

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:)	
)	
U P)	OAH No. 16-0521-PER
<hr/>)	Agency No. 2016-005

DECISION

I. Introduction

U P is a former senior fire captain with the No Name City Fire Department (NNCFD). He resigned from the NNCFD in January 2016, approximately one year before what would have been his normal retirement age of 60 years. He promptly applied for disability status. His application was denied by the PERS Administrator for both occupational and non-occupational disability benefits. Mr. P appealed the denial. His case went to hearing on December 13 and 14, 2016. Mr. P represented himself. Assistant Attorney General Siobhan McIntyre represented the PERS Administrator.

The record shows that Mr. P has a presumably permanent condition, specifically chronic depression and anxiety disorder, which renders him incapable of performing the arduous duties of a senior fire captain, and indeed of any firefighter. There are no accommodations that could be reasonably provided to him, and no comparable positions available. Accordingly, he is disabled. However, because Mr. P did not demonstrate that his job was a substantial factor in his disability, he does not qualify for occupational disability, and instead only qualifies for non-occupational disability. Accordingly, the PERS Administrator’s denial of his application for non-occupational disability benefits is REVERSED, while the denial of occupational disability benefits is AFFIRMED.

II. Facts

Mr. P began working for the NNCFD as a firefighter in 1984. He was promoted to fire captain in 1994. In 2000, he was promoted first to senior fire captain, and then to battalion chief, where he also served as the departmental-wide safety officer. The positions of battalion chief and safety officer were more hands-off positions. In these positions, he would not actively fight fires, but would instead show up at incident scenes and assess the overall scene.¹

¹ Mr. P’s testimony.

In late 2008, the NNCFD had some restructuring and budget cuts, which resulted in the safety officer position being eliminated. Mr. P then became a senior fire captain in early 2009. A fire station may have from zero to eight fire captains, who are responsible for emergency response and training fire crews. There is only one senior fire captain for each fire station. The senior fire captain has the same responsibility as a fire captain with the added responsibility for the fire station and special projects. Both fire captains and senior fire captains are active hands-on emergency responders. Consequently, when Mr. P moved from being a battalion chief/safety officer to being a senior fire caption, he went from serving in an oversight capacity to being active duty line personnel. Mr. P was subsequently demoted to fire captain, due to restructuring, and returned to senior fire captain status in 2011, where he remained during his tenure with the NNCFD.²

During the course of his career with the NNCFD, Mr. P received an Associate of Applied Science degree in Applied Fire Science, a Bachelor of Science degree in Fire Services Administration, a Master of Science degree in Executive Fire Service Leadership, and was taking courses, as recently as 2014, toward another Bachelor of Science degree, this time in Occupational Safety and Health/Fire Science.³ He consistently received average to above average employee evaluations during his tenure with the NNCFD.⁴

Mr. P had two work-related injuries during his firefighting career. He was injured in 1996, when a ceiling fell on him while covering a house fire. He was out of work for five days due to that incident.⁵ He was also injured in 2002, when he fell during physical fitness training. He incurred a laceration above his left eye. He did not lose any work time due to the accident.⁶

Mr. P's wife and stepdaughter were both experiencing problems with substance abuse in 2013. His stepdaughter's issues resulted in her and her infant child living with Mr. P and his wife. Mr. P began displaying emotional behavior and tearfulness, which he believed affected his job performance. He began seeking help through Al-Anon and the National Alliance for the Mentally Ill in 2013. He was seeing a family counselor, who referred him to psychologist Dr. H, Ph.D.

² Mr. P's testimony; Ex. F.

³ Exs. B, C, G, 30.

⁴ Ex. A.

⁵ Ex. I.

⁶ Exs. J, K; Mr. P's testimony.

Dr. H treated Mr. P and performed a neuropsychological evaluation of him over three dates, October 30, November 24, and December 2, 2014. She found that he had a full-scale IQ of 120. Her conclusion and diagnoses, which were based upon her testing and Mr. P's recitation of his history, including some head trauma, was that he was mildly cognitively impaired, had some possible "temporal lobe and left frontal lobe dysfunction likely attributable at least in part to his history of mild traumatic brain injuries. The influence of carbon monoxide exposure from his early employment as a firefighter may be represented in these findings as well." She also found a moderate degree of anxiety and depression. She further found that "[h]is work as a firefighter compounds his emotional distress with its attendant life-threatening crises which he consistently witnesses and for which he has some professional responsibility."⁷ Her diagnoses were cognitive disorder not otherwise specified, depressive disorder not otherwise specified, generalized anxiety disorder, head injury unspecified, and suspected toxic effect of carbon monoxide.⁸ Although she did not diagnose him with post-traumatic stress disorder (PTSD), she found that he had "at least mild symptoms" of PTSD.⁹

