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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FIRST JUDICIAL DISTRICT AT JUNEAU

PATRICK SHIER, )  
Administrator of the )  
Public Employees' )  
Retirement System, )  
 )  
Appellant, )  
vs. )  
 )  
L V , )  
Appellee. )

Case No.: 1JU-08-774 CI

Appellant, Patrick Shier, Administrator of the Public Employees' Retirement System (PERS), appeals a decision of the Office of Administrative Hearings (OAH) granting L V occupational disability benefits. Shier argues that the OAH erred by: (1) unreasonably ignoring medical opinions and drawing medical conclusions based on hearsay and lay witnesses; (2) relying on irrelevant factual evidence; (3) making a factual error that Ms. V is occupational disabled when the record does not support such a finding; (4) applying the wrong standard of review to the Administrator's decision and; (5) inappropriately shifting the burden of proof to the Administrator.<sup>1</sup>

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<sup>1</sup> Points on Appeal, filed August 7, 2008.

1 I. FACTS

2 L V began working for the State of Alaska,  
3 Department of Health and Social Services on February 1, 1989.<sup>2</sup>  
4 She was with the State for 15 years. Her most recent position  
5 with the Department was as an Eligibility Quality Control  
6 Technician I.<sup>3</sup> This position is primarily a desk job requiring  
7 sitting at a desk, frequent written and verbal communication  
8 and occasional driving.<sup>4</sup> The job also requires some physical  
9 demands such as occasional walking, standing, bending and  
10 repetitive hand motions related to computer use.<sup>5</sup> The job  
11 required Ms. V to understand both state and federal law.  
12 Failure of Ms. V to properly perform her job could result in  
13 federal fines being imposed on the Agency.<sup>6</sup> Ms. V 's former  
14 supervisor, Eileen Monaghan, testified that Ms. V had "above  
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19 <sup>2</sup> Record on Appeal at P4, 20, 147. The court notes the Record on  
20 Appeal has handwritten numbers in Volumes 1 and a portion of 2  
21 "1-383" the remainder of volumes 2-4 are numbered from "P2"  
forward.

22 <sup>3</sup> Record on Appeal at P20, P147.

23 <sup>4</sup> Record on Appeal at P755-56, 779-87.

24 <sup>5</sup> Id.

25 <sup>6</sup> Transcript of Hearing May 5 & 7, 2008 at 101, 105, and 106.

1 average intelligence" and that she satisfactory fulfilled her  
2 job requirements prior to the accident.<sup>7</sup>

3 On March 27, 2002, while on state business, Ms. V  
4 lost control of the car she was driving resulting in a nearly  
5 head-on collision with another vehicle.<sup>8</sup> Ms. V was traveling  
6 between 35 and 50 miles per hour at the time of the accident.

7 A. The Medical Evidence

8 Ms. V 's pre-accident medical history is volumous  
9 and shows complaints of numerous conditions including neck,  
10 shoulder and back pain, hemorrhoids, irritable bowel syndrome,  
11 fibromyalgia, chronic fatigue syndrome, restless leg syndrome,  
12 periodic limb movement disorder, depression, anxiety, and job  
13 related back strain.<sup>9</sup>

14 Ms. V was conscious and alert when the ambulance  
15 arrived at the March 27, 2002 accident scene. The ambulance  
16 transported her to the Emergency Room in Palmer, Alaska where  
17 she was seen by Dr. Mark Lee.<sup>10</sup> Ms. V did not suffer any  
18 bruises or abrasions to her head however she did complain of  
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21 <sup>7</sup> Transcript of Hearing May 5 & 7, 2008 at 47-50, 54-55 and 60.

22 <sup>8</sup> Record on Appeal at P583, 751-54.

23 <sup>9</sup> Record on Appeal at P192, 214-55, 268-82, 314-359, 538-45,  
24 546-49, 645-746.

25 <sup>10</sup> Record on Appeal at P581-95.

1 back, neck, knee and chest pain.<sup>11</sup> She denied any head trauma or  
2 any loss of bowel or bladder control and the ER staff made no  
3 findings to the contrary.<sup>12</sup> Following an examination and six  
4 hours of observation, Dr. Lee declared Ms. Vos stable. Ms. V  
5 was prescribed pain killers and released from the hospital with  
6 instructions to follow-up with her primary physician, Dr. Van  
7 Houten, the next day.<sup>13</sup>

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9           Following the accident Ms. V made several follow-up  
10 visits to Dr. Van Houten including one on the afternoon  
11 immediately following her release from the ER. At first she  
12 complained of pain similar to that reported at the ER.  
13 However, by two weeks after the accident Dr. Van Houten noted  
14 issues with forgetfulness, possible loss of consciousness and  
15 possible traumatic brain injury.<sup>14</sup> Dr. Van Houten did not refer  
16 Ms. V to a specialist or perform any diagnostic tests to  
17 specifically detect brain injury.<sup>15</sup>

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21 <sup>11</sup> Record on Appeal at P583.

22 <sup>12</sup> Record on Appeal at P334.

23 <sup>13</sup> Record on Appeal at P583, 585.

24 <sup>14</sup> Record on Appeal at P323.

25 <sup>15</sup> Record on Appeal at P323, P306-60.

1           On July 23, 2002 Ms. V was involved in a second car  
2 accident.<sup>16</sup> This accident was not work related and resulted in  
3 treatment from Dr. Van Houten for complaints of neck pain,  
4 upper and lower back pain and shoulder pain.<sup>17</sup>

5           On August 27, 2002 Dr. Van Houton referred Ms. V to  
6 Dr. Larry Levine to evaluate on-going pain in Ms. V 's back,  
7 hip, buttock, knee and feet.<sup>18</sup> Ms. V reported to Dr. Levine  
8 that she had "several minutes of lost consciousness" as a  
9 result of the March 27, 2002 accident and a loss of bladder  
10 control.<sup>19</sup> Dr. Levine recommended medication for Ms. V 's pain  
11 and depression.<sup>20</sup>

12           On October 23, 2002 based on Ms. V 's claims of lost  
13 consciousness following the March 2002 accident, Dr. Levine  
14 referred Ms. V for a speech language pathology interview and  
15 evaluation with Anne Ver Hoef, MA, CCC-SLP. Ms. Ver Hoef  
16 diagnosed Ms. V with "traumatic brain injury" and "cognitive  
17 disorder" and developed a plan for continued diagnostic  
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21 <sup>16</sup> Record on Appeal at P108.

