

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

IN THE MATTER OF:)
)
D. C.) OAH No. 07-0070-PER
) Div. R & B No. 2007-004

DECISION AND ORDER

I. Introduction

D. C. filed an application for occupational disability benefits with the State of Alaska, Division of Retirement and Benefits (“Division”) on August 17, 2006.¹ On January 16, 2007, Department of Administration Deputy Commissioner Melanie Millhorn denied Ms. C.’s application.² On February 1, 2007, Ms. C. filed an appeal which was referred to the Office of Administrative Hearings.³

The formal hearing was held on April 30th and May 1st of 2007. Ms. C. represented herself and was assisted by B. W. of the Alaska Injured Worker’s Alliance. The Division was represented by Assistant Attorney General Joan M. Wilkerson. The hearing was recorded.

Kay L. Howard, Administrative Law Judge, Office of Administrative Hearings, presided over the hearing. Based on the record as a whole and after due deliberation, the decision denying Ms. C.’s application for occupational disability benefits is affirmed.⁴

II. Facts

A. Background

Ms. C. is 51 years old. She came to Alaska from the Seattle area in 1995 and started working for the Municipality of Anchorage as a bus driver in the spring of 1996.⁵ During the nine years of her employment as a bus driver for the Municipality, Ms. C. filed approximately eighteen workers’ compensation injury reports, which will be discussed below. Most of the

¹ Division’s Exh. P9 (The Division’s 829-page file, which constitutes the bulk of the record in this matter, was submitted to the OAH with prestamped exhibit numbers P1 through P829. All citations to exhibit numbers that begin with the letter “P” refer to that file).

² Exh. P1.

³ Exh. P3.

⁴ At a status conference held on April 27, 2007, to hear oral argument on the Division’s motion to exclude her pre hearing brief and late filed exhibits, Ms. C. indicated she is not appealing the issue of nonoccupational disability; rather, she is only pursuing occupational disability benefits.

injury reports describe neck, shoulder and back pain;⁶ four of them involved traffic accidents and six of Ms. C.'s injury claims were controverted by the workers' compensation carrier.⁷

Ms. C. was terminated from employment on September 21, 2006, because she had not been to work since April 11, 2006, ostensibly for medical reasons.⁸

B. Independent Medical Examinations of Ms. C.

During the course of her employment as a bus driver, Ms. C. filed numerous workers' compensation claims.⁹ As a result, Ms. C. was scheduled by the insurance carrier for five separate independent medical examinations (IME) performed by four different medical professionals during the time period from May 1, 2003 through July 15, 2006. The IMEs are summarized below:

1. May 1, 2003; performed by Dr. Patrick L. Radecki, MD

On August 27, 2002, Ms. C. was involved in a motor vehicle accident while driving a bus. In the process of turning left, the bus was hit on the left driver's side by another vehicle. Ms. C. filed a workers' compensation claim, citing pain in her neck and back. She worked for about a month after the accident, but was taken off work because of persistent pain. Other than a one day trial return to work in February 2003, Ms. C. was essentially off work from November 2002 until some time in 2003.¹⁰ The insurance carrier referred her to Dr. Patrick L. Radecki for an IME of Ms. C., which was performed on May 1, 2003.¹¹

⁵ C. hearing testimony.

⁶ Exh. P727-828.

⁷ Exh. P770.

⁸ Exh. P12.

⁹ October 25, 1996 – bus rear-ended; May 17, 1997 – pulled a muscle in neck while securing a disabled passenger; March 15, 1999 – collided with a street light on an icy intersection, causing shoulder and arm pain; March 8, 2000 – odor from bus caused sinus headache; March 28, 2000 – slipped and fell while walking to bus, injuring neck, left shoulder, lower back and foot; August 1, 2001 – reported pinched nerve after securing a wheelchair to bus; February 13, 2002 – reported pinched nerve due to driving on unplowed roads which aggravated neck and left shoulder; June 2, 2002 – reported pain in low back but no specific event; August 27, 2002 – collided with a van resulting in pain to neck and back; November 12, 2003 – ill-fitting bus seats causing pinched nerve in tailbone; February 2, 2004 – hit the back of another bus with the back of bus she was driving; March 15, 2004 – slipped and fell in parking lot, injuring neck, upper and lower back and right side; June 12, 2004; May 28, 2005 – exacerbation of old injuries after bus “lurched” due to mechanical problems and accident; April 21, 2006 – injury to neck, lower back, wrists due to driving a bus. Exh. P727-828.

¹⁰ Exh. P127.

¹¹ Exh. P126.

