent spinal fusion. As a result of his injury and fusion, Mr. A. is limited in his functional activities. Specific physical limitations include lifting a maximum of 30 pounds, limited forward bending at the waist, and limited twisting of the lumbar spine.^[61]

Dr. Bursell’s letter to Mr. Hayes did not mention Mr. A.’s February 12, 2001, episode as an event of concern. Nor did the doctor’s chart notes on March 20, 2001, in which Dr. Bursell wrote that Mr. A. was “doing well” and had “been able to go to work and perform his work duties within the recommended limitations.”⁶² Indeed, Dr. Bursell’s chart notes of March 20th indicate:

Mr. A. comes in today in follow-up regarding his chronic low back pain. He reports he has been doing better since he stopped doing abdominal crushes [sic] for exercise. His back is improved. He still has a fair amount of pain and needs some pain medication for this. He takes 2-3 oxycodone 5 mg per day.^[63]

On March 27, 2001, Dr. Bursell completed a Certification of Health Care Provider for Mr. A.’s Family Medical Leave. He notes that Mr. A.’s chronic condition commenced with his “spinal fusion surgery 4/00,” and it would probably continue for Mr. A.’s lifetime.⁶⁴ The doctor confirmed that Mr. A. would need to be absent from work on an intermittent or part-time basis for treatment, possibly for up to 6-12 months.⁶⁵ However, Dr. Bursell denied that Mr. A. was

⁶⁰ *Id.*

⁶¹ Exh. N at 278.

⁶² *Id.* at 279.

⁶³ *Id.*

⁶⁴ *Id.* at 280.

⁶⁵ *Id.* at 281.

incapacitated, or that he would need to work on a reduced schedule. The doctor indicated Mr. A. was able to perform the essential functions of his job.⁶⁶

Mr. A. began to complain of neck and shoulder pain on April 13, 2001.⁶⁷ Dr. Bursell's notes indicate this was the "second bad episode of neck pain," with the first occurring while Mr. A. was at work in February, but there is no reference to him having neck pain either in the doctor's or the physical therapist's chart notes prior to April 2001.⁶⁸ On April 20, 2001, Mr. A. had telephone contact with Dr. Chapman's office in Seattle and reported he "[r]ecently did something to neck couple weeks ago."⁶⁹ They made arrangements for him to have cervical and lumbar x-rays taken before his consultation with Dr. Chapman the next week.⁷⁰ On April 23, 2001, Mr. A. had an office visit with Dr. Bursell, who concluded Mr. A.'s neck and upper extremity pain was "most likely secondary to intervertebral disk herniation."⁷¹

Mr. A. went to Dr. Chapman's office for a follow-up visit on April 26, 2001. Dr. Chapman wrote a letter to Dr. Bursell reporting the results of the appointment.⁷² Dr. Chapman said that Mr. A. complained of neck pain and lower left extremity numbness that began after a work incident he had several weeks prior, but the symptoms were improving and overall, Mr. A. was "doing well one year after his lumbar spine surgery."⁷³ Dr. Chapman informed Dr. Bursell that Mr. A. had good range of motion in his neck and that Mr. A. was advised intermittent episodes of numbness in the lower extremity are not catastrophic.⁷⁴ Mr. A. reported he was doing abdominal crunches for exercise with his physical therapist, but they were causing him pain, so he was advised not to do them.⁷⁵ Dr. Chapman endorsed a plan for Mr. A. to take a two or three-week leave of absence from work to exercise and wean himself off of narcotic pain

⁶⁶ *Id.* at 282.

⁶⁷ *Id.* at 284.

⁶⁸ *See id.* at 276-283.

⁶⁹ *Id.* at 286C.

⁷⁰ *Id.*

⁷¹ *Id.* at 286.

⁷² Although the letter to Dr. Bursell went out under Dr. Chapman's signature, Mr. A. evidently saw an orthopedics physician's assistant named Quynh Nguyen. During the hearing, Mr. A. complained that Dr. Chapman did not see him during that visit and opined it was because the doctor didn't want to know that his surgery on Mr. A. hadn't been successful. Record of hearing, testimony of Mr. A. *See, also*, R. at 286M.

