

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

IN THE MATTER OF:)

J. L. T.)

) OAH No. 05-0777-PER
) Div. R & B No. 2005-005

DECISION AND ORDER

I. Introduction

J. L. T. filed an application for disability retirement benefits with the State of Alaska, Division of Retirement and Benefits. On September 2, 2005, the system administrator denied Mr. T.'s application for the reason that he does not suffer from a presumably permanent disabling condition caused by a work injury. On September 29, 2005, Mr. T. filed an appeal. The appeal was referred to the Office of Administrative Hearings on November 21, 2005.

The formal hearing was held on January 31, 2006 through February 2, 2006. Mr. T. appeared in person and represented himself. Sarah J. Felix, counsel for the Division of Retirement and Benefits, participated by telephone from Juneau. The hearing was recorded.

Kay L. Howard, Administrative Law Judge in the Alaska Office of Administrative Hearings, presided over the hearing. Having reviewed the record in this case and after due deliberation, I have concluded that the decision of the system administrator denying Mr. T.'s application for disability retirement benefits should be affirmed.

II. Facts

A. Background

Mr. T. is a 42-year old man who holds a Bachelor of Science degree in human services, and is trained as a paramedic and firefighter.¹ In addition, he is a certified diver and former private pilot.

Mr. T. spent approximately 12 years in the U.S. military as a paratrooper.² He made between 700 and 1,000 jumps during his career, and also participated in search and rescue missions, scuba diving, and mountain climbing.³ The job required a significant amount of heavy

¹ *Id.*

² T. hearing testimony.

³ *Id.*

lifting of both equipment and people. Mr. T. reported he received a whiplash from the pendulum effect of the parachute opening every time he was on a jump, but he never had to seek medical attention for a whiplash injury.⁴

During a 1993 parachute jump, Mr. T. suffered a serious injury to his left knee, which required reconstruction of the left anterior cruciate ligament⁵, also known as an ACL reconstruction, and of the left posterior cruciate ligament⁶, also known as a PCL reconstruction, and subsequent physical therapy. Mr. T. returned to full duty as a paratrooper after the surgery. Mr. T. also received a pinched nerve in the thoracic area of his back in 1992, but there is no information in the record regarding the seriousness or outcome of that injury.⁷

Mr. T. receives Veteran's Administration disability benefits for a 40% service-related disability, 20% of which is based on the left knee injury and subsequent ACL reconstruction, and 20% of which is related to scarring on his left knee.⁸

Mr. T.'s most recent employment prior to this appeal was with the Municipality of Anchorage, where he worked as a paramedic and firefighter from March 20, 2000, through November 28, 2005, a period of over 5½ years.⁹ In order to obtain his job as a paramedic/firefighter, Mr. T. had to pass a physical agility test and pre-employment physical.¹⁰ The physical agility test includes a ladder race, hose drag and lift, and carrying victims and equipment.¹¹

While working at the municipality, Mr. T.'s duties included responding to emergency calls, comforting, examining, treating, caring for and transporting sick and injured patients; combating, extinguishing, and preventing fires; apparatus and station maintenance; professional training and study; standby activities such as physical training and regular exercise, sleeping, and

⁴ *Id.*

⁵ *Id.*

⁶ Exh. A at pg. 2.

⁷ T. hearing testimony.

⁸ *Id.*

⁹ Exh. E at pg. 2.

¹⁰ T. hearing testimony.

¹¹ M. G. hearing testimony.

meals.¹² Other miscellaneous duties involving the community included public education, station tours, school programs and research projects.¹³

B. Mr. T.'s Injuries

The focus of this appeal is on four injuries Mr. T. received during the course of his employment with the fire department.¹⁴ Those injuries are discussed as follows:

1. June 2, 2004:

Mr. T. was running on a treadmill as part of his exercise program at work. He does not know exactly how it happened, but essentially he fell off the treadmill to the right and up against a cabinet. He experienced sharp pain in both knees and also injuries to his head, neck, right shoulder and right hip. Mr. T.'s head injury cleared up, but he continued to have headaches, which he believed originated from the neck area.¹⁵ Although he felt more pain in the left knee, it settled down fairly quickly. However, his right knee took approximately 1½ weeks to improve somewhat to a point at which it plateaued and has continued to give him problems. He reported “intermittent swelling and snapping involving the right knee while attempting to run.”¹⁶