Ms. C.'s chief complaint at the time of the IME was "lower back pain" from the accident on August 27, 2002.¹² Dr. Radecki reviewed Ms. C.'s medical records from August 28, 2002, through April 9, 2003, that were provided for the appointment. Dr. Radecki noted that beginning the day after the accident, she saw Dr. Keister and was conservatively treated by him for several months. She had a steroid injection of the sacroiliac joint and fifteen rolfing treatments. Ms. C. was also seen by Dr. James, who gave her an epidural steroid injection and she had just started treatment with Dr. Susan Klimow.¹³

Dr. Radecki noted that the history of back pain given by Ms. C. to the various medical providers who had seen her was inconsistent. For example, she told Dr. Radecki at the beginning of the appointment that "she did not have significant low back problems prior to the onset of pain in her back after a car versus bus collision on August 27, 2002."¹⁴ However, Ms. C. reported to Dr. Vasileff, who saw her on November 12, 2002, that she had a past history of lower back pain and that it had become progressively worse since she started her job as a bus driver six years previous.¹⁵

Dr. Radecki interviewed Ms. C. regarding her past medical history, including her injuries, illnesses, operations, hospitalizations, allergies and medications.¹⁶ Also, while going over Ms. C.'s socioeconomic history, Dr. Radecki noted that she practices Kendo, a martial art featuring sword fighting while wearing body armor. Ms. C. indicated she had performed this activity twice a week for the past two and half years, but she had not done the most physical part of the activity recently.¹⁷

Dr. Radecki conducted a physical examination of Ms. C. including her cervical spine and upper extremities and performed a broad range of motion tests of her cervical spine, shoulders, elbows and wrists.¹⁸ He noted that the muscle strength testing throughout her upper extremities was excellent and that a dynamometer measured her grip strength at 59 pounds for her right hand

¹² Exh. P127.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Exh. P128-129.

¹⁶ Exh. P132-133.

¹⁷ Exh. P133.

¹⁸ Exh. P134-135.

and 60 pounds for her left hand.¹⁹ Dr. Radecki examined Ms. C.'s lumbar spine and lower extremities, during which she indicated tenderness, described as a stinging sensation, from palpation of L1 through L5, and at L4 -- L5.²⁰ She also had significant pain complaints in the fatty tissues around each greater trochanter.²¹

Ms. C. was able to touch the floor upon bending at the lumbar spine and was able, from a sitting position, to raise both right and left legs to 90 degrees.²² Dr. Radecki noted that Ms. C.'s muscle strength testing throughout her lower extremities was excellent but her abdominal muscles were noted to be quite weak.²³

Dr. Radecki reviewed Ms. C.'s imaging studies. He reported that she had a magnetic resonance imaging test (MRI) on September 27, 2002, which showed a zone of high intensity which was believed to be a possible annular tear and that there was some disc degeneration. He stated from reading the MRI that it was difficult to determine whether it was an L5 – S1 disc or the L4 -- L5 disc but that it "is a degenerated disk with some element of dehydration which bulges minimally."²⁴ Dr. Radecki further noted that the zone of high intensity seen on the first MRI was also seen on a second MRI performed on February 21, 2003, but the zone of high intensity was not as intense in the second test; the radiologist who conducted the second MRI did not identify an annular tear.²⁵

The following are Dr. Radecki's impressions as a result of the independent medical examination he performed on Ms. C. on May 1, 2003:

1. Subjective complaints of cervical, shoulder and lumbar pain, without objective evidence orthopedic, neurologic or rheumatologic diagnosis related to motor vehicle accident of August 27, 2002.
2. Psychosocial factors affecting presentation.
3. Degenerative disc disease, lumbar spine, minimal.

¹⁹ Exh. P135.

²⁰ Exh. P136.

²¹ *Id.* The greater trochanter is defined as "one of the bony prominences toward the near end of the thigh bone (the femur)." <http://www.medterms.com/script/main/art.asp?articlekey=10448>.

²² *Id.*

²³ *Id.*

²⁴ Exh. P137.

²⁵ *Id.*

4. Obesity.^[26]

In addition to giving his impressions of Ms. C.'s complaints, Dr. Radecki answered several questions posed by the insurance company. As to her diagnosis, he stated:

Ms. C. has subjective complaints of pain in the cervical and lumbar spine, as well as the shoulders which she attributes to the motor vehicle accident of August 27, 2002.

She also has a history of a prior motor vehicle accident in 1991, with cervical spine pain. She also had some low grade pre-existing low back complaints which are somewhat nonspecific in nature. At this time, Ms. C. has had resolution of her neck and shoulder and thoracic area complaints, but continues to have nonspecific complaints of lower back pain.

She has some degenerative disc disease in the lumbar spine, disc desiccation and minimal bulge, which is essentially unremarkable with no consistent findings on the MRI scans to explain her multiple subjective complaints.

There is some evidence of functional overlay with diffuse stinging complaints in multiple areas of the shoulder girdles as well as the lumbar region. There are likely psychosocial factors operant which are causing prolonged pain complaints.^[27]

Dr. Radecki also answered a question whether, using a reasonable degree of medical certainty, Ms. C.'s occupational injury "was a substantial factor in bringing about the employee's current complaints...."²⁸ Dr. Radecki responded:

It is not felt that the motor vehicle accident of August 27, 2002, is a substantial factor in Ms. C.'s prolonged subjective complaints at this time.

It is possible that Ms. C. could have sustained a minor strain to her neck at the time of the motor vehicle accident. However, she was in the front of the bus, and the back of the bus was hit by what she says was a glancing blow. She was seatbelted at the time of the accident.

There have been no objective abnormalities relative to this accident. In the first few weeks she was treated with prn pain

²⁶ *Id.*

²⁷ Exh. P138.

²⁸ *Id.*

medications and then slowly over time she had increasing pain complaints.

