

2002

Joanna Murphy, petitioner, v. Utah State Retirement Board Long Term Disability Program: Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOANNA MURPHY,

Petitioner,

v.

UTAH STATE RETIREMENT BOARD
LONG TERM DISABILITY PROGRAM

Respondent.

BRIEF OF THE PETITIONER

CASE NO. 20020942-CA

BRIEF OF THE PETITIONER

APPEAL FROM THE UTAH STATE RETIREMENT BOARD,
LONG TERM DISABILITY PROGRAM

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ORAL ARGUMENT IS REQUESTED

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BRIEF OF THE PETITIONER

STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(a), § 49-11-613(7), and § 63-46b-16.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Whether the Utah State Retirement Board incorrectly interpreted the law of hearsay in administrative hearings when it failed to consider medical reports and medical statements

in its findings, concluding that “a finding of fact that was contested may not be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence.”

Standard of review. The standard of review of the Board’s denial of benefits is governed by the Utah Administrative Procedures Act (UAPA). UAPA provides, in relevant part:

(4) The appellate court shall grant relief only if, on the basis of the agency’s record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

. . . .

(d)Petitioner must be substantially prejudiced by the agency’s erroneous interpretation or application of the law.

Utah Code Ann. § 63-46b-16(4)(d).

The issue of whether medical evidence and medical statements were incorrectly excluded as hearsay from consideration in the Board’s findings, is reviewed under Utah Code Ann. § 63-46b 10(3) and under the “residuum rule.” A correction-of-error standard, giving no deference to agencies decisions, is used to review agencies’ ruling on issues characterized as general law, including “ rulings concerning interpretation of statutes unrelated to the agency.” Morton Intern, Inc. v. Auditing Div., 814 P.2d 581, at 585 (Utah 1991). Because the agency is interpreting the UAPA, which is a general statute unrelated to the agency’s own statute and its discretionary grants, the Board’s statutory interpretation and application should be reviewed for correctness. This court has held that whether factual findings are based on a residuum of competent evidence is a question of law reviewed for correctness. Industrial

Power Contractors v. Industrial Com'n, 832 P.2d 477 (Utah App.1992).

2. Whether the Board is required to decide the “reasonableness,” of gainful employment a claimant is found capable of, provided by the definition of “total disability,” including a consideration of any relevant vocational elements, and has incorrectly interpreted the law when concluding it has no burden of providing any vocational proof on this issue once a claimant has proved her impairment and functional limitations.

Standard of Review: Petitioner must be substantially prejudiced by the agency’s erroneous interpretation or application of the law. Utah Code Ann. § 63-46b-16(4)(c) and (d).

The Utah Supreme Court has held that “[t]he fact that the Administrative Procedure Act incorporates the terms ‘application of the law’ and ‘interpretation of the law’ under a single standard supports the contention that absent a grant of discretion, an agency’s interpretation or application of statutory terms should be reviewed for error.” Morton Intern., Inc. v. Auditing Div. of Utah, 814 P.2d 581 (Utah 1991).

3. Whether the Utah State Retirement Board’s decision denying long-term disability benefits was based upon substantial evidence.

Standard of Review. Petitioner must be substantially prejudiced by:

(g) The agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

Utah Code Ann. § 63-46b-16(4)(g).

When determining whether an agency finding is supported by substantial evidence when viewed in light of the whole, this court weighs evidence that both supports and detracts from the finding. Grace Drilling v. Board of Review, 776 P.2d 63, 67, 68 (Utah Ct. App.1989). Substantial evidence is something less than the weight of the evidence, but more than a mere scintilla of evidence. Id., at 68. Substantial evidence is that quantum and quality of relevant evidence that will convince a reasonable mind to support a conclusion. First Nat'l Bank v. County Bd. of Equalization, 799 P.2d 1163, 1165 (Utah 1990). However, findings will "not be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible." Hurley v. Board of Review of Indus. Comm'n, 767 P.2d 524, 526-27 (Utah 1988).

A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. Rule 24(9), Utah Rules of Appellate Procedure (1990). The burden lies with the petitioner, as the complaining party, to "marshall all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." Grace Drilling Co. v. Board of Review of Indus. Comm'n, 776 P.2d at 68.

DETERMINATIVE STATUTORY PROVISIONS

The following statutes are controlling in this action:

Utah Code Ann. § 63-46b-16(4)(d), (g), (h)(i) and (h)(iv)

Utah Code Ann. § 49-11-613

Utah Code Ann. § 49-21-102

Utah Code Ann. § 49-21-401

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a petition for review of a final agency order of the Utah State Retirement Board (“Board”). The Board’s order denied the petitioner’s claim for long-term disability benefits under the Public Employees’ Long-Term Disability Act.

B. COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

In a prior decision, the Board **granted** Ms. Murphy disability benefits for the initial statutory period of twenty-four months, from October 1998 through September 2000. At the end of this two-year period, Ms. Murphy’s benefits were discontinued. Ms. Murphy appealed the discontinuation of her benefits and was denied on December 27, 2000. Ms. Murphy then requested a review of her denial by the Long Term Disability Claims Review Committee, and was denied at this review on April 17, 2001. Ms. Murphy appealed this denial by writing to the Executive Director of the Utah Retirement Systems, and was denied by the director on July 6, 2001. Ms. Murphy appealed the director’s denial and requested a hearing before a **hearing officer**. A hearing was held on April 29, 2002. Findings of Fact, Conclusions of Law and an Order denying long-term disability benefits was issued on July 30, 2002. These Findings of Fact and Conclusions of Law and Order denying benefits were revised and

reissued September 26, 2002. The revised Findings of Fact, Conclusions of Law, and Order denying benefits was adopted as the order of the Utah State Retirement Board on October 10, 2002. This is an appeal from the above mentioned final agency action.

C. STATEMENT OF FACTS

Joanna is 50 years old, born August 23, 1951. She graduated from Bingham High School, then attended the University of Utah, obtaining a Bachelor's degree in psychology in 1975. She successfully pursued a career as a Child Care Licensing Specialist for the State of Utah from 1987, until her medical condition forced her to discontinue work in 1998. As Dr. Joseph A. Brown explained in a letter dated August 14, 1998, Joanna was seriously ill at that time with chronic active Hepatitis C. Her illness was complicated by treatment with interferon and its serious side effects, leaving her with a substantial illness four to five days a week. (Petitioner's Exhibit 2). During this same period, Joanna continued to develop other associated medical problems that have gradually worsened. Though Joanna's liver functions returned to normal by December of 2000, and the hepatitis C virus is at remission levels, she was left with a combination of severe physical impairments. Joanna has been medically determined to suffer from fibromyalgia, with associated fatigue, myalgias, arthralgias, insomnia, headaches, blepharitis, plantar fasciitis, and a tendency to develop other focal pain and inflammation. (Petitioner's Exhibits 3-14). She is diagnosed with, and is treated for several autoimmune diseases, hashimoto thyroiditis (Petitioner's Exhibits 14, 15) celiac disease (Petitioner's Exhibits 15, 16, 17) and allergic reactions (Petitioner's

Exhibits 18-20). Additionally, she had been diagnosed, and is treated for Type II Diabetes Mellitus (Petitioner's Exhibit 15) gastroesophageal reflux, irritable bowel syndrome (Petitioner's Exhibits 3-4) carpal tunnel (Petitioner's Exhibits 12, 22) and cervical disk degeneration (Petitioner's Exhibit 4).

SUMMARY OF ARGUMENT

First, the Board erroneously applied the law concerning the treatment of hearsay evidence in administrative proceedings when it failed to consider medical records and medical statements as evidence of Ms. Murphy's physical impairments. The Utah Administrative Procedures Act and the "residuum rule," correctly applied, would not have required the exclusion of such evidence from consideration when making findings of fact regarding Ms. Murphy's impairments, or conclusions of law based upon those findings. The sworn testimony of Ms. Murphy and Dr. Bateman provided the required residuum of evidence.

Secondly, the Board incorrectly interprets the statutorily imposed burden of proof. Both case law under related areas of disability law, and the Long-Term Disability Program's initial determination procedures, provide guidance for interpreting the law regarding the scope of the "burden of proof" imposed upon employees at disability hearings. The definition of "total disability" requires that gainful employment the employee is found capable of must be "reasonable," and that vocational elements must be considered when determining that employment. At earlier levels of determinations of "total disability" the

agency collects the information needed to determine “reasonable” employment, considering the employees medical-vocational background. The agency should continue this role at the hearing level. In this sense, the agency has some burden of proof already built into its procedures, to enable its determinations. This burden should remain with the agency, and should not shift to the employee at the hearing level, to provide the vocational expertise required to make a determination of “reasonable” employment, after she has proven her impairments and functional limitations.

Lastly, the Board’s denial of disability benefits rested upon the testimony and evaluation by a physical therapist, as well as the purported failure of Dr. Bateman to provide sufficient evidence supporting proof of disability. The physical therapist has training and experience rehabilitating and evaluating injured workers, primarily in workers’ compensation cases. According to the testimony of Dr. Bateman, a consulting specialist Ms. Murphy was referred to, and supported by medical reports and statements of many other doctors, Ms. Murphy has a systemic illness of a chronic nature, rather than an acute work-related injury. Dr. Bateman testified that the type of evaluation performed by the physical therapist is inadequate for evaluating the expected on-the-job performance by those with systemic illness. Medical reports and statements supporting Ms. Murphy’s medical problems, and functional limitations were not considered by the Board in its findings.

ARGUMENT

POINT ONE

THE BOARD ERRONEOUSLY APPLIED THE HEARSAY RULE WHEN IT EXCLUDED MEDICAL RECORDS AND MEDICAL STATEMENTS FROM ITS FINDINGS OF FACT

The Board excluded from its consideration of the issue of medical impairment twenty-two exhibits, and approximately 116 pages of medical reports and medical statements, including those of numerous diagnostic tests.¹ After admitting the medical reports and medical statements into evidence, the Board finds:

6. Petitioner failed to provide any non-hearsay evidence showing she maintained any medically determinable physical impairment from accepted clinical and laboratory diagnostic techniques.

Order, dated September 26, 2002, Findings of Fact, p. 3. The Public Employees' Long-Term Disability Act defines "Total disability":

"Total disability" means, after the elimination period and the first 24 months of disability benefits, the complete inability, based solely on physical objective medical impairment, to engage in any gainful occupation which is reasonable, considering the eligible employee's education, training, and experience.

Utah Code Ann. § 49-21-102(11)(b). "Objective medical impairment" is defined:

"Objective medical impairment" means an impairment resulting from an injury or illness which is diagnosed by a physician and which is based on accepted objective medical tests or findings rather than subjective complaints.

¹Diagnostic tests include an MRI, a nerve conduction study (EEG), laboratory reports, a biopsy, testing related to sleep disorder, and pulmonary function.

It is true that many of the medical records and statements admitted into evidence, including medical documents of laboratory and other diagnostic testing, were hearsay. Ms. Murphy was unable to produce as witnesses the numerous doctors, radiologists, hospital technicians, and other health care professionals, involved in the treatment, diagnosing, and testing of her medical problems.²

As this Court noted in Cordova v. Blackstock, 861 P.2d 449 (Utah App. 1993):

The Utah Supreme Court has determined that there are "significant differences between court trials and proceedings before administrative agencies and that the technical rules of evidence need not be applied before the latter." *Yacht Club v. Utah Liquor Control Comm'n*, 681 P.2d 1224, 1226 (Utah 1984) (footnote omitted). Hearsay evidence is admissible in proceedings before administrative agencies. *Id.* However, findings of fact cannot be based exclusively on hearsay evidence; they must be supported by a residuum of legal evidence competent in a court of law. *Id.*

Evidence of Ms. Murphy's impairments does not rest exclusively on hearsay. The necessary residuum of competent evidence supporting a finding that Ms. Murphy has physical impairments consists of the Ms. Murphy's and Dr. Bateman's sworn testimony regarding her impairments. Once an employee's testimony concerning her impairments is supported with the objective medical data supplied in medical reports, the claims of disability should no longer be considered merely "subjective complaints," but should be considered

²It seems unlikely there are many disabled employees who are able to afford such an onerous requirement, or are able to track down the considerable numbers of individuals involved in the production of their medical records, to provide testimony under oath about the truth of the matters reported in those documents.

competent testimony of the claimant's direct knowledge of an "objective medical impairment." The information providing objective clinical, laboratory, and diagnostic testing data, should no longer be considered mere hearsay when testified to under oath by those with direct knowledge on the issue of Ms. Murphy's impairments, i.e., Ms. Murphy and Dr. Bateman.