2. October 6, 2004:

While putting his gear on a fire truck, Mr. T. experienced upper and lower back pain, which worsened when he was involved in lifting a heavy patient later that day. Mr. T. had to perform a lift and turn technique for the patient without assistance from another paramedic because of the limited space available. He experienced immediate upper and lower back pain and by the following morning could not get out of bed.¹⁷

3. December 5, 2004:

Mr. T. was riding as a passenger in the Battalion Chief's vehicle, which was rear-ended at a low speed. Mr. T. was restrained by both the chest restraint and lap belt portion of the seatbelt, but he reported experiencing pain in his spine all the way down to his heels.¹⁸ There was no

¹² Exh. D at pg. 3.

¹³ *Id.*

¹⁴ Beginning on October 4, 2001, Mr. T. experienced a total of seven injuries that were reported during his employment with the municipality. Exh. A at pg. 2. This appeal involves the last four injuries that occurred during the period from June 2, 2004 through February 19, 2005.

¹⁵ Exh. A at pg. 3.

¹⁶ *Id.*

¹⁷ Exh. A at pg. 3.

¹⁸ *Id.*

identifiable damage on the vehicle and no repairs were necessary.¹⁹ His chief did not observe that Mr. T. was injured²⁰, but Mr. T. believes this particular episode significantly exacerbated the pain in his low back.²¹

4. February 19, 2005:

While walking across the parking lot at work, Mr. T. injured his back from slipping on the ice that had not been sanded. He was using a walking stick, which he used to prevent himself from falling down.

The record is incomplete regarding the exact times when Mr. T. was off work in 2004 due to these injuries. The only document available consists of a portion of an employee earnings spreadsheet showing Mr. T.'s pay status, hours, rate of pay and amount paid for the period from February 17, 2005 through November 28, 2005.²² It is clear, however, from casual references in the record that Mr. T. was off work on several occasions in 2004; Dr. McGuire also put him on light-duty work.²³ He was apparently working a light duty shift in December 2004 when he was involved in the motor vehicle accident in the Battalion Chief's vehicle, as travel with the Chief is described as one of the duties in a light duty shift.²⁴

C. Medical Treatment

The medical records Mr. T. provided indicate he was seen by Dr. Scott Kiester, D.O., twice in June 2004, three times in October 2004, five times in November 2004, once in December 2004, three times in January 2005, and once in February 2005. Dr. Kiester noted that swimming helped Mr. T., so he recommended an exercise program. He also referred Mr. T. to specialists for consultation and evaluation, as he felt they could best address Mr. T.'s ability-to-work issues. Dr. Kiester also prescribed physical therapy and swimming and limited Mr. T.'s lifting to 20 pounds.²⁵

¹⁹ *Id.*

²⁰ Exh. G at pg. 1.

²¹ *Id.*

²² Exh. H. Ironically, the document is titled "T. Earnings 2002-2005."

²³ Exh. C. at pg. 1.

²⁴ *See, for example*, Exh. F at pg. 1.

²⁵ R. (Record) at 94-119.

Mr. T. had MRI studies of his knees taken on June 14, 2004. The left knee indicated a prior ACL reconstruction and arthritis, and the right knee showed a small horizontal meniscus tear, which is a degenerative condition.²⁶

Also on June 14, 2004, Mr. T. was seen by Dr. David McGuire who diagnosed him as having subluxing patella of both knees and posterior cruciate ligament (PCL) insufficiency. He recommended conservative treatment with restriction of Mr. T.'s activities and an exercise program. Dr. McGuire also suggested Mr. T. consider the option of an arthroscopy and possible PCL reconstruction of his left knee.²⁷

Mr. T. also was treated by Dr. Tim Kanady, a chiropractor, ten times in November 2004, and seven times in December 2004. Dr. Kanady completed a physician's statement that said Mr. T.'s complaints would significantly restrict his job performance.²⁸ Mr. T. was treated by another chiropractor, Dr. Tom DeSalvo, once in December 2004, fifteen times in January 2005 and eight times in February 2005. Dr. DeSalvo's opinion was that Mr. T. could not carry out the normal functions of his job.²⁹

