****THIS DECISION HAS BEEN MODIFIED AND REDACTED TO CONFORM TO OAH PUBLICATION STANDARDS.****

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
	)	
K.Q.	)	OAH No. 17-0075-PER
	)	Agency No. 2017-001

DECISION

I. Introduction

In 2008, K.Q. fractured his thoracic spine in an accident that occurred while he was at work. He has experienced pain in his mid-back since that time. In 2016, he was terminated from his employment. He applied to the Division of Retirement and Benefits for occupational disability benefits, claiming that his 2008 on-the-job injury was a substantial cause of the disabling pain that caused his termination.

The medical evidence in this record, however, does not establish that Mr. Q's accident caused Mr. Q. to be disabled. To the contrary, the medical evidence establishes that his thoracic spine condition does not prevent him from working. Even if Mr. Q's pain were to be considered disabling, the evidence does not prove that the 2008 accident was a substantial cause of his current pain. Therefore, the Division's decision denying occupational disability benefits is affirmed.

II. Facts

K.Q. is a 58-year-old resident of Anchorage. In 1998, Mr. Q began working as a general maintenance technician at [a public entity whose employees are PERs members].[1] A general maintenance technician has a very broad spectrum of duties: The [employer's] July 2015 version of the official job duties describes those duties as follows:

1. Ability to Routinely works under the direct supervision of a craft technician/supervisor. May be required to work independently.
2. Maintains water or sewer systems to include soldering, threading, thawing unplugging, fixture cleaning, adjustment, and service.
3. Maintains HVAC equipment to include cleaning, lubricating adjusting, changing filters, and testing.
4. Maintains and performs minor repairs on buildings to include painting, minor carpentry, minor glass replacement, and minor millwork replacement.
5. Maintains grounds to include lawn mowing and seeding, and snow plowing, shoveling, and removal.
6. Repairs and installs of signs, fences, and playground equipment, and installs and repairs concrete and asphalt surfaces.
7. Operates hand or power tools and equipment.

[1] KQ testimony.

8. Works within established safety procedures.
9. Works cooperatively with others within established maintenance and safety procedures.[2]

The statement described the "physical/mental demands" of the position as follows:

- This position routinely requires lifting up to 50 pounds, with [or] without accommodations, and may require lifting over 50 pounds with assistance.
- This position routinely work at heights over 20 feet.[3]

The statement also noted, however that

> The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.[4]

Over the years, Mr. Q worked for many different sections of the [employer's] maintenance crew, including heating and venting, mechanical, electrical, glass, automation/fire, and plumbing and heating.[5] He had certifications in second class boiler work, painting, and hazmat.[6] The unrefuted testimony of two of his colleagues—including the individual designated as his "craft lead"—established that Mr. Q was a capable maintenance technician with a good work ethic who could problem solve as needed to get the job done.[7]

Mr. Q. described his job as "very aerobic." One focus that he had for many years was compressor maintenance. This frequently required having to haul large boxes up ladders and work overhead while servicing the equipment. If a motor head had to be replaced or a barrel had to be moved, the items being moved weighed between 50 and 200 pounds.[8] He took pride in taking care of himself. For example, he undertook a daily stretching regimen so as to avoid injury on the job.[9]

On the afternoon of January 24, 2008, Mr. Q was at [a job site], repairing the magnet mechanism that is part of door closure system for a metal fire door. Because the mechanism had been incorrectly installed by the contractor, the original mechanism had sunk into the drywall.[10] The repair required installation of a new steel plate. To install the plate, Mr. Q needed to predrill

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2 Exhibit 20 at 1. The October 2013 version, which [the employer] attached to its statement of disability sent to the Division of Retirement and Benefits was slightly different. Exhibit 3 at 2. The differences are not material.
3 Exhibit 20 at 1-2.
4 *Id.* at 2 (italics omitted).
5 KQ testimony.
6 *Id.*
7 Haering testimony; Neumann testimony.
8 KQ testimony.
9 *Id.*
10 *Id.*

the metal studs in the wall. Mr. Q was standing about four feet off the ground on a ladder leaning against the wall while he worked overhead. The force he applied to press the drill into the metal studs caused the ladder to slide on the tile floor and kick out from under him. Mr. Q, who weighed about 300 pounds at the time of the accident, fell and landed on the tile floor. His chest and knees took the brunt of the impact.[11]

