

2002

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

Utah Court of Appeals

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STATUTES

Petitioner incorrectly cites to the 2003 statutes in her Appellate Brief. The Utah Legislature recodified and renumbered Title 49 in 2002. Petitioner’s claim arose in 2001, therefore, the Utah State Retirement Board cites to the applicable 2001 statutes which apply to her claim.

Utah Code Ann. § 49-1-610 ..... 2, 6, 12, 13

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## **STATEMENT OF JURISDICTION**

U.C.A. § 49-1-610(5) allows a member who is aggrieved by a decision of the Utah State Retirement Board (“Board”) to “obtain judicial review by complying with the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act.”

U.C.A. §63-46b-16 confers jurisdiction on the Supreme Court or other appellate court designated by statute to review all final agency action resulting from formal adjudicative hearings.

U.C.A. §78-2a-3(2)(a) and Rule 14 of the Utah Rules of Appellate Procedure confer jurisdiction on the Court of Appeals over the final orders and decrees resulting from formal adjudicative proceedings.

## **STATEMENT OF ISSUES**

1. Did the Board properly state and interpret the administrative hearsay rules in its Order?
2. Does the statute placing the burden of proof on Petitioner place any burden of proof on the Board?
3. Did the Board have substantial evidence to support its finding that Petitioner failed to meet the standards for total disability?

## **STANDARD OF REVIEW**

Petitioner may only be granted relief if, on the basis of the factual record, the Court determines that she has been prejudiced by Board action 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).

The Appellate Court does not conduct a de novo credibility determination or reweigh the evidence. Questar Pipeline Co. v. State Tax Comm'n, 850 P.2d 1175, 1178 (Utah 1993), nor will an agency's findings of fact be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible Hurley v. Board of Review of Industrial Comm'n, 767 P.2d 524, 526-527 (Utah 1988.) It is the province of the agency, not the Appellate Court, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the agency to draw the inference. Albertsons Inc. v. Dept. of Employment Security, 854 P.2d 570, 575 (Utah App. 1993).

### **DETERMINATIVE STATUTORY PROVISIONS**

Utah Code Ann. § 49-9-103(9) 2000

“‘Total disability’ means the complete inability, due to medically determinable physical or mental impairment, to engage in the employee’s regular occupation during the elimination period and the first 24 months of disability benefits. *Thereafter, ‘total disability’ means the complete inability, based solely on medically determinable physical impairment, to engage in any gainful occupation which is reasonable, considering the employees’ education, training, and experience. ‘Total disability’ exists only if during any period of ‘total disability’ the employee is under the regular care of a physician other than the employee.’*”

### **STATEMENT OF THE CASE FACTUAL BACKGROUND**

This is an appeal from an Order of the Utah State Retirement Board, adopted by the Board September 26, 2002, denying Joanna Murphy (“Petitioner”) long-term

disability benefits.

Petitioner is a 50 year old woman with a Bachelor's degree in psychology from the University of Utah in 1975. Petitioner's Memorandum, at 2. Petitioner was a former employee of the State Health Department from 1987 through July 1998 as a Family/Child Care Specialist. Id. The Board's Long-Term Disability Program ("LTD Program") granted Petitioner a two year own occupation disability benefit from October 1998 through September 2000. Petitioner's Hearing Exhibit, 1-a. In order to determine Petitioner's capacity to physically perform work-like tasks, and to determine if permanent and total disability existed as defined by Title 49, Chapter 9, a Functional Capacity Evaluation was performed on November 16 and 17, 2000, by Cory C. Davis, P.T. The report concluded the following:

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.

Respondent Hearing Exhibit A, at 5-6. (Emphasis added.) The LTD Program denied Petitioner's application for permanent and total disability benefits following the receipt of the report from Mr. Davis opining that Petitioner could physically perform at least "light" duty work. Petitioner's Hearing Exhibit 1-e.

The executive director of the Utah Retirement Systems formally denied the Petitioner's appeal for permanent and total disability benefits on July 6, 2001.

Petitioner's Hearing Exhibit 1-f. Petitioner appealed the executive director's denial of permanent and total disability benefits. Petitioner's Request for Board Action at 1.