On January 25, 2005, Mr. T. was seen in Dr. McGuire's office by Dr. Ross Brudenell for a determination of permanent partial impairment ratings for his left knee, as result of the injury of May 24, 2004, and for his right knee, based on the injury of June 2, 2004. Dr. Brudenell determined Mr. T. had a 5% permanent partial impairment rating for his left knee, and a total permanent partial impairment rating of 7% of the whole person for both knees.³⁰

Mr. T. also visited Dr. Louis Kralick, a neurological surgeon, of the Advanced Pain Centers of Alaska, on December 28, 2004, and again on January 26, 2005. Dr. Kralick determined from his inspection of Mr. T.'s MRIs that he had degenerative disc disease at C5-6 and C6-7.³¹ Dr. Kralick recommended that Mr. T. have physical therapy and epidural steroid injections in his cervical and lumbar regions in order to improve his symptomology.³²

²⁶ R. at 117-118.

²⁷ R. at 92.

²⁸ R. at 169-198.

²⁹ R. at 121-167.

³⁰ R. at 91.

³¹ R. at 78, 83-84.

³² R. at 80.

On February 7, 2005, Mr. T. consulted with Dr. Davis Peterson, an orthopedist, who also diagnosed him as having degenerative disc disease.³³ Dr. Peterson suggested that instead of surgery, Mr. T. work with a rehab specialist and monitor his condition for improvement.

D. Independent Medical Examinations

Mr. T. filed workers compensation claims regarding all of the above injuries, and all of the claims were controverted.³⁴ As requested by his worker's compensation carrier, Mr. T. was seen for two Independent Medical Examinations (IME) by Steven J. Schilperoort, MD.³⁵ Dr. Schilperoort conducted comprehensive physical exams of Mr. T. in addition to oral interviews. For the first IME, Mr. T. provided Dr. Schilperoort with the incident reports for each injury, plus hospital records and medical records from Dr. Kiester, Dr. McGuire, and Dr. Kralick.³⁶

1. IME -- January 25, 2005

The physical examination involved an inspection of Mr. T.'s posture and gait and numerous physical tests including heel and toe walking, hopping and squatting.³⁷ Dr. Schilperoort examined Mr. T.'s cervical and thoracic spine areas and upper extremities and performed range of motion tests of the cervical spine and shoulders.³⁸ He also conducted motor strength tests of Mr. T.'s upper extremities. Dr. Schilperoort examined and tested the lumbar spine area for muscle spasms and tenderness and conducted range of motion tests of the lumbar spine and hips.³⁹ Dr. Schilperoort conducted numerous tests of Mr. T.'s legs including hip rotation, sitting and standing leg raising, deep tendon reflex tests of the knees and ankles, and range of motion and alignment tests.⁴⁰ He also conducted detailed tests on each knee involving stress and stability testing.⁴¹

³³ R. at 86-88.

³⁴ R. at 207, 214, 218.

³⁵ Dr. Schilperoort is certified by the American Board of Independent Medical Examiners, and the American Academy of Orthopedic Surgery. Exh. J. He graduated from medical school in 1974 and completed his residency in orthopedics in 1978. *Id.* From 1979 through 1997, Dr. Schilperoort was an orthopedic surgeon at Kaiser Permanente. *Id.* Dr. Schilperoort testified that after contracting hepatitis C, he became unable to perform orthopedic surgery because of the extreme fatigue associated with the disease. However, he has had an active practice as an independent medical consultant since 1997. *Id.*

³⁶ Exh. A at pgs. 1-2.

³⁷ Exh. A at pg. 18.

³⁸ Exh. A at pgs. 18-19.

³⁹ Exh. A at pg. 19.

⁴⁰ Exh. A at pg. 20.

⁴¹ Exh. A at pg. 21.

As a result of his examinations, Dr. Schilperoort made several conclusions about Mr. T.'s condition, discussed first as they related to his injuries (by date), and second as they related to specific areas of Mr. T.'s body.