After the fall, Mr. Q picked himself up, shook it off, took some time to recover, climbed back on ladder, and finished the job. He then drove himself to the emergency room. He described the accident and said that he had pain in the mid-back and knee.[12] An x-ray taken at the emergency room showed no fractures or dislocations.[13] He was released with instructions to follow up with his regular doctor and a note that would both excuse a short absence from work and allow him to return to work whenever he felt ready.[14]

Although Mr. Q returned to work soon, his mid-back still hurt. He saw his doctor, Dr. Ilona Farr, and a chiropractor. On March 3, Dr. Farr ordered an MRI of Mr. Q's thoracic spine—the spine that is located in the mid-back (distinct from the upper back/neck area, called the cervical spine, and the low-back area, called the lumbar spine). The MRI showed an "anterior wedge compression fracture of the T5 vertabra, and disc protrusion to the left of the midline at T6-T7."[15] These injuries, which are in the mid-back, were caused by Mr. Q's January 24 fall.[16] A specialist at the Alaska Spine Institute, Dr. James Levine, evaluated Mr. Q on March 10, 2008, and advised against an epidural steroid injection because of the risk of injury from the injection. Mr. Q was treated with pain medication.

For the next eight years, 2008-2016, Mr. Q continued to work at [the public entity employer]. Throughout his time, he was consistently hampered by mid-back pain.[17] The pain would vary in intensity—at one time, in late 2009, when he was less active at work, he described it as a one on a scale of 10.[18] Later, when he was on his feet performing a full day's work,

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11 *Id.*
12 Exhibit 5; KQ testimony.
13 Exhibit 5 at 5.
14 *Id.* at 4.
15 Exhibit 8 at 3.
16 *Id.;* Exhibit 13 at 12; Kaplan testimony.
17 KQ testimony; Farr testimony.
18 Exhibit 8 at 21. In 2009, Mr. Q injured his left shoulder, requiring surgery for a rotator cuff and labral tear. Supp. Exhibit 4 at 13. His description of how he injured his shoulder in 2009 showed that he was engaged in vigorous activity, "pushing up the slam hatch" of a heavy fire door. KQ testimony. It appears that he was not hampered by pain during this time.

however, the pain would return.[19] Mr. Q described his situation during this time almost as a catch-22: Yes, he could work full time. But, as he testified, and his colleagues corroborated, the quality and quantity of his work was diminishing because of the pain.[20] And the exertion required for him to be on his feet working all day in pain meant that he had nothing left for after work. He had trouble sleeping. He abandoned all of his hobbies, which formerly included forms of vigorous exercise, such as cross-country skiing. He had little energy for household chores, which took a toll on his family life.[21]

Over this time, Mr. Q was given tasks that were less physically demanding than he had handled previously.[22] His main duty for about the last 3-4 years before his termination in 2016 involved security codes in [the public entity's] buildings, including a "mapping" project.[23]

In 2012 and in 2015, [his employer] referred Mr. Q to a Seattle medical assessment company for an independent medical examination.[24] The 2012 examination, performed by Dr. Dennis Chong, concluded that the 2008 fall was the cause of Mr. Q's 2008 injury.[25] After examining Mr. Q , and describing his medical history, Dr. Chong entered the following findings:

- "The examinee has reached medical stability as of today's examination."
- "No permanent impairment was sustained at this juncture from the industrial event."
- "There is no permanent impairment rating."
- "Mr. [Q] is to be commended for his work ethic. Hopefully he will continue to progress on his weight reduction program and does not revert to needing his pain medications to be gainfully employed."[26]

The 2015 report, also prepared by Dr. Chong, reiterated the findings of the 2012 report.[27] It noted that Mr. Q suffered from neck pain, in addition to back pain.[28] Dr. Chong added the following:

- "The employee is working full time regular duties. There is no objective basis that requires any work restrictions."[29]

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19 Supp. Exhibit 4 at 13.
20 KQ testimony; Haering testimony; Neumann testimony.
21 KQ testimony.
22 KQ testimony; Haering testimony; Neumann testimony.
23 KQ testimony.
24 Exhibit 13.
25 The report noted that Mr. Q suffered from osteopenia, which made him susceptible to a compression fracture and prolonged his healing. *Id.* at 10. Id further noted, however, that his osteopenia had been treated and resolved. *Id.* at 13; *see also* Kaplan testimony.
26 Exhibit 13 at 14-15.
27 Exhibit 14.
28 *Id.* at 8.