⁷³ *Id.* at 286L.

⁷⁴ *Id.*

⁷⁵ *Id.*

medications, but the doctor would not consent to Mr. A.'s request to take a "continuous full time leave of absence for a home rehab program."⁷⁶

Mr. A. missed work on multiple occasions in April 2001. On June 15, 2001, Dr. Bursell wrote to Mr. A.'s immediate supervisor, M. F., indicating that the missed days were a result of the 2/12/2001 injury of that year.⁷⁷ During an appointment on June 18, 2001, Dr. Bursell's chart notes indicate:

[Mr. A.'s] current job has become very stressful. His supervisor is having more and more difficulty with his time off work. Also, when he is at work, he finds that he has to basically stay in his chair the entire shift and that does not allow him to get up and walk around and stretch like he needs to to control his back pain symptoms.^[78]

In July 2001, Dr. Bursell began to discuss with Mr. A. the possibility that he would not be able to return to work, and that he may have to apply for disability.⁷⁹ Mr. A. began a two-month long medical leave on July 17, 2001.⁸⁰ Dr. Bursell sent a letter to his employer on August 15, 2001, stating he recommended that Mr. A. "not return to work and pursue a medical retirement as I think it is unlikely he will be able to return to his work in any consistent and full-time manner."⁸¹

On September 21, 2001, the manager of the Juneau employment security call center, Jason Hayes, wrote to Mr. A. The letter informed Mr. A. that he had been on continuous medical leave for two months and had no leave balances remaining. Mr. Hayes indicated he had received Dr. Bursell's letter recommending that Mr. A. not return to work and instead pursue a medical retirement. Mr. Hayes requested that Mr. A. contact him no later than October 3, 2001, to discuss whether he would be returning to work. Finally, Mr. Hayes wrote:

If you are able and intend to return to work, you are required to provide a certification from your doctor stating that you are medically able to return to work on a regularly attended full-time basis. If you can not return to work by that time, you must be

⁷⁶ *Id.*

⁷⁷ *See id.* at 287, 305.

⁷⁸ *Id.* at 289.

⁷⁹ *See id.* at 298, 302, 307.

⁸⁰ Exh. E.

⁸¹ Exh. N at 309.

prepared to present a reasonable plan for your return to work. Failure to comply with these requirements will likely result in your separation from State service.^[82]

Mr. A. replied to Jason Hayes' letter by email. Mr. A. wrote that he was unable to work, but he had not given up the hope that he would be able to return to work someday.⁸³ He stated he had applied for occupational disability and asked Mr. Hayes to hold his job open until he learned whether he qualified for disability.⁸⁴

Mr. Hayes responded on October 16, 2001, informing Mr. A. he had exhausted all of his accrued leave and unpaid leave under the state and federal family and medical leave laws. Mr. Hayes stated that as a result, and because of Mr. A.'s inability to return to work as documented in Dr. Bursell's letter, he would be terminated from his position as an Employment Security Specialist with the Juneau UI Call Center, effective October 31, 2001.⁸⁵

Mr. A. eventually moved to No Name, Idaho, in hopes that the climate would be more conducive to his recovery. In July, 2002, he began seeing Dr. Mark A. Hernandez, who indicated agreement (with Dr. Bursell) that Mr. A. probably would not be able to return to the workforce.⁸⁶ In June 2003, he again moved in search of a better climate, this time to No Name, Utah.⁸⁷ When the summer in Utah proved too hot, Mr. A. moved to No Name, California.⁸⁸

C. Mr. A.'s Application for Disability

Mr. A. filed an application for occupational disability benefits with the Division of Retirement and Benefits on September 24, 2001.⁸⁹ On his application he described the nature of his disability as:

Severe pain + numbness, Neck, back, L arm and hand, fingers /
Lower back, hips, legs, feet + toes, stabbing pain, weakness, numb,
can't stand at times and cant sit, sometimes all I can do is scream

and stated that the cause of his disability was the February, 2001, back injury.⁹⁰

⁸² Exh. E.

⁸³ Exh. G.

⁸⁴ *Id.*

⁸⁵ Exh. H at 1.