As to the May 25, 2004, injury⁴², the doctor concluded Mr. T. has pre-existing degenerative arthritis of the left knee which was not causally related to the May 25th injury episode. Dr. Schilperoort determined that the May 25th episode consisted of a temporary “symptomatic exacerbation” of Mr. T.'s degenerative arthritis, and that it had resolved to his baseline condition before the incident.⁴³

Regarding the June 2, 2004, treadmill injury, the doctor concluded Mr. T. has pre-existing cervical spine degenerative disc disease, which was not causally related to the June 2nd episode; and Mr. T. has a degenerative tear of the right medial meniscus, which was not causally related to the June 2nd event. The doctor further concluded that as a result of the June 2nd event, Mr. T. experienced a contusion (bruising) of the right knee which had resolved with no permanent impairment of function; symptomatic exacerbation of his cervical spine degenerative disc disease, which had resolved with no net permanent impairment of function; and a probable right trapezius strain that had resolved with no permanent impairment of function.⁴⁴

As to the October 6, 2004, lifting injury, Dr. Schilperoort concluded Mr. T. has pre-existing degenerative disc disease of the lumbar spine (L4-5 and L5-S1), which was not causally related to the October 6th episode; and thoracic and lumbar strains associated with the on-the-job injury that had resolved with no permanent impairment of function.⁴⁵

Regarding the December 5, 2004, vehicle accident, Dr. Schilperoort indicated it was a “reported symptomatic exacerbation” of Mr. T.'s low back pain.⁴⁶ Dr. Schilperoort noted that Mr. T. reported tenderness throughout his spinal regions, but the doctor stated Mr. T. reported levels of pain that were disproportionately high as compared to his own valid objective findings

⁴² On May 24, 2004, while he and a coworker were carrying a patient on a gurney down some stairs, Mr. T. experienced a sharp pain in his left knee. He felt it again when they were offloading and rolling the patient into the ER. His knee was swollen for about four days afterward. This injury apparently is not at issue in this appeal, but Dr. Schilperoort believed it was pertinent to Mr. T.'s claim, so he discussed it in his report.

⁴³ Exh. A at pg. 23.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

regarding Mr. T.'s spinal region.⁴⁷ Dr. Schilperoort explained that there were no palpable spasms whatsoever throughout Mr. T.'s cervical, thoracic, or lumbar regions.

Dr. Schilperoort also discussed “nonorganic pain signs,” which are behaviors presented by an individual who is attempting to portray himself as injured when, in fact, he is not. The doctor said Mr. T. demonstrated nonorganic pain signs during the IME, the most notable of which was a significant number of “simulations.” The doctor explained that a simulation is a physical maneuver that demonstrates the original mechanism of an injury, such as “popping” a finger joint. If a true injury had occurred originally, the simulation would actually reproduce the pain. Dr. Schilperoort explained that it would not make sense for an individual to demonstrate the maneuver that would in essence then re-create the painful experience.

Dr. Schilperoort indicated that as a result of his physical examination of Mr. T.'s left knee, he concluded that the only significant abnormality is degenerative arthritis, and that the symptoms of the arthritis that resulted from the May 24th lifting episode were simply a minor exacerbation of the arthritis that had resolved back to baseline. The doctor concluded Mr. T.'s left knee had achieved medical stability, and that any residual pain experienced by Mr. T. resulted from the degenerative arthritis, not from the May 24th injury event. Similarly, as to Mr. T.'s right knee, Dr. Schilperoort said the only documented injury that had occurred to Mr. T.'s right knee was a contusion that had fully resolved. The doctor referred to the tear in the meniscus, but stated since it is horizontal, it is degenerative in nature and not traumatically induced, in contrast to a vertical tear, which would indicate trauma to the knee.

Dr. Schilperoort disagreed with Dr. McGuire's June 14, 2004, diagnosis that Mr. T. has subluxing patellae in both knees. Dr. Schilperoort indicated he could not substantiate Dr. McGuire's diagnosis because the latter did not perform instability testing and the MRI scans done on the same day do not show any evidence of any damage or injury that may have given rise to subluxing patella for either knee.⁴⁸ Dr. Schilperoort also disagreed with Dr. McGuire's suggestion that Mr. T. have a PCL (posterior cruciate ligament) reconstruction because the June 14, 2004, MRI scan of the left knee showed a slight buckling of the PCL, but it was otherwise intact and did not require that procedure.⁴⁹

⁴⁷ *Id.*

⁴⁸ Exh. A at pg. 24.