- "Mr. [Q] would be considered fully resolved as it relates to the residuals of his industrial event of January 24, 2008. Notwithstanding, he continues to attend to palliative management, that is passive manual therapies of chiropractic adjustment and massage therapy, as well as chronic pain medication management from the office of Dr. Levine. It is highly unlikely that his treatment is related to his industrial event of January 24, 2008. It is much more likely that he has chronic mechanic[al] back pain secondary to his chronic morbid obesity."[30]

Because Mr. Q continued to experience pain, he and his doctors tried physical therapy, massage, chiropractic manipulations, and a number of different pain medications. Mr. Q's use of pain medication, however, became problematic. In 2015, he was having severe nausea, vomiting, and stomach pain, which continued off and on for some time.[31] Later, he came to realize that at least some of the cause of his gastric discomfort was his opioid pain medication, and he discontinued the opioids. According to Mr. Q., however, he had begun self-medicating to treat his pain with medical marijuana.[32] The record indicates several drug screenings being positive for marijuana use beginning in 2014.[33]

Mr. Q. was terminated from his job on May 2, 2016.[34] The reason for his termination was that a drug test revealed marijuana use in violation of [the public entity employer's] employment policy.[35] On May 20, 2016, Mr. Q. applied to the Division of Retirement and Benefits for both occupational and nonoccupational disability benefits.[36] He described the January 24, 2008, on-the-job accident as the disabling event. He identified the damage to his cervical spine and his thoracic spine as the disabling conditions.[37]

Mr. Q. continued to seek treatment for pain. Shortly before his termination, on April 14, 2016, he saw nurse practitioner Brandy Atkins for "further evaluation of chronic left sided thoracic pain and some neck pain."[38] Although at the hearing Mr. Q's testimony minimized any neck pain that he felt during this period, the medical records from this time generally record

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29 *Id*. at 12.
30 *Id.*
31 Supp. Exhibit 4 at 15; KQ testimony.
32 KQ testimony.
33 Supp. Exhibit 4 at 15.
34 Exhibit 3 at 1.
35 KQ testimony.
36 Exhibit 1.
37 *Id.*
38 Exhibit 12 at 2.

symptoms consistent with neck (cervical) pain.[39] After her examination, Ms. Atkins concluded "[b]y no means is he disabled, but I am sure there are some days when his pain flares and he finds it difficult to work."[40] She noted from x-rays a "severe disc space narrowing C6/7."[41] She ordered MRIs of the thoracic and cervical spine.[42] After reviewing the MRIs, she noted a "disc protrusion left T6/7" and that his "C6/7 level [] is quite degenerative."[43] She referred him to Dr. Larry Kropp, an interventional anesthesiologist, for pain treatment.[44]

On May 12, 2016, Dr. Kropp performed a transforaminal steroid injection in Mr. Q's thoracic spine region—meaning an injection into the spine cavity.[45] The record in this case shows that Dr. Kropp repeated the thoracic injection procedure in 2016 and 2018, for a total of seven thoracic injections.[46] Dr. Kropp noted "excellent results" from the injections.[47] Following a September 2016 visit with Mr. Q., Dr. Kropp noted "[i]t's his neck that's bothering him now."[48] In September 2016, Dr. Kropp performed two "selective nerve root block[s] – cervical C5/6."[49] He rated the results as "excellent."[50]

Although Mr. Q. did experience considerable relief during a time following the injections, in general, his pain has continued to flare even after the injections.[51] He does not believe that he could perform the essential duties of his job.[52]

Following Mr. Q's 2016 disability benefits application, as requested by the Division, the [employer] filled out an "Employer's Statement of Disability" form. Under the inquiry that asked about "effect of disabilities on duties," the [employer] wrote, "cannot perform job duties."[53]

The Division also sent forms to Mr. Q's physicians. His family practice doctor, Dr. Farr, noted that Mr. Q "can't do heavy lifting" and that he "needs to change to less physically active

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39 *See, e.g.,* Exhibit 10 at 2 (chart notes of Dr. Kropp noting "thoracic [and] neck pain"); Exhibit 15 at 9 (chiropractic chart notes for July 14, 2016, that document his complaints as "pain in the mid-thoracic spine, the upper thoracic spine, and the cervical spine bilaterally – all left greater than right"); Exhibit 16 at 1" ([n]eck and thoracic pain").