Dr. Vasileff mentioned she is a fairly large woman who has had back pain in the past and, to a reasonable degree of medical certainty, it is felt she is experiencing low back pain syndrome consistent with her age, obesity, and physical deconditioning.^[29]

Further, Dr. Radecki believed that "psychosocial factors are delaying or prohibiting a full recovery.... she has widespread subjective complaints which are not explained by the little bit of arthritic change at one vertebral body level in the lumbar spine."³⁰ Dr. Radecki went on to state that most of Ms. C.'s complaints "are merely the aches and pains of age (which Ms. C. herself discusses), significant overweight and deconditioning, as well as psychosocial factors."³¹ Dr. Radecki did not support any further medical care for Ms. C. as a result of the "alleged occupational exposure of August 27, 2002. There is no evidence that the motor vehicle accident was significant."³² Rather, he added Ms. C.:

is certainly capable of working as a bus driver. She has limitations in her mind, but there are no physical limitations of an objective nature. She is deconditioned, but it does not take significant conditioning to drive a bus with power steering and sitting.

There are no work restrictions that are work-caused. In addition, the bit of degenerative disc disease in isolation would not cause chronic ongoing pain or restrictions.^[33]

Finally, Dr. Radecki stated:

Ms. C. has perceptions in her mind that she has significant disability, but there is no objective evidence of any true disability of an orthopedic, neurologic, or rheumatologic nature. Essentially, caregivers are treating Ms. C.'s subjective complaints in the face of negative physical examinations and negative imaging studies with no significant objective findings.³⁴

²⁹ Exh. P138-139.

³⁰ Exh. P139.

³¹ *Id.*

³² Exh. P140.

³³ *Id.*

³⁴ Exh. P141.

2. January 6, 2004; performed by Dr. Richard L. Peterson, DC, and Dr. Holm Neumann, MD, PhD

Following her IME performed by Dr. Radecki on May 1, 2003, Ms. C. continued to be treated for low back pain by Dr. Susan Klimow, Dr. Michael James, and Stacy Szymanski, a physical therapist.³⁵ Ms. C. received total disability from October 2, 2002, through March 28, 2003, and again from March 29, 2003, through May 30, 2003.³⁶ On May 30, 2003, the insurance carrier determined that Ms. C. required no further care relating to the August 27, 2002, incident.³⁷ Ms. C. was released to work for up to six hours per day on June 5, 2003, with the hours per week increasing in subsequent weeks.³⁸ On June 18, 2003, Dr. Klimow found Ms. C. totally disabled from June 13, 2003, to June 18, 2003, and partially disabled from June 19, 2003, to July 16, 2003, with a reevaluation scheduled for that day. Dr. Klimow limited Ms. C. to 20 pounds lifting, with no bus driving until she had been fully reassessed.³⁹

On November 12, 2003, Ms. C. filed another incident report indicating she had a pinched nerve in her lower spine that was causing numbness in her right leg, a condition she attributed to the bus driver's seat.⁴⁰ On November 13, 2003, Ms. C. began to be treated by Dr. Timothy Kanady, DC.

Ms. C. was referred by her insurance carrier to another independent medical examination, which was performed by Richard L. Peterson, DC, and Holm Neumann, MD, PhD, on January 6, 2004.⁴¹ Drs. Peterson and Neumann noted that Ms. C. began the history of her injuries by referring to the August 27, 2002, bus accident. She told the doctors she sought medical care after the bus accident from Dr. Keister but her condition did not improve, so she eventually saw Dr. Susan Klimow and Dr. Michael James in the spring of 2003.⁴² Ms. C. said she attempted to return to work subsequent to Dr. Radecki's IME, but indicated she was unable to work because her pain was too severe.⁴³ Ms. C. further stated that she received a lumbar support in September

³⁵ Exh. P95; *see also* Exh. P111-118.

³⁶ Exh. P113.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Exh. P114.

⁴¹ Exh. P94-125.

⁴² Exh. P95.

⁴³ *Id.*

2003 but she found it to be of no benefit and her back continued to be aggravated.⁴⁴ She complained that the driver seats in the buses were broken down and as a result, she could not drive some of the buses because of the condition of the seat.⁴⁵ She indicated her condition continued to deteriorate through November 2003, at which time she filed the claim for which she was then evaluated by Drs. Peterson and Neumann.

Drs. Peterson and Neumann performed a thorough and extensive review of Ms. C.'s medical records, as had Dr. Radecki.⁴⁶ They indicated her records were the same as had been described by Dr. Radecki, with the addition of the information that was gleaned from Ms. C.'s treatments subsequent to his examination of her.⁴⁷

Drs. Peterson and Neumann conducted a thorough physical examination of Ms. C., which included an examination of her lumbar spine and lower extremities, a neurological assessment of her lower extremities, an examination of her cervical spine and upper extremities and a neurological evaluation of her upper extremities.⁴⁸ They also reviewed her x-ray and MRI reports.⁴⁹

As a result of their examination of Ms. C. and her medical records, Drs. Peterson and Neumann formed the impression that Ms. C. has degenerative disc disease in her lumbar spine, as identified on a previous MRI scan, with a small central L4 – L5 disc protrusion without nerve impingement.⁵⁰ They also indicated she had cervical and lumbar strain related to both the incident on August 27, 2002, and the incident on December 1, 2003, but felt them both to be resolved.⁵¹

Drs. Peterson and Neumann did not proffer a diagnosis regarding Ms. C.'s injury of November 12, 2003. Rather, they noted:

There is no diagnosis that the panel can give in relationship to the claim incident of November 12, 2003. The panel's opinion is similar to that of Dr. Radecki's in that Ms. C. has subjective complaints relative to her spine and that she is severely

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Exh. P96-118.