⁴⁹ Exh. A at pg. 25.

Dr. Schilperoort stated the history of Mr. T.'s cervical spine area is not as clear as the history regarding his other spinal areas. The doctor surmised Mr. T.'s military history as a paratrooper would be consistent with any whiplash type injuries he had experienced. Dr. Schilperoort concluded that with the exception of a "mildly moderate limitation" in Mr. T.'s ability to flex laterally to the right, all of his other cervical spine motions fell entirely within normal limits that are compatible with degenerative disc disease at C5-6 and C6-7. Dr. Schilperoort concluded that the June 2nd treadmill incident exacerbated Mr. T.'s pre-existing degenerative changes, but they had resolved back to baseline.⁵⁰

Finally, the doctor discussed Mr. T.'s low back injuries. He indicated that Mr. T. has pre-existing degenerative disc disease with a degenerative disc bulge at L4-5, and degenerative arthritis at L5-S1. The doctor acknowledged there is little question that in the October 6th lifting episode, Mr. T. experienced a valid "acute lumbar strain" on top of his pre-existing degenerative changes, as indicated by the palpable spasm reported by the emergency room doctor the next day. Dr. Schilperoort concluded, however, that Mr. T.'s strain had fully resolved as of the date of the IME, because there was no longer any palpable spasm present. He said that Mr. T.'s physical examination fell entirely within normal limits, other than a significant number of nonorganic pain findings.⁵¹

Dr. Schilperoort noted that other than Mr. T.'s October 6th lifting injury, all of the other injuries he experienced involved relatively low-grade impact force, including the December 5th accident in the Battalion Chief's Suburban. He added that the magnitude and application of forces involved in the rear end collision could not reasonably have resulted even in a "symptomatic exacerbation of a pre-existing condition."⁵²

Finally, Dr. Schilperoort concluded from his independent medical examination that Mr. T. had achieved medical stability for all of his injuries and that he had no permanent impairment of function based on the events that occurred on June 2, 2004, October 6, 2004, or December 5,

⁵⁰ *Id.*

⁵¹ Exh. A at pg. 26.

⁵² *Id.*

2004.⁵³ Dr. Schilperoort stated Mr. T. could return to full-time, full-duty work as a paramedic/firefighter as of that date.⁵⁴

2. IME – December 6, 2005

For the second IME, Mr. T. provided the records from the first IME, in addition to new records from Dr. DeSalvo, Dr. Kennedy, Dr. William Sabolesky, Dr. Brudenell and Dr. Peterson, plus records from Advanced Sports Medicine, Advanced Pain Centers of Alaska, and records from his visit to the emergency room at Alaska regional hospital after the February 19, 2005, incident when he slipped on the ice in the parking lot.⁵⁵

Following his evaluation of Mr. T., Dr. Schilperoort reaffirmed his findings and conclusions regarding the injuries he had discussed in the previous IME.⁵⁶ In addition, Dr. Schilperoort stated that with respect to the February 19, 2005, episode in which Mr. T. slipped on the ice in the parking lot, it involved only the "symptomatic aggravation" of Mr. T.'s low back and right lower extremity and hip pain, all of which had resolved back to baseline levels.⁵⁷ Finally, Dr. Schilperoort affirmed his earlier conclusion that Mr. T. could return to full regular unlimited duty without restriction.⁵⁸

E. Mr. T.'s Termination from Employment

Mr. T. was absent from work for approximately five months during the period from February 2005 through July 2005, through a combination of paid leave, Family and Medical Leave, and unpaid injury leave.⁵⁹ In July 2005, Mr. T. returned to a light duty schedule that consisted primarily of office and administrative work and other duties such as driving the Battalion Chief's vehicle. This light duty work consisted of a 40-hour week paid at Mr. T.'s regular wages.⁶⁰ In contrast, his regular assignment as a paramedic/firefighter involved working a 56-hour week and receiving additional compensation such as hazardous duty pay.⁶¹ Mr. T. continued doing this light duty work up until his termination in November 2005.