Dr. H then referred Mr. P to Dr. N, D.O. Dr. N was a physician with No Name Injury Services. She is a brain injury specialist. During his initial meeting with Dr. N, Mr. P told her that his emotional difficulties began in approximately 2003.¹⁰ She examined and subsequently treated Mr. P. Her initial diagnosis was that he did not experience PTSD, but that he had a mood disorder due to old head injuries, based upon a history of multiple concussions. She also found that he had a memory deficit, and deficits in attention, motor control, and perception.¹¹ She ordered a brain MRI; the results were normal.¹²

Dr. N prescribed Mr. P Cymbalta. The Cymbalta helped, but it had side effects, and she switched his medication to Amantadine and Wellbutrin. The Amantadine was discontinued due to side effects. The Wellbutrin was also discontinued because it was not having any effect.¹³ Dr. N also recommended that Mr. P try neurofeedback as a treatment. Mr. P had one neurofeedback

⁷ Ex. H, p. 7.

⁸ Ex. H, p. 8.

⁹ Ex. H, p. 7.

¹⁰ Ex. L, p. 2.

¹¹ Ex. L, pp. 4 -5.

¹² Ex. L, p. 9.

¹³ Ex. L, pp. 10 – 11, 14; Mr. P's testimony.

session. He had such an adverse reaction, consisting of an extremely severe anxiety attack, that he never resumed neurofeedback.¹⁴

Mr. P believes that his difficulties with handling emotions dated back to 2003. The position that he held until late 2008, as safety officer, was a good position for him because he was one step removed from active participation at fire scenes. After his demotion to senior fire captain in early 2009, he was placed at a very busy station, station 6, and was subsequently placed in station 1. He experienced discomfort with emergency response and sleep disruptions. He then tried to cope with job stress by taking assignments to stations which had less activity, such as station 10. Regardless, he felt that he was not able to control his emotions, and that it was impacting his job performance and his working relationship with colleagues.¹⁵

Mr. P applied several times for a promotion to battalion chief in 2015, a position he had held in the past. As part of the application process, he was required to appear in front of a board of battalion chiefs. In the January 2015 board, he was asked a question about what he was doing to control his emotions. The chief who asked him that question had been present at an incident scene where Mr. P thought that he did not perform well. Mr. P failed the last board, which was in November 2015. He had never failed a test before. He felt that meant that a lot of people were questioning his skills and it caused him to reevaluate and reconsider his continued employment with the NNCFD.¹⁶

Mr. P subsequently resigned from the NNCFD and applied for disability benefits. As part of his application, he submitted statements from both Dr. N and Dr. H that he was “[b]etter suited for more admin duties given mild cognitive/attention issues,”¹⁷ and that his condition “can impact judgement in crisis situations.”¹⁸ Both Dr. N and Dr. H stated that his condition was not likely to improve to allow him to perform his work in the future.¹⁹ The “Employer’s Statement of Disability” was completed by K J, the NNCFD’s deputy chief of operations. That disability statement provides that Mr. P would not be retained if his disability application was denied, that he would not be assigned to other duties, and that “[t]he department is unable to accommodate Mr. P’s disabling condition medical condition in his present position and considered him for

¹⁴ Mr. P’s testimony.
¹⁵ Mr. P’s testimony.
¹⁶ Mr. P’s testimony.
¹⁷ Dr. N, Ex. 16, p. 2.
¹⁸ Dr. H, Ex. 16, p. 3.
¹⁹ Ex. 16, pp. 2 – 3.

vacant positions, however Mr. P is not qualified.”²⁰ After Mr. P’s resignation, Dr. H prepared a disability claim form for Mr. P, which provided in pertinent part, that:

His anxiety can impact judgment in crisis situations as frequently encountered in his work. Limitations in visual memory & motor self-regulation can impact his job performance as a firefighter as well.²¹

B C is currently a battalion chief and the assistant chief of training operations. He worked with Mr. P from 1999 up until Mr. P retired. In 2013 and 2014, he worked at a different fire station from Mr. P. However, that fire station would respond to calls along with Mr. P’s fire station. Chief C’s personal interaction with Mr. P resulted in the following observations:

- He observed a change in Mr. P’s behaviors starting after Mr. P returned from being a safety officer to being active duty line personnel. That change consisted of Mr. P being easily overwhelmed in high stress situations.
- Mr. P’s behavior change was not what would be considered normal for similarly situated employees. It was an increase in emotional involvement which impacted his ability to make global decisions. Mr. P did not establish operational authority and did not provide time critical guidance to firefighters during operational readiness exercises.
- When Chief C operated with Mr. P in several high acuity situations, he observed a lot of “chaos”; Mr. P could not be given complex tasks and would get “lost.”
- The primary time where Chief C observed Mr. P’s impacted work performance was in 2013 – 2014.²²

Chief C was asked about one specific incident in 2014, where he participated in a call with Mr. P. Mr. P was the initial company officer. Chief C was one of the last responders. Chief C observed that Mr. P should have taken charge and directed the operation. Instead, things that should have been done were not, and Mr. P was more of a problem than a solution.²³ Mr. P was written up for inadequate performance during that incident:

During the vehicle extraction on No Name Road on the morning of the 28th of September, you failed to follow the SOG on Incident Command by failing to manage the deployment of ALL units, to control all incident communications between the scene and Fire Dispatch, to provide continuing and overall program reports and perform situational evaluation (size up) and risk assessment. Your radio was on the wrong channel and the information you provided was very minimal.

²⁰ Ex. 16, p. 1.

²¹ Ex. 1, p. 4.

²² Chief C’s testimony: December 13, 2016 at 3:04.00 – 3:20:30.

²³ Chief C’s testimony: December 13, 2016 at 2:51:23.

Your initial size up was “1 male patient entrapped, upside down vehicle, unable to gain good access to him”. This occurred after you were on scene for three minutes and 3 seconds. As the incident commander you did not make correct assignments to incoming units and failed to respond when hailed on Tac 3 which was the assigned radio channel.²⁴

Chief C was concerned about Mr. P’s ability to perform safely:

In a supervisory role, I would have grave concern about the safety of the crew he was working with. As a single operating firefighter, again, I would not be confident in focus on solutions as we face higher and higher acuity calls, I would have concerns. Skill set performance, I would feel safe. But, decision making, I would have concerns.²⁵

Chief C was a credible witness. Based upon an observation of his demeanor and the manner in which he answered questions, if anything, he downplayed his concerns about Mr. P’s work performance out of what appeared to be an attempt to not offend his former colleague.

K J is the deputy chief of operations and the health and safety officer for the NNCFD. She is the person who completed Mr. P’s “Employer’s Statement of Disability” mentioned above. She has known and worked with Mr. P for over 10 years. She began noticing a decrease in Mr. P’s performance beginning in 2014. He appeared stressed and his reactions were different from his previous performance. His difficulties became obvious in the fall of 2015. She heard reports from department battalion chiefs that he was emotional and overreacting, which was consistent with her own experience. She was first made aware of the 2014 incident recited immediately above at the hearing. The incident constituted a deficient performance and raised grave concerns for her. She wished that she had found out about the incident earlier. Her opinion was that Mr. P’s condition renders him incapable of being a firefighter at any level, that he did not meet the National Fire Protection standards for firefighters, and that there were no accommodations which could make him capable of being a firefighter.²⁶ Deputy Chief J was also a credible witness.

Mr. P’s application for disability was reviewed for the PERS Administrator by Maximus Federal Services, Inc. As part of that review, a psychologist reviewed Mr. P’s medical/psychological records and some employment records, but did not meet or examine Mr. P. The Maximus report concluded, based upon its consulting psychologist’s review, that Mr. P

²⁴ Ex. 14.

²⁵ Chief C’s testimony: December 13, 2016 at 3:24:32 – 3:24:55.

²⁶ Deputy Chief J’s testimony.

was not disabled. However, the Maximus report did not contain a copy of the consulting psychologist's report; it merely summarized that report.²⁷ Neither the Maximus consulting psychologist nor the person who authored the Maximus report testified.

Mr. P subsequently met with Dr. W, Psy. D., for an independent neuropsychological exam on November 3, 2016. Dr. W is a board-certified neuropsychologist, with experience treating emergency responders.²⁸ During that exam, Mr. P

indicated, though, that looking back, as he was employed with the fire department that he had significant problems with anxiety. He said that over the last year or so of his work he would experience significantly heightened anxiety when the alarms would go off. He recalls difficulty controlling his emotions when speaking over the radio. He also remembered having difficulties providing information that was calm and coherent during emergency situations.²⁹

Mr. P did state, however, that his symptoms had improved since he retired from the fire department.³⁰ He also stated that his wife and his stepdaughter's substance abuse issues had been resolved: his wife had been sober for approximately eight months before the neuropsychological evaluation and his stepdaughter for one year.³¹