⁴⁷ *See* Exh. P111-118.

⁴⁸ Exh. P118-120.

⁴⁹ Exh. P121.

⁵⁰ *Id.*

⁵¹ Exh. P121-122.

overfocused on her discomfort. On a more-probable-than-not basis, these complaints are secondary to her being overweight and deconditioned. There is no specific identifiable injury related to the November 12, 2003, claim.

The panel also notes that she was in an automobile accident on December 1, 2003, but this does not appear to be causing any significant impact to her symptomology other than she is now focused on a neck claim for that incident.^[52]

In response to a question posed to them regarding whether Ms. C. has any pre-existing or concurrent conditions related to the injury of November 12, 2003, the doctors stated:

The panel notes that Ms. C. has some degenerative changes, but we do not feel that these significantly aggravated, accelerated, exacerbated, or otherwise combined with the November 12, 2003, incident.^[53]

Drs. Peterson and Neumann stated there were no objective findings they could make related to the incident of November 12, 2003, nor to the prior incident on August 27, 2002. The doctors said Ms. C. does have some degenerative changes, but these are from the “natural progression of the aging process and are unrelated to the November 12, 2003, claim.”⁵⁴ The doctors explained their findings by saying:

The panel believes that she has significant magnification of symptomatology and that her subjective complaints are not consistent with a soft tissue injury. The panel notes that if any soft tissue injury had occurred dating back to August 27, 2002, such symptoms would have been expected to have resolved with the passage of time considering the normal biological healing process of soft tissue injuries. However, her history indicates that her symptoms did not resolve, which suggests that psychosocial factors are involved in the prevention of her recovery. Thus, it appears there is significant embellishment of symptoms due to her perception that she is significantly injured, but objective findings do not confirm these complaints.^[55]

The doctors concurred with Dr. Radecki's assessment that Ms. C. has "perceptions of significant disability" and that her caregivers were treating her based on those subjective

⁵² Exh. P122.

⁵³ *Id.*

⁵⁴ Exh. P123.

complaints rather than on the basis of the negative physical examinations and negative imaging studies. Drs. Peterson and Neumann concluded, based on their observations, that continued treatment for those reasons “may continue to reinforce her symptom complex.”^{56]} Drs. Peterson and Neumann concluded “that Ms. C. is capable at this time of returning to her work in the same capacity as she was at the time of her alleged incident of November 12, 2003.”⁵⁷

3. May 1, 2004; performed by Dr. Scot G. Fechtel, DC, MD

On February 2, 2004, Ms. C. was involved in an accident while driving a bus. The bus was stopped to allow a passenger to deboard when it was hit from behind by another vehicle.⁵⁸ Her injury report indicated neck and shoulder pain.⁵⁹ One month later, Ms. C. slipped and fell in the bus parking lot, injuring her neck, upper and lower back and right side.⁶⁰

Ms. C. was referred to Dr. Scot G. Fechtel, a chiropractic orthopedist and medical neurologist, for an IME which was conducted on May 1, 2004.⁶¹ Dr. Fechtel conducted a verbal interview with Ms. C., taking her medical history, socioeconomic information and he performed a physical examination of her. At the time, she indicated neck, left trapezius, and lumbosacral aching and stabbing pains, with her pain level varying from 1.5 to 3.5 on a scale of 0 (lowest) to 10 (highest).⁶²

Dr. Fechtel performed range of motion tests on Ms. C.’s lumbar spine, cervical spine and shoulders, and measured and tested all of her extremities with regard to motor power, grip strength, sensation and reflexes.⁶³ He concluded as a result of the February 2, 2004, accident, that she had a mild strain injury that had resolved to baseline.⁶⁴ He also concluded that Ms. C. has a longstanding “chronic musculoskeletal pain syndrome of the axial spine and related soft tissues.”⁶⁵ He explained that “each occupational incident triggers a minor strain which flares up her underlying chronic pain syndrome” which seems to have occurred with the February 2, 2004,

⁵⁵ *Id.*

⁵⁶ Exh. P124.

⁵⁷ *Id.*

⁵⁸ Exh. P787.

⁵⁹ *Id.*

⁶⁰ Exh. P780.

⁶¹ Exh. P75-93.

⁶² Exh. P76.

⁶³ Exh. P78-80.

⁶⁴ Exh. P82.

accident.⁶⁶ However, Dr. Fechtel did not believe the injury she received that day was a “substantial factor” in her physical complaints, nor did it cause a worsening of her problems. Rather, he believed Ms. C.’s complaints and her need for treatment were caused by “the other incidents that have occurred and her longstanding chronic pain syndrome.”⁶⁷

Dr. Fechtel opined that Ms. C. may have a pre-existing problem involving her low lumbar spine that “can predispose to mechanic back pain and early degenerative changes [,]”⁶⁸ but he did not have a clear enough set of imaging studies to really determine whether she had that problem.⁶⁹ Finally, Dr. Fechtel stated Ms. C. had recovered from the incident on February 2, 2004, and that she was medically stable from the incident.⁷⁰

4. November 11, 2005; performed by Dr. Patrick L. Radecki, MD

On May 28, 2005, Ms. C. was involved in another bus accident. She hit the left back of another bus with the right rear of her bus after being crowded by another vehicle while in a right hand turn.⁷¹ She filed an occupational injury report that indicated in addition to the accident, the bus exacerbated an of old injury after it “lurched” due to transmission problems.⁷² Ms. C. was referred for another IME, her second one with Dr. Radecki.