The Board offered no objections at the hearing to any of the medical documents or medical statements submitted as evidence, and all twenty five of Ms. Murphy's exhibits were admitted into evidence. Tr. 3: 22 through 7: 6. Ms. Murphy provided sworn testimony at the hearing on April 29, 2002, regarding all of the impairments documented in the medical records and also testified to her functional limitations associated with these impairments; information which is also reported in several medical statements by Ms. Murphy's doctors and her physical therapist.

Ms. Murphy testified to her esophagus reflux, Tr. 10:17, insomnia, Tr. 10:19-24, 22: 12-25, 23: 1-11, plantar fasciitis, Tr. 11:1-14, 31: 13-14, physical therapy and exercises, 11: 1-11, 14: 7-12, 31: 2-3, allergies and blepharitis, Tr. 11:19-25, 28: 20-24, functional limitations, Tr. 12:10-13, 16: 1-23, 17: 13-25, 23: 12-25, 24:1-3, hypothyroidism, Tr. 12:25, fatigue, Tr. 13:10-19, neck pain and headache, Tr. 13: 22-23, 17: 2-9, carpal tunnel, Tr. 14:8-11, 18: 11-25, 19: 1-12, 35: 23-25, 36: 1-3, celiac disease and diabetes, Tr. 14: 16-25, 15: 1-14, 28: 1-14, automobile accidents, Tr. 21: 15-24, hepatitis C, Tr. 21: 19-24, Interferon therapy, Tr. 22:2-7, pain and fatigue, Tr. 27: 1-18, irritable bowel syndrome, Tr. 27: 11,

fibromyalgia and chronic fatigue, Tr. 29: 4-11, 31: 4-12, MRI and EEG, Tr. 36: 18-20. Ms. Murphy testified she was diagnosed with fibromyalgia by Dr. Anderson, Dr. Kurrus, and Dr. Lee Smith, and was referred to Dr. Bateman by Dr. Barbuto.

Dr. Bateman testified as an expert in the area of chronic fatigue and fibromyalgia, and as a consulting specialist to whom Ms. Murphy had been referred by her doctor. Tr. 36: 10-32, 38: 9-15, 29: 2-15. Dr. Bateman testified she evaluated Ms. Murphy in an initial consultation on October 27, 2000, and again on February 20, 2002. As part of the first consultive exam, and after an extensive review of Ms. Murphy's medical and psychosocial history, Dr. Bateman found that Ms. Murphy met the medical criteria for fibromyalgia. Tr. 42-44. Dr. Bateman then testified, in depth, about Ms. Murphy's underlying medical problems "contributing and compounding" her fibromyalgia symptoms, and included numerous references to the information found in the medical and diagnostic reports she had reviewed. Tr. 43: 14-25, 44: 1-9. Dr. Bateman read from her own evaluation of Ms. Murphy that "with this complex medical history, the fibromyalgia syndrome must be considered secondary to multiple underlying risk factors." Tr. 44: 20-22. Dr. Bateman opined at length on Ms. Murphy's underlying illnesses, and that fibromyalgia syndrome often occurs "in a piggyback fashion to other underlying illnesses." Tr. 45: 12-15. Dr. Bateman testified these underlying illnesses include chronic hepatitis C, multiple head and neck trauma, type two diabetes, and autoimmune disease, which included her autoimmune thyroid disease, allergies, celiac and other "gut" disease. Tr. 43: 18-25, 44: 1-8, 22-24, 45: 1-4. Dr. Bateman read and

opined upon Dr. Anderson's Residual Functional Capacity Questionnaire, agreeing with Dr. Anderson's assessment that, "given Joanna's combination of medical problems, that she would probably miss many more than four days per month, and would have difficulty working sequential full-time days, even in a week." Tr. 58: 21-25, 59: 1-16.

Dr. Bateman testified about Ms. Murphy's sleep disorders, common with fibromyalgia, and found in Dr. Bateman's consultive report. Tr. 70: 8-25, 71: 1-8. Dr. Bateman also testified regarding Ms. Murphy's bowel function disorders, affected "because people with fibromyalgia get autonomic neurologic dysfunction, with includes regulation of bowel function . . . and hormonal and neurotransmitter abnormalities, which affect bowel function. Tr. 72: 1-7. Dr. Bateman opined about Ms. Murphy's "feeling lightheaded when she stands, and (inaudible) equilibrium bumping into walls, which is also well established." Tr. 72: 19-24.

Dr. Bateman testified:

The objective data, if I may list it, is just strong objective – data supporting (inaudible) supporting diabetes . . . neuropathy, pain, and fatigue are common symptoms of diabetes. She has clearly diagnosed hepatitis C. . . And I've already said that all of her symptoms could come from hepatitis C. She has documented hypothyroidism. She has documented allergies, hypersensitivity, pneumonitis and herpes simplex." Tr. 83: 25. Dr. Bateman testified that "it's listed in my report that she has carpal tunnel."

Tr. 83: 7-8. Dr. Bateman also testified there is medical evidence that would support a neck or head injury. Tr. 84: 18-23.

Because of the foregoing sworn testimony given by Ms. Murphy and Dr. Bateman,

it was incorrect to exclude the medical records from any consideration from the Findings of Fact based upon hearsay. Both Ms. Murphy and Dr. Bateman provided an ample residuum of competent evidence upon which to base findings of “objective medical impairment.”

The Utah Supreme Court has held it to be improper in a worker’s compensation case for an administrative law judge to reject the statements of treating physicians which were unavailable as witnesses on the basis of hearsay. Bunnell v. Industrial Com’n of Utah, 740 P.2d 1331, (Utah 1987). The court found, “There was no reason for the rejection of the statements on that basis.” Id., at 1333.

In this case, there is little difference in its effect, from rejecting the statements of treating physicians as evidence, and rejecting that same evidence from all consideration on the issue of medical impairments or functional limitations.

The Board’s basis for refusing to consider the medical records and medical statements is found in its Conclusions of Law:

3. In formal administrative adjudicative proceedings, “A finding of fact that was contested may not be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence.” U.C.A. § 63-46b-10(3).

Order, dated September 26, 2002, Findings of Fact, p. 3, Conclusions of Law, p. 4.

The Board’s reliance on the above UAPA provision is rather confusing, in that the medical records and medical statements submitted into evidence by Ms. Murphy were not contested by the Board’s only witness, Mr. Cory Davis. Mr. Davis, a physical therapist, testified only to his own functional evaluation of Ms. Murphy, but made no medical findings,

and did not contest any medical or clinical findings, diagnoses, laboratory or diagnostic testing reported in any medical reports or statements.

POINT TWO

THE BOARD ERRED WHEN IT FAILED TO DECIDE THE ISSUE OF “REASONABLENESS” AND CONCLUDED IT SHARES NO BURDEN IN DETERMINING “TOTAL DISABILITY”

In its Conclusions of Law, the Board states:

1. Pursuant to Utah Code Ann. § 49-1-610 and § 49-9-401, Petitioner bears the burden of proof in this matter. The Utah State Retirement Board is not subject to any state or federal statute, rule, or common law, such as any shifting burden standard, in determining whether a Petitioner qualifies for long-term disability benefits under Utah Code Annotated, Title 49.

Order, dated September 26, 2002, Conclusions of Law, p. 3. In its Findings of Fact, the Board finds:

4. . . . [Dr. Bateman] testified that she was not an employment specialist and did not know the legal standards for disability in this case.

Order, dated September 26, 2002, Findings of Fact, p. 2.

It is true that the Utah State Retirement and Insurance Benefit Act imposes a burden of proof upon appellants. Utah Code Ann. § 49-11-613(4) provides under the statutory section entitled “Appeals procedure – Right of appeal to hearing officer – Board reconsideration – Judicial review”:

(4) The moving party in any proceeding brought under this section shall bear the burden of proof.

The above provision imposes a burden of proof upon an employee when she appeals

a decision to the executive director, to the hearing officer, and to the Board. However, as discussed below, there are numerous procedures and provisions followed by the Public Employees' Health Program ("PEHP") which demonstrate its involvement with vocational information gathering and determinations of "total disability" based upon that vocational information, and which occur prior to the levels of appeal for which the statutory burden of proof is provided.

Utah Code Ann. § 49-21-401 provides:

(1) An eligible employee shall apply for long-term disability benefits under this chapter by:

. . . .

(b) signing a consent form allowing the office access to the eligible employee's medical records; and

(c) providing any documentation or information reasonably requested by the office.

(2) Upon request by the office, the participating employer of the eligible employee shall provide to the office documentation and information concerning the eligible employee.

The Public Employees' Health Program ("PEHP") Long-Term Disability ("LTD") Program Master Policy³ provides under "G. How to file a Claim," as part of the application process:

1. The following information must be submitted to and received by the Program within 90 days of initial application:

a. . . . a signed consent form allowing the office access to the

³See Master Policy pp. 4-6 in Addendum 10

Eligible Employee's medical records and employment records;

b. A detailed statement from Physician(s) describing the objective basis for the diagnosis (including x-ray reports, and any other evaluative procedures);

. . . .

4. Eligible Employer must provide relevant information concerning the Eligible Employee's status, including: payroll information, job description, inability to perform services, job accommodation, etc.

The Master Policy further provides, under H. Claims Appeal Process:

1. If an Eligible Employee feels a disability claim has been denied inappropriately, a full review of the claim may be requested by writing to the LTD Claims Review Committee within 60 days of the date of the denial letter.

The Master Policy additionally provides under "D. Rehabilitation":

1. All Eligible Employees receiving a Monthly Disability Benefit under the Program shall be evaluated and when appropriate may be required to engage in a rehabilitation program.

2. . . . The program may refer the Eligible Employee to a disability specialist for a review of the Eligible Employee's condition and a written rehabilitation plan.

The above provisions delineate part of the process the LTD program undergoes when an employee pursues a claim for long-term disability benefits. The program collects medical information from the employees' medical sources, and vocational and employment information from the employer. The LTD program is also authorized to provide vocational evaluation and rehabilitation, referring the employee to individuals with expertise in that area, to determine the possibility for reentry into the job market. After gathering the relevant

information the LTD program makes its determinations of “total disability.”

The LTD program provides for two levels of disability determinations on the issue of “total disability,” made by the agency before the burden of proof imposed by § 49-11-613(4) occurs. Utah Code Ann. § 49-21-401(3) provides for the program’s initial determination under a section entitled “Disability benefits – Application – Eligibility”:

(3) The office shall review all relevant information and determine whether or not the eligible employee is totally disabled.

Utah Code Ann. § 49-21-102(11)(b) defines “Total disability”:

“Total disability” means, after the elimination period and the first 24 months of disability benefits, the complete inability, based solely on physical objective medical impairment, to engage in any gainful occupation which is reasonable, considering the eligible employee’s education, training, and experience.

Upon being denied disability benefits beyond the initial two year period, Ms. Murphy was informed that the process of appeal was identical to her initial application: she was notified that a caseworker had determined she was not “totally disabled” beyond the first two-year period of disability, and that she could appeal this denial by requesting review by the LTD Review Committee. Petitioner’s Exhibit 1c. The LTD Review Committee then requested information regarding Ms. Murphy’s functional restrictions and limitations relative to her activities of “daily living, sedentary employment, and rehabilitation efforts.” Petitioner’s Exhibit 1d. The LTD Review Committee next issued a denial stating “with proper management of your conditions, work within sedentary classifications is appropriate.” Petitioner’s Exhibit 1e.