⁸⁶ *See id.* at 339.

⁸⁷ Appellant's Hearing Brief at 3.

⁸⁸ *Id.*

⁸⁹ Exh. F.

Jason Hayes prepared a Supervisor's Statement of Disability dated August 30, 2001.⁹¹ Mr. Hayes stated that Mr. A.'s work station had been evaluated and adjusted by ergonomic specialists, that all of Mr. A.'s requests for time to take breaks to stand, stretch, or walk, had been met, and that his supervisor had limited the necessity for him to work on the rolling file cabinets.⁹² Additionally, he said that Mr. A. had made no requests for accommodations under the Americans with Disabilities Act.⁹³

D. Independent Medical Examination of Mr. A.

An independent medical examination (IME) of Mr. A. was conducted for purposes of evaluating a workers' compensation claim independent of this appeal. The IME was performed on April 25, 2002, by Dr. David M. Chaplin, an orthopedic surgeon, who reviewed Mr. A.'s medical history, examined him and evaluated his condition.⁹⁴

Mr. A. reported to Dr. Chaplin that as a result of his injury on February 12, 2001, he had severe pain "bilaterally in his low back and into his left leg."⁹⁵ He said he took about two weeks off after the incident, returned to work until July 25, 2001, and hadn't worked since then.⁹⁶ Mr. A. told Dr. Chaplin his back pain had both worsened and improved spontaneously since July 2001, but even so, he couldn't do much of anything.⁹⁷ Mr. A. said he couldn't walk more than a quarter mile, couldn't stand more than 1½ minutes and couldn't sit more than 15 minutes at a time.⁹⁸

Mr. A. further told Dr. Chaplin he had "burning, stabbing, shooting, aching" bilateral back pain that moved around on its own and was never in the same place.⁹⁹ Mr. A. described his pain level as ranging, on a scale of one to ten, between four or five on a good day to nine or ten

⁹⁰ *Id.*

⁹¹ Exh. D at 1. These dates are somewhat confusing: Mr. A. signed his application for disability on 8/5/01, but it was not filed with the department until 9/24/01. Perhaps it was first shown to Jason Hayes, who prepared his report before Mr. A. filed the application.

⁹² *Id.* at 2.

⁹³ *Id.*

⁹⁴ Exh. K.

⁹⁵ *Id.* at 2.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Dr. Chaplin noted that Mr. A. sat for longer than 30 minutes with no apparent discomfort while the doctor took his medical history. *Id.*

⁹⁹ *Id.*

on the worst days.¹⁰⁰ At those times, Mr. A. said he couldn't move or get out of his chair.¹⁰¹ In addition to having back pain, Mr. A. told Dr. Chaplin he had pain and numbness in both legs and "burning, numbness, shooting and stabbing" pain in his left arm and hand that originated from his shoulders, and occasional neck pain, mostly on the left.¹⁰²

When the doctor asked Mr. A. how he hurt his back, he replied it was from three back injuries he received in 1993, 1996 and 1997.¹⁰³ Mr. A. also told Dr. Chaplin that the spinal fusion he had in April 2000 "was of no help" because it was not performed well and he had been "way worse" since then.¹⁰⁴

After taking Mr. A.'s medical history, Dr. Chaplin performed a thorough physical examination of him and reviewed all of his medical records. Dr. Chaplin concluded Mr. A. has "[d]egenerative disc disease lumbar spine with prior decompression and fusion, L3 to S1, predating the injury of 2-12-01."¹⁰⁵ In response to specific written questions regarding whether Mr. A.'s February 12, 2001, injury at work contributed to his medical condition, Dr. Chaplin concluded that "[t]he exacerbation of back pain putting a file in a rolling file tub was not a substantial factor in bringing about [Mr. A.'s] current condition."¹⁰⁶ Dr. Chaplin added:

"Mr. A. does not have any evidence of pathology that can explain his multiple ongoing symptoms and there is no specific treatment that would guarantee his participation in future gainful employment. However, there is no specific physical problem that would prevent return to gainful employment. However, with the presence of a fusion in his lumbar spine, he should avoid lifting over 50 pounds and not be required to perform prolonged bending and stooping."¹⁰⁷

As to the possible treatment options Mr. A. might consider in order to improve his condition, Dr. Chaplin indicated:

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 3.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 7.