40 Exhibit 12 at 4.

41 *Id.*

42 *Id.* at 6.

43 *Id.* at 9.

44 *Id.*

45 Exhibit 10 at 1.

46 *Id.* at 5-6; 12; 18, 38.

47 *Id.* at 13; 26.

48 *Id.* at 28.

49 *Id.* at 30, 35.

50 *Id.* at 36.

51 KQ testimony.

52 *Id.*

53 Exhibit 3.

job as symptoms are worse with [l]ifting, physical labor."[54] In response to a question asking how Mr. Q's disability restricted job performance, Dr. Kropp noted "no lifting [greater than] 20 lbs."[55] He also noted that he expected Mr. Q to improve so that "work could be performed in the future."[56] Ms. Adkins filled out the form by noting "[n]o physical restriction other than pain complaints" and that "he can work."[57]

The Division also referred Mr. Q's records to a consultant, requesting a review and recommendation on whether Mr. Q is presumably permanently disabled from performing the duties of a general maintenance worker. The physician who reviewed the records for the consultant concluded that Mr. Q's "thoracic injury has healed. No further treatment is indicated."[58] The physician concluded that Mr. Q was "not disabled from performing his customary work duties as a General Maintenance Worker."[59] Based on the consultant's recommendation, on December 6, 2016, the Division denied Mr. Q's application for both occupational and nonoccupational disability.[60]

Mr. Q appealed the denial to the Office of Administrative Hearings. During the pre-hearing process, based in part on new information, the Division referred Mr. Q's medical records to a different consultant firm for a second review.[61] The reviewing physician, Dr. Mark Kaplan, who testified at the hearing, agreed with the previous recommendation that Mr. Q's application for occupational disability should be denied.[62] Dr. Kaplan's report stated that "Imaging of the thoracic spine does not show any residual neural compromise or progressive deformity related to the compression fracture."[63]

Dr. Kaplan did, however, recommend that Mr. Q be granted nonoccupational disability benefits based on his cervical spine condition.[64] Dr. Kaplan explained at the hearing that his recommendation was based on the severity of the narrowing of Mr. Q's spinal cavities, known as the "foramina," in his cervical spine, as revealed in the imaging diagnostics, and confirmed by

54 Exhibit 9 at 24.
55 Exhibit 10 at 15.
56 *Id.*
57 Exhibit 12 at 1.
58 Exhibit 4 at 7.
59 *Id.* at 8.
60 *Id.* at 4.
61 Supplemental Exhibit 4.
62 *Id.* at 19; Kaplan testimony.
63 Supplemental Exhibit 4 at 18.
64 *Id.* at 19.

neurological tests and Mr. Q's reports of neck pain and radiating pain.[65] This narrowing made it dangerous for Mr. Q to be working overhead or lifting heavy loads.[66] Based on Dr. Kaplan's recommendation, the Division amended its earlier decision, and granted Mr. Q nonoccupational disability benefits.

The hearing then went forward, except that now the only issue in dispute was whether Mr. Q was entitled to *occupational* disability benefits. A two-day hearing was held in Anchorage on May 2 and May 4, 2018.

III. Discussion

A vested member of PERS who is terminated because of a disability is eligible for disability benefits from PERS.[67] If the disability meets the definition of "occupational disability," the benefit will be more generous than if the disability is deemed "nonoccupational."[68] Eligibility for either form of disability benefits requires that the employee be terminated "because of a total and apparently permanent" disability.[69] The main difference between the two categories of disability is whether the employee was injured on the job.[70]

In this case, the Division does not dispute that Mr. Q is disabled. Therefore, no matter what the outcome of this case, Mr. Q will receive disability benefits.

The parties do, however, draw very different conclusions regarding what makes Mr. Q disabled and how he became disabled. First, the parties disagree over which of Mr. Q's conditions is the disabling condition. In Mr. Q's view, his disabling condition is the pain in his

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65 Kaplan testimony.