22 <sup>17</sup> Record on Appeal at P108, P306-15, 402-68.

23 <sup>18</sup> Record on Appeal at P191.

24 <sup>19</sup> Id.

25 <sup>20</sup> Record on Appeal at P194.

1 testing.<sup>21</sup> The record is silent as to what further tests were  
2 contemplated. The record does show Ms. V participated in  
3 speech therapy with Ms. Ver Hoef through 2003. Ms. V was  
4 prescribed pain relief medications at this time that may have  
5 impaired her functional abilities.<sup>22</sup>

6 Ms. V began seeing Dr. Byron Perkins, a family  
7 practitioner on January 27, 2003. She reported to the doctor  
8 that she had suffered "significant brain trauma" following the  
9 March 27, 2002 accident.<sup>23</sup> Dr. Perkins did not refer Ms. V to  
10 a specialist or order any diagnostic testing specifically  
11 related to the claim of brain trauma. Dr. Perkins diagnosed Ms.  
12 V with post-traumatic brain injury, cervical degenerative  
13 joint disease (DJD), depression and post traumatic stress  
14 disorder (PTSD).<sup>24</sup> Dr. Perkins found Ms. V was temporarily  
15 disabled and would be unable to return to work until March 1,  
16 2003.<sup>25</sup> Ms. V continued to see Dr. Perkins through May, 2003<sup>26</sup>

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18 <sup>21</sup> Record on Appeal at P508.

19 <sup>22</sup> Record on Appeal at P469-508, 757-68. Transcript of Hearing  
20 May 5 & 7, 2008 at 139-40, 170, 173, 17-180, 183.

21 <sup>23</sup> Record on Appeal at P211.

22 <sup>24</sup> Id.

23 <sup>25</sup> Id.

24 <sup>26</sup> Ms. V went to see Dr. Perkins on April 7, 2003 related to  
25 chronic pain. At that time she reported blood and mucus in her  
stools and a past history of hemorrhoids. Record on Appeal at  
P202-204.

1 and continued on the pain medications during this time.<sup>27</sup> Dr.  
2 Perkins found Ms. V was unable to return to work in her  
3 former position and supported her claim for occupational  
4 disability.

5           Following a worker's compensation claim Ms. V  
6 participated in neuro-psychological evaluation at the state's  
7 request with Dr. Jeffrey Powell.<sup>28</sup> Following the tests it was  
8 Dr. Powell opinion there was no indication of cognitive decline  
9 or objective support for Ms. V's cognitive complaints. Dr.  
10 Powel opined it probable Ms. V had no "neoropsychologically  
11 based injury" and he suspected she suffered from  
12 undifferentiated somatoform disorder (an emotional disorder  
13 which causes overstatement or misinterpretation of somatic  
14 experience).<sup>29</sup>

15           On April 2, 2003 Ms. V underwent a medical  
16 examination with the state's neurologist, Dr. Jacqueline  
17 Weiss.<sup>30</sup> Dr. Weiss found no impairment and believed Ms. V was  
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22 <sup>27</sup> Record on Appeal at P197-211, 201-211.

23 <sup>28</sup> Record on Appeal at P155-210.

24 <sup>29</sup> Record on Appeal at P156, 174, 176, 178.

25 <sup>30</sup> Record on Appeal at P122-155.

1 capable of returning to her prior position with the State  
2 without work restrictions.<sup>31</sup>

3 On April 2, 2003 as part of her worker's compensation  
4 claim Ms. V also underwent an evaluation at her employer's  
5 request with Orthopedic Surgeon, Dr. Charles N. Brooks. Dr.  
6 Brooks found that any injuries sustained by Ms. V in relation  
7 to the March 27, 2002 accident were probably only temporarily  
8 disabling.<sup>32</sup> Dr. Brooks did not make any findings in regards to  
9 neuropsychological impairment as that was not his specialty.<sup>33</sup>

10 A psychiatric examination related to Ms. V's  
11 worker's compensation claim was performed by Dr. Patricia  
12 Lipscomb on January 26, 2004. Dr. Lipscomb diagnosed Ms. V  
13 with pre-existing undifferentiated somatoform disorder as well  
14 as depression and anxiety.<sup>34</sup> Dr. Lipscomb found Ms. V was not  
15 permanently incapable of working.<sup>35</sup>

16 In April 2006, three years after Ms. V applied for  
17 PERS disability benefits, she saw Dr. S. Ali Safdar, an  
18 internist, complaining of rectal bleeding over the preceding  
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21 <sup>31</sup> Record on Appeal at P506, 153, 154.

22 <sup>32</sup> Record on Appeal at P186 and P189.

23 <sup>33</sup> Record on Appeal at P189.

24 <sup>34</sup> Record on Appeal at P355.

25 <sup>35</sup> Record on Appeal at P359.



1 three or four weeks.<sup>36</sup> Following a colonoscopy Ms. V was  
2 diagnosed with anal cancer.<sup>37</sup> On June 23, 2006 Ms. V saw Dr.  
3 Catherine Chodkiewicz, a chemotherapist.<sup>38</sup> During that visit Ms.  
4 V stated the bleeding had been going on for at least 3 years.

5 **B. Disability Claim History**

6 Ms. V did not return to work at the state following  
7 the March 27, 2002 head-on collision. She believed she no  
8 longer had the mental abilities to perform her job.<sup>39</sup> There is  
9 evidence that Ms. V hoped to return to work with an  
10 accommodation of a reduced caseload or be allowed to work from  
11 home; however her supervisor denied these requests.<sup>40</sup>

12 On March 18, 2003 Ms. V applied for PERS  
13 occupational disability benefits claiming traumatic brain  
14 injury, PTSD, depression, fibromyalgia, chronic fatigue  
15 syndrome, irritable bowel syndrome and degenerative disc  
16 disease all as a result of the March 27, 2002 vehicle  
17 accident.<sup>41</sup>

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19 <sup>36</sup> Record on Appeal at 271-271.

20 <sup>37</sup> Record on Appeal at 273.

21 <sup>38</sup> Record on Appeal at 273.

22 <sup>39</sup> Transcript of Hearing May 5 & 7, 2008 at 91-92, 102, 105, and  
106.