¹⁰⁶ *Id.* at 9.

¹⁰⁷ *Id.* at 8.

Mr. A. is not undertaking specific treatment at this time other than continued narcotic use. He does not appear to be actively seeking to recover from his illness and has no plans to return to work.^[108]

Dr. Chaplin indicated Mr. A.'s limitations in terms of his activities should be considered permanent,¹⁰⁹ but he did not agree that Mr. A. was unable to work. Rather, Dr. Chaplin found that "Mr. A. is physically fit to work in an office setting using computerized equipment with accommodations for alternately sitting and standing."¹¹⁰ Dr. Chaplin had no treatment recommendations for Mr. A.

An additional review of Mr. A.'s medical records, including files from Dr. Bursell and the independent medical examination, was conducted for purposes of this appeal by Dr. Kim C. Smith in May, 2003.¹¹¹ Dr. Smith concurred with the independent medical examination's findings and recommended against granting Mr. A. either occupational or non-occupational disability.¹¹²

The Division of Retirement and Benefits denied Mr. A.'s application for occupational disability on June 23, 2003.¹¹³ The reason for the denial was that Mr. A. could not show that he was suffering from a presumably permanent disabling condition, thus disqualifying him for either occupational or non-occupational disability.¹¹⁴ On July 21, 2003, Mr. A. filed this appeal. His appeal was forwarded to the Office of Administrative Hearings on August 18, 2005.

III. Discussion

The provisions of AS 39.35.410(a) determine whether a PERS member is eligible for occupational disability benefits. The statute provides:

An employee is eligible for an occupational disability benefit if employment is terminated because of a total and apparently permanent occupational disability, as defined in AS 39.35.680, before the employee's normal retirement date.

The term "occupational disability" is defined in AS 39.35.680(26), which states:

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 9.

¹¹¹ Exh. O at 1.

¹¹² *Id.* at 2.

¹¹³ Exh. L at 1.

¹¹⁴ *Id.* at 1-2.

(26) "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; 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[.]

The employee has the burden of proving by a preponderance of the evidence that the elements of the statute have been met.¹¹⁵ Thus, Mr. A. must show that (1) he was terminated because of a disability (2) that presumably permanently prevents him from satisfactorily performing his usual or comparable work duties and (3) his work injuries were a substantial factor in bringing about his disability.¹¹⁶

A. Mr. A. Was Terminated Because of His Medical Condition

Mr. A. first must show that he was terminated from his position at the employment security office "because of" an occupational disability. In the case of *Stalaker v. M.L.D.*,¹¹⁷ the Alaska Supreme Court set out the criteria for determining whether a PERS claimant was terminated because of a claimed disability. The claimant in *M.L.D.* was the police chief in a small Bush community. During an authorized trip to Anchorage for a dental appointment, M.L.D. was hospitalized for severe depression brought on by work-related stress. He was terminated from his employment after he failed to return to work upon the expiration of his leave of absence.¹¹⁸ The court found that M.L.D.'s disability caused his termination because it was his disability that prevented him from returning and his failure to return to work was the event that triggered his termination.¹¹⁹

In reaching its decision in *M.L.D.*, the court held that the tort law theory of "legal causation" should be used to determine whether the "because of" requirement in the statute has

¹¹⁵ *Rhines v. State*, 30 P.3d 621, 628 (Alaska 2001), citing *Stalaker v. Williams*, 960 P.2d 590, 594 (Alaska 1998); see also AS 44.62.460(e)(2).

¹¹⁶ See *Cacioppo v. State*, 813 P.2d 679 (Alaska 1991).

¹¹⁷ 939 P.2d 407 (Alaska 1997).

¹¹⁸ *Id.* at 410.