Dr. W concluded that Mr. P did not have any neurocognitive condition, indications of traumatic brain injury, or PTSD. He opined that the MRI would likely have shown if Mr. P had experienced traumatic brain injury or effects from exposure to carbon monoxide. Mr. P's MRI was normal. Dr. W did find that Mr. P had "mild depression with anxious features." Dr. W's ultimate conclusion, as reflected in his written report, was that:

However, from a psychological standpoint, the claimant had been having difficulties controlling emotion and his depression was worsening. In his position, as Senior Fire Captain. If the position continued to involve rapid response to emergency situations, a need for calm direction during time of emergency and communication with others, and rapid decision making, then I find it unlikely that he would be able to perform at any occupational level requiring that skill set.³²

Dr. W's report found that while the disrupted sleep schedule consistent with a fire captain's duties aggravated Mr. P's underlying psychological condition, it was not a substantial factor in his condition. He found "no evidence of psychological impairment secondary to repeated

²⁷ Ex. 17.

²⁸ Ex. P; Dr. W's testimony.

²⁹ Ex. O, pp. 1 – 2.

³⁰ Ex. O, p. 1.

³¹ Ex. O, p. 4.

³² Ex. O, p. 17.

exposure to stressful incidents.”³³ Dr. W testified in this case. His testimony was consistent with his report. He was a credible witness, who is experienced in dealing with the problems faced by emergency responders.

Mr. P was a credible witness, based upon an observation of his demeanor and the consistency of his testimony.

III. Discussion

A. Nonoccupational Disability.

Mr. P has the burden of proof. As a public employee, to qualify for non-occupational disability, among meeting other criteria, he must prove that he was terminated due to “a total and apparently permanent nonoccupational disability.”³⁴ The term “nonoccupational disability” is defined by statute:

“nonoccupational 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 or another position or job that an employer makes available and for which the employee is qualified by training or education, not including a condition resulting from a cause that the board, in its regulations has excluded.³⁵

The factual issues regarding whether Mr. P meets this definition are best answered by referring to Dr. W’s report and testimony, and the testimony of Deputy Chief J and Chief C. It should be noted that the conclusion reached by Maximus that Mr. P is not disabled is given very little weight. It was based upon a document review conducted by a consulting psychologist, who did not meet, examine, or treat Mr. P, and the consulting psychologist’s report was not provided, but was instead summarized in the Maximus report. Neither the author of the Maximus report nor the consulting psychologist were available to explain their conclusions or be asked questions about them.

1. Does Mr. P have a presumably permanent condition?

The answer to this question is yes. Although Dr. W discounted the diagnoses provided by Dr. H and Dr. N, he found that Mr. P had a diagnosis of mild depression with anxious features. Dr. W was a very credible witness. His report and his testimony satisfactorily explained why he discounted the diagnoses of neurocognitive impairment, traumatic brain injury,

³³ Ex. O, p. 16.

³⁴ AS 39.35.400(a).

³⁵ AS 39.35.680(24).

and PTSD. His examination was conducted approximately 10 months after Mr. P left the NNCFD, and when Mr. P's familial stressors had greatly decreased due to his wife's and stepdaughter's sobriety for eight months and one year, respectively, preceding the examination. After Mr. P left the NNCFD, he was no longer subject to the stressful working conditions and disturbed sleep patterns that characterized that job. Nonetheless, he still experiences depression with anxious features, even after his familial stressors had significantly decreased. Given these facts, it is more likely true than not true that Mr. P's condition is presumably permanent.

The PERS Administrator argued that Mr. P's condition persisted because he did not cooperate with treatment options. Specifically, he started with Cymbalta, changed his medication from Cymbalta, discontinued his medications, and did not continue on with neurofeedback. However, the record, including Mr. P's testimony, established that he had adverse reactions with each of these treatments and medications. Accordingly, the PERS Administrator's argument on this point is not persuasive.

2. Does Mr. P's presumably permanent condition make him unable to perform his job or another job, which his employer makes available, for which he is suited by his training or education?

Mr. P's entire career and training has been as a firefighting professional. His education, which is substantial, has also been oriented towards firefighting. The NNCFD's Deputy Chief of Operations J testified Mr. P's mental condition made him incapable of performing as a firefighter at any level, and that there were no jobs available for him with the NNCFD. The "Employer's Statement of Disability" which Deputy Chief J completed provided that "[t]he department is unable to accommodate Mr. P's disabling condition medical condition in his present position and considered him for vacant positions, however Mr. P is not qualified."³⁶ Consistent with Deputy Chief J's testimony, Chief C testified that he would have concerns about Mr. P's ability to perform, either as a senior captain or as a regular firefighter.