Ms. Murphy was at no time required to determine, based upon her medical records, employment and vocational information, physical therapy and rehabilitation records, what type of job would be “reasonable” for her, considering her impairments and other vocational information. The LTD Review Committee arrived at the conclusion, after reviewing her records, that Ms. Murphy would be capable of working at jobs with a “sedentary classification.” This conclusion by the LTD Review Committee seems to reference the same classification of jobs according to their strength or exertional requirements, as defined by the Department of Labor’s Dictionary of Occupational Titles (“DOT”), which was later testified to by the Board’s witness.⁴

This approach by the LTD Program, is entirely consistent with other agencies responsible for making disability determinations. In related areas of disability law, such as Social Security disability, and Workers’ Compensation, a disability claimant is required to prove, through objective medical evidence, the impairments from which she suffers, and the degree of functional limitations resulting from these impairments. If the claimant’s proven impairments, when considered along with other relevant vocational factors, prevent the claimant from either returning to prior work, or from fitting into well established exertional levels or categories of work available in the economy as defined by the Department of Labor (such as work within a “sedentary” or “light” classification), then agencies in these related

⁴The DOT’s categorization of job’s according to “strength ratings” was submitted as Exhibit C at the hearing.

areas of disability law, have generally been considered to be in the best position to provide evidence there is work the claimant can perform, taking their functional limitations and vocational situation into consideration.⁵

Under Social Security disability law, the Code of Federal Regulations provides medical and vocational guidelines which are displayed in the Code as a system of “grids.”⁶ This medical-vocational analysis codified in the “grids,” synchronizes various combinations of DOT categories of “strength ratings” (“sedentary,” “light,” “medium,” etc.) with various vocational elements (“age,” “education,” “job skills,” “experience”). When a disability claimant does not fit neatly within the medical-vocational guidelines of the “grids,” the agency provides vocational experts to testify, providing information concerning what types of jobs are available in the national economy, considering the functional limitations due to medical impairments and the individual’s vocational situation. This approach, and its “burden shifting,” has long been supported by Federal case law. Channel v. Heckler, 742 F.2d 577, 579 (10th Cir. 1984)⁷.

⁵See Addendum 6-1 and 7-1. In both Social Security disability law and Workers’ Compensation law, the function that remains with an individual, after taking all medical impairments into account, is termed the “residual functional capacity.” Utah Code Ann. § 34A-2-413(1)(c)(iv); and 20 C.F.R. § 416.920(a)-(f).

⁶See Addendum 8-1

⁷“The ALJ may apply the Secretary’s medical-vocational guidelines (the grids) in lieu of taking the testimony of a vocational expert only when the grids accurately and completely describe the claimant’s abilities and limitations.” Jones v. Heckler, 760 F.2d 993, 998 (9th Cir. 1985). The Secretary may not rely on the grids alone when they do not accurately and completely describe a claimant’s RFC, the Secretary must also hear the testimony

Workers' Compensation law has a similar concept guiding medical-vocational determinations—that of the “odd lot.” The “odd-lot” concept developed out of a common sense notion, and has also long been applied. The term “odd lot” was first used in the case of Cardiff Corp. v. Hall, 1 K.B. 1009 (1911):

[T]here are cases in which the onus of sh[o]wing that suitable work can in fact be obtained does fall upon the employer who claims that the incapacity of the workman is only partial. If the accident has left the workman so injured that he is incapable of becoming an ordinary workman of average capacity in any well known branch of the labour market— if in other words the capacities for work left to him fit him only for special uses and do not, so to speak, make his powers of labour a merchantable article in some of the well known lines of the labour market, I think it is incumbent upon the employer to sh[o]w that such special employment can in fact be obtained by him. If I might be allowed to use such an undignified phrase, I should say that if the accident leaves the workman's labour in the position of an "odd lot" in the labour market, the employer must sh[o]w that a customer can be found who will take it.

The Utah Supreme Court followed the logic of this analysis when it opined in Marshall v. Industrial Commission, 704 P.2d 581 (Utah 1985):

It is much easier for the [employer] to prove the employability of the [employee] for a particular job than for the [employee] to try to prove the universal negative of not being employable at any work.

Marshall citing Brown v. Safeway Stores, Inc., 704 P.2d 305 (1970). This “burden shifting” to the agency occurs even though Workers' Compensation Law also imposes the burden of proving “total disability” on the employee. Utah Code Ann. § 34A-2-413(1)(b) provides:

To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:

of a vocational expert. Perminster .v Heckler, 765 F.2d 870 (9th Cir. 1985).

. . . .

(ii) the employee is permanently totally disabled;

In analytical “steps” very similar to Social Security disability law, step four of Utah Code Ann. § 34A-2-413(c) provides that “to find an employee permanently totally disabled, the commission shall conclude that:

(iv) the employee cannot perform other work reasonably available, taking into account the employee’s age, education, past work experience, medical capacity, and residual functional capacity.

In the present case, the LTD program has the responsibility for determining “total disability” before the statutory burden is imposed upon an employee claiming long-term disability; the LTD program currently accepts and exercises its position in making vocational determinations based upon the claimant’s demonstrated medical impairments and functional limitations. These initial determinations occur after the employee meets her burden of providing medical evidence to the LTD Program to prove the degree of her impairment. This sharing of burdens provided in the initial determination levels should inform the statutory burden imposed at the next levels of appeal under Utah Code Ann. § 49-11-613(4). Accordingly, these relative burdens, already incorporated into the procedures at the two initial levels of the agency’s determinations, should be retained throughout the appeals process.

In fact, the procedures used at the hearing in the present case indicate that the Board has, at least in some of its actions, accepted this burden. A physical therapist was brought

in to evaluate Ms. Murphy and to provide testimony at her hearing in regards to her functional and vocational abilities. Because the physical therapist in this case testified he had never seen the Dictionary of Occupational Titles, and his training and experience did not support the requisite vocational expertise, he was not qualified to testify to the issue of “reasonableness,” or how particular medical impairments, might effect an individual’s job prospects, considering that individuals particular vocational profile⁸. Tr. 103: 8-11.

The definition of “total disability” clearly anticipates that a finding must be made concerning what is “reasonable” employment for the claimant, and that vocational elements must be considered when making this finding. The only remaining question is who must provide the vocational experts that can provide this critical information for the “total disability” findings—the disabled employee who may have few monetary resources at their disposal, or the agency, which is to some degree already providing this necessary element.

POINT THREE

MARSHALING THE RESPONDENT’S EVIDENCE SHOWS THE BOARD FAILED TO SUPPORT ITS DECISION WITH SUBSTANTIAL EVIDENCE

Marshaling Respondent’s Evidence. Mr. Cory Davis, a physical therapist, performed a Physical Functional Capacity Evaluation on Ms. Murphy November 17, 2000, and testified for the Board concerning Ms. Murphy’s evaluation at the hearing. Mr. Davis opined in his

⁸This issue is developed more fully on pages 30-33 of this brief.

evaluation that “Ms. Murphy can do more, at times, than she currently demonstrates, states or perceives.” Respondent’s Exhibit B, p. 5. The Functional Capacity Evaluation reports:

despite times of significantly high pain ratings and reported fatigue she remained lighthearted, freely laughed and joked without apparent difficulty. This general attitude, combined with other observations such as excessive and non-anatomical pain drawing, excessively low functional status’ reporting, self limitation without observed secondary muscle recruitment, etc. are considered to be signs of symptom magnification.

Respondent’s Exhibit B, p. 5. Mr. Davis testified, “She did have or seem to demonstrate an ability to do something more than what maybe her perceived ability would be.” Tr. 90:8-10. Mr. Davis further pointed out that Ms. Murphy rated her level of disability at the time at seventy percent, which would be considered “crippling,” and which is, on the rating scale, the most severe. She “actually rated herself below what would be considered sedentary level of work, or level of ability.” Tr. 93: 7-17, 94: 9-11. Mr. Davis testified:

the things she completed in the intake interview would lead one to believe that she was severely disabled or had a severe difficulty in performing many activities. And yet what I observed over the two days of activities that we did, she demonstrated that she was capable of doing quite a few activities.

Tr. 96: 9-14. Mr. Davis, testified that the evaluation was divided over a two-day period of time and, referring to his evaluation report, testified he found she was able to participate in the evaluation over both days, lasting anywhere from two to three hours each day. Tr. 88:20-22, 89: 24-25, 90: 1-2.

Mr. Davis’s evaluation included testing for activities of sitting, standing, walking, climbing stairs, manual dexterity, range of motion, and strength measurements, including

lifting, carrying, pushing, pulling, grip, and pinch. Mr. Davis's evaluation reported Ms. Murphy could sit for 100 minutes, stand for 14 minutes, dynamic stand for 19 minutes, walk .23 miles in 10 minutes at 1.5 mph., demonstrate a pinch strength that was "average" when compared to the general population, was able to reach, stoop, squat and bend, lift 30 lbs. 4 inches, 35 lbs. 12 inches, 25 lbs. waist to chest, 20 lbs. chest to eye level, carry 25 lbs. for 30 feet, push a 60 lb. cart for 10 feet, pull a 40 lb. cart for 10 feet, and demonstrate average manual dexterity according to the VALPAR Assembly test, average to poor with the Minnesota Rate of Manipulation test, and average to poor fine dexterity using the Purdue Pegboard test. Respondent's Exhibit B, pp. 2-5.

Mr. Davis reported that Ms. Murphy demonstrated "good functional strength of the lower extremities with good body mechanics." He reported:

Ms. Murphy demonstrated average functional abilities in the LIGHT physical Demand Characteristic of Work Level according to the U.S. Dept. of Labor. The limitations observed were mostly dealing with apparent poor functional upper extremity strength.

Respondent's Exhibit B, p. 6. Mr. Davis testified that based upon Ms. Murphy's ability to lift thirty-five pounds 12 inches to a knuckle, and her ability to lift a twenty five pound box and carry it thirty feet, that Ms. Murphy "would actually be into the medium category." Mr. Davis's testimony was consistent with his Functional Capacity Evaluation, and he explained in more detail the procedures he used during his evaluation. Tr. 96-101. Mr. Davis testified that, based upon what he observed, he felt that Ms. Murphy would be capable of a light, "and probably capable of at least a sedentary type job." Tr. 102: 6-8.

The Board finds that Dr. Bateman testified she “could not provide an opinion about Petitioner’s specific physical abilities, but could only provide a general opinion about individuals who suffer from fibromyalgia from her ‘experience’ as a ‘consulting specialist’ rather than a treating physician.” Order, dated September 26, 2002, Findings of Fact, p. 2.

Dr. Bateman testified at the hearing:

[W]e do two types of visits: we do consultative visits and then I see patients who come to me for management. And she came for a consultative visit. And she had a number of doctors who were taking care of her, so there was no point in me doing management of her care.

Tr. 60: 11-16.

The Board finds that Dr. Bateman testified “that Petitioner’s worst and most difficult problems were pain and fatigue resulting from fibromyalgia,” and that “there was no objective way in which to measure Petitioner’s pain and fatigue, but that she relied solely on petitioner’s self-reported symptoms.” Order, dated September 26, 2002, p. 2.

Dr. Bateman was asked at the hearing:

[I]f you could go through her problems and her physical impairments in order of severity . . . As close as you can, in order of their severity . . . what are her most severe symptoms in 2000.

Tr. 64: 21-23, 65: 13-15. Dr. Bateman responded:

I can tell you that the content of our visit is, we don’t list it in order of severity . . . We talk about fatigue, and pain, and sleep, and we do it in that order. . . . And I can tell you based on what I know of her and what I . . . would think that her two most, and this is true with fibromyalgia in general, that fatigue and pain are interconnected symptoms. And that – that fatigue and pain are usually the most limiting. . . . So I would say that pain and fatigue are right up there as number one and two.

Tr. 66: 2-13, 68: 2-3. Dr. Bateman was asked:

And when you diagnose pain or fatigue, are those objective observations or are they subjective, as to what the patient describes?

Dr. Bateman responded:

By definition they're subjective. I believe that indirectly you can get objective data, but it has to do with looking at performance, looking at what they've been able to do, and see if their symptoms are consistent. But by very nature, fibromyalgia, its complete diagnosis, its clinical diagnosis and everything about it is subjective. With the exception of tender points, which are a feeble attempt to rescue some kind of objective data for these patients. That's all we have, except the things I quoted you. I talked to you about lots of objective data used on a research basis, it just has not evolved to the point where it's used clinically.

Tr. 81:18-25, 82: 1-7.