23 <sup>40</sup> Transcript of Hearing May 5 & 7, 2008 May 5 & 7, 2008 at 111-  
24 114, 138-139; Record on Appeal at P789-790.

25 <sup>41</sup> Record on Appeal at P20.

1           On December 18, 2003 Ms. V . was notified by the  
2 Division of Public Assistance that her employment with the  
3 state would be terminated effective December 31, 2003.<sup>42</sup>

4           Ms. V 's disability claim was reviewed by the  
5 Division's medical consultant Dr. William Cole. Dr. Cole  
6 reviewed only Ms. V 's medical records. On June 3, 2004 he  
7 concluded Ms. V was not permanently impaired by the  
8 accident.<sup>43</sup> The Division's psychiatric consultant, Dr. Thomas A.  
9 Rodgers also reviewed Ms. V 's records and medical files and  
10 agreed with earlier opinions that Ms. V suffers from  
11 preexisting "Undifferentiated Somatization Disorder" that did  
12 not prevent her from returning to work.<sup>44</sup>

13           Based on the opinions of Dr. Cole and Dr. Rodgers,  
14 as well as the medical documentation provided by Ms. V , on  
15 June 14, 2004 the Administrator concluded that Ms. V was not  
16 suffering from a presumably permanent disabling condition at  
17 the time her employment was terminated. The Administrator  
18 denied her claim for occupational disability benefits and found  
19 since she did not have a permanently disabling condition she  
20 was also not eligible for non-occupational disability

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23 <sup>42</sup> Record on Appeal at P77, 199.

24 <sup>43</sup> Record on Appeal at P11.

25 <sup>44</sup> Record on Appeal at P14-16.

1 benefits.<sup>45</sup> Ms. V appealed the Administrator's decision to the  
2 PERB on July 8, 2004.<sup>46</sup>

3 On September 11, 2006 Ms. V provided supplemental  
4 information to the Division regarding her subsequent diagnosis  
5 of anal cancer. She claimed her earlier diagnosis of  
6 hemorrhoids and irritable bowel syndrome were in error and that  
7 she actually had anal/colorectal cancer before her state  
8 employment terminated.<sup>47</sup> She further claimed this was a  
9 disabling physical condition that existed prior to her  
10 termination and therefore she was entitled to PERS disability  
11 benefits.<sup>48</sup>

12 On October 17, 2006 Ms. V 's case was assigned to  
13 Administrative Law Judge Mark Handley. Scheduled proceedings  
14 were delayed to permit the Administrator and his consulting  
15 physicians' time to review the new medical information related  
16 to the anal cancer provided by Ms. V .<sup>49</sup> Judge Handley held a  
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18 <sup>45</sup> Record on Appeal at P2.

19 <sup>46</sup> Record on Appeal at P1. The appeal was originally filed with  
20 the Public Employees 'Retirement Board (PERB) however during  
21 the time Ms. V 's appeal was pending the Alaska Legislature  
22 dissolved the PERB and transferred appellate authority over  
PERS appeals to the Office of Administrative Hearings (OAH).  
See § 81 Ch 9 FSSLA (2005); AS 39.35.006.

23 <sup>47</sup> Record on Appeal at P797-98.

24 <sup>48</sup> Id.

25 <sup>49</sup> Judge Handley proposed remanding the case to the  
Administrator to consider this new information but the

1 hearing on March 5 and 7, 2008 on this matter. On June 17, 2008  
2 Judge Handley issued a proposed decision of his intent to  
3 overturn the Administrator's denial of benefits to Ms. V .<sup>50</sup>  
4 The Administrator submitted a Proposal for Action pursuant to  
5 AS 44.64.060 to Judge Handley requesting changes to the  
6 proposed decision.<sup>51</sup> Judge Handley denied the requests and  
7 issued his decision.<sup>52</sup> The Administrator appeals.

## 8 II. STANDARD OF REVIEW

9 Four principal standards of review for administrative  
10 decisions appealed to the Superior Court are recognized: (1) the  
11 substantial evidence standard applies to findings of fact; (2)  
12 the reasonable basis standard applies to questions of law  
13 involving agency expertise; (3) the substitution of judgment  
14 standard applies to questions of law where no expertise is  
15 involved; and (4) the reasonable and not arbitrary standard  
16 applies to review of administrative regulations.<sup>53</sup>  
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20 Administrator opposed remand claiming it was the Judge's role  
21 to review the information available at the time the  
Administrator's decision was made.

22 <sup>50</sup> Record on Appeal at 42.

23 <sup>51</sup> Record on Appeal at 46.

24 <sup>52</sup> Record on Appeal at 21.

25 <sup>53</sup> Id.

1           The issues surrounding whether the Office of  
2 Administrative Hearings' (OAH) erred by granting L       V  
3 occupational disability benefits involve findings of fact. The  
4 court reviews the ALJ's findings on this issue under the  
5 substantial evidence standard.<sup>54</sup> "Substantial evidence" is  
6 evidence that a reasonable mind, viewing the record as a whole,  
7 might accept as adequate to support the decision.<sup>55</sup>

8           It is well settled that substantial evidence to  
9 support an administrative agency's finding of fact may take the  
10 form of circumstantial evidence or indirect proof.<sup>56</sup> The  
11 determination of whether the amount and type of evidence is  
12 substantial is a legal question.

13           In applying this standard the court does not re-weigh  
14 evidence or choose between competing inferences, but only  
15 determines whether such evidence exists.<sup>57</sup> If conflicting  
16 evidence exists, the court is to view evidence in favor of  
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19 <sup>54</sup> See Stalnaker v. M.L.D., 939 P.2d 407, 411 n. 7 (Alaska  
20 1997).

21 <sup>55</sup> Tolbert v. Alascom, Inc., 973 P.2d 603 (Alaska, 1999)  
22 applying the substantial evidence test to a Worker's  
23 Compensation claim.

23 <sup>56</sup> Baxter, 806 P.2d 1373.

24 <sup>57</sup> AS 44.62.570(c); Lewis v. Commercial Fisheries Entry Comm'n,  
25 892 P.2d 175 (Alaska, 1995).

1 findings appealed, even if the Court might have taken a  
2 different view of the facts.<sup>58</sup>

3 Whether Judge Handley erred in applying the proper  
4 standard of review is a question of law that does not involve  
5 agency expertise. This issue is reviewed under the  
6 "substitution of judgment" standard.