¹¹⁹ *Id.* at 411-412.

been satisfied in PERS occupational disability cases.¹²⁰ It is a two-part test. The first inquiry is a “but for” prong that looks at whether the claimant’s disability is an actual cause of the termination.¹²¹ The second part considers the “proximate cause” or, legal policy prong. If the disability is found to be an actual cause of the termination, the legal policy inquiry determines the significance and importance of the disability’s role in the termination and whether to assign legal responsibility.¹²²

Mr. A. has established that he was terminated because of his medical condition. Mr. A. began a two-month long medical leave of absence on July 17, 2001. One month later, Dr. Bursell sent a letter to Mr. A.'s employer stating he did not believe Mr. A. would be able to return to full-time work, so he should instead pursue a medical retirement. At the end of Mr. A.'s leave, Jason Hayes, the manager of the Juneau Call Center, wrote to Mr. A. to discuss his circumstances and inquire whether he would be returning to work. Mr. Hayes informed Mr. A. that if he intended to return, he would need to be certified to do so by a doctor, but if he could not return and could not present a reasonable plan for his return, he would likely be separated from State service.

Mr. A. responded by email that he was unable to work, but also that he had not given up the hope that someday he would be able to return to his job. He asked Mr. Hayes to hold his job open until he learned whether he qualified for occupational disability.

Mr. Hayes wrote back to Mr. A. on October 16, 2001, informing him that because he had exhausted all of his accrued leave and unpaid leave under the state and federal family and medical leave laws, and because he was unable to return to work, he would be terminated from his job as an Employment Security Specialist, effective October 31, 2001.¹²³

Mr. A.'s situation is comparable to M.L.D.'s in that his failure to return to work at the Juneau Call Center was the event that prompted his termination. He was terminated because he was unable to work due to his back pain, he had used all of his leave time and his employer was unable to keep his job open or restructure it for him. Had Mr. A. been able to work or had he

¹²⁰ *Id.* at 412.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Exh. H at 1.

indicated he would return to work in a reasonable about of time, he would not have been terminated.¹²⁴

B. Mr. A. Does Not Have a Disability that Presumably Permanently Prevents Him from Satisfactorily Performing His Usual or Comparable Work Duties

1. Mr. A.'s medical condition is presumably permanent

Mr. A. must prove by a preponderance of the evidence that his condition is presumably permanent, meaning that it is more likely than not permanent.¹²⁵ Mr. A. has met this statutory requirement, as shown through the medical opinions of three doctors who examined him.

First, when Dr. Chapman initially evaluated Mr. A. for back surgery in February 2000, the doctor recommended a spinal fusion, but he told Mr. A. that he might not experience complete pain relief and that degenerative changes could occur higher up in his spine.¹²⁶ Mr. A. was informed that there were no guarantees for pain relief, and that certain activities would probably always bother him. Dr Chapman also told him that future disk surgery or fusions might be necessary.¹²⁷

Second, during the summer after Mr. A.'s injury of February 12, 2001, Dr. Bursell came to the conclusion that Mr. A.'s condition had become permanent. In July 2001, Dr. Bursell initiated a conversation with Mr. A. regarding his ability to return to work and whether he should apply for disability.¹²⁸ After Mr. A. took a two-month long medical leave, Dr. Bursell recommended in a letter to the Department of Labor on August 15, 2001, that Mr. A. "not return to work and pursue a medical retirement as I think it is unlikely he will be able to return to his work in any consistent and full-time manner."¹²⁹

Finally, Dr. Chaplin's evaluation of Mr. A. indicates his condition is permanent. Although after the independent medical examination, Dr. Chaplin disagreed as to the nature and

¹²⁴ During the hearing, Mr. A. suggested Jason Hayes had bad feelings about him and these feelings were somehow connected to his termination. Ironically, had the evidence borne this out, the causal link between Mr. A.'s disability and his termination would have weakened his case even more.

¹²⁵ *Stalnaker v. Williams*, 960 P.2d 590 (Alaska 1998).

¹²⁶ Exh. N at 116.

¹²⁷ *Id.* at 117.

¹²⁸ *See* Exh. N at 298, 302, 307.