The Board finds that Dr. Bateman testified she was not an employment specialist and did not know the legal standards for disability in this case. Order, dated September 26, 2002,

Findings of Fact, p. 2. At the hearing Dr. Bateman testified as follows:

Q. So have you provided impairment ratings for individuals, patients in the past?

A. You know, I don't use the term impairment ratings. Maybe it would be a better way to – you know, I assess level of function and make determinations about how impaired people are, and I do that on many occasions.

Q. Are you aware how, say, the Utah Department of Labor classifies fibromyalgia for impairment ratings?

A. No.

Q. Okay. Would that be important in determining whether they're disabled, to look at a standard to determine impairment?

A. You know, I'd like to say that I'm not the one determining if she's disabled. I made a comment in my assessment about whether she was disabled. My consultation is to – to (inaudible), to assess her illness and her combined symptoms, and to make a statement about what I think her multiple problems are. And then I made a one-sentence recommendation about whether I thought she was disabled or not. But I'm not the one determining disability.

Tr. 79: 21-25, 80: 1-16.

The Board Did Not Support Its Decision With Substantial Evidence. Board correctly pointed out in its findings that Dr. Bateman is not an employment specialist, and as Dr. Bateman acknowledged, she is capable of determining the level of impairment, but not the issue of “disability.” Mr. Davis, however, is also not an employment specialist, and his testimony and curriculum vita indicate he does not have the training or experience to opine on the issue of “disability.” No vocational experts testified at the hearing.

Mr. Davis testified he uses a “chart” for determining which category of “physical demand level” individuals are capable of. Mr. Davis testified that he placed Ms. Murphy in the “light” physical demand level in his evaluation. Tr. 90: 13-25. He also testified that based on her ability to lift thirty-five pounds twelve inches, and her ability to carry a twenty-five pound box thirty feet, she demonstrated she “would actually be into the medium category.” Tr. 100: 8-17. At the hearing Petitioner's attorney objected to Mr. Davis's “physical demand characteristics work chart” in that this chart was not the “best evidence” of the DOT's descriptions of its strength ratings of jobs, was an incomplete summary of the DOT,

and did not contain important aspects of the original document.⁹ Tr. 90: 23-25, 91: -92.

Utah Code Ann. § 63-46b-8(1)(b)(iii) provides that a presiding officer:

may receive documentary evidence in the form of a copy or excerpt if the copy or excerpt contains all pertinent portions of the original document.

In this case, the “work chart” may have been admitted as evidence of what Mr. Davis based the vocational aspects of his evaluation upon, but would have been inadmissible as a representation of the DOT’s “strength ratings” that Mr. Davis erroneously believed he was applying. Mr. Davis testified he has never seen the actual DOT. Tr. 103: 5-6.

The DOT places the exertional requirements for work activities into categories of “sedentary,” “light,” “medium,” “heavy,” and “very heavy.” These levels of exertion include, as an important element of categorization, *durational* requirements, i.e., the exertional levels required for the job-related activities of sitting, standing, walking, lifting, carrying, pushing/pulling are measured not only in terms of exerting “pounds of force,” but also in terms of sustaining that exertion of force over varying periods of time. According to

⁹The transcript does not record specific objections by Petitioner’s attorney concerning the “work chart.” A discussion of the chart occurred “off the record,” during a recess ordered by the hearing officer. The transcript does record that the “work chart” was believed to be based upon the Department of Labor’s Dictionary of Occupational Titles (“DOT”) strength ratings. A true copy of the DOT’s job category strength ratings was offered by Petitioner’s attorney—which the transcript indicates the hearing officer accepted into evidence and marked as Exhibit “C.” Respondent’s attorney objected to the true copy of the DOT coming into evidence as the Board’s exhibit, however it is unclear from the transcript whether the true copy of the DOT came in as Petitioner’s or Respondent’s exhibit. It is also unclear from the transcript whether the “work chart,” itself, was admitted into evidence. Tr. 90: 13-25; 91, 92.

the DOT, “frequently” means from one-third to two-thirds of the time, and “occasionally” means up to one-third of the time. These requirements for exerting pounds of force as a sustained effort over time, is a concept that is central to the DOT’s exertional levels or “strength ratings” for job categories. Mr. Davis testified he was unaware of the element of time required in the DOT’s description of its “strength rating” categories.

According to the DOT, a “light” level of exertion requires an individual to walk or stand “frequently”—up to six hours out of an eight-hour workday¹⁰—exert up to 20 pounds of force “occasionally”—up to two and one half hours of an eight hour workday—or sit most of the time but push and pull arm or leg controls. According to the DOT a “medium” level of exertion requires that an individual be capable of exerting twenty to fifty pounds of force for up to two and one half hours of an eight-hour workday (“occasionally”) and/or from ten to twenty five pounds of force for up to 6 hours of an eight-hour work day (“frequently”), and be able to stand more than 6 hours per eight-hour workday. Exhibit C, p. 2.

Because Mr. Davis was unaware of the durational requirements, he evaluated Ms. Murphy as demonstrating performance at a “light” level of exertion, even though she tested in the activity of standing for only fourteen minutes without a break, (and nineteen minutes with three to four short breaks) and tested in the area of walking for only ten minutes, and standing/walking combined for a total one hour over the two day evaluation, with sitting

¹⁰“Light” level is defined as “in excess of those for Sedentary Work” and the standing/walking requirement for “sedentary” is “occasional” or up to one-third of the time—approximately two and one half hours of an eight hour work-day.

breaks in between. Tr. 97: 10; 105: 18-25; 106; 107: 1-15.

Although Mr. Davis had never seen the DOT or its durational requirements for sustained efforts, his routine for evaluating individuals does include a type of evaluation for extrapolating sustained efforts from his testing data. Mr. Davis testified he used the “MET” for estimating Ms. Murphy’s ability for a sustained effort. This test consists of measuring her “heart rate” during a “step test.” Ms. Murphy stepped up and down to a one and a half inch step for three minutes, took a short break, and stepped up and down to a six inch step for three minutes. Mr. Davis estimated that Ms. Murphy’s “physiological response” placed her at a “light” work level. Tr. 98:2-8. Mr. Davis’s training and experience, according to his curriculum vita and his testimony, is in the area of worker’s compensation cases, and involve the rehabilitation and evaluation of injured workers. His undergraduate work at the WERK center at Brigham Young University as a physical therapy aid was where he “first got exposure to working with and evaluating injured workers.” He later worked for four years in the Idaho Falls hospital where he “was in charge of and worked with exclusively workers’ compensation cases. Mr. Davis testified that he “attended several continuing education courses related to evaluation and treatment of injured workers.” Respondent’s Exhibit A, Tr. 86-87. Mr. Davis’s background and training are important consideration in assessing his ability to evaluate Ms. Murphy’s functional limitations—in that Ms. Murphy is not an injured worker.

Dr. Bateman highlighted the problems with evaluating an individual with systemic

illness or chronic problems who cannot sustain activities over longer periods of time, with short term methods designed to test and evaluate a worker's acute injuries. Dr. Bateman testified she had reviewed Mr. Davis's functional capacity evaluation and offered an in depth opinion about its shortcomings. Tr. 52-58, 80: 22-25, 81: 1-10.

Dr. Bateman testified that fibromyalgia patients "are able to perform short-term and in a limited fashion with the consequence of escalation of their symptoms, either when they do it for a prolonged period, or when they do it for sequential periods." Tr. 53: 5-8. She opined that:

[t]his kind of an evaluation . . . does not take into account fatigueability over time, in a day, with repetitive motion . . . by fatiguability I mean not only causing more fatigue, but causing more pain, and the two interact. It doesn't take into account developing overuse syndromes, which she has had well documented in plantar fasciitis, which is an overuse syndrome in the feet, and carpal tunnel which is an overuse syndrome in the hands. And is a known, associated problem with fibromyalgia and with hepatitis C. It doesn't take into account post-exertional delays in pain that occur the next day, or that accumulate over a period of time, which symptoms are the homework of fibromyalgia . . . So this kind of an assessment is not a good assessment for determining anything about fibromyalgia, other than, acute strength, short-term ability to sit . . . And I think the data in his report is fine, but extrapolating beyond the data becomes risky in terms of estimating someone's ability to work.

Tr. 57, 58: 1-2. Ms. Murphy testified to the post-exertional delays in pain she experienced the days after her evaluation by Mr. Davis. Tr. 24, 25: 1-13.

Dr. Bateman opined upon Mr. Davis's description of Ms. Murphy's pain being "non-anatomic," stating:

I found her symptoms to be – her report of pain to be very consistent . . . her

pain drawing to be consistent with her report, consistent with his report . . . the findings are entirely consistent with her syndrome, the places that pain occurs in fibromyalgia. And so in that way, they're entirely anatomic, and they relate to her prior underlying injuries. Her carpal tunnel syndrome is significantly anatomic; her myofascia pain from her prior head and neck injuries of her neck and shoulders is exactly anatomic; and her foot and ankle pain . . . I don't know if it's just fibro or if it relates to, you can get a peripheral neuropathy from hepatitis C.

Tr. 56: 6-25.

Dr. Bateman testified regarding Dr. Anderson's medical statement in a Residual Functional Capacity Questionnaire, agreeing with Dr. Anderson that Ms. Murphy's impairments would likely cause her to be absent from work more than four days per month:

Yes. In fact, I think given Joanna's combination of medical problems, that she would have difficulty working sequential full-time days, even in a week.

Tr. 58: 21-25, 59: 1-16; Petitioner's Exhibit 5. Dr. Bateman also gave her opinion regarding Ms. Murphy's ability to work. Responding to the hearing officers question:

Now, based upon that diagnosis, you did not make any determination about whether she was impaired for working?

Dr. Bateman testified:

I did make a statement about that on the recent visit saying I felt like she was unable to work full-time due to her combined problems.

Tr. 85: 11-13.

Ms. Murphy and Dr. Bateman also testified to the issues delineated in pages eleven through fourteen of this brief. Consistent with Dr. Bateman's testimony concerning Ms. Murphy's loss of balance, Mr. Davis testified that the during the following stair climbing test, Ms. Murphy used a handrail, "primarily for assistance in balance, not necessarily for

assistance in strength.” Tr. 98: 16-17. It is clear that Mr. Davis does not have the medical training to properly assess how Ms. Murphy’s medical problems would be expected to effect her ability to perform work-related activities over a sustained period of time, such as that required for regular full-time employment in a competitive work environment.

By failing to consider Ms. Murphy’s medical records and other medical statements, the Board ignored the bulk of Ms. Murphy’s case. Dr. Sara Jane Anderson, Ms. Murphy’s regular treating physician since 1983, has the greatest familiarity with Ms. Murphy’s medical condition and has followed the progression of her disease over the years. Petitioner’s Exhibit 4. Dr. Anderson indicated in her functional capacity evaluation that Ms. Murphy cannot sustain the demands of full-time work, even at a “sedentary” level of physical exertion, that her pain is often severe enough to interfere with her attention and concentration, and that her pain medication makes her drowsy. Dr. Anderson reports Ms. Murphy needs to shift positions at will from sitting, standing or walking, and that she can stand and walk less than two hours total in an eight-hour day. Dr. Anderson reports that Ms. Murphy’s carpal tunnel leaves her with significant limitations in doing repetitive reaching, handling, and fingering, that her fatigue and generalized pain, including frequent headaches, would result in frequent absences from work, “more than four days per month.” Petitioner’s Exhibit 5. Ms. Murphy’s most recent physical therapist, Debra Stafshoolt, reports functional limitations consistent with Dr. Anderson’s. Petitioner’s Exhibit 6.

The Board failed to consider medical reports documenting Ms. Murphy’s diagnoses

of fibromyalgia by Dr. Lee Smith, Petitioner's Exhibit 3, by Dr. Anderson, Petitioner's Exhibit 4, and by Dr. Bateman, Petitioner's Exhibits 8-9. The Board failed to consider medical reports of Dr. Stanchfield, Petitioner's Exhibit 15. The Board failed to consider medical reports diagnosing carpal tunnel, diagnosed by nerve conduction study, Petitioner's Exhibits 12 and 22, Hashimoto thyroiditis, Exhibit 15n, plantar fasciitis with edema of right leg, Petitioner's Exhibit 11, abnormal MRI, Petitioner's Exhibit 12, sleep diagnostic report, Exhibit 13, Celiac disease with pathology report, Petitioner's Exhibit 16-17, hypersensitivity reactions, Petitioner's Exhibits 18-20, and problems with eye inflammation, Petitioner's Exhibit 10.