### 7 III. DISCUSSION

8 An employee seeking occupational disability benefits  
9 must prove that his or her employment was "terminated because  
10 of a total and apparently permanent occupational disability, as  
11 defined in AS 39.35.680, before the employee's normal  
12 retirement date."<sup>59</sup> The employee bears the burden of  
13 establishing by a preponderance of the evidence that the  
14 disability was proximately caused by an injury which occurred  
15 in the course of employment.<sup>60</sup>

16 AS 39.35.680 (26) defines an "occupational disability" as:

17 a physical or mental condition that, in the  
18 judgment of the administrator, presumably  
19 permanently prevents an employee from  
20 satisfactorily performing the employee's usual  
21 duties for an employer or the duties of another  
comparable position or job that an employer makes

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22 <sup>58</sup> Id.

23 <sup>59</sup> AS 39.35.410.; Stalnaker v. Williams, 960 P.2d 590, 593  
24 (Alaska, 1998).

25 <sup>60</sup> AS 39.35.680(26); See also State, Public Employees Retirement  
Bd. v. Cacioppo, 813 P.2d 679, 683 (Alaska, 1991).

1 available and for which the employee is qualified  
2 by training or education; however, the proximate  
3 cause of the condition must be a bodily injury  
4 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.

5 An employee who is seeking occupational or non-  
6 occupational disability benefits under the PERS statutes must  
7 prove by credible evidence that her condition is more likely  
8 than not permanent. If the employee meets that burden, her  
9 condition is presumably permanent and she is entitled to  
10 disability benefits.<sup>61</sup>

11 **A. The OAH did not inappropriately shift the burden of proof to  
12 the Administrator or apply the wrong standard of review.**

13 The Administrator argues that the wrong standard of review  
14 was applied to the Administrator's decision and that the burden  
15 of proof was inappropriately shifted to the Administrator.<sup>62</sup>  
16 These are conclusions of law and therefore are reviewed under  
17 the "substitution of judgment" standard. "We 'adopt the rule of  
18 law that is most persuasive in light of precedent, reason, and  
19 policy.'"<sup>63</sup>

20 **1. Standard of review**

21  
22 <sup>61</sup> Stalnaker v. Williams, 960 P.2d 590, 594 (Alaska, 1998).

23 <sup>62</sup> Points on Appeal, filed August 7, 2008.

24 <sup>63</sup> Alyeska Pipeline Serv. Co., 77 P.3d at 1231 (quoting Guinn v.  
25 Ha, 591 P.2d 1281, 1284 n. 6 (Alaska 1979)).

1           The Administrator argues that the Administrative Law  
2 Judge has appellate jurisdiction over PERS disability claims  
3 under AS 39.35.006 and that it is was the Judge's role to  
4 review the *Division's* factual findings for substantial evidence  
5 rather than making his own independent findings. In other words  
6 the Administrator argues the role of the OAH is more analogous  
7 to an intermediary appellate court than that of a trial court.

8           Under AS § 39.35.006 "an employer, member, annuitant,  
9 or beneficiary may appeal a decision made by the administrator  
10 to the office of administrative hearings established under AS  
11 44.64. An aggrieved party may appeal a final decision to the  
12 superior court." The Administrator argues the statutory  
13 language "may appeal a decision made by the administrator to  
14 the office of administrative hearings" indicates that the OAH  
15 role is by its very nature appellate. The Administrator's  
16 interpretation of the statute in this way disregards the role  
17 of the OAH as explained in AS §44.64.030.

18           Under AS § 44.64.030(a)(26) the OAH conducts all  
19 adjudicative administrative hearings related to the public  
20 employees retirement system. AS § 44.64.030(c) permits the  
21 agency to delegate to the administrative law judge assigned to  
22 conduct the hearing on behalf of the agency. The ALJ has the  
23 authority to permit discovery, subpoena witnesses etc. and to  
24  
25



1 make a *final agency decision* in the matter. It is only this  
2 *final decision* that may be appealed to the superior court by  
3 any party (emphasis added). Therefore the OAH 's role is more  
4 analogous to a trial court than an intermediate appellate  
5 court. The case law also supports this interpretation.

6 In Stalnaker v. Williams<sup>64</sup> the Alaska Supreme Court  
7 tackled the issue of whether the Public Employees' Retirement  
8 Board (PERB) was more analogous to a trial court or an  
9 appellate court. The court reasoned the former stating, "The  
10 Board is to make findings, including findings based on new  
11 evidence not presented to the administrator. The Board's duty  
12 to make such findings distinguishes it from appellate bodies,  
13 which only review the records from earlier proceedings."<sup>65</sup>

14  
15 The Administrator recognizes Stalnaker but argues  
16 since authority has been transferred from the PERB to the OAH  
17 since Stalnaker was decided that this reasoning no longer  
18 applies since the OAH does not have the same medical expertise  
19 as the PERB. The court disagrees. The basis of the court's  
20 findings in Stalnaker was the role the board played in  
21 conducting hearings and collecting new evidence, rather than  
22 specific expertise vested in the Board.

23  
24 <sup>64</sup> 960 P.2d 590, 595 (Alaska, 1998)

25 <sup>65</sup> Id. at 596.

1           The OAH role in conducting hearings is distinctly  
2 different than that of the Administrator. Judge Handley was not  
3 tasked to determine whether the Administrator's factual  
4 findings were supported by substantial evidence but rather to  
5 collect additional evidence and to conduct the administrative  
6 hearings. Based on this information the OAH issues a final  
7 order. It is this order that is final decision appealable to  
8 the superior court. The OAH role is clearly analogous to that  
9 of a trial court, not an intermediate appellate court. Judge  
10 Handley did not usurp the Administrator's authority to approve  
11 or disapprove claims for retirement benefits rather he  
12 fulfilled the role intended of the OAH.

## 13           2. Burden of proof

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15           A public employee seeking medical retirement has the  
16 burden of proving by a preponderance of the evidence that she  
17 has met the required elements of the statute.<sup>66</sup> The  
18 Administrator argues that Judge Handley "in making his findings  
19 without sufficient proof" improperly shifted the burden from  
20 Ms. V to prove her disability to the Division to prove it did  
21 not exist. This argument is without merit. As explained in  
22 detail below sufficient evidence exists to find Ms. V met her  
23 burden in demonstrating her disability. There is no evidence

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24  
25 <sup>66</sup> 2 AAC 64.290 (e).