¹²⁹ *Id.* at 309.

origin of Mr. A.'s back problems, he did concede that the limitations placed on Mr. A.'s activities, such as not lifting over 50 pounds, likely would be permanent in nature.¹³⁰

2. Mr. A.'s condition does not prevent him from satisfactorily performing his usual or comparable work duties

Mr. A. did not meet his burden of proving he is incapable of satisfactorily performing his usual or comparable work duties. On the contrary, the evidence in this appeal shows it is more likely than not that Mr. A. is able to satisfactorily perform his usual or comparable work duties. In a Certification of Health Care Provider Dr. Bursell completed just six weeks after Mr. A.'s February 12, 2001, work injury, the doctor reported that Mr. A. has a chronic condition that commenced with his spinal fusion surgery in April 2000. Dr. Bursell rejected the notion that Mr. A. was incapacitated, or that he would need to work on a reduced schedule. The doctor specifically indicated Mr. A. was able to perform the essential functions of his job.¹³¹ By August 2001, Dr. Bursell was leaning toward medical retirement for Mr. A., but this recommendation came after Mr. A. told the doctor he had to stay in his chair all day and was not able to get up, stretch and move around at all.¹³² The information Mr. A. gave Dr. Bursell is not consistent with Jason Hayes' testimony and written report that he had Mr. A.'s work station adjusted ergonomically and also had accommodated Mr. A.'s request to take breaks throughout the work day for the purpose of getting up, stretching and moving around.¹³³

Dr. Chaplin also concluded Mr. A.'s condition did not prevent him from satisfactorily performing his usual or comparable work duties. During the IME in April 2002, Mr. A. complained that he was unable to sit for more than 15 minutes at a time, but during the medical history portion of the exam, Dr. Chaplin observed Mr. A. sitting for over 30 minutes "with no apparent discomfort."¹³⁴ Dr. Chaplin found Mr. A. was physically fit to work in an office setting using computers, so long as he had accommodations for alternately sitting and standing during the work day.

¹³⁰ Exh. K at 8.

¹³¹ See Exh. N at 282.

¹³² See Exh. N at 289.

¹³³ See Exh. D.

¹³⁴ Exh. K at 9.

C. Mr. A.'s Work Injuries Were Not the Proximate Cause of His Disability

In a PERS occupational disability case, an applicant must prove “proximate cause,” the question whether the injury that occurred in the course of a person’s employment caused the person’s disability. In order to establish proximate cause, the applicant must show that the occupational injury is a “substantial factor” in the employee’s disability.¹³⁵ Mr. A. has not met his burden of proving that his occupational injury on February 12, 2001, was a “substantial factor” in his disability.

After a comprehensive independent medical examination, Dr. David M. Chaplin, a board-certified orthopedic surgeon, concluded that Mr. A.’s injury on February 12, 2001, was not a substantial factor in bringing about his current condition, but rather, it was merely an exacerbation of back pain that resolved thereafter. Dr. Chaplin determined, from his thorough examination of Mr. A. and his medical records, that Mr. A.’s back problems preexisted his employment, and that they were merely the natural result of his three previous work injuries and his April 2000 spinal fusion. Moreover, Dr. Chaplin added that there was no evidence of pathology or a specific physical problem that would prevent Mr. A. from returning to gainful employment.

Dr. Chaplin’s conclusions about Mr. A.’s physical condition are persuasive and consistent with the evidence in the record that shows Mr. A. has a lengthy history of substantial back problems that predate February 12, 2001, and that his injury on that date was a minor flare-up that resolved itself to baseline levels soon thereafter. His documented injuries began in the late 1980’s, when he injured his back while carrying a trunk of equipment. He was off work as a corrections officer for several days and subsequently was treated numerous times by a chiropractor. Mr. A. had more serious injuries in later years. In 1993, while working for the City of No Name, he felt a snap in his back while trying to move a dumpster that was frozen to the ground. Initially he was found to have a low back and ligament strain, but a subsequent examination revealed he also had two cracked vertebrae. Similarly, in 1996, Mr. A. injured his back while swinging a bag of books into a dumpster on the UAA campus. He thereafter left his job at the university because of recurring back pain when he lifted objects.

¹³⁵ *State, Public Employees Retirement Bd. v. Cacioppo*, 813 P.2d 679 (Alaska 1991).