Dr. Radecki conducted an interview with Ms. C. that discussed the injury, her current symptoms and her past medical history. She indicated that after the accident she had pain in her neck, shoulder and low back⁷³, but that essentially these symptoms had resolved within a month or two.⁷⁴ Ms. C. indicated she has had chronic pains in her neck and low back for some time, with flare-ups.⁷⁵

As to her current symptoms, Ms. C. was worried about carpal tunnel syndrome because of occasional problems with dexterity and numbness in her ring and little fingers, but Dr.

⁶⁵ *Id.*

⁶⁶ Exh. P83.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Exh. P84.

⁷⁰ Exh. P85.

⁷¹ Exh. P64.

⁷² Exh. P277.

⁷³ Exh. P65.

⁷⁴ *Id.*

⁷⁵ *Id.*

Radecki concluded these were not classic signs of carpal tunnel syndrome.⁷⁶ Ms. C. also indicated she had had a flare-up of her low back pain and had been treated by her chiropractor, Dr. Kanady, twice a week for the last two months, which seemed to help her for two to three days after each treatment.⁷⁷

Dr. Radecki described Ms. C.'s past history as being "predominantly one of chronic musculoskeletal pain syndromes along her axial spine and soft tissues," as noted by Dr. Fechtel in the IME he conducted on May 1, 2004.⁷⁸ Dr. Radecki related this to the "regional complaints" Ms. C. had during his first IME on May 1, 2003, and his sense that "she had psychosocial factors affecting her presentation."⁷⁹

Following a thorough physical examination of Ms. C., including her upper and lower extremities, range of motion, reflex and strength tests, Dr. Radecki stated that his impression is Ms. C. has a "[h]istory of chronic pain syndrome with known nonphysiologic reactions to provocative maneuvers[;] degenerative changes in the cervical spine at C5-C6 and in the lumbar spine at L4-L5; and "subjective symptomology provoked or aggravated by the May 2005 incident in the neck, low back, and right shoulder, all felt, *by the patient*, to have resolved within two months."⁸⁰

As a result of his examination of Ms. C., Dr. Radecki diagnosed her with:

chronic, subjective pain in the area of the lumbar region, diffuse in nature, not felt due to any real physical abnormality. Diffuse stinging over this entire region is felt to be overwhelmingly due to psychosocial factors. There may be some minor element of mechanical low back pain due to her age, very significant increased weight, and deconditioning.^[81]

Dr. Radecki indicated Ms. C. has some minor degenerative joint changes in her cervical and lumbar spine areas, but he stated these were "consistent with her age."⁸² Dr. Radecki did not believe the incident of May 25, 2005, to have been a "substantial factor" in her need for

⁷⁶ *Id.*

⁷⁷ Exh. P66.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Exh. P70 (emphasis added).

⁸¹ Exh. P70-71.

⁸² Exh. P71.

current treatment⁸³, because she is medically stable⁸⁴, and that she suffers from “symptom magnification and/or malingering.”⁸⁵

5. July 15, 2006; performed by Dr. Patrick L. Radecki, MD

Dr. Radecki performed a final IME on Ms. C. on July 15, 2006, following a report of an April 12, 2006, occupational injury she filed in which she indicated her injury consisted of “L5/S1 disk degenerative disk disease . . .also carpal tunnel syndrome.”⁸⁶ At the IME, Ms. C. denied she had a new injury, saying her past problems were continuing and she had been off work since March 6, 2006.⁸⁷ Her chief complaints were carpal tunnel syndrome, neck pain and a torn disc, L5-S1, and she said it hurts her to drive because she has numbness in her hands and pain in her neck and right shoulder.⁸⁸

Dr. Radecki reviewed the medical records and imaging studies Ms. C. provided and conducted a physical examination in which he tested Ms. C.’s lumbar spine, cervical spine, shoulders, elbows, wrists, hands and fingers, and lower extremities.⁸⁹ As a result of his examination, Dr. Radecki concluded Ms. C. had:

Multiple subjective complaints involving the neck and upper limbs diffusely.

Ms. C.'s presentation is that of a non-physiologic pain disorder being the best explanation for her complaints.

Ms. C. has had documented by her treating physicians full range of motion of the shoulders on April 4, 2006, and full range of motion of the neck on April 12, 2006, and normal motor and sensory findings in the upper limbs on March 15, 2006.

Today she presents with extremely limited range of motion of her neck and shoulders, and bizarre nonphysiologic altered sensation of the hands.

This all points to an inconsistent physical examination presentation, which would point to magnification of symptomology, either purposeful or non-purposeful, which makes

⁸³ *Id.*

⁸⁴ Exh. P73.

⁸⁵ Exh. P71.