1 that Judge Handley shifted the burden to the Administrator.

2  
3 B. Substantial evidence exist to support the finding that Ms.  
4 Vos suffered a presumably permanent brain injury that prevented  
5 her from satisfactorily performing her usual or comparable work  
6 duties on the date her employment was terminated with the  
7 state.

8  
9 Judge Handley in making his findings concluded Ms.  
10 V , "probably suffered brain trauma in the head-on car  
11 accident that occurred in the course of her employment,"<sup>67</sup> and  
12 that "she did not recover from her brain injury before her  
13 employment was terminated."<sup>68</sup> The Judge concluded that the brain  
14 injury was the proximate cause of Ms. V 's termination and was  
15 presumably permanent and therefore she qualified for benefits.<sup>69</sup>

16 The Administrator argues that Judge Handley's  
17 decision is not supported by substantial evidence and that he  
18 erroneously ignored the medical experts while relying on lay  
19 witnesses and hearsay. The court disagrees.

20 The standard of review applied when reviewing agency  
21 findings of fact is that they will only be set aside if they  
22 are not supported by substantial evidence on the whole record;  
23 inherent in that standard is a requirement that facts found be

24 <sup>67</sup> Record on Appeal at 16.

25 <sup>68</sup> Record on Appeal at 17.

<sup>69</sup> Record on Appeal at 19.

1 based on evidence in the record.<sup>70</sup> This court is not to reweigh  
2 the evidence presented however it must find that the decision  
3 to grant Ms. V benefits is supported by enough evidence to  
4 allow a reasonable mind to conclude that Ms. V has met her  
5 burden. This evidence may include indirect or circumstantial  
6 evidence

7 In reaching his decision that Ms. V suffered brain  
8 trauma as a result of the head-on collision Judge Handley  
9 relies on Ms. V's physical condition and on changes in her  
10 mental abilities following the accident. Specifically he  
11 depends on the testimony of family, friends and co-workers  
12 regarding changes in Ms. V's cognitive abilities including  
13 memory loss, confusion, and anxiety, following the March 2002  
14 accident. Ms. V also testified on her own behalf at the  
15 hearing regarding changes in her physical and mental state  
16 following the accident including wetting her pants after the  
17 accident, losing her smell for a year and cognitive  
18 difficulties. Judge Handley found this testimony to be very  
19 credible.<sup>71</sup> However, his decision is not based solely on lay  
20 testimony; he also relied on the observations of Dr. Perkins  
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22  
23 <sup>70</sup> City of Fairbanks v. Alaska Public Utilities Commission, 611  
24 P.2d 493 (Alaska, 1980); State, Public Employees Retirement Bd.  
v. Cacioppo, 813 P.2d 679 (Alaska, 1991).

25 <sup>71</sup> Final Decision and Order OAH NO. 06-0701-PER at 17.

1 and Dr. Van Houten following the accident and the treatment  
2 records of Mr. V 's speech therapist, Ms. Van Hoef. Lastly,  
3 Judge Handley found the admissions of the Division's experts  
4 during the administrative hearings supportive of his findings.

5 Ms. V 's medical record is extensive. Following her  
6 disability claim she underwent four litigation related medical  
7 examinations. Dr. Powel, Dr. Weiss and Dr. Lipscomb all  
8 evaluated Ms. V related to her claims of brain injury, post-  
9 traumatic stress disorder and depression. An orthopedic  
10 specialist, Dr. Brooks, examined Ms. V for her other post car  
11 accident medical complaints. All four of these doctors  
12 concluded that Ms. V did not suffer from a presumably  
13 permanent disability related to the March 2002 car accident  
14 that prevented her from returning to her job with the State.  
15 Despite these opinions, Judge Handley found that Ms. V 's  
16 brain injury could have gone undetected by the tests and  
17 evaluations performed by the state's experts and that these  
18 experts did not have an adequate benchmark of Ms. V 's pre-  
19 accident cognitive abilities in order to fully comprehend her  
20 post-accident conditions.<sup>72</sup> He also found other evidence existed  
21 in records from Ms. V 's treating physicians, Dr. Perkins and  
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25 <sup>72</sup> Final Decision and Order OAH NO. 06-0701-PER at 16-27.

1 Dr. Van Houten, to support a finding that Ms. V had a head  
2 trauma resulting in a presumably permanent disability.  
3 Further, Dr. Taylor and Dr. Van Houten referred Ms. V to  
4 speech therapy for memory/cognitive impairment evaluation and  
5 treatment.<sup>73</sup> The therapist's records also support Ms. V's  
6 claims of decreased cognitive abilities.

7 Dr. Van Houten was Ms. V's treating physician. Upon  
8 release from the emergency room Ms. V immediately went to  
9 Doctor Van Houten's office due to severe pain and back spasms.<sup>74</sup>  
10 During that visit Ms. V denied any head trauma but was unsure  
11 if she had lost consciousness.<sup>75</sup> Ms. V continued to see Dr.  
12 Van Houten regularly in the aftermath of the accident for her  
13 severe pain. A few weeks later the doctor's notes begin to  
14 reflect problems with Ms. V's memory loss, difficulty with  
15 concentration and cognitive functioning, as well as a "possible  
16 loss of consciousness immediately following the accident" and  
17 possible traumatic brain injury.<sup>76</sup> In the months following the  
18 accident Ms. V's continued to complain of cognitive problems  
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22 <sup>73</sup> Record on Appeal at P 509.

23 <sup>74</sup> Transcript of Hearing May 5 & 7, 2008.

24 <sup>75</sup> Record on Appeal at P334.

25 <sup>76</sup> Records on Appeal P313-335.