66 *Id.*

67 *See* AS 39.35.400 – 39.35.410.

68 *Compare* AS 39.35.410(c) and (d) *with* AS 39.35.400(c).

69 *See* AS 39.35.400(a), 39.35.410(a).

70 The definition of an occupational disability is

> 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.

AS 39.35.680(27). In contrast, a nonoccupational disability is

> 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 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

AS 39.35.680(24).

thoracic spine. Mr. Q argues that his thoracic pain, caused by his thoracic condition, led to him being unable to do his job duties. The Division, on the other hand, asserts that Mr. Q's disabling condition is the status of his cervical spine, and that no medical evidence supports the conclusion that his thoracic spine condition prevents him from working. Moreover, the Division contends that he was able to do the job assigned to him by [his employer] without regard to his thoracic pain. Second, Mr. Q asserts that his thoracic pain was legally caused by his accident at work. The Division disputes this conclusion, arguing that whatever thoracic pain Mr. Q experiences (which it does not regard as disabling) was not caused by his 2008 accident.

Below, this decision will first address whether Mr. Q has met all of the elements needed to show that his thoracic spine injury is a disabling condition—whether it is a total and apparently permanent disability, and whether it presumably permanently prevents him from doing his usual duties (or the duties of another position made available to him). Second, assuming that the thoracic pain is a disabling condition, this decision will address whether Mr. Q has proved that his 2008 accident caused the thoracic pain.

A. Has Mr. Q proved that his thoracic spine pain was a disabling condition?

For Mr. Q to prove that his thoracic spine pain is a disabling condition, he must prove that it is "a total and apparently permanent occupational disability."[71] He must also prove that it "presumably permanently prevents [him] from satisfactorily performing [his] usual duties."[72]

Here, Mr. Q offers his testimony, and the testimony of his colleagues, to prove that he has a condition that affects his ability to do his job. He has identified the condition as thoracic spine pain caused by a thoracic spine injury. He has provided considerable evidence that his condition has been longstanding and that he has pursued many different treatment modalities, including medication, chiropractic treatment, physical therapy, massage therapy, transcutaneous electrical nerve stimulation (commonly called "TENS"), and, after his termination, steroidal injections. Although some of these measures achieved some short-term relief, he testified that none have alleviated the pain sufficiently for him to be able to adequately perform his official job duties. He

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[71] AS 39.35.410(a). Another element of qualifying for occupational disability is that the member must have been terminated because of the disability. Here, the Division did not argue that Mr. Q was not terminated because of the disability. I conclude that the Division waived this issue and I am allowed to conclude that his termination was because of the condition Mr. Q claims was disabling—which was his pain. Waiving the termination issue, however, is not a concession that the condition was disabling—the two inquiries are distinct. *See In re DJ,* OAH No. 16-1087-PER (Office of Admin. Hearings 2017) at 19 *available at:* http://aws.state.ak.us/officeofadminhearings/Documents/PER/PER161087.pdf.

[72] AS 39.35.680(27).

concludes that this evidence supports an inference that his injury to his thoracic spine is a permanent disabling injury.

I understand Mr. Q's theory of the case. Further, I agree that his evidence does add some support for his theory that his injury is permanently disabling. His experience of pain in his mid-back, the length of time that he has spent battling his pain, and the effort he has made in seeking out treatment provider after treatment provider, explain why he has reached a conclusion that his mid-back pain issues cannot be resolved.

Supporting a theory, however, is very different from *proving* a theory. In order to prove the element of a permanent disability, Mr. Q must come forward with medical evidence that he has an actual injury to his mid-back that is permanently disabling. And he must prove that the symptoms prevent him from performing his "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."[73]

Here, no doctor has testified that Mr. Q's thoracic injury is a permanent injury that prevents him from working. He has offered the testimony of Dr. Farr, who explained that patients do not usually present with mid-back pain.[74] More common is neck or upper- or low-back pain. Dr. Farr testified that she accepted Mr. Q's explanation of the pain, and agreed with him that source of mid-back pain was likely a mid-back injury. She explained that she had done some research the previous evening, and found that the literature identified a syndrome called "T-4 syndrome" that could be a source of his pain related to a thoracic injury. She stated, however, that she did not know whether the source of the pain was due to T-4 syndrome or Mr. Q's neck. Further, she acknowledged that she had never viewed any of the 2016-17 MRIs of his cervical or thoracic spine. Notably, Dr. Farr explicitly stated that she had never made a determination that Mr. Q was disabled.[75] In sum, Dr. Farr's testimony provides some modest support that Mr. Q's theory might be plausible. It does not, however, provide the medical support for his theory that he needs to prove his case.