⁵³ Exh. A at pg. 29.

⁵⁴ *Id.*

⁵⁵ Exh. B. at pg. 2.

⁵⁶ Exh. B at pg. 15.

⁵⁷ Exh. B at pg. 16.

⁵⁸ Exh. B at pg. 22.

⁵⁹ T. P. hearing testimony; Exh. H.

⁶⁰ *Id.*

⁶¹ *Id.*

In November 2005, Mr. T. was working a 40-hour per week light duty assignment. He was informed by the acting Battalion Chief that he would remain on the light duty shift until he was medically released to resume his regular duties.⁶² On November 9, 2005, Mr. T. in writing requested a return to a 56-hour light duty schedule, or, in the alternative, a modified 40-hour or 56-hour schedule, ostensibly to reduce his commuting time back and forth to his home in Sutton.⁶³ That request was denied.

On Friday, November 18, 2005, Mr. T. submitted a memo to Chief F. requesting reassignment to his normal duties as a paramedic/firefighter. He indicated he had a medical report authorizing him to return to his regular job without restrictions.⁶⁴ The report he included with this memo to the Chief was page 31 of Dr. Schilperoort's IME report dated January 25, 2005. That particular page of the IME report contained the doctor's conclusion that Mr. T. could return to full, regular, unlimited duty work without restriction.⁶⁵ Apparently, the Chief believed that page 31 was from a recent doctor's note, when in fact, it had been generated 10 months earlier.

On November 20, 2005, Deputy Chief D. S. convened a meeting with Mr. T. and a union representative. The Deputy Chief confirmed that Mr. T. did not work his regular paramedic/firefighter shift the previous day, and that Mr. T. did not expect to work full duty because he believed the Battalion Chief would "do the right thing."⁶⁶ Mr. T. explained what he meant by the comment was that he would not be assigned to an ambulance because of his "back injury." In answer to the Deputy Chief's question whether he could return to full duty work, Mr. T. replied "yes and no."⁶⁷ The Deputy Chief informed Mr. T. that in order to return to his regular duties as a paramedic/firefighter, he would have to provide a work release from a physician; Mr. T. acknowledged that requirement. When Mr. S. asked Mr. T. why he provided the physician's note from January 2005 with his cover letter, he stated his intent was to get off the light duty 40-hour work week.

⁶² Exh. F at pg. 1.

⁶³ *Id.*

⁶⁴ Exh. 7; Exh. F at pg. 1.

⁶⁵ *See* Exh. A at pg. 31.

⁶⁶ Exh. F at pg. 1.

⁶⁷ *Id.*

As a result of this meeting, Deputy Chief S. determined that Mr. T. was attempting to deceive Chief F. and the Fire Department in order to resume light duty work on a 56-hour shift rather than on a 40-hour shift. The Deputy Chief concluded Mr. T. had committed an act of dishonesty that risked further injury to himself and increased the Department's liability. As a result, the Deputy Chief terminated Mr. T.'s employment, effective November 28, 2005.⁶⁸

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(27), which states:

(27) "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[.]

In this case, the administrator denied occupational disability benefits to Mr. T. for the reason that he does not suffer from a presumably permanent disabling condition caused by a work injury.

The employee has the burden of proving by a preponderance of the evidence that the elements of the statute have been met.⁶⁹

A. Mr. T. Was Not Terminated Because of a Total and Apparently Permanent Occupational Disability

Mr. T. first must show that he was terminated from his position at the municipality "because of" his occupational disability. In the case of *Stalaker v. M.L.D.*⁷⁰, the court held that

⁶⁸ Exh. F at pg. 2.

⁶⁹ *Rhines v. State*, 30 P.3d 621, 628 (Alaska 2001), citing *Stalaker v. Williams*, 960 P.2d 590, 594 (Alaska 1998); see

the tort law theory of “legal causation” should be used to determine whether the “because of” requirement in the statute has been satisfied in PERS occupational disability cases. 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.⁷¹ 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.⁷²

1. Mr. T.’s disability was not an actual cause of his termination

The Division argues that Mr. T. was terminated from his position at the municipality because of dishonesty in his attempt to be reassigned back to a 56-hour shift from the 40-hour light duty shift he was working at the time. Mr. T. claims his physical injuries and limitations constitute a disability, which prevents him from performing his full work duties.