1 including a loss of ability to concentrate and remember and a  
2 loss of coordination.<sup>77</sup>

3 Beginning on January 27, 2003 Ms. V went to see Dr.  
4 Byron Perkins, a family practitioner. Dr. Perkins diagnosed Ms.  
5 V with post-traumatic brain injury, cervical degenerative  
6 joint disease (DJD), depression and post traumatic stress  
7 disorder (PTSD).<sup>78</sup> Dr. Perkins found Ms. V was temporarily  
8 disabled and would be unable to return to work until March 1,  
9 2003.<sup>79</sup>

10 Numerous case notes from Dr. Perkins' later visits  
11 with Ms. V express a finding of traumatic brain injury. For  
12 example, on March 23, 2003 Dr. Perkins noted "Post Traumatic  
13 Brain Injury is of most concern due to cognitive functional  
14 loss as well as anosmia."<sup>80</sup> He also noted at that time Ms. V 's  
15 depression and PTSD were "a direct result of her motor vehicle  
16 trauma" and stated that he would support her medical  
17 retirement.<sup>81</sup> On April 17, 2003 Dr. Perkins noted Ms. V as  
18 having trouble with her cognitive function and in particular  
19 with her memory and he assessed her with Post Traumatic Brain

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21 <sup>77</sup> Records on Appeal P313-335.

22 <sup>78</sup> Record on Appeal at P211, 201.

23 <sup>79</sup> Record on Appeal at P211.

24 <sup>80</sup> Record on Appeal at P206. Ansomia is a loss of smell.

25 <sup>81</sup> Record on Appeal at P206.

1 Injury.<sup>82</sup> In a follow-up visit a little more than a week later  
2 his notes state Ms. V had Post Concussion Syndrome.<sup>83</sup> Ms. V  
3 continued to see Dr. Perkins through May, 2003<sup>84</sup> and continued  
4 on the pain medications during this time.<sup>85</sup>

5 Records from Ms. V 's speech therapist, Ms. Van  
6 Hoef, state Ms. V had a traumatic brain injury and are  
7 consistent with the lay testimony of L and V V and  
8 others that Ms. V was having difficulty with reading and  
9 comprehension, with word retrieval and with her ability to  
10 remember after the accident.

11 In her initial interview and evaluation on October  
12 23, 2002 Ms. Van Hoef's report states under "assessment" that,  
13 "definitely reports post concussive symptoms."<sup>86</sup> On October 31,  
14 2002 Ms. Van Hoef reports Ms. V had a "demonstrated word  
15 finding and rapid language processing impairment" and that she  
16 was "demonstrating at least mild neuro-cognitive language  
17

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19 <sup>82</sup> Record on Appeal at P204.

20 <sup>83</sup> Record on Appeal at P201.

21 <sup>84</sup> Ms. V went to see Dr. Perkins on April 7, 2003 related to  
22 chronic pain. At that time she reported blood and mucus in her  
23 stools and a past history of hemorrhoids. Record on Appeal at  
P202-2004.

24 <sup>85</sup> Record on Appeal at P197-211, 201-211.

25 <sup>86</sup> Record on Appeal at P508.



1 impairment."<sup>87</sup> On November 4, 2002 Ms. Van Hoef treatment notes  
2 state,

3 "The evaluation revealed mild-moderate verbal  
4 memory deficits including word retrieval. Ms. Vos  
5 exhibited good attention but tasks requiring  
6 concentration (mental manipulation while maintaining  
7 attn-focus) were at least mildly impaired. Ms. Vos has  
8 a good verbal vocabulary but she has difficulty  
9 accessing it."<sup>88</sup>

10 Ms Van Hoef concluded that Ms. V 's functional skills are  
11 impaired by these deficits.<sup>89</sup>

12 Ms. V continued her treatment with Ms. Van Hoef  
13 through March, 2003. She did this despite losing her insurance  
14 and having to pay for the visits herself.<sup>90</sup> Ms. Van Hoef's  
15 treatment notes show Ms. V was making some progress during  
16 this time, however she had problems with homework assignments  
17 and was feeling continuously anxious, nervous and overwhelmed  
18 about her inability to remember things and for her mind to  
19 function the same it used to.<sup>91</sup>

20 Despite the testimony of Ms. V and her friends and  
21 family, the division's consulting physician and consulting

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22 <sup>87</sup> Record on Appeal at P507.

23 <sup>88</sup> Record on Appeal at P505.

24 <sup>89</sup> Record on Appeal at P505 & 506.

25 <sup>90</sup> Transcript of Hearing May 5 & 7, 2008 at 85-202.

<sup>91</sup> Record on Appeal at P190-191.

1 psychiatric doctor, Dr. Cole and Dr. Rodgers, respectively,  
2 reviewed Ms. V 's extensive medical records and the reports of  
3 the IMEs and both concluded that Ms. V.'s disability claim  
4 should be denied. It should be noted that these doctors  
5 reviewed Ms. V 's records only; they did not conduct their own  
6 examination of her and did not speak with any family members,  
7 employers, etc.

8           Despite the conclusions of Dr. Cole and Dr. Rodgers  
9 the testimony they offered during the hearing in front of Judge  
10 Handley recognized the possibility that Ms. V could have  
11 experience a traumatic brain injury that did not manifest  
12 immediately and could have gone undetected. The doctors also  
13 discussed the general symptoms of someone who has experienced  
14 such an injury. These symptoms matched many of the complaints  
15 Ms. V experienced after the accident.

16           Dr. Cole testified at the May 5 and 7, 2008 hearing  
17 that he could find no evidence in the records to support Ms.  
18 V 's claim of a brain injury or head trauma following the  
19 accident.<sup>92</sup> However, he admitted he would be concerned about the  
20 possibility of a brain injury from a head on collision of a  
21 vehicle traveling at 45 mph.<sup>93</sup> He also testified that memory  
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24 <sup>92</sup> Transcript of Hearing May 5 & 7, 2008 at 237-238.

25 <sup>93</sup> Id. at P251-252.

1 loss and cognitive disabilities may result from a traumatic  
2 brain injury as may the loss of sense of smell.<sup>94</sup> Dr. Cole  
3 recognized that no pre-accident information related to Ms.  
4 V 's IQ or cognitive abilities exists so it was difficult to  
5 asses her post-accident functioning and that the bottom line is  
6 that this case comes down to who you believe more, the lay  
7 witnesses or the medical records.<sup>95</sup>

8           Dr. Rodgers also testified at the March 2008  
9 hearings. He recognized that traumatic brain injuries may not  
10 appear immediately following an accident but rather may take 5  
11 days, a week or even a month before physical or psychological  
12 symptoms to appear.<sup>96</sup> He also stated that the medication Ms. Vos  
13 was on may have masked or exaggerated symptoms of a traumatic  
14 brain injury.<sup>97</sup> He also agreed that when no verifiable pre-  
15 accident cognitive data exists that the best way to determine  
16 changes in brain function, such as the ability to concentrate  
17 or remember, following a traumatic accident is through  
18 independent verification by others who knew the person's pre-  
19 accident abilities.  
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22 <sup>94</sup> Id. at P253-254.