In contrast, Dr. Kaplan, who was qualified as an expert in the diagnosis and treatment in conditions of the spine, and who has reviewed the recent MRIs, gave persuasive medical testimony for why Mr. Q's thoracic issues could not be considered disabling. He explained that unlike the neck or low back, the mid-back is supported by the rib cage, which offered

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73 AS 39.35.680(27).
74 Farr testimony
75 *Id*.

considerable stability. Given the support provided by Mr. Q's ribs, nothing that he saw in Mr. Q's diagnostic images could be considered disabling.[76]

The opinions of other medical providers found in the record support Dr. Kaplan's conclusion that Mr. Q's thoracic spine has no medical condition that is a total and presumably permanent condition that prevents him from doing his job. Although they did not testify, the medical records show that Dr. Chong and ANP Adkins, both of whom physically examined Mr. Q, and who reviewed the available diagnostic evidence, did not consider Mr. Q's thoracic condition to be disabling.

Moreover, not only has Mr. Q failed to prove that the source of his pain is a permanent thoracic injury, he has also failed to prove that his pain is disabling. Mr. Q is correct that, under cases that interpret Alaska's public employee's retirement system disability requirements, pain can be a disabling condition.[77] In his case, however, although he testified that his pain prevented him from doing his job, and his colleagues testified to a diminishment in his job performance, he has not proved that his pain permanently prevented him from performing his usual job duties

First, pain is not always disabling. People are able to work even with some pain. Here, Mr. Q has some evidence that his pain has been difficult to manage—he has tried many different approaches, and struggled with side effects from pain medication. Yet, the medical records, including the records of his recent round of injections, indicate that treatment modalities exist that would offer sufficient pain control to allow Mr. Q to continue to work in spite of the thoracic pain. Given that the treatments tended to be positive, and Dr. Kaplan's strong testimony that he has no medical concern regarding pain related to Mr. Q's thoracic condition, Mr. Q has not proved that his thoracic condition prevented him from working.[78]

Second, Mr. Q has not proved that his pain prevented him from performing his usual duties at [the public entity that employed him]. As Mr. Q and his colleagues testified, the [public

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[76] Kaplan testimony.

[77] *See, e.g., Shea v. State, Dep't of Admin., Div. of Ret. and Ben.,* 267 P.3d 624, 629 (Alaska 2011) (recognizing that pain can be disabling); *Hester v. State, Pub. Employees' Ret. Bd.,* 817 P.2d 472, 476 n.7 (Alaska 1991) ("We believe that increased pain or other symptoms can be as disabling as deterioration of the underlying disease itself."); *In re D.F.,* OAH No. 07-0613-PER at 1 (OAH 2008) (Administrator granted nonoccupational disability benefits on basis of employee's degenerative disc disease); *In re J.M.J.,* OAH No. 10-0324-PER (OAH 2012) (Administrator granted nonoccupational disability benefits on basis of employee's pain symptoms and degenerative disc disease); *In re E.E-T.,* OAH No. 10-0082-PER (OAH 2012) (Administrator granted nonoccupational disability benefits on basis of employee's chronic pain); *Lopez v. Adm'r, Pub. Employees' Ret. Sys.,* 20 P.3d 568, 570 (Alaska 2001) (noting that Administrator had granted member non-occupational disability benefits on the basis of degenerative arthritis in her hip).