At the hearing, both Petitioner and Dr. Lucinda Bateman testified that Petitioner's worst and most difficult problems were pain and fatigue. Tr: 27: 1-6; 68: 1-6. Dr. Bateman testified that there was no objective way in which to measure Petitioner's pain and fatigue, but that she relied on Petitioner's self-reported symptoms. Tr: 81: 18-25; 82: 1-7. Dr. Bateman testified that she was not an employment specialist and did not know the legal standards for disability in this case. Tr: 80: 2-16. Dr. Bateman could not provide an opinion about Petitioner's specific physical abilities. She only provided a general opinion about individuals who suffer from fibromyalgia from her "experience." Tr: 70: 5-8; 71:9-13. Dr. Bateman failed to provide Petitioner with an impairment rating pursuant to the American Medical Association Guidelines or provide an opinion that Petitioner met the standard for "total disability" under U.C.A. § 49-9-103(9) based on her diagnoses. Tr: 77: 3-8. Dr. Bateman was the only health care professional Petitioner

called to testify at the hearing. Tr: 37: 1-20.

Following the hearing and after reviewing briefs from both parties, the Board's hearing officer determined that Petitioner failed to meet the standards for "total disability" under U.C.A. § 49-9-103(9). Decision, dated June 28, 2002. Petitioner appealed the Board's Order of September 26, 2002, to this Court.

### **SUMMARY OF THE ARGUMENT**

1. The Board properly admitted Petitioner's documents into evidence and considered such evidence in determining that Petitioner failed to meet the statutory standard of "total disability." The Board's Findings of Fact and Conclusions of Law regarding the hearsay rule were correctly applied and should not be reversed.
2. The Board properly interpreted the statutory burden of proof under U.C.A. § 49-1-610(3) placing it squarely on the Petitioner to prove "total disability." Petitioner's request for the Court to apply a different standard or burden to the Board must be rejected as a matter of law. Petitioner mistakenly assumes that Worker's Compensation or Social Security disability laws are the most applicable laws to the Board's determination. Yet, even if some non-statutory shifting burden applied, Petitioner cannot prevail on a claim for "total disability" because Petitioner cannot prove a medically determinable impairment.
3. The Board's decision denying Petitioner disability benefits was supported by substantial evidence. The hearing officer heard testimony from the Board's

witness, Mr. Cory Davis, that Petitioner could physically perform employment tasks in at least the sedentary category. Additionally, Dr. Bateman testified that Petitioner's claims were subjective and, thus, Petitioner did not prove a medically determinable physical impairment.

### **ARGUMENT**

I. **The Board Properly Considered Petitioner's Evidence, Including Hearsay Evidence, in Determining that Petitioner Failed to Meet the Statutory Standard for "Total Disability" Under U.C.A. § 49-9-103(9).**

Petitioner provided no evidence in her objections, nor in her brief that the Administrative Hearing Officer failed to consider any evidence presented by Petitioner, or that any error of law was made by the **Hearing Officer** in considering **evidence** presented by Petitioner. In fact, Petitioner specifically admits that her exhibits were received into evidence. Appellate Brief, at 11.

Petitioner's Brief contradicts itself claiming in one place that the hearing officer "failed to consider" Petitioner's medical records, and in another, that the disputed records were specifically admitted into evidence. Petitioner's Summary of Argument states,

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**.

**Appellate Brief**, at 7. Later, Petitioner states in her Brief,

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.

Id, at 11; TR. 3:22 - 7:6. Such inconsistencies are confusing to the Board and no doubt to this Court. If Petitioner is asserting that her evidence was not admitted by the Hearing Officer, it simply is not true and is evidenced by the record. Id. Petitioner apparently erroneously believes that silence by the Board regarding Petitioner's exhibits constitutes non-consideration.

These hearsay exhibits went to the weight of the evidence and not to their admissibility. That the Hearing Officer failed to find these exhibits persuasive is clear from his decision when he states that "The evidence presented by Petitioner did not meet the requirements established by the Utah State Legislature in order to be entitled to long-term disability benefits." Decision, dated June 28, 2002. This is hardly a lack of consideration of Petitioner's evidence. On the contrary, the Hearing Officer clearly did "consider" Petitioner's evidence and determined that it did not meet the criteria for "total disability" under the statute.