By December 1996, Mr. A. was seeking medical treatment for chronic back complaints. He reported to Dr. Bruce Schwartz he had difficulties holding a job because of his back pain. Dr. Schwartz diagnosed Mr. A. as having degenerative disk disease as a result of his back injury at the No Name landfill.¹³⁶ Dr. Schwartz authorized time off for Mr. A. and limited him to light duty work. As early as February 12, 1997, Mr. A. was requesting either surgery or retraining. Throughout 1997, Mr. A. continued to have back pain and duty restrictions limiting the extent of his physical activities at work.

Mr. A. was seen by Dr. Bursell for the first time in April 1998. The doctor confirmed Dr. Schwartz' earlier diagnosis of degenerative disc disease and concluded it was the result of Mr. A.'s previous work injuries. Later in 1998, Mr. A. rejected Dr. Bursell's recommendation that he have a lumbar fusion surgery, so the doctor treated Mr. A. for the next two years with physical therapy and exercise programs. Mr. A. finally agreed to have a spinal fusion in early 2000. While evaluating him for the surgery, Dr. Jens Chapman determined he had "significant" degenerative disc disease at L5-S1 with complete disc space collapse, and "moderately severe" degenerative disc disease at L4-5.¹³⁷ Dr. Chapman informed Mr. A. he might continue to have pain after the surgery and that degenerative disc changes might progress up his spine. Dr. Chapman performed the surgery on April 24, 2000, but even though Mr. A. improved somewhat, his back pain was not eliminated entirely. Mr. A. returned to full-time work at the Juneau Call Center within two months, but he continued to use pain medications in higher doses and physical therapy exercise programs. Mr. A. missed multiple days of work between June 2000 and February 12, 2001, the date of the injury that gave rise to this appeal.

Mr. A.'s medical records are voluminous. Yet there is scant evidence in the record to support Mr. A.'s claim his disability was caused by his injury at work on February 12, 2001. The primary reference is a June 2001, report to Mr. A.'s employer in which Dr. Bursell stated the February injury was the reason for Mr. A.'s work absences. But this document appears to be the only time Dr. Bursell made a contemporaneous causal link between Mr. A.'s February 2001 work injury and his disability. At other times, Dr. Bursell did not consider the February event to be a significant problem. For example, six weeks after Mr. A.'s February 12, 2001, injury, Dr. Bursell wrote in his chart notes that Mr. A. was doing well – improving, in fact – and that he had

¹³⁶ An MRI conducted on May 30, 1997, verified the doctor's diagnosis. *See* Exh. N at 66.

been able to go to work and perform his work duties within the limitations the doctor had given him.¹³⁷ Similarly, just one week later, Dr. Bursell noted while completing a health care provider certification that Mr. A.'s chronic condition commenced with the spinal fusion surgery he had in April 2000. Dr. Bursell did not mention the February 12, 2001, event as a causative factor in Mr. A.'s medical condition.

IV. Conclusion

Mr. A. failed to meet his burden of proving by a preponderance of the evidence that he was terminated because of a disability that presumably permanently prevents him from satisfactorily performing his usual or comparable work duties and that his work injuries were a substantial factor in bringing about his medical condition. Rather, more likely than not, Mr. A.'s medical condition does not prevent him from satisfactorily performing his usual or comparable work duties at the Alaska Department of Labor and this condition was not caused by performing his duties at the Alaska Department of Labor, it was caused by previous injuries, degenerative disc disease and problems resulting from spinal fusion surgery he had in April 2000. Mr. A. is thus not entitled to occupational disability benefits.

V. Order

- The Administrator's denial of Mr. A.'s application for occupational disability benefits is AFFIRMED.

DATED this 13th day of November, 2006.

By: Signed
Kay L. Howard
Administrative Law Judge

¹³⁷ *Id.* at 116.

¹³⁸ Dr. Bursell noted one of the reasons Mr. A. was doing better was because he had stopped doing abdominal crunches as part of his exercise routine.

Adoption

This Order is issued under the authority of AS 39.35.006. 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 Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 19th day of December, 2006.

By: Signed
Signature
Kay L. Howard
Name
Administrative Law Judge
Title

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