[78] This does not mean that I do not believe Mr. Q's testimony that he experienced pain or that work was difficult because of his pain. Mr. Q , however, has not proved that his pain could not be ameliorated or that his thoracic condition was the source of disabling pain.

entity] had been giving him lighter duty assignments, and he was given assistance on physical tasks. Moreover, the [entity's] job description states that it would provide reasonable accommodations to disabled employees.[79] Mr. Q's testimony was that he could not completely perform each of the job duties listed in the job description for a general maintenance technician. He did establish, however, that he was unable to perform the job duties actually assigned to him by [his public entity employer] to the satisfaction of the employer.[80]

In sum, Mr. Q has not proved that his thoracic spine condition was disabling. Therefore, even assuming that his pain was caused by an on-the-job injury, he is not eligible for occupational disability benefits. We turn next to a different question—even assuming that Mr. Q's pain was disabling, has Mr. Q proved that his pain was caused by an on-the-job accident?

B. Has Mr. Q proved that his 2008 on-the-job accident was the actual cause of his disability for purposes of occupational disability benefits?

For an on-the-job injury to be considered the legal cause of a disabling condition under PERS, the injury must have been a "substantial factor" in causing the disability.[81] Determining whether an injury was a substantial factor involves two inquiries. First, the injury must have been an actual cause of the disability—but for the injury, the disabling condition would not have occurred as it did.[82] A work injury may be an actual cause of the disability if it aggravates, accelerates, or combines with a pre-existing condition to produce the disability.[83] Under the cases

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79 Exhibit 20 at 2.

80 The Division's grant of nonoccupational disability took the same approach—it, too, was based on an academic analysis of the description of the job duties rather than on an analysis of whether Mr. Q's cervical spine condition prevented him from performing his actual usual duties. Kaplan testimony. Moreover, an element of nonoccupational disability benefits is that the employee must have been terminated because of the employee's disability. Although the evidence clearly established that Mr. Q was terminated because of his use of marijuana and not because of his disability as required under AS 39.35.400, the Division apparently waived this issue. That the Division may have been lenient in granting nonoccupational disability status to a member based on a severe medical condition (cervical spine impairment), however, does not mean that Mr. Q is relieved from the burden of proving all elements of his claim when that claim is based on an entirely different medical condition (thoracic spine impairment). Furthermore, Mr. Q did not argue that the Division had waived the issue of job performance, so the Division had no reason to put on additional evidence or argument regarding why it granted nonoccupational disability based on Mr. Q's cervical spine impairment.

81 *Shea v. State, Dep't of Admin., Div. of Ret and Benefits,* 267 P.3d 624, 632-33 (Alaska 2011). Occupational disability is defined in AS 39.35.680(27). Under the statute a disability is occupational if "the proximate cause of the condition [is] a bodily injury sustained, or a hazard undergone, while in the performance and within the scope of the employee's duties." *Id.*

82 *Shea,* 267 P.3d at 633.

83 *Hester v. Public Employees' Retirement Board*, 817 P.2d 472, 475 (Alaska 1991) (adopting test identical to that applied in workers' compensation cases); *State, Public Employees' Retirement Board v. Cacioppo*, 813 P.2d 679, 683 (Alaska 1991).

on occupational disability, even a mild physical event may be a legal cause of a disability, if medical evidence proves that the event is a substantial factor in causing the disability.[84]

Second, the injury must have been the proximate cause of the disability. This means that the injury was sufficiently important in causing the injury that a reasonable person would consider the employment and the injury responsible for the disability.[85]

This does not mean, however, that a member's conclusion about the cause of the member's pain can substitute for medical evidence. In other cases involving medical causation issues, the Alaska Supreme Court has been reluctant to assume causation from the perception of the worker or a juxtaposition of work with the disabling condition.[86] Pain can be misperceived or referred, so a subjective inference of causation will not usually be persuasive. This is especially true when medical evidence refutes the inference made by the patient.

Here, no medical evidence confirms that Mr. Q's the thoracic pain was caused by the 2008 accident. Dr. Kaplan explained that the January 2008 accident had caused injury to the thoracic spine, including a compression fracture, which had healed. Although Mr. Q still had a disc protrusion in the thoracic area (which Dr. Kaplan agreed was a result of the accident), in Dr. Kaplan's opinion, that disc protrusion was not a substantial cause of pain.[87] Although Dr. Farr speculated that Mr. Q may have something called "T-4 syndrome," she was not knowledgeable about that syndrome and had never diagnosed Mr. Q as having T-4 syndrome. Given Dr. Kaplan's persuasive testimony that the 2008 thoracic injury could not be contributing to disabling pain, Mr. Q's subjective belief that his pain was related to his 2008 injury does not establish that the accident actually caused his pain at the time of his termination. Therefore, even if Mr. Q's thoracic pain were a disabling condition, Mr. Q has not proved that it was caused by the 2008 accident.