Petitioner complains that the Board's Finding of Fact #6 was incorrect as a matter of law. It is unclear how a finding of fact can be incorrect as a matter of law - and as to what Petitioner's specific objection is to this Finding. Petitioner may only be granted relief from an appeal of a Finding of Fact if, on the basis of the factual record, the court determines that she has been prejudiced by Board action that is not supported by substantial evidence when viewed in light of the whole record before the court. U.C.A. § 63-46b-16(4)(g). The Appellate Court does not conduct a de novo credibility

determination or reweigh the evidence. Questar Pipeline Co. v. State Tax Comm'n, 850 P.2d 1175, 1178 (Utah 1993). Nor will an agency's findings of fact be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible. Hurley v. Board of Review of Industrial Comm'n, 767 P.2d 524, 526-27 (Utah 1988). It is the province of the agency, not the Appellate Court, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the agency to draw the inference. Albertons Inc. v. Department of Employment Security, 854 P.2d 570, 575 (Utah App. 1993).

Petitioner objects to the Finding of Facts #6 in the Board's Order which states,

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. This statement correctly reflects the evidence in this case. It clearly states that all of Petitioner's evidence of her alleged impairment was either 1) hearsay, or 2) failed to use accepted clinical and laboratory diagnostic techniques. The issue is not, as Petitioner defined it, whether Petitioner provided evidence that she was tired and achy. The issue is whether substantial evidence existed to find that Petitioner's evidence was either 1) hearsay, or 2) failed to show "medically determinable physical impairment."

The sum total of Petitioner's evidence in this matter is the testimony of Petitioner and Dr. Lucinda Bateman, and the medical records which Petitioner placed into evidence.

The medical records are out of court statements attempting to prove the matter asserted, and thus qualify as hearsay under Rule 801 of the Utah Rules of Evidence. Therefore, the only open question regarding the accuracy of Finding #6 is whether Petitioner's witnesses' testimony proved medically determinable physical impairment using accepted clinical diagnostic techniques.

As Petitioner testified that she is not a doctor and not qualified to testify medically her testimony, while relevant, is not evidence of impairment using accepted clinical and laboratory diagnostic techniques. TR 33:10-17. Petitioner did call a physician to testify. Strangely, Petitioner did not call not her treating physician, but a consulting physician, Dr. Lucinda Bateman, who had seen Petitioner on only two occasions, and spent very little time with Petitioner. Dr. Bateman, while qualified to testify to Petitioner's alleged impairment, failed to perform any objective tests on Petitioner or to provide any accepted diagnostic evidence of her alleged impairments. After discussing the latest objective tests for fibromyalgia, Dr. Bateman was asked,

Q: Now, did you test Ms. Murphy for any of those –

A: No, because it's irrelevant. Because they're expensive and it doesn't alter my treatment. Nor does it make the diagnosis, because they're not considered as – you know, it's not an accurate enough test for predictability, it's insensitive and nonspecific. It's not used clinically.

Q: So you don't really know if she suffers from those problems, you were just talking about fibromyalgia patients in general?

A: That's correct. . . .”

TR. 69:22 - 70:8. Later Dr. Bateman was asked concerning the objective criteria for Petitioner's alleged diagnosis of fibromyalgia through her pain and fatigue,

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

A: 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 its very nature, fibromyalgia, its complete diagnosis, its clinical diagnosis and everything about it is subjective. . . . 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 - 82:7. Dr. Bateman's own statements show that no objective tests are currently accepted for fibromyalgia and she freely admits that her conclusions are completely based on Petitioner's self-described symptoms of pain and fatigue. Dr. Bateman provided no objective basis for her diagnosis of fibromyalgia, nor did any of the hearsay records provide objective evidence of Petitioner's alleged aches and pains. As such, the Board's Order finding as a fact that Petitioner provided no "non-hearsay evidence showing she maintained any medically determinable physical impairment from accepted clinical and laboratory diagnostic techniques" was both accurate and proper. Therefore, this Court should find that "substantial evidence" existed for the Board's Finding of Fact #6.

Likewise, the Board's Conclusion of Law #3 was also absolutely correct. It is unclear from her Brief whether Petitioner specifically objects to this Conclusion or not. It states,

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).

The Board conducts formal adjudicative proceedings under U.C.A. § 49-1-610. Such proceedings are governed by the Utah Administrative Procedures Act (“UAPA”) under Title 63, Chapter 46b. The Board’s Conclusion of Law was a direct quote from the applicable UAPA statute regarding the rule for hearsay in formal administrative proceedings. Petitioner provided no reasoning or evidence why this conclusion was incorrect or why the UAPA rules for formal administrative hearings do not apply. Hence, the Court should find that the Board’s Conclusion of Law #3 was correct as a matter of law.