Mr. Davis has no training or background as a vocational expert and could offer no testimony concerning what exertional level of job category would be "reasonable" for Ms. Murphy, considering relevant vocational experience or the level of any proven impairments she has. "Total disability" requires vocational considerations be included in a determination of "reasonable" employment. The issues of whether there are occupations or jobs available for an individual with severe carpal tunnel, or an individual with an expected level of absenteeism from work, were not addressed.

CONCLUSION

This Court should first find that the Board incorrectly interpreted the law when refusing to consider the medical records and statements submitted into evidence. Second, this Court should find that the Board bears a burden in providing the vocational expertise

necessary to make its required findings on the “reasonableness” of any gainful occupation under the definition of “total disability,” and which it failed to provide in this case. Lastly, this Court should find that the Board failed to base its determination upon substantial evidence, for all of the reasons above delineated.

RESPECTFULLY SUBMITTED this 8th day of August, 2003.

UTAH LEGAL SERVICES, INC.
Attorneys for Appellants


BY: L. Kathleen Ferro

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing BRIEF

to:

HOWARD, PHILLIPS & ANDERSEN
Attorneys for Respondent
DAVID B. HANSEN
560 East 200 South, Suite 300
Salt Lake City, Utah 84102

Dated this 5th day of August, 2003.

63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

History: C. 1953, 63-46b-16, enacted by L. 1987, ch. 161, § 272; 1988, ch. 72, § 26.

Cross-References. — Review of proceed-

ings before State Tax Commission, jurisdiction and standard, §§ 59-1-601, 59-1-610.

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

- (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
- (ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence,

except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 3; 1991, ch. 268, § 22; 1992, ch. 127, § 12; 1994, ch. 13, § 45; 1995, ch. 299, § 47; 1996, ch. 159, § 19; 1996, ch. 198, § 49.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, added Subsection (2)(h) and redesignated former Subsections (2)(h) through (j) as Subsections (2)(i) through (k).

The 1994 amendment, effective May 2, 1994, substituted "Board of Pardons and Parole" for "Board of Pardons" in Subsection (2)(h) and inserted "Administrative Procedures Act" in Subsection (4).

The 1995 amendment, effective May 1, 1995, substituted "School and Institutional Trust

Lands Board of Trustees, Division of Sovereign Lands and Forestry actions reviewed by the executive director of the Department of Natural Resources" for "Board of State Lands" in Subsection (2)(a).

The 1996 amendment by ch. 159, effective July 1, 1996, substituted "Division of Forestry, Fire and State Lands" for "Division of Sovereign Lands and Forestry" in Subsection (2)(a).

The 1996 amendment by ch. 198, effective July 1, 1996, deleted former Subsection (2)(d), listing appeals from circuit courts, and redesignated former Subsections (2)(e) to (2)(k) as (2)(d) to (2)(j).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

Cross-References. — Composition and jurisdiction of military court, §§ 39-6-15, 39-6-16.

created by this title are not subject to alienation or assignment by the member, retiree, participant, or their beneficiaries and are not subject to attachment, execution, garnishment, or any other legal or equitable process.

(2) The office may, upon the request of the retiree, deduct from the retiree's allowance insurance premiums or other dues payable on behalf of the retiree, but only to those entities that have received the deductions prior to February 1, 2002

(3) (a) The office shall provide for the division of an allowance, defined contribution account, continuing monthly death benefit, or refund of member contributions upon termination to former spouses and family members under an order of a court of competent jurisdiction with respect to domestic relations matters on file with the office.

(b) The court order shall specify the manner in which the allowance, defined contribution account, continuing monthly death benefit, or refund of member contributions shall be partitioned, whether as a fixed amount or as a percentage of the benefit.

(c) Allowances, continuing monthly death benefits, and refunds of member contributions split under a domestic relations order are subject to the following:

(i) the period for which payments shall be made under the original domestic relations order may not be altered;

(ii) payments to an alternate payee shall begin at the time the member or beneficiary begins receiving payments; and

(iii) the alternate payee shall receive payments in the same form as payments received by the member or beneficiary.

(4) In accordance with federal law, the board may deduct the required amount from any benefit, payment, or other right accrued or accruing to any member of a system, plan, or program under this title to offset any amount that member owes to a system, plan, or program administered by the board.

(5) The board shall make rules to implement this section.

History: C. 1953, 49-1-609, enacted by L. 1987, ch. 1, § 28; 1990, ch. 83, § 1; 1991, ch. 224, § 2; 1994, ch. 90, § 6; 1995, ch. 197, § 8; 2000, ch. 283, § 4; 2001, ch. 141, § 6; renumbered by L. 2002, ch. 250, § 35.

Amendment Notes. — The 2000 amendment, effective March 16, 2000, in Subsection (3)(a) substituted "service retirement" for "retirement" and inserted "continuing monthly death benefit."

The 2001 amendment, effective March 15, 2001, added Subsections (3)(d) through (f) and redesignated former Subsection (3)(d) as (g)

The 2002 amendment, effective March 26, 2002, renumbered this section, which formerly appeared as § 49-1-609, rewrote Subsections (1), (2) and (3), and redesignated former Subsection (3)(g) as (5)

49-11-613. Appeals procedure — Right of appeal to hearing officer — Board reconsideration — Judicial review.

(1) (a) All members, retirees, participants, alternative payees, or covered individuals of a system, plan, or program under this title shall acquaint themselves with their rights and obligations under this title.

(b) A person who claims a benefit, legal right, or employment right under this title shall request a ruling by the executive director.

(c) A person who is dissatisfied by a ruling of the executive director with respect to any benefit claim or legal right under any system, plan, or program under this title shall request a review of that claim by a hearing officer.

- (2) The hearing officer shall
 - (a) be hired by the executive director after consultation with the board;
 - (b) follow the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act, except as specifically modified under this title;
 - (c) hear and determine all facts pertaining to applications for benefits under any system, plan, or program under this title and all matters pertaining to the administration of the office, and
 - (d) make conclusions of law in determining the person's rights under any system, plan, or program under this title and matters pertaining to the administration of the office
- (3) The board shall review and approve or deny all decisions of the hearing officer in accordance with rules adopted by the board.
- (4) The moving party in any proceeding brought under this section shall bear the burden of proof
- (5) A party may file an application for reconsideration by the board upon any of the following grounds
 - (a) that the board acted in excess of its powers;
 - (b) that the order or award was procured by fraud;
 - (c) that the evidence does not justify the determination of the hearing officer; or
 - (d) that the party has discovered new material evidence that could not, with reasonable diligence, have been discovered or procured prior to the hearing.
- (6) The board shall affirm, reverse, or modify the decision of the hearing officer, or remand the application to the hearing officer for further consideration.
- (7) A party aggrieved by the board's decision may obtain judicial review by complying with the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act.
- (8) The board may make rules to implement this section

History: C. 1953, 49-1-610, enacted by L. 1987, ch. 1, § 29; 1987, ch. 112, § 2; 1987, ch. 161, § 150; 1988, ch. 102, § 2; 1988, ch. 179, § 5; 1992, ch. 157, § 4; 1993, ch. 226, § 2; 2001, ch. 141, § 7; renumbered by L. 2002, ch. 250, § 36.

Amendment Notes. — The 2001 amend-

ment, effective March 15, 2001, added Subsection (3) and redesignated the former Subsections (3) and (4) as (4) and (5)

The 2002 amendment, effective March 26, 2002, renumbered and rewrote this section, which formerly appeared as § 49-1-610

49-11-614. Vesting on termination of system or plan.

If any system or the Utah Governors' and Legislators' Retirement Plan is terminated, the accrued benefits of each member in the terminated system or plan shall immediately become vested and nonforfeitable.

History: C. 1953, 49-1-613, enacted by L. 1990, ch. 273, § 6; renumbered by L. 2002, ch. 250, § 37.

Amendment Notes. — The 2002 amendment, effective March 26, 2002, renumbered this section, which formerly appeared as § 49

1-613, substituted "system or the Utah Governors' and Legislators' Retirement Plan" for "retirement plan established under this title," substituted "terminated system or plan" for "plan" and deleted "100%" before "vested"

History: C. 1953, 49-20-406, enacted by L. 2002, ch. 220, § 2, renumbered by L. 2002, ch. 220, § 4

Coordination clause — This section was enacted as § 49-8-406 it was renumbered by

the coordination clause in L. 2002 ch. 220 § 4(2)(b) for consistency with the recodification of this title by L. 2002 ch. 250

Effective Dates — Laws 2002 ch. 220 § 3 makes the act effective on July 1, 2002

CHAPTER 21

PUBLIC EMPLOYEES' LONG-TERM DISABILITY ACT

Part 1 General Provisions		Part 4 Disability Benefits	
Section		Section	
49-21-101	Title	49-21-401	Disability benefits — Application — Eligibility
49-21-102	Definitions	49-21-402	Reduction of benefit — Circumstances — Application for other benefits required
49-21-103	Creation of program		
49-21-104	Creation of trust fund	49-21-403	Termination of disability benefits — Calculation of retirement benefit
49-21-105	Purpose		
Part 2 Membership Eligibility		49-21-404	Annual adjustment to disability benefit
49-21-201	Program membership — Eligibility	49-21-405	Disability benefit — Exclusions
Part 3 Contributions		49-21-406	Rehabilitative employment — Interview by disability specialist — Maintaining eligibility — Additional treatment and care
49-21-301	Contributions to fund program — Adjustment of premium rate	49-21-407	Health insurance reimbursements for persons with a disability — Limitations

PART 1

GENERAL PROVISIONS

49-21-101. Title.

This chapter is known as the “Public Employees’ Long-Term Disability Act.”

History: C. 1953, 49-9-101, enacted by L. 1987, ch. 1, § 165, renumbered by L. 2002, ch. 250, § 195

Amendment Notes. — The 2002 amendment, effective March 26, 2002 renumbered

this section which formerly appeared as § 49-9-101, and substituted “Public Employees Long-Term Disability Act” for “Utah Public Employees Disability Act.”

49-21-102. Definitions.

As used in this chapter

(1) “Date of disability” means the date on which a period of continuous disability commences, and may not commence on or before the last day of actual work

(2) “Elimination period” means the three months at the beginning of each continuous period of total disability for which no benefit will be paid and commences with the date of disability

(3) (a) "Eligible employee" means:

(i) any regular full-time employee as defined under Section 49-12-102 or 49-13-102, public safety service employee as defined under Section 49-14-102 or 49-15-102, or judge as defined under Section 49-17-102 or 49-18-102, whose employer provides coverage under this chapter, or the governor of the state; and

(ii) an employee who is covered by a retirement program offered by the Teachers' Insurance and Annuity Association of America, if the employee's employer provides coverage under this chapter; and

(b) "Eligible employee" does not include any employee that is exempt from coverage under Section 49-21-201.

(4) "Maximum benefit period" means the maximum period of time the monthly disability income benefit will be paid under Section 49-21-403 for any continuous period of total disability.

(5) "Monthly disability benefit" means the monthly payments and accrual of service credit under Section 49-21-401 and health insurance reimbursements paid under Section 49-21-408, or any combination of them.

(6) "Objective medical impairment" means an impairment resulting from an injury or illness which is diagnosed by a physician and which is based on accepted objective medical tests or findings rather than subjective complaints.

(7) "Physician" means a licensed physician.

(8) "Regular monthly salary" means the amount certified by the participating employer as the monthly salary of the eligible employee, unless there is a discrepancy between the certified amount and the amount actually paid, in which case the office shall determine the regular monthly salary.

(9) "Regular occupation" means either the primary duties performed by the eligible employee for the twelve months preceding the date of disability, or a permanent assignment of duty to the eligible employee.

(10) "Rehabilitative employment" means any occupation or employment for wage or profit, for which the eligible employee is reasonably qualified to perform based on education, training, or experience while unable to perform the employee's regular occupation.

(11) (a) "Total disability" or "totally disabled" means the complete inability, due to objective medical impairment, whether physical or mental, to engage in the eligible employee's regular occupation during the elimination period and the first 24 months of disability benefits.