23 <sup>95</sup> Id. at P255-262.

24 <sup>96</sup> Transcript of Hearing May 5 & 7, 2008 at 316-318.

25 <sup>97</sup> Id. at P329-330.

1 Dr. Rodgers also explained that brain damage may be  
2 due to actual brain injury or to the psychological response to  
3 such an accident. The later type of injury usually resolves  
4 itself over time however damage to the actual brain tissue may  
5 or may not resolve over time.<sup>98</sup> The Doctor also testified that  
6 none of the State doctors ever spoke directly with Ms. V 's  
7 employers or co-workers to understand the cognitive  
8 complexities of Ms. V 's position and her abilities to meet  
9 those demands; rather they relied upon the job description they  
10 were provided. He recognized this may have been different than  
11 what Ms. V or her co-workers were actually experiencing.<sup>99</sup> Nor  
12 did these physicians consider the observations of lay witnesses  
13 who knew Ms. V before and after the accident.  
14

15 During the March 5 & 7, 2008 hearings numerous  
16 witness offered testimony that supported Ms. V 's claim  
17 disability as it related to her brain injury.

18 M P , Ms. V 's mother, testified that prior to  
19 the accident Ms. V was very bright and motivated about her  
20 job.<sup>100</sup> Following the accident Ms. V completely lost her short  
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23 <sup>98</sup> Id. at 334-337.

24 <sup>99</sup> Id. at 354-357.

25 <sup>100</sup> Transcript of Hearing May 5 & 7, 2008 at 22-30.

1 term memory, that she was extremely anxious.<sup>101</sup> These were  
2 conditions that were not present before the accident. The loss  
3 of memory was reported to continue through the time of the  
4 hearing.<sup>102</sup>

5 Ms. V 's step-father, M P , testified that  
6 prior to the accident Ms. V was very smart and worked hard at  
7 her job. Following the accident he reports Ms. V experienced  
8 memory loss and resulting anxiety due to her inability to  
9 remember and return to work.<sup>103</sup>

10 E M , a former co-worker of Ms. V ' ,  
11 testified that Ms. V was a smart, efficient and competent  
12 worker.<sup>104</sup> While Ms. M only saw or spoke with Ms. V a  
13 few times following the accident she described Ms. V as  
14 confused, unable to focus and as having issues with memory  
15 recall.<sup>105</sup>

17 M M , a friend of Ms. V 's since 1996 and  
18 someone who have lived with her for a 9 month period a few  
19 years prior to the accident, described Ms. V pre-accident as  
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21 <sup>101</sup> Id.

22 <sup>102</sup> Id.

23 <sup>103</sup> Transcript of Hearing May 5 & 7, 2008 at 30-40.

24 <sup>104</sup> Transcript of Hearing May 5 & 7, 2008 at 42-60.

25 <sup>105</sup> Id.

1 a very high-energy and capable person with above average  
2 intelligence and excellent communication skills.<sup>106</sup> Ms. M  
3 testified following the accident she noticed a marked decrease  
4 in energy level, a loss of enthusiasm for life, compromised  
5 decision making ability and a decrease in both short and long  
6 term memory.<sup>107</sup> She also testified how upset Ms. V was when  
7 she realized she would be unable to return to her work with the  
8 State.

9  
10 V V, Ms. V's husband, who knew her for 16  
11 years testified that L excelled at her jobs and enjoyed  
12 working.<sup>108</sup> He testified that following the accident L was  
13 quite bruised, lost her ability to smell for quite sometime and  
14 experienced memory loss. These are all symptoms consistent with  
15 a traumatic brain injury as explained by Dr. Cole.<sup>109</sup>

16 Lastly, L V presented testimony on her  
17 physical and mental condition both prior to and post accident.  
18 In regards to physical changes Ms. V testified that  
19 immediately following the accident when she was brought to the  
20

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22 <sup>106</sup> Transcript of Hearing May 5 & 7, 2008 at 64-79.

23 <sup>107</sup> Id. at 95.

24 <sup>108</sup> Transcript of Hearing May 5 & 7, 2008 at 81-84.

25 <sup>109</sup> Transcript of Hearing May 5 & 7, 2008 at P255-262.

1 ER she was disoriented and confused.<sup>110</sup> She can not recall  
2 whether anyone there asked whether she had lost  
3 consciousness.<sup>111</sup> As Ms. V was leaving the ER she realized for  
4 the first time that she had wet her pants.<sup>112</sup> She also testified  
5 to losing her smell for approximately one year.<sup>113</sup>

6 Ms. V also experienced significant cognitive  
7 changes post accident. She testified that prior to the accident  
8 she was always proud of her abilities, particularly her  
9 competencies at work.<sup>114</sup> Following the accident she was very  
10 confused often being told something and then only a few minutes  
11 later completely forgetting. She also was experiencing problems  
12 with word retrieval and having difficulty reading and  
13 understanding what she read. She claims this was recognized by  
14 her physical therapist and is the reason she was referred to  
15 speech therapy. This was not usual for her before the accident.  
16 She would try to review work manuals in the course of her  
17 speech therapy sessions but had difficulty reading and  
18 comprehending the material or remembering the information.  
19

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21 <sup>110</sup> Transcript of Hearing May 5 & 7, 2008 at 85-202.

22 <sup>111</sup> Id.

23 <sup>112</sup> Id.

24 <sup>113</sup> Id.

25 <sup>114</sup> Transcript of Hearing May 5 & 7, 2008 at 85-202.

1 Ms. V testified that she tried to work through her  
2 cognitive issues and hoped to go back to work as she loved her  
3 job.<sup>115</sup> After meeting with co-workers she felt unable to do all  
4 the duties of her former job as "My ability to think at a  
5 higher level has not improved."<sup>116</sup> Despite this Ms. V believed  
6 there were some tasks she was able to perform and hoped to  
7 return with a reduced workload or to work from home but those  
8 requests were denied.