In sum, the Board specifically admitted Petitioner’s hearsay exhibits, provided “substantial evidence” to support its finding of fact, and correctly applied the UAPA rule regarding hearsay in its conclusions of law. Therefore, Petitioner’s complaint that the Board failed to “consider” her hearsay evidence must be denied.

II. The Board Properly Interpreted Utah Law in Determining that Petitioner Bore the Burden of Proof Under U.C.A. § 49-1-610(3) to Prove She Met the Statutory Standard for “Total Disability.”

U.C.A. § 49-1-610(4) imposes the burden of proof upon a Petitioner before the Board to show that they are entitled to relief. Despite this clear rule, Petitioner repeatedly asked the Board’s Hearing Officer, and now asks this Court, to ignore Utah law imposing the burden of proof in Board administrative hearings on the Petitioner and to apply a

different burden of proof to the Board, or apply some other shifting burden of proof in disability hearings. See, Petitioner’s Memorandum Closing Arguments, at 5-7 and Appellate Brief at 15. In essence Petitioner requests that this Court inappropriately rewrite the statutes governing the Board’s administrative hearings providing a different burden of proof.

A. The Board Correctly Interpreted Statutes Imposing the Burden of Proof on Petitioner to Show She Met the Standards for “Total Disability.”

Petitioner’s complaint that the Board failed to apply the correct burden of proof centers around the Board’s Order, Conclusion of Law #1 which 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. As with the Board’s other Conclusions of Law, this Conclusion is absolutely correct.

U.C.A. § 49-1-610(4), states, “the moving party in any proceeding brought under this section shall bear the burden of proof.” U.C.A. § 49-9-401. This statute has not been previously interpreted by the Utah Courts and stands on its own to be interpreted via its plain language. It is well settled Utah law that when statutory language is clear and unambiguous the courts will not contradict its plain meaning. Larsen v. Allstate Ins. Co., 857 P.2d 263, 265 (Utah 1993)(“Specifically, we will not interpret unambiguous language in a statute to contradict its plain meaning.”); See also, Johnson v. Utah State Retirement

Bd., 770 P.2d 93, 95 (Utah 1988)(“A fundamental principle of statutory construction is that unambiguous language in the statute itself may not be interpreted so as to contradict its plain meaning.”)

Given this statute imposing the burden of proof on the “moving party,” the sole issue in the hearing before the board was whether Petitioner proved by a preponderance of evidence that she met the qualifications for “total disability” as that term is defined under U.C.A. § 49-9-103(9). “Total Disability” is defined in U.C.A. § 49-9-103(9) in relevant part as “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.”

Thus, Petitioner, in order to prevail at a hearing for disability benefits, is required as a matter of law under the plain meaning of Title 49, to prove by a preponderance of the evidence: 1) she suffers from “medically determinable physical impairment”, and 2) due solely to her impairment she is completely unable to perform any gainful occupation which is reasonable, considering her education, training, and experience. Petitioner can prove neither.

B. Petitioner Makes Faulty Assumptions In Arguing the Board Must Determine Reasonableness.

Petitioner’s argument that the Board has the burden to determine the “reasonableness” of employment for Petitioner suffers from at least four faulty assumptions. First, Petitioner incorrectly asserts that the Board failed to determine

“reasonable employment” when it determined that Petitioner failed to meet the standards for “total disability.” Second, Petitioner wrongfully presumes that the Board assumed the burden of proof in denying Petitioner disability benefits prior to the hearing. Third, Petitioner incorrectly claims that Social Security and Worker’s Compensation laws are the most applicable laws to the Board’s determination. Fourth, even if some non-statutory shifting burden applied, Petitioner assumes the Board must make findings of fact regarding reasonableness in each disability case even if Petitioner cannot prove a medically determinable impairment.

First, both the Hearing Officer in his decision, and the Board in its Order determined the issue of “reasonableness” in concluding that Petitioner failed to prove she met the standards for “total disability.” Order, dated September 26, 2002, Conclusions of Law, p.4. U.C.A. § 49-9-103(9) defines “total disability” as, “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.” In finding that Petitioner failed to meet this standard, it may be presumed that the Board considered the “reasonableness” of employment Petitioner could perform since it is part of the definition of “total disability.” The Board is unaware of any law or requirement that it dissect statutory standards and make findings concerning each individual term of the statute. For example, the Board, in making its findings of did not make specific individual findings concerning the statutory interpretation of the words

“complete,” “solely,” “gainful occupation,” “education,” “training,” or “experience,” but rather made a specific finding that Petitioner failed to meet the standards for “total disability.” Placing a burden on the Board to interpret every piece of every statute used in making its determination is overly burdensome and pointless. As no vocational experts testified at the hearing and neither Petitioner nor the Board provided vocational evidence, Petitioner’s claim that the Board erred as a matter of law in determining “reasonableness” is incorrect.