(b) "Total disability" means, after the elimination period and the first 24 months of disability benefits, the complete inability, based solely on physical objective medical impairment, to engage in any gainful occupation which is reasonable, considering the eligible employee's education, training, and experience.

History: C. 1953, 49-9-103, enacted by L. 1987, ch. 1, § 167; 1987, ch. 111, § 2; 1994, ch. 270, § 1; 1995, ch. 197, § 22; 1996, ch. 79, § 63; 1999, ch. 292, § 19; 2000, ch. 283, § 8; renumbered by L. 2002, ch. 250, § 196.

Amendment Notes. — The 1999 amendment, effective March 19, 1999, added Subsection (6), making related designation changes, and in Subsection (9) substituted the language

beginning "medically determinable" and ending "not less than 12 months" for "injury and illness" in the first sentence and inserted "medically determinable" in the second sentence

The 2000 amendment, effective March 16, 2000, deleted "but is not limited to" after "term includes" in the second sentence of Subsection (2) and "which can be expected to result in death or which has lasted or can be expected to

(5) Firefighter service employees, as defined under Section 49-16-102, are not eligible for coverage under this chapter.

(6) Public safety service employees, as defined in Sections 49-14-102 and 49-15-102, who are covered under a long-term disability program offered by an employer which is substantially similar to this program are not eligible for coverage under this chapter.

(7) Legislators are not eligible for coverage under this chapter.

History: C. 1953, 49-9-203, enacted by L. 1987, ch. 1, § 170; 1987, ch. 111, § 3; 1991, ch. 282, § 1; 1992, ch. 157, § 27; renumbered by L. 2002, ch. 250, § 200.

Amendment Notes. — The 2002 amendment, effective March 26, 2002, renumbered and rewrote this section, which formerly appeared as § 49-9-203

PART 3

CONTRIBUTIONS

49-21-301. Contributions to fund program — Adjustment of premium rate.

(1) During each legislative session, the board shall certify to the Legislature the employer paid premium rate expressed as a percentage of salary which is required to fund the Public Employees' Long-Term Disability Trust Fund.

(2) Upon the board's recommendation, the Legislature shall adjust the premium rate to maintain adequate funding for the Public Employees' Long-Term Disability Trust Fund.

History: C. 1953, 49-9-301, enacted by L. 1987, ch. 1, § 171; 1990, ch. 285, § 24; 1994, ch. 90, § 23; renumbered by L. 2002, ch. 250, § 201.

Amendment Notes. — The 2002 amendment, effective March 26, 2002, renumbered

this section, which formerly appeared as § 49-9-301, inserted "Long-Term" in Subsection (1); and substituted "Public Employees' Long-Term Disability Trust Fund" for "disability trust fund" in Subsection (2).

PART 4

DISABILITY BENEFITS

49-21-401. Disability benefits — Application — Eligibility.

(1) An eligible employee shall apply for long-term disability benefits under this chapter by:

- (a) completing an application form prepared by the office;
- (b) signing a consent form allowing the office access to the eligible employee's medical records; and
- (c) providing any documentation or information reasonably requested by the office.

(2) Upon request by the office, the participating employer of the eligible employee shall provide to the office documentation and information concerning the eligible employee.

(3) The office shall review all relevant information and determine whether or not the eligible employee is totally disabled.

(4) If the office determines that the eligible employee is totally disabled due to accidental bodily injury or physical illness which is not the result of the performance of an employment duty, the eligible employee shall receive a monthly disability benefit equal to $\frac{2}{3}$ of the eligible employee's regular

monthly salary, for each month the total disability continues beyond the elimination period, not to exceed the maximum benefit period

(5) If the office determines that the eligible employee is totally disabled due to psychiatric illness, the eligible employee shall receive

(a) a maximum of two years of monthly disability benefits equal to $\frac{2}{3}$ of the eligible employee's regular monthly salary for each month the total disability continues beyond the elimination period,

(b) a maximum of \$10,000 for psychiatric expenses, including rehabilitation expenses approved by the office's consultants, paid during the period of monthly disability benefits, and

(c) payment of monthly disability benefits according to contractual provisions for a period not to exceed five years if the eligible employee is institutionalized due to psychiatric illness

(6) If the office determines that the eligible employee is totally disabled due to a physical injury resulting from external force or violence as a result of the performance of an employment duty, the eligible employee shall receive a monthly disability benefit equal to 100% of the eligible employee's regular monthly salary, for each month the total disability continues beyond the elimination period, not to exceed the maximum benefit period

(7) (a) Successive periods of disability are considered as a continuous period of disability if the period of disability

(i) results from the same or related causes,

(ii) is separated by less than six months of continuous full-time work at the individual's usual place of employment, and

(iii) commences while the individual is an eligible employee covered by this chapter

(b) The inability to work for a period of less than 15 consecutive days is not considered as a period of disability

(c) If Subsection (7)(a) or (b) does not apply, successive periods of disability are considered as separate periods of disability

(8) The office may, at any time, have any eligible employee claiming disability examined by a physician chosen by the office to determine if the eligible employee is totally disabled

(9) A claim brought by an eligible employee for long-term disability benefits under the Public Employee's Long-Term Disability Program is barred if it is not commenced within one year from the eligible employee's date of disability, unless the office determines that under the surrounding facts and circumstances, the eligible employee's failure to comply with the time limitations was reasonable

(10) Medical or psychiatric conditions which existed prior to enrollment may not be a basis for disability benefits until the eligible employee has had one year of continuous enrollment in the Public Employees Long-Term Disability Program

(11) If there is a valid benefit protection contract, service credit shall accrue during the period of total disability, unless the disabled eligible employee is exempted from a system, or is otherwise ineligible for service credit

History: C. 1953, 49-9-401, enacted by L. 1987, ch. 1, § 172; 1987, ch. 111, § 4; 1995, ch. 197, § 23; 1998, ch. 267, § 10; 1999, ch. 292, § 20; renumbered by L. 2002, ch. 250, § 202.

Amendment Notes. — The 1998 amendment, effective May 4, 1998, added Subsection (5)

The 1999 amendment, effective March 19, 1999, made two minor stylistic changes in Subsection (4) and added Subsection (6)

The 2002 amendment, effective March 26, 2002, renumbered and rewrote this section, which formerly appeared as § 49-9-401

Dean Evans Chrysler Plymouth v Morse, 692 P2d 779 (Utah 1984) (decided before 1988 amendment)

A worker's cause of action accrues when the industrial accident occurs, a worker who knew of his accident within the eight-year limitations period and had his first medical operation within that period, but sought to amend his award after that period, was time-barred from bringing such claims Middlestadt v Indus Comm'n, 852 P2d 1012 (Utah Ct App 1993)

Test of total disability.

Employee who had only partial loss of vision which was subject to correction by use of glasses did not sustain total disability, the test of such disability being whether it prevents employee from doing work for which he is

adapted, and not that in which he was injured United States Smelting, Ref & Mining Co v Evans, 35 F2d 459 (8th Cir 1929) cert denied, 281 U S 744, 50 S Ct 350, 74 L Ed 1157 (1930)

Unknown preexisting condition.

After an accident aggravated a preexisting asymptomatic condition of employee, he was entitled to full compensation for the twenty percent whole person permanent partial impairment caused by the accident Crosland v Board of Review, 828 P2d 528 (Utah Ct. App.), cert denied, 843 P2d 1042 (Utah 1992)

Cited in Booms v Rapp Constr Co, 720 P2d 1363 (Utah 1986)

COLLATERAL REFERENCES

C.J.S. — 99 C J S Workmen's Compensation § 562 et seq

A.L.R. — Workers' compensation reopening

lump-sum compensation payment, 26 A.L.R 5th 127

34A-2-413. Permanent total disability — Amount of payments — Rehabilitation.

- (1) (a) In cases of permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section.
- (b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:
 - (i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;
 - (ii) the employee is permanently totally disabled; and
 - (iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability
- (c) To find an employee permanently totally disabled, the commission shall conclude that:
 - (i) the employee is not gainfully employed;
 - (ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;
 - (iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational disease that is the basis for the employee's permanent total disability claim; and
 - (iv) the employee cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity.
- (d) Evidence of an employee's entitlement to disability benefits other than those provided under this chapter and Chapter 3. Utah Occupational

(d) Each State agency will be responsible for comprehensive oversight management of its consultative examination program, with special emphasis on key providers.

(e) A key consultative examination provider is a provider that meets at least one of the following conditions:

(1) Any consultative examination provider with an estimated annual billing to the Social Security and Supplemental Security Income programs of at least \$100,000; or

(2) Any consultative examination provider with a practice directed primarily towards evaluation examinations rather than the treatment of patients; or

(3) Any consultative examination provider that does not meet the above criteria, but is one of the top five consultative examination providers in the State by dollar volume, as evidenced by prior year data.

(f) State agencies have flexibility in managing their consultative examination programs, but at a minimum will provide:

(1) An ongoing active recruitment program for consultative examination providers;

(2) A process for orientation, training, and review of new consultative examination providers, with respect to SSA's program requirements involving consultative examination report content and not with respect to medical techniques;

(3) Procedures for control of scheduling consultative examinations;

(4) Procedures to ensure that close attention is given to specific evaluation issues involved in each case;

(5) Procedures to ensure that only required examinations and tests are authorized in accordance with the standards set forth in this subpart;

(6) Procedures for providing medical or supervisory approval for the authorization or purchase of consultative examinations and for additional tests or studies requested by consulting medical sources. This includes physician approval for the ordering of any diagnostic test or procedure where the question of significant risk to the claimant/beneficiary might be raised. See § 416.919m.

(7) Procedures for the ongoing review of consultative examination results to ensure compliance with written guidelines;

(8) Procedures to encourage active participation by physicians and psychologists in the consultative examination oversight program;

(9) Procedures for handling complaints;

(10) Procedures for evaluating claimant reactions to key providers; and

(11) A program of systematic, onsite reviews of key providers that will include annual onsite reviews of such providers when claimants are present for examinations. This provision does not contemplate that such reviews will involve participation in the actual examinations but, rather, offer an opportunity to talk with claimants at the provider's site before and after the examination and to review the provider's overall operation.

(g) The State agencies will cooperate with us when we conduct monitoring activities in connection with their oversight management of their consultative examination programs.

[56 FR 36967, Aug 1, 1991, 65 FR 11880, March 7, 2000]

PROCEDURES TO MONITOR THE CONSULTATIVE EXAMINATION

§ 416.919t Consultative examination oversight.

(a) We will ensure that referrals for consultative examinations and purchases of consultative examinations are made in accordance with our policies. We will also monitor both the referral processes and the product of the consultative examinations obtained. This monitoring may include reviews by independent medical specialists under direct contract with SSA.

(b) Through our regional offices, we will undertake periodic comprehensive reviews of each State agency to evaluate each State's management of the consultative examination process. The review will involve visits to key providers, with State staff participating, including a program physician when the visit will deal with medical techniques or judgment, or factors that go to the core of medical professionalism.

(c) We will also perform ongoing special management studies of the quality of consultative examinations purchased from key providers and other sources and the appropriateness of the examinations authorized.

[56 FR 36968, Aug 1, 1991]

EVALUATION OF DISABILITY

§ 416.920 Evaluation of disability of adults, in general.

(a) Steps in evaluating disability. We consider all evidence in your case record when we make a determination or decision whether you are disabled. When you file a claim for Supplemental Security Income disability benefits and are age 18 or older, we use the following evaluation process. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider the effect of your physical or mental impairment; if you have more than one impairment, we will also consider the combined effect of your impairments. Your impairment(s) must be

severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any *current work activity, the severity of your impairment(s), your residual functional capacity, your past work, and your age, education, and work experience.* If we can find that you are disabled or not disabled at any point in the review, we do not review your claim further. Once you have been found eligible for Supplemental Security Income benefits based on disability, we follow a somewhat different order of evaluation to determine whether your eligibility continues, as explained in § 416.994(b)(5).

(b) If you are working. If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

(d) When your impairment(s) meets or equals a listed impairment in Appendix 1. If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) Your impairment(s) must prevent you from doing past relevant work. If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) Your impairment(s) must prevent you from doing other work.

(1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 416.962).