⁸⁶ Exh. P194.

⁸⁷ Exh. P45 & P51.

⁸⁸ Exh. P45.

⁸⁹ Exh. P52-55.

her look as though she has a significant disorder, and yet there is no objective abnormality and all of these subjective findings are inconsistent.

Thus, Ms. C. merely has a subjective pain syndrome that has persisted since 2003.^[90]

Dr. Radecki indicated that Ms. C.'s complaints regarding carpal tunnel syndrome were not supported by the physical examination because her motor and sensory examinations were inconsistent.⁹¹ He stated her minimal symptoms were consistent with her age, body mass index, and wrist ratio instead of being caused by her work.⁹² Dr. Radecki also concluded that Ms. C.'s degenerative disc changes in both her cervical and lumbar spines were consistent with her age, and the degenerative disc disease in her lumbar spine had not changed remarkably since 2002, based on MRI scans.⁹³

Dr. Radecki stated that Ms. C.'s current diagnosis is:

widespread pain complaints, with complaints in practically all areas of the neck, shoulder girdle, arms, forearms, and hands, as well as throughout her low back and pelvic region that cannot possibly be explained merely on the basis of some mild degenerative disc and spondylitic change consistent with age.

It is felt that Ms. C. has remarkably magnified her complaints due to psychosocial factors, as was noted on prior independent medical evaluations in 2003, 2005, and now today.^[94]

Dr. Radecki indicated Ms. C. does have some pre-existing conditions, but these are due to her being significantly overweight and because she had reached 50 years of age.⁹⁵ He indicated she projected significant and overwhelming symptom magnification, both as to her asserted carpal tunnel syndrome and the degenerative disc disease and the changes in her neck and low back.⁹⁶

⁹⁰ Exh. P56-57.

⁹¹ Exh. P57.

⁹² *Id.*

⁹³ Exh. P58.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Exh. P59.

Dr. Radecki concluded that Ms. C. has diffuse widespread pain complaints that are based on psychosocial factors, not objective findings, and there was no evidence that she had a new injury after being released to work after the November 2005 IME.⁹⁷ Dr. Radecki stated that Ms. C. has chosen to present with widespread pain syndrome that was not validated based on the multiple inconsistent findings in the IME. Finally, he concluded Ms. C. did not experience an injury on April 12, 2006, nor was there any acceleration, exacerbation, or aggravation of her complaints based on a work incident that day, and finally, that Ms. C. was medically stable.⁹⁸

D. Ms. C.'s Termination and Application for Occupational Disability

Ms. C.'s last day of work as a bus driver was April 11, 2006.⁹⁹ She did not return to work subsequent to that date, so she was terminated by the Municipality of Anchorage on September 21, 2006.¹⁰⁰

Ms. C. filed an application for occupational disability benefits with the Division of Retirement and Benefits on August 17, 2006.¹⁰¹ On her application she described the nature of her disability as:

Tear in right shoulder, carpal tunnel syndrome, tear in L5-S1 disk, bulge, stenosis, impingement in T1-S7, DJD.^[102]

Ms. C. stated that the cause of her disability was:

Carpal tunnel – occupational – driving – torn disk – driving, torn shoulder, driving, neck problems, driving. Multiple accidents and injuries, Documented by workers comp.^[103]

An Employer's Statement of Disability was submitted to the Division on November 20, 2006, having been prepared by G. T., the People Mover Supervisor of Operations and Maintenance.¹⁰⁴ It states that Ms. C. had been terminated "because she can not drive her bus route because of physical disability."¹⁰⁵ The employer's statement also indicated that Ms. C. had

⁹⁷ *Id.*

⁹⁸ Exh. P59-62.

⁹⁹ G. T. hearing testimony.

¹⁰⁰ Exh. P12.

¹⁰¹ Exh. P9.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Exh. P12.

¹⁰⁵ *Id.* Mr. T. testified during the hearing that the statement that Ms. C. had been terminated because of a physical disability was not a medical assessment or opinion of her condition but rather it merely repeated Ms. C.'s reason why

a physical limitation preventing her from “sitting for over 30 minutes at a time prevents her from performing the function of driving her bus route which takes 1.5 to 2 hours each.”¹⁰⁶

The Division of Retirement and Benefits denied Ms. C.’s application for occupational disability on January 16, 2007. The reason given for the denial was that Ms. C. could not show that she was suffering from a “presumably permanently disabling condition caused by [her] work environment.”¹⁰⁷ The Division also evaluated her application for a nonoccupational disability benefit and determined she also had not provided medical evidence sufficient to “substantiate a presumably permanently disabling condition.”¹⁰⁸ Ms. C. appealed the denials on February 1, 2007, and her appeal was forwarded to the Office of Administrative Hearings.

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:

(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.¹⁰⁹ Thus, Ms. C. must show that: (1) she has a disability;

she could not continue to work as a bus driver.

¹⁰⁶ *Id.*

¹⁰⁷ Exh. P4.

¹⁰⁸ Exh. P5.

¹⁰⁹ *Rhines v. State*, 30 P.3d 621, 628 (Alaska 2001), *citing Stalnaker v. Williams*, 960 P.2d 590, 594 (Alaska 1998); *see also* AS 44.62.460(e)(2).