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84 *See, e.g., Shea,* 267 P.3d at 634 (holding that agency must evaluate under correct test whether evidence proves prolonged sitting may have been substantial cause of applicant's disability).

85 *Shea,* 267 P.3d at 633-34.

86 *Cf., e.g., Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1056 (Alaska 1994) (reversing finding that cardiac arrest that occurred at work was caused by employment); *Fox v. Alascom, Inc.*, 718 P.2d 977, 980-81 (Alaska 1986) ("fact that the employee perceives employment as the source of the injury is not enough to establish the preliminary link unless there is some testimony that the employment affected the employee to help create the disability"). Great care must be taken in applying these cases because they involve application of workers' compensation law, which is different from law in retirement disability cases. *Fox,* in particular, is inquiring about whether an employee has established a preliminary link between employment and the injury, an inquiry that has no part in this current analysis. These cases are cited only for informational purposes, not as precedent. They merely supply some support for the notion that juxtaposing two medical events in time is not evidence that one caused the other.

87 Kaplan testimony.

IV. Conclusion

KQ's 2008 on-the-job accident injured his thoracic spine. The medical evidence in this record shows that the injury has healed. Although Mr. Q has suffered from pain his mid-back since that time, the evidence establishes that he does not have a disabling condition in his thoracic spine. Furthermore, even if he did have disabling pain, he has not proved that the 2008 accident was a substantial cause of that pain. The Division's decision denying Mr. Q's application for occupational disability benefits is affirmed.

DATED: June 6, 2018.

By: ___/Signed/_____
Stephen Slotnick
Administrative Law Judge

Adoption

1. Analysis of Mr. Q's [arguments in response to proposed decision]

Mr. Q has filed a proposal for action, arguing primarily that the proposed decision does not give sufficient credence to the testimony of the lay witnesses. He cites to several cases in which lay testimony was found sufficient to establish a causal connection between an accident and subsequent disabling condition.[88] He asks that the decision be amended to find that his testimony and that of his colleagues (relating to the diminishment in his ability to work after the 2008 accident) establishes that the 2008 accident was the cause of his disabling condition.

In fact, however, I gave careful consideration to the lay testimony. The problem for Mr. Q is that, first, the lay testimony never established that he was disabled by his thoracic pain. That testimony did not establish that Mr. Q's thoracic pain "presumably permanently prevents [Mr. Q] from satisfactorily performing [his] usual duties for [the employer] or the duties of another comparable position or job that [the employer] makes available and for which [Mr. Q] is qualified by training or education." Indeed, the evidence reveals that Mr. Q was able to perform the job duties assigned by his employer in spite of his thoracic pain. (Although pain from his cervical condition also did not prevent him from performing those duties, as explained in the decision, Dr. Kaplan testified that it was dangerous for him to do so. Accordingly, his cervical spine condition was considered disabling.)

[88] *See, e.g., Veco, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985) "Two factors determine whether expert medical evidence is necessary in a given case: the probative value of the available lay evidence and the complexity of the medical facts involved."); *Choi v. Anvil*, 32 P.3d 1, 4 (Alaska 2001) ("This lay testimony, based on personal observation, described a situation easily understood by a jury: a rear-end automobile collision causing relatively common injuries.").

Second, here, I have been presented with two different injuries. Mr. Q presents lay testimony that his thoracic pain was disabling. The Division presented expert testimony that his cervical spine condition was disabling. The testimony of Dr. Kaplan that Mr. Q's cervical spine impingement was a disabling condition was persuasive. His testimony that Mr. Q's thoracic spine condition was not disabling was supported by other medical evidence. This evidence was more persuasive than the weak inference from the lay testimony that the diminishment in Mr. Q's capacity to work that began with the accident means that if he was disabled at the time of his termination, that disability must have been caused by the 2008 accident.

Therefore, I adopt the decision without making any changes.

2. Adoption

Under the authority of AS 44.64.060(e)(1), I adopt this decision 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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 5th day of July, 2018.

By: ____/*Signed*/_____
Name: Stephen C. Slotnick
Title: Administrative Law Judge