Mr. T. has not shown that his termination was caused by his disability. The record in this case clearly shows that Mr. T. was terminated from his employment with the municipality because he attempted to manipulate the system so his supervisor would grant him permission to return to the 56-hour shift from the 40-hour shift. The municipality considers Mr. T.’s attempt an act of deceit, and ultimately, dishonesty, for which he was terminated from his employment. Mr. T.’s physical limitations, or, disabilities, for the purpose of this discussion, were not an actual cause of his termination. The record shows that Mr. T. was already working light duty shift, which he could have remained on indefinitely. Had he taken no action in an attempt to go back to his 56-hour shift, Mr. T. conceivably still could be working for the Fire Department.

2. Proximate cause is not at issue under the circumstances of Mr. T.’s case

Proximate cause is relevant only if actual cause has been found.⁷³ Since Mr. T.’s disability was not an actual cause of his termination, it is not necessary to address the issue whether legal responsibility, or proximate cause, exists.

also AS 44.62.460(e)(2).

⁷⁰ 939 P.2d 407 (Alaska 1997).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Rhines* at 628.

B. Mr. T. Does Not Have a Presumably Permanent Occupational Disability Caused by a Work Injury

In order to establish that he has an occupational disability, Mr. T. must show that he has a disability, his disability presumably permanently prevents him from satisfactorily performing his usual job duties, and his work-related circumstances are a substantial factor in causing the disability.

Mr. T. has not met the statutory requirements for any of these factors. After two comprehensive independent medical examinations, in addition to 4½ hours of testimony, Dr. Schilperoort, a board-certified independent medical examiner and board-certified orthopedic surgeon, established that Mr. T. does not suffer from a presumably permanent disability caused by his employment as a paramedic/firefighter. Dr. Schilperoort concluded, from his thorough examinations of Mr. T. and his medical records, that Mr. T.'s back and knee conditions preexisted his employment, and that these conditions merely continued along their normal course, which included normal degeneration. Further, Dr. Schilperoort concluded that the specific injuries Mr. T. received during his employment that were claimed to have caused his disability did not cause a substantial aggravation of Mr. T.'s pre-existing back and knee conditions.

Dr. Schilperoort acknowledged that in the October 6 lifting episode, Mr. T. experienced a valid "acute lumbar strain" on top of his pre-existing degenerative changes. However, Dr. Schilperoort also concluded that Mr. T.'s lumbar strain had fully resolved as of the date of the IME, because there was no longer any palpable muscle spasm present. Otherwise, Dr. Schilperoort described Mr. T.'s low-grade pain as being consistent with his pre-existing degenerative disc disease and arthritis. Dr. Schilperoort found as a result of his January 2005 IME that Mr. T. could return to his normal work duties as a paramedic/ firefighter. Significantly, the doctor's December 2005 IME confirmed his earlier findings.

Dr. Schilperoort's conclusions about Mr. T.'s physical condition are consistent with Mr. T.'s known history as a paratrooper. Mr. T. was in the military for 12 years, during which time he participated in between 700 and 1000 parachute jumps, which he acknowledged is a jarring physical activity that creates a whiplash effect each time the parachute opens. Mr. T. was injured on at least one of those jumps and as a result had to undergo ligament reconstruction of his left knee, for which he was awarded a 40% disability rating from the military.

IV. Conclusion

Mr. T. failed to meet his burden of proving by a preponderance of the evidence that he was terminated from his employment because of a total and apparently permanent disability. Further, Mr. T. failed to meet his burden of proving by a preponderance of the evidence that he has a presumably permanent disability as a result of his employment with the Municipality of Anchorage. Mr. T. is thus not entitled to occupational disability benefits.

V. Order

- The Administrator's denial of Mr. T.'s application for occupational disability benefits is AFFIRMED.

DATED this 15th day of June, 2006.

By: Signed
Kay L. Howard
Administrative Law Judge

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 31st day of July, 2006.

By: Signed
Kay L. Howard
Administrative Law Judge

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