(2) the disability is presumably permanent and prevents her from satisfactorily performing her usual or comparable work duties; (3) her work injuries were a substantial factor in bringing about her disability; and (4) her employment was terminated as a result of the disability.¹¹⁰

A. Ms. C. Was Terminated Because of Her Medical Condition

Ms. C. must show that she was terminated from her position as a bus driver “because of” an occupational disability. In the case of *Stalnaker v. M.L.D.*,¹¹¹ 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.¹¹² 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.¹¹³

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 been satisfied in PERS occupational disability cases.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶

Ms. C. has established that she was terminated because of her medical condition. Her last day of work as a bus driver was April 11, 2006, after which she did not return to work. Her former supervisor, G. T., testified that after she used all of her leave time, Ms. C. was terminated by the Municipality on September 21, 2006.

¹¹⁰ *Cacioppo v. State*, 813 P.2d 679 (Alaska 1991).

¹¹¹ 939 P.2d 407 (Alaska 1997).

¹¹² *Id.* at 410.

¹¹³ *Id.* at 411-412.

¹¹⁴ *Id.* at 412.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Ms. C.'s situation is comparable to M.L.D.'s in that her failure to return to work as a bus driver was the event that prompted her termination. She was terminated because she believed she was unable to work due to her multiple complaints and she had used all of her leave time. Had Ms. C. been able to work and had she returned to work when her leave time was depleted, she would not have been terminated.

B. Ms. C. Does Not Have a Disability that Presumably Permanently Prevents Her from Satisfactorily Performing Her Usual or Comparable Work Duties

1. Ms. C. does not have a disability

Ms. C. must prove by a preponderance of the evidence that she has a disability and it is presumably permanent, meaning that it is more likely than not permanent.¹¹⁷ Ms. C. has not met this statutory requirement, as shown through the overwhelming weight of the entire evidentiary record.

During the course of her nine year employment with the Municipality of Anchorage as a bus driver, Ms. C. filed approximately 18 workers' compensation injury reports.¹¹⁸ The bulk of them describe neck, shoulder and back pain. Four of the claims involved minor traffic accidents, and several of the claims list the cause of her injury as "driving a bus." Six of the claims were controverted by the workers' compensation insurance carrier.¹¹⁹

In conjunction with her workers' compensation claims, four doctors conducted five separate independent medical examinations (IME) of Ms. C. between 2003 and 2006, as discussed above. Three of the examinations were performed by Dr. Patrick Radecki, who is board certified in Physical Medicine and Rehabilitation, Neurophysiology and Electrodiagnostic Medicine.¹²⁰ As a result of his thorough examinations of Ms. C. and his review of her medical records, Dr. Radecki, who also testified at the hearing, concluded that Ms. C. did not suffer from a disability. Rather, Dr. Radecki's medical opinion was that Ms. C.'s complaints were the result of a nonphysiologic and chronic pain disorder that was based on psychosocial factors rather than objective physical measurements derived from the medical tests he administered. Dr. Radecki testified and noted in all three IMEs that he performed on Ms. C. that she exhibited

¹¹⁷ *Stalnaker v. Williams*, 960 P.2d 590 (Alaska 1998).

¹¹⁸ Exh. P727-828.

¹¹⁹ Exh. P770.

¹²⁰ See Exh. A.

"overwhelming symptom magnification" that resulted in inconsistent test results when compared with the physical complaints she communicated. Further, Dr. Radecki noted that a significant portion of Ms. C.'s complaints could be explained based on her weight, deconditioning and her age.¹²¹

Dr. Radecki's conclusion that Ms. C. was exhibiting symptom magnification inconsistent with objective injuries was shared by the other doctors who examined her. The second IME was performed on January 6, 2004, by Dr. Richard L. Peterson, DC, and Dr. Holm Neumann, MD, PhD. Both doctors, after conducting a thorough physical examination of Ms. C., as well as her medical records and imaging studies, concluded that Ms. C. has degenerative disk disease in her lumbar spine, with a small central L4 -- L5 disc protrusion, but they believed there was no nerve impingement from the protrusion. Drs. Peterson and Neumann were unable to identify a specific injury diagnosis or condition that Ms. C. would have suffered from the claim she filed on November 12, 2003. They stated Ms. C. significantly embellished her symptoms due to her belief that she was significantly injured, but there were no objective findings to confirm her complaints.¹²²

Dr. Radecki's conclusion was also shared by Dr. Scot Fechtel, a chiropractic orthopedist and medical neurologist, who conducted an IME of Ms. C. on May 1, 2004, following an accident she was in while driving a bus on February 2, 2004. Dr. Fechtel was the first physician who identified Ms. C.'s underlying problem as "chronic pain syndrome," but he did not believe the injury she received on February 2, 2004, caused a worsening of her problems or was a "substantial factor" in her physical complaints.¹²³

It should be noted that the record in this case, which consists of nearly 1000 total pages, contains several hundred pages of medical records compiled during the course of Ms. C.'s treatment by numerous medical professionals.¹²⁴ The bulk of these records indicate that Ms. C.'s medical providers made sincere efforts to assist her with her medical complaints. Dr. Kanady, Ms. C.'s chiropractor from November 2003, testified that in his opinion, Ms. C. could not work as a bus driver any longer. Similarly, Dr. Mulholland, who evaluated Ms. C. for an impairment

¹²¹ See Exh. P139.