[50 FR 8728, March 5, 1985; 50 FR 19164, May 7, 1985; 56 FR 5554, Feb. 11, 1991; 56 FR 36968, Aug. 1, 1991; 65 FR 80308, Dec. 21, 2000]

§ 416.920a Evaluation of mental impairments.

(a) General. The steps outlined in §§ 416.920 and 416.921 apply to the evaluation of physical and mental impairments. In addition, when we evaluate the severity of mental impairments for adults (persons age 18 and over) and in persons under age 18 when Part A of the Listing of Impairments is used, we must follow a special technique at each level in the administrative review process. We describe this special technique in paragraphs (b) through (e) of this section. Using this technique helps us:

(1) Identify the need for additional evidence to determine impairment severity;

(2) Consider and evaluate functional consequences of the mental disorder(s) relevant to your ability to work; and

(3) Organize and present our findings in a clear, concise, and consistent manner.

(b) Use of the technique.

(1) Under the special technique, we must first evaluate your pertinent symptoms, signs, and laboratory findings to determine whether you have a medically determinable mental impairment(s). See § 416.903 for more information about what is needed to show a medically determinable impairment. If we determine that you have a medically determinable mental impairment(s), we must specify the symptoms, signs, and laboratory findings that substantiate the presence of the impairment(s) and document our findings in accordance with paragraph (e) of this section.

(2) We must then rate the degree of functional limitation resulting from the impairment(s) in accordance with paragraph (c) of this section and record our findings as set out in paragraph (e) of this section.

(c) Rating the degree of functional limitation.

(1) Assessment of functional limitations is a complex and highly individualized process that requires us to consider multiple issues and all relevant evidence to obtain a longitudinal picture of your overall degree of functional limitation. We will consider all relevant and available clinical signs and laboratory findings, the effects of your symptoms, and how your functioning may be affected by factors including, but not limited to, chronic mental disorders, structured settings, medication, and other treatment.

(2) We will rate the degree of your functional limitation based on the extent to which your impairment(s) interferes with your ability to function independently, appropriately, effectively, and on a sustained basis. Thus, we will consider such factors as the quality and level of your overall functional performance, any episodic limitations, the amount of supervision or assistance you require, and the settings in which you are able to function. See § 12.00C through 12.00H of the Listing of Impairments in

on the number of sedentary, unskilled occupations or the total number of jobs to which the individual may be able to adjust, considering his or her age, education and work experience, including any transferable skills or education providing for direct entry into skilled work.

(4) "Sedentary work" represents a significantly restricted range of work, and individuals with a maximum sustained work capability limited to sedentary work have very serious functional limitations. Therefore, as with any case, a finding that an individual is limited to less than the full range of sedentary work will be based on careful consideration of the evidence of the individual's medical impairment(s) and the limitations and restrictions attributable to it. Such evidence must support the finding that the individual's residual functional capacity is limited to less than the full range of sedentary work.

(i) While illiteracy or the inability to communicate in English may significantly limit an individual's vocational scope, the primary work functions in the bulk of unskilled work relate to working with things (rather than with data or people) and in these work functions at the unskilled level, literacy or ability to communicate in English has the least significance. Similarly, the lack of relevant work experience would have little significance since the bulk of unskilled jobs require no qualifying work experience. Thus, the functional capability for a full range of sedentary work represents sufficient numbers of jobs to indicate substantial vocational scope for those individuals age 18-44 even if they are illiterate or unable to communicate in English.

Table No. 1—Residual Functional Capacity: Maximum Sustained Work Capability Limited to Sedentary Work as a Result of Severe Medical Determinable Impairment(s)

Rule	Age	Education	Previous work experience	Decision
201 01	Advanced age	Limited or less	Unskilled or none	Disabled
201 02	do	do	Skilled or semiskilled—skills not transferable ¹	Do
201 03	do	do	Skilled or semiskilled—skills transferable ¹	Not disabled
201 04	do	High school graduate or more—does not provide for direct entry into skilled work ²	Unskilled or none	Disabled
201 05	do	High school graduate or more—provides for direct entry into skilled work ²	do	Not disabled.
201 06	do	High school graduate or more—does not provide for direct entry into skilled work ²	Skilled or semiskilled—skills not transferable ¹	Disabled
201 07	do	do	Skilled or semiskilled—skills transferable ¹	Not disabled
201 08	do	High school graduate or more—provides for direct entry into skilled work ²	Skilled or semiskilled—skills not transferable ¹	Do
201 09	Closely approaching advanced age	Limited or less	Unskilled or none	Disabled
201 10	do	do	Skilled or semiskilled—skills not transferable	Do
201 11	do	do	Skilled or semiskilled—skills transferable	Not disabled
201 12	do	High school graduate or more—does not provide for direct entry into skilled work ³	Unskilled or none	Disabled
201 13	do	High school graduate or more—provides for direct entry into skilled work ³	do	Not disabled
201 14	do	High school graduate or more—does not provide for direct entry into skilled work ³	Skilled or semiskilled—skills not transferable	Disabled
201 15	do	do	Skilled or semiskilled—skills transferable	Not disabled
201 16	do	High school graduate or more—provides for direct entry into skilled work ³	Skilled or semiskilled—skills not transferable	Do
201 17	Younger individual age 45-49	Illiterate or unable to communicate in English	Unskilled or none	Disabled
201 18	do	Limited or less—at least literate and able to communicate in English	do	Not disabled
201 19	do	Limited or less	Skilled or semiskilled—skills not transferable	Do
201 20	do	do	Skilled or semiskilled—skills transferable	Do
201 21	do	High school graduate or more	Skilled or semiskilled—skills not transferable	Do

Rule	Age	Education	Previous work experience	Decision
201 22	do	do	Skilled or semiskilled—skills transferable	Do
201 23	Younger individual age 18–44	Illiterate or unable to communicate in English	Unskilled or none	Do ⁴
201 24	do	Limited or less—at least literate and able to communicate in English	do	Do ⁴
201 25	do	Limited or less	Skilled or semiskilled—skills not transferable	Do ⁴
201 26	do	do	Skilled or semiskilled—skills transferable	Do ⁴
201 27	do	High school graduate or more	Unskilled or none	Do ⁴
201 28	do	do	Skilled or semiskilled—skills not transferable	Do ⁴
201 29	do	do	Skilled or semiskilled—skills transferable	Do ⁴

¹ See 201.00(f)

² See 201.00(d)

³ See 201.00(g)

⁴ See 201.00(h)

202.00 Maximum sustained work capability limited to light work as a result of severe medically determinable impairment(s). (a) The functional capacity to perform a full range of light work includes the functional capacity to perform sedentary as well as light work. Approximately 1,600 separate sedentary and light unskilled occupations can be identified in eight broad occupational categories, each occupation representing numerous jobs in the national economy. These jobs can be performed after a short demonstration or within 30 days, and do not require special skills or experience.

(b) The functional capacity to perform a wide or full range of light work represents substantial work capability compatible with making a work adjustment to substantial numbers of unskilled jobs and, thus, generally provides sufficient occupational mobility even for severely impaired individuals who are not of advanced age and have sufficient educational competencies for unskilled work.

(c) However, for individuals of advanced age who can no longer perform vocationally relevant past work and who have a history of unskilled work experience, or who have only skills that are not readily transferable to a significant range of semi-skilled or skilled work that is within the individual's functional capacity, or who have no work experience, the limitations in vocational adaptability represented by functional restriction to light work warrant a finding of disabled. Ordinarily, even a high school education or more which was completed in the remote past will have little positive impact on effecting a vocational adjustment unless relevant work experience reflects use of such education.

(d) Where the same factors in paragraph (c) of this section regarding education and work experience are present, but where age, though not advanced, is a factor which significantly limits vocational adaptability (i.e., closely approaching advanced age, 50–54) and an individual's vocational scope is further significantly

limited by illiteracy or inability to communicate in English, a finding of disabled is warranted.

(e) The presence of acquired skills that are readily transferable to a significant range of semi-skilled or skilled work within an individual's residual functional capacity would ordinarily warrant a finding of not disabled regardless of the adversity of age, or whether the individual's formal education is commensurate with his or her demonstrated skill level. The acquisition of work skills demonstrates the ability to perform work at the level of complexity demonstrated by the skill level attained regardless of the individual's formal educational attainments.

(f) For a finding of transferability of skills to light work for individuals of advanced age who are closely approaching retirement age (age 60–64), there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry.

(g) While illiteracy or the inability to communicate in English may significantly limit an individual's vocational scope, the primary work functions in the bulk of unskilled work relate to working with things (rather than with data or people) and in these work functions at the unskilled level, literacy or ability to communicate in English has the least significance. Similarly, the lack of relevant work experience would have little significance since the bulk of unskilled jobs require no qualifying work experience. The capability for light work, which includes the ability to do sedentary work, represents the capability for substantial numbers of such jobs. This, in turn, represents substantial vocational scope for younger individuals (age 18–49) even if illiterate or unable to communicate in English.

Table No. 2—Residual Functional Capacity: Maximum Sustained Work Capability Limited to Light Work as a Result of Severe Medically Determinable Impairment(s)

Rule	Age	Education	Previous work experience	Decision
202 01	Advanced age	Limited or less	Unskilled or none	Disabled

BEFORE THE UTAH STATE RETIREMENT BOARD

JOANNA MURPHY,

Petitioner,

v.

**UTAH STATE RETIREMENT BOARD,
LONG TERM DISABILITY PROGRAM,**

Respondent.

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ORDER

File #: 01-30D

A hearing was held on April 29, 2002, before the Adjudicative Hearing Officer on Petitioner's Request for Board Action. The Petitioner appeared with Counsel Kathleen Ferro. The Board was represented by David B. Hansen. Based upon the evidence in this matter and the legal memoranda submitted, the Adjudicative Hearing Officer makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. JoAnna Murphy ("Petitioner") was an employee of the State Health Department from August 23, 1986, through July 10, 1998 as a Family/Child Care Specialist.
2. The Utah State Retirement Board, Long-Term Disability Program ("LTD Program") granted Petitioner a two year disability benefit from October 1998 through September

2000.

3. On July 6, 2001, Petitioner was formally denied permanent and total disability benefits due to a lack of objective medical documentation showing that Petitioner was totally and permanently disabled from all employment based solely on physical impairment.

4. A hearing was held on April 29, 2002, in which the Petitioner and Dr. Lucinda Bateman testified that the Petitioner's worst and most difficult problems were pain and fatigue resulting from fibromyalgia. Dr. Bateman testified that there was no objective way in which to measure Petitioner's pain and fatigue, but that she relied solely on petitioner's self-reported symptoms. She also testified that she was not an employment specialist and did not know the legal standards for disability in this case. Dr. Bateman testified she could not provide an opinion about Petitioner's specific physical abilities, but could only provide a general opinion about individuals who suffer from fibromyalgia from her "experience" as a "consulting specialist" rather than a treating physician. Dr. Bateman was unable to conclusively determine whether Petitioner suffered from any medically determinable physical impairment as a result of medically acceptable clinical and laboratory diagnostic techniques. It should be noted that Dr. Bateman, in her entire time as a "consulting specialist," spent less time with the Petitioner than Mr. Davis in performing his functional capacity evaluation. No physician other than Dr. Bateman testified at the hearing.

5. Mr. Cory Davis, a physical therapist that performed a Physical Functional Capacity Evaluation on Petitioner on November 17, 2000, and testified at the hearing on April 29, 2002, that according to the Petitioner's objective abilities Petitioner could physically perform "light duty" work. He also testified that the Petitioner, while not a malingerer, could perform more

physical activities than she perceived of her abilities. He concluded the following in his testimony and in his report:

This general attitude, combined with other observations such as excessive and non-anatomical pain drawing, excessively low functional status reporting, self limitation without observed secondary muscle recruitment, etc. are considered to be signs of symptom magnification. In describing symptom magnification, I am by no means implying intent. Rather, I am simply stating that Ms. Murphy can do more, at times, than she currently demonstrates, states or perceives. While her subjective reports should not be disregarded, they should be considered within the context of symptom magnification findings.

By performing lifting and carrying activities as outlined in the chart above, Ms. Murphy demonstrated average functional abilities in ***LIGHT Physical Demand Characteristic of Work Level*** according to the U.S. Depart. of Labor. She demonstrated good overall body mechanics, utilizing functional lower extremity strength well.