9 Judge Handley found Ms. V 's testimony "very  
10 credible" and that she was best positioned to present evidence  
11 of the mental demands of her duties in her position with the  
12 State and how a reduction in her cognitive abilities hindered  
13 her from performing those duties.<sup>117</sup>

14 Judge Handley did not err in choosing not to accept  
15 the opinions of the state's medical experts. Rather he chose to  
16 find the testimony of the lay witnesses, coupled with the  
17 records of Doctors Van Houten, Dr. Perkins and Ms. Van Hoef,  
18 and the testimony of Dr. Cole and Dr. Rodgers regarding the  
19 symptoms of a brain trauma patient and the possible delays in  
20 symptom onset more convincing than the findings of the state's  
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22 \_\_\_\_\_  
23 <sup>115</sup> Id.

24 <sup>116</sup> Id. at 87.

25 <sup>117</sup> Final Decision and Order OAH NO. 06-0701-PER at 17.



1 experts. While there is conflicting evidence to argue that Ms.  
2 V was not disabled due to a brain injury as a result of the  
3 accident this court's role is not to reweigh the evidence or  
4 the credibility of the witnesses but to determine whether  
5 substantial evidence exists to support the finding.

6 After extensive review of the record, and viewing the  
7 evidence in favor of the findings appealed, the court finds  
8 substantial evidence exists to uphold Judge Handley's  
9 determination that: (1) Ms. V suffered a brain injury from  
10 the March 2002 motor vehicle accident while on duty with the  
11 State; (2) while Ms. V had pre-existing medical conditions  
12 prior to the accident, the accident was more than a substantial  
13 factor in the disability that caused her termination; and (3)  
14 that the disability presumably permanently prevented Ms. V  
15 from satisfactorily performing her usual duties as an employee  
16 on the date of her termination.

17  
18 **C. Relevancy of information related to anal cancer.**

19 The Administrator asserts that Judge Handley erred by  
20 considering irrelevant information in making its findings  
21 related to Ms. V 's anal caner.<sup>118</sup>

22 Ms. V was diagnosed with anal cancer in 2006,  
23 approximately 3 years after her work with the State was

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25 <sup>118</sup> Brief of Appellant at 41-42.

1 terminated and four years after the March 27, 2002 car  
2 accident. As of May 29, 2008 she had undergone four surgeries  
3 related to her cancer including having her anus, rectum and  
4 portion of her vagina removed and has undergone extensive  
5 chemotherapy and radiation.<sup>119</sup> Ms. V argues that the cancer  
6 was likely pre-existing prior to her termination, went  
7 diagnosed for many years and may have been responsible for many  
8 of her medical complaints. She further asserts that the  
9 diagnosis of a somatic disorder may have been incorrect when  
10 she was indeed experiencing symptoms from her undiagnosed  
11 cancer.

12 The Administrator argues that Judge Handley should  
13 not have considered this information, as while certainly  
14 unfortunate, it does not relate to why Ms. V was terminated  
15 from her employment.

16 The court has already found that substantial evidence  
17 exists to uphold Judge Handley's decision the Ms. V was  
18 disabled due to her traumatic brain injury, therefore whether  
19 or not Judge Handley improperly considered information related  
20 to the later diagnosed anal cancer is harmless.

21 The Administrator raises an additional concern with  
22 Judge Handley's apparent reliance on Ms. V 's current medical  
23 condition, which clearly prevents her from returning to work,  
24

25 <sup>119</sup> Record on Appeal at 80.

1 rather than making a determination of whether she would have  
2 been capable of returning to work at the time of her  
3 termination.

4 In making his findings Judge Handley does reference  
5 Ms. V 's current medical condition as preventing her from  
6 working. He states, "Whether Ms. V would have sufficiently  
7 recovered from her brain injury to have been able to re-assume  
8 her duties absent her other medical problems is not an issue  
9 that needs to be decided in this appeal."<sup>120</sup> He goes on to  
10 explain, "There can really be no dispute that Ms. V is  
11 currently disabled, and that the prognosis is that she will  
12 probably not be able to return to work in the foreseeable  
13 future."<sup>121</sup>

14 Judge Handley never made a determination as to the  
15 likely date of the on-set of Ms. V 's anal cancer. However,  
16 such a determination was unnecessary given that his ultimate  
17 decision in finding Ms. V eligible for disability was based  
18 on the brain injury not on the anal cancer. Judge Handley  
19 clearly states that "Ms. V suffered from a total and  
20 apparently permanent occupational disability, because of her  
21 brain injury"<sup>122</sup> and that while "It is possible that Ms. V may

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23 <sup>120</sup> Final Decision and Order OAH NO. 06-0701-PER at 17.

24 <sup>121</sup> Final Decision and Order OAH NO. 06-0701-PER at 17.

25 <sup>122</sup> Final Decision and Order OAH NO. 06-0701-PER at 17, 19.

1 have recovered her mental abilities sufficiently to have  
2 resumed her duties at some point had her cancer and treatment  
3 not added to her health problems, at the time she terminated,  
4 her employment, her occupational disability was apparently  
5 permanent."<sup>123</sup> The ALJ's finding that Ms. V 's condition due to  
6 the brain injury was presumably permanent at the time of  
7 termination is also supported by Dr. Perkin's in his  
8 recommendation of Ms. V for medical retirement.

9 Because Judge Handley independently concluded that  
10 Ms. V 's disability due to the brain injury was presumably  
11 permanent, any consideration of her current medical condition  
12 due to the impact of the cancer is harmless error.

#### 13 IV. CONCLUSION

14 In making his findings ALJ Handley did not err by  
15 applying the wrong standard of review or by shifting the burden  
16 of proof to the State. Substantial evidence exist to support  
17 the ALJ's finding that Ms. V suffered a presumably permanent  
18 brain injury that prevented her from satisfactorily performing  
19 her usual or comparable work duties on the date her employment  
20 was terminated with the state. Any irrelevant information  
21 reviewed by the ALJ in making this finding was harmless error.  
22 The decision of ALJ Handley is therefore AFFIRMED.

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25 <sup>123</sup> Final Decision and Order OAH NO. 06-0701-PER at 19-20.

1 Dated at Sitka, Alaska this 28<sup>th</sup> day of August, 2009.

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David V. George  
Superior Court Judge

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