¹²² See Exh. P123.

¹²³ See Exh. P83.

¹²⁴ See, *i.e.*, Exh. P152-726.

rating in relation to a workers' compensation claim, testified he believed her injuries were work related. However, he did not treat Ms. C., but rather, he relied on the subjective complaints she presented to him.¹²⁵

On the other hand, Dr. Radecki's observation and conclusion carries the most weight regarding Ms. C.'s treatment by the medical providers from whom she sought treatment. Dr. Radecki noted that Ms. C. routinely failed to make significant progress as a result of the treatment she received because "caregivers are treating Ms. C.'s subjective complaints in the face of negative physical examinations and negative imaging studies with no significant objective findings."¹²⁶ In other words, Dr. Radecki believed that the medical professionals Ms. C. sought treatment from did not address the fact that her physical examinations and imaging studies were essentially negative, and they elected to treat her based instead on subjective statements she made regarding her symptoms and problems.

On the eve of and during the hearing, Ms. C. sought to introduce two new theories of her case – that she suffers from fibromyalgia, a chronic condition characterized by widespread pain in muscles, ligaments and tendons¹²⁷, and that she had recently received a positive result from a “HLAB27” test, which she asserted would cause her increased pain because she had more inflammation. However, this evidence was not developed by Ms. C., nor did she offer any medical evidence more substantive than a provider's passing thought that she might have the condition.¹²⁸ Given the totality of the evidence in this appeal, Ms. C.'s late-filed evidence that seeks to provide a basis for her believed disability does not disturb the weight of the medical opinions of the four doctors who performed IMEs on her and concluded Ms. C. does not have a disability.

2. Ms. C.'s condition does not prevent her from satisfactorily performing her usual or comparable work duties

Ms. C. did not meet her burden of proving she is incapable of satisfactorily performing her usual or comparable work duties. On the contrary, the evidence in this appeal shows it is

¹²⁵ Dr. Mulholland hearing testimony.

¹²⁶ See Exh. P141.

¹²⁷ <http://www.mayoclinic.com/health/fibromyalgia/DS00079>

¹²⁸ See Ms. C.'s unmarked post-hearing exhibits from Primary Care Associates, filed with the OAH on May 16, 2007.

more likely than not that, Ms. C. is able to satisfactorily perform her usual or comparable work duties.

Dr. Radecki concluded that Ms. C. was capable of working as a bus driver during the first and each successive IME that he performed for her, and that she did not have any work restrictions that would be work related.¹²⁹ He explained that she was deconditioned, but he could not see how it would take significant conditioning to drive a bus with power steering while sitting. His opinion also was driven by the fact that he could find no objective evidence that Ms. C. suffered from any true disability, so his medical opinion that she could drive a bus naturally derived from that lack of objective evidence.¹³⁰

Dr. Radecki's opinion was shared by Dr. Peterson and Dr. Neumann as a result of their IME on January 6, 2004¹³¹, as well as Dr. Fechtel in his IME of May 1, 2004.¹³²

C. Ms. C.'s Work Injuries Were Not the Proximate Cause of Her Condition, or a Factor Aggravating Her Condition

In a PERS occupational disability case, an applicant must prove “proximate cause.” The question becomes 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.¹³³ Ms. C. has not met her burden of proving that any of the occupational injuries she reported to her employer during the course of her employment was a “substantial factor” in her condition. Evidence in the record clearly establishes that Ms. C. does not have a disability and that she is able to return to work as a bus driver. To the extent that the medical records generated by her care providers suggest that driving a bus created or contributed to Ms. C.’s medical problems, those suggestions are rejected as devoid of merit.

The results of five comprehensive IMEs and Dr. Radecki’s conclusions about Ms. C.’s physical condition are persuasive and consistent with the evidence in the record. Ms. C.’s

¹²⁹ See, i.e., Exh. P140.

¹³⁰ Although he did not address it as a reason for his conclusion that Ms. C. does not suffer from a disability, Dr. Radecki nonetheless noted during the May 1, 2003, that she had been practicing Kendo, a martial art involving sword fighting while wearing body armor. See Exh. P133.

¹³¹ See Exh. P124.

¹³² See Exh. P85.

¹³³ *State, Public Employees Retirement Bd. v. Cacioppo*, 813 P.2d 679 (Alaska 1991).

personal belief that she is somehow disabled as a result of work-related injuries does not seriously challenge the medical evidence. Ms. C. has not presented credible evidence that her medical condition was caused by her injuries at work.

IV. Conclusion

Ms. C. failed to meet her burden of proving by a preponderance of the evidence that she has a disability which permanently prevents her from satisfactorily performing her usual or comparable work duties, and that her work injuries were a substantial factor in bringing about her medical condition. To the contrary, it is more likely than not that Ms. C.'s medical condition does not prevent her from satisfactorily performing her usual or comparable work duties as a bus driver for the Municipality of Anchorage. Therefore, Ms. C. is not entitled to occupational disability benefits.

V. Order

- The January 16, 2007, denial of Ms. C.'s application for occupational disability benefits is AFFIRMED.

DATED this 18th day of December, 2007.

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 14th day of January, 2008.

By: Signed
Kay L. Howard
Administrative Law Judge

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