(Emphasis added.)

6. Petitioner failed to provide any non-hearsay evidence showing she maintained any medically determinable physical impairment from accepted clinical and laboratory diagnostic techniques.

CONCLUSIONS OF LAW

1. Pursuant to Utah Code Ann. § 49-1-610 and § 49-9-401, Petitioner bears the burden of proof in this matter. The Utah State Retirement Board is not subject to any state or federal statute, rule, or common law, such as any shifting burden standard, in determining whether a Petitioner qualifies for long-term disability benefits under Utah Code Annotated, Title 49.

2. In order to qualify to receive permanent and total long-term disability benefits,

Petitioner must prove that she meets the definition of “totally disabled” found in Utah Code Ann.

§ 49-9-103(9), which reads in applicable part:

Total disability means . . . the complete inability, based solely on medically determinable physical impairment, to engage in any gainful occupation which is reasonable, considering the employee’s education, training, and experience.

Section 49-9-101(6) defines “medically determinable impairment:”

Medically determinable impairment” means an impairment that results from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. *A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by the individual’s statement or symptoms.*

(Emphasis added.)

3. In formal administrative adjudicative proceedings, “A finding of fact that was contested may not be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence.” U.C.A. § 63-46b-10(3).

4. Petitioner failed to meet the statutory standard of “total disability” found in Utah Code Ann. § 49-9-103(9), because she did not show any medically determinable physical impairment which prevented her from engaging in reasonable employment.

ORDER

IT IS HEREBY ORDERED that Petitioner’s appeal for permanent and total long-term disability benefits is denied.

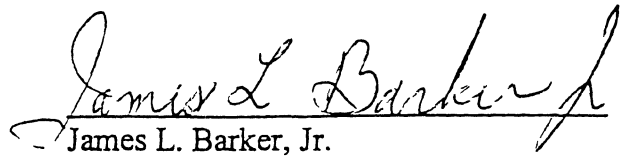
BOARD RECONSIDERATION

Within ten (10) days of a Board order, any party may file a written request for reconsideration stating the specific grounds upon which relief is requested as set forth in Utah Code Ann. §49-11-613. This filing for reconsideration is not a prerequisite for seeking judicial review of the order on review. The request for reconsideration shall be filed with the Board and one copy sent by mail to each person making the request. The Board chairman or executive director shall issue a written order granting or denying the request within twenty (20) days of receipt. If no order is issued within twenty (20) days, the request is denied.

JUDICIAL REVIEW

If Petitioner is aggrieved with the final Board order, she may seek a judicial review within thirty (30) days after the date that the order constituting final Board action is issued. Petitioner shall name the Board and all other appropriate parties as respondents. The Utah Court of Appeals has jurisdiction to review all final Board actions resulting from formal proceedings. All petitioners shall follow the procedures established in Utah Code Ann. § 63-46b-17.

DATED this 26 day of September, 2002.


James L. Barker, Jr.
Adjudicative Hearing Officer

The foregoing Findings of Fact, Conclusions of Law, and Order of Denial of the Adjudicative Hearing Officer is hereby adopted as the order of the Utah State Retirement Board.

Dated this 10 day of ~~September~~^{October}, 2002.

APPROVED AS TO FORM

UTAH STATE RETIREMENT BOARD

BY

Duane C. Frisby
Duane C. Frisby

CERTIFICATE OF MAILING

I hereby certify that on this the 17 day of ^{October}~~September~~, 2002, I mailed a true and correct copy of the above **Order**, postage pre-paid, to the following:

L. Kathleen Ferro
254 West 400 South, 2nd Floor
Salt Lake City, Utah 84101

David B. Hansen
Howard, Phillips & Andersen
560 East 200 South, Suite 300
Salt Lake City, Utah 84102

Della Buck
Renee Jensen

PUBLIC EMPLOYEES' HEALTH PROGRAM
LONG-TERM DISABILITY PROGRAM

2002-2003

MASTER POLICY

- 3 discontinuance of premium payments on behalf of the Eligible Employee for any purpose, including leave without pay and similar circumstances

D. Pre-Existing Conditions

Medical or psychological conditions which existed prior to enrollment shall not be considered a basis for disability benefits until the Eligible Employee has had one year of continuous enrollment in the Program

E. Overpayment and Recovery

If at any time the Program has made an overpayment to the Eligible Employee, the Eligible Employee will have 30 days upon the receipt of written notification from the Program to make arrangements for repayment. If arrangements are not made by the Eligible Employee to rectify any overpayments, the Program has the following rights

- 1 cancel coverage and make a request for repayment together with all attorney fees and court costs, and/or
2. offset any monies payable from the Program.

F. Filing a Claim

1. When an Eligible Employee is absent from employment as a result of a condition that may result in a Total Disability, Eligible Employee shall contact Program.
2. Any claim brought by an Eligible Employee for long-term disability benefits is barred if not commenced within one year from the date of that disability, unless Eligible Employee can demonstrate to the Office's satisfaction, that due to extenuating circumstances the Eligible Employee was prevented from filing a claim within one year of the disability

G. How to file a Claim.

- 1 The following information must be submitted to and received by the Program within 90 days of initial application
 - a. Completed LTD application claim form, including a signed consent form allowing the office access to the Eligible Employee's medical records and employment records,
 - b A detailed statement from Physician(s) describing the objective basis for the diagnosis (including x-ray reports, and any other evaluative procedures),
2. The Program may require that the Eligible Employee be examined by a health care provider of the Program's choice
3. Proof of Total Disability will be submitted at the Eligible Employee's own expense
4. Eligible Employer must provide relevant information concerning the Eligible Employee's status, including; payroll information, job description, inability to perform services, job accommodations, etc
5. An Eligible Employee must apply for all government disability benefits immediately upon application to the Program and provide proof of such filing to the Program. The Eligible Employee must provide the Program with a copy of government's disability award and/or denial letters. If these benefits are denied, an Eligible Employee is required to appeal the decision

6. All information requested above shall be sent to

**Public Employees Long-Term Disability Program
560 East 200 South
Salt Lake City, Utah 84102-2004**

H. Claims Appeal Process

- 1 If an Eligible Employee feels a disability claim has been denied inappropriately, a full review of the claim may be requested by writing to the LTD Claims Review Committee within 60 days of the date of the denial letter. Requests should be mailed to

**LTD Claims Review Committee
Long-Term Disability Program
560 East 200 South
Salt Lake City, Utah 84102**

2. If an Eligible Employee disagrees with the decision or action taken by the LTD Claims Review Committee, the Eligible Employee has within 60 days the right to request an Administrative Review from the Executive Director. Requests should be mailed to

**Utah Retirement Systems
Executive Director
540 East 200 South
Salt Lake City, Utah 84102**

3. Upon receipt of written request, including any pertinent additional information or comments, the Executive Director will review the case and either grant or deny the request. The Eligible Employee will receive written notification within 30 days of the outcome. Charges for medical records necessary for claims review are the Eligible Employee's responsibility.
4. If the Eligible Employee is dissatisfied with the decision of the Executive Director, the Eligible Employee may, within 30 days of the denial, request a review of that claim by a hearing officer by filing a Request for Board Action. The Request for Board Action should be on a standard form provided by and returned to the Retirement office.
5. The hearing officer will provide a written decision to be reviewed by the Board. If the Board finds against the Eligible Employee, the Eligible Employee may either petition the Board for reconsideration or, within 30 days, appeal to the Utah Court of Appeals.

III. BENEFITS

A. Eligibility for Benefits

- 1 An Eligible Employee is qualified for a Monthly Disability Benefit if the Eligible Employee has become Totally Disabled as a result of:
- a. an Accidental Bodily Injury;
 - b. disease or illness causing Total Disability; or
 - c. a physical injury resulting from external force or violence as a result of the performance of duty
-

- 2 To be eligible for a monthly Total Disability benefit, a disabled Eligible Employee must be under the regular constant care of a Physician

B. Calculation of Monthly Disability Benefits

- 1 The Monthly Disability Benefit for a Totally Disabled Eligible Employee who has become Totally Disabled due to Accidental Bodily Injury, disease or illness is equal to two-thirds of the Eligible Employee's Regular Monthly Salary
- 2 The Monthly Disability Benefit for a Totally Disabled Eligible Employee who has become Totally Disabled due to a physical injury which is the result of external force or violence as a result of the performance of duty for an Employer, the Monthly Disability Benefit will be equal to 100% of the Eligible Employees' Regular Monthly Salary.
3. The Monthly Disability Benefit for a Totally Disabled Eligible Employee who has become Totally Disabled due to psychiatric illness, is equal to two-thirds of the Eligible Employee's Regular Monthly Salary.
 - a. An Eligible Employee who becomes Totally Disabled primarily as a result of psychiatric illness may also be eligible for a maximum benefit of \$10,000 to be paid during the disability period for psychiatric expenses, including rehabilitation expenses approved by the Program's specialist,
 - b and if the Eligible Employee is institutionalized in an accredited mental health institution, there is a 5 year Maximum Benefit Period benefit.

C. Duration of Benefits

1. Monthly Disability Benefits will be paid during a period of Total Disability or Total and Permanent Disability in accordance with Section I (I), and shall terminate in accordance with Section III (G), or when the Eligible Employee is no longer disabled, whichever comes first.
2. If a Totally Disabled Eligible Employee has exhausted Eligible Employee's two-year own occupation benefit based on a physical impairment, the Eligible Employee may be eligible for a psychopathy disability benefit.

D. Rehabilitation

1. All Eligible Employees receiving a Monthly Disability Benefit under the Program shall be evaluated and when appropriate and may be required to engage in a rehabilitation program. Benefits will be affected as follows:
 - a. The Monthly Disability Benefit will be offset by 50% of the amount earned in approved Rehabilitative Employment; and
 - b. The rehabilitation benefit will be payable for up to 24 months or to the end of the Maximum Benefit Period, whichever occurs first.
2. Each Eligible Employee receiving a Monthly Disability Benefit shall be interviewed by the Program
The Program may refer the Eligible Employee to a disability specialist for a review of the Eligible Employee's condition and a written rehabilitation plan

3. If an Eligible Employee receiving a Monthly Disability Benefit fails to participate in an office-approved rehabilitation program within the limitations set forth by a Physician or rehabilitation specialist, the Monthly Disability Benefit will be suspended or terminated.
4. The Program may, as a condition of paying a Monthly Disability Benefit, require that the Eligible Employee receive medical care and treatment if that treatment is reasonable or usual according to current medical practices

E. Adjustments and Offsets

1. In order to be eligible for a Monthly Disability Benefit the Eligible Employee must apply for all Social Security, retirement, disability, workers compensation, or any other insurance benefits to which the Eligible Employee may be entitled.
 2. The Monthly Disability Benefit shall be reduced by any amounts received by, or payable to, the Eligible Employee from the following sources for the same period of time during which the Eligible Employee is entitled to receive a Monthly Disability Benefit. Benefits under section (2) which are increased to reflect a change in Consumer Price Index, the Monthly Disability Benefit shall not be further reduced but shall only be offset by benefits determined at the level in effect at the time of Total Disability:
 - a. Social Security disability benefits, including all benefits received by the Eligible Employee, the Eligible Employee's spouse, and the Eligible Employee's dependent children;
 - b. workers' compensation indemnity benefits;
 - c. any monies received by judgment, legal action, or settlement from a third party liable to the Eligible Employee for the disability,
 - d. unemployment compensation benefits;
 - e. automobile no-fault, medical payments, or similar insurance payments, and
 3. The Monthly Disability Benefit shall be reduced by any amount in excess of one-third of the Eligible Employee's Regular Monthly Salary received by, or payable to, the Eligible Employee from the following sources for the same period of time during which the Eligible Employee is entitled to receive a Monthly Disability Benefit
 - a. any employer-sponsored retirement programs; and
 - b. any disability benefit resulting from the disability for which benefits are being received from the Program.
 4. Any amounts received by or payable to the Eligible Employee under the above stated sources shall be considered as amounts received, whether or not they were actually received.
 5. The Program may treat as a benefit any amount the Eligible Employee is entitled to receive, but does not receive because application is not made, and reduce the monthly benefit accordingly
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