Dr. W came to a similar conclusion, that Mr. P was not capable of providing the calm direction and decision making required in high stress rapid response situations.

Based upon the evidence recited above, Mr. P has shown that he cannot perform his previous job as a senior captain, nor can he perform as a regular firefighter. The NNCFD, his employer, has no positions for him which he is suited for by his training, education, or

³⁶ Ex. 16, p. 1.

experience. Mr. P has therefore proven, by a preponderance of the evidence, that he meets the statutory standard for non-occupational disability.

B. Occupational Disability.

Mr. P has the burden of proof. As a public employee, to qualify for occupational disability, among meeting other criteria, he must prove that he was terminated due to “a total and apparently permanent occupational disability . . . before the employee’s normal retirement date.”³⁷ It is undisputed that Mr. P resigned from the NNCFD approximately one year before his normal retirement date. The term “occupational disability” is defined by statute:

“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 wilful negligence of the employee;³⁸

The test for occupational disability is therefore the same as for nonoccupational disability with one additional element: is “the proximate cause of [Mr. P’s] condition a bodily injury sustained, or a hazard undergone, while in the performance and within the scope of the employee’s duties”? In Mr. P’s case, the underlying condition, as diagnosed by Dr. W, is depression with mild anxiety.

Mr. P’s work must be a “proximate” cause of his disability, however, it need not be the only cause. Mr. P can prove occupational disability by establishing “that the occupational injury is a *substantial factor* in the employee’s disability regardless of whether a nonoccupational injury could independently have caused disability.”³⁹ The case law provides that a substantial factor can be one which aggravates, accelerates, or combines with a pre-existing condition or brings about the symptoms of a pre-existing condition, even if it does not aggravate the pre-existing condition.⁴⁰ Where, as is the case here, the disability is mental in nature, “there must be

³⁷ AS 39.35.410(a).

³⁸ AS 39.35.680(27).

³⁹ *Lopez v. Administrator, PERS*, 20 P.3d 568, 573 (Alaska 2001) (emphasis in original) *citing State v. Cacioppo*, 813 P.2d 679, 683 (Alaska 1991).

⁴⁰ *Hester v. Public Employee’s Retirement Board*, 817 P.2d 472, 475 (Alaska 1991) (adopting the standard applied in Alaska Workers’ Compensation law).

some evidence that the employment played an ‘active role’ in the development of the mental disability and did not ‘merely provide a stage for the event.’”⁴¹

The timelines in this case show that Mr. P did not begin to actively evince noticeable diminished job performance until 2013. Mr. P had moved from his more hands-off position as the safety officer to an active duty position as a senior fire captain in early 2009. 2013 was when his wife and his stepdaughter both experienced substance abuse issues, and the stepdaughter and her young child moved in with Mr. P and his wife. If Mr. P’s work stress was a substantial factor in his disability, one would reasonably expect his diminished performance to have surfaced sometime after early 2009 and before 2013. However, the timing of his diminished work performance was instead noted as beginning in 2013, concurrent with his familial stressors. This supports an inference that the familial stressors were a substantial factor in his disability, and that his employment was not a substantial factor in his disability.

Mr. P has therefore not shown that his employment was a substantial factor in his disability. As a result, he does not meet the statutory test for occupational disability.

IV. Conclusion

Mr. P has a presumably permanent disabling condition which qualifies him for nonoccupational disability. However, his employment was not a substantial factor in his disability. He therefore qualifies for nonoccupational disability, but not for occupational disability.

DATED this 20th day of January, 2017.

By: Signed
Lawrence A. Pederson
Administrative Law Judge

⁴¹ *Fox v. Alascom*, 718 P.2d 977, 984 (Alaska 1986) citing *Albertson’s Inc. v. Workers’ Compensation Appeals Board of State of California*, 131 Cal.App.3d 308, 182 Cal. Rptr. 304, 309 (California 1986).

Adoption and Notice of Appeal Rights

The Decision in this case was issued on January 20, 2017. Mr. P filed a Proposal for Action on February 13, 2017. The PERS Administrator did not file a Proposal for Action. After consideration of Mr. P's Proposal for Action, the Decision, in accordance with AS 44.64.060, is adopted, without change, as the final administrative determination in this matter.

This Decision is issued under the authority of AS 39.35.006. 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 February, 2017.

By: Signed
Signature
Lawrence A. Pederson
Name
Administrative Law Judge
Title

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