Second, Petitioner wrongly assumes that the Board’s LTD Program maintains and accepts a burden to prove Petitioner’s vocational abilities prior to denying her benefits. No such burden exists in the statute, board rule, board resolution, nor in the LTD Master Policy. The Board denies it maintains any such burden before, during or after a hearing by a Petitioner. While Petitioner points to the long-term disability determination process as evidence of the LTD Program’s acceptance of a burden to prove functional vocational inability, Petitioner confuses the LTD Program’s requirement to *determine* whether a Petitioner meets the standards for “total disability” and the Petitioner’s requirement to *prove* she meets the standards for “total disability.” The Board’s LTD Program maintains no burden, at any time, to prove that Petitioner does not meet the statutory standards for “total disability.” The burden to prove that Petitioner meets the statutory standard for “total disability” rests solely and completely with Petitioner.

Third, Petitioner’s assertions that the Board’s process is much like Social Security

or Worker's Compensation is a red herring designed to try and divert the Court's attention from the statutory standard imposing the burden of proof squarely on the Petitioner to prove "total disability." While the Board's governing statutes stand on their own and must be interpreted on their own, the closest analogous body of law to the Boards's disability determination process are private disability plans governed by the Employees' Retirement Income and Security Act ("ERISA"). Although the Board's long-term disability, being a governmental plan under the IRS Code, is specifically exempt from federal ERISA requirements, the Board acts much more like a private disability plan than either a Worker's Compensation plan or Social Security.

The United States Supreme Court adopted the rule in ERISA cases that a plan's decision concerning benefits will be upheld unless a Plaintiff can show that the plan acted in an "arbitrary and capricious" manner in denying benefits under the plan document. Firestone Tire and Rubber Co. v. Bruch, 109 S.Ct. 948 (1989). This standard has been followed by the 10<sup>th</sup> Circuit. See, e.g., Siemon v. AT&T Corp., 117 F.3d 1173 (10<sup>th</sup> Cir. 1997)(upholding a denial of disability benefits where plan did not interpret plan document in an arbitrary and capricious manner). In this case, Chapter 9 of Title 49 acts as a type of Plan Document. Applying the Firestone standard, Petitioner would be required to show that the Board acted in an "arbitrary and capricious" manner in denying disability benefits to Petitioner. As the Board reasonably determined that Petitioner failed to meet the statutory standard for "total disability" after a full and fair hearing, the Board did not act

in an arbitrary and capricious manner. Therefore, under the most analogous disability law, the Board's determination that Petitioner failed to meet the standard for "total disability" must be upheld.

Lastly, Petitioner makes a faulty assumption that the Board must reach a determination of "reasonableness" even if Petitioner cannot prove "medically determinable impairment." Even if this Court requires the LTD Program to prove the "reasonableness" of gainful employment as Petitioner requests under Worker's Compensation and Social Security laws, Petitioner must prove impairment through objective medical evidence *prior* to the burden shifting to the agency to prove reasonable employment. As the Board found that Petitioner did not prove "objective medical impairment," the issue of whether the Board could or could not prove vocational reasonableness becomes moot even under Worker's Compensation and Social Security laws. It makes no sense to claim that a Petitioner suffers from no objective impairment, but the Board must still prove the reasonableness of employment she may pursue.

Therefore, given the plain statutes placing the burden of proof squarely on the Petitioner to prove she meets the standard for total disability, and given Petitioner's multiple faulty assumptions that the Board has the burden to show the "reasonableness" of gainful employment, this Court must find that the Board correctly interpreted that Petitioner bears the burden of proof to show "total disability" under Title 49.

III. The Board's Order Denying Petitioner Disability Benefits for Her Failure to Meet the Statutory Standard for "Total Disability" Is Supported By Substantial Evidence.

The Board's decision denying Petitioner disability benefits is supported by substantial evidence. Petitioner may only be granted relief from the Board's decision if, on the basis of the factual record, the Court determines that she has been prejudiced by Board action 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).

The Appellate Court does not conduct a de novo credibility determination or reweigh the evidence. Questar Pipeline Co. v. State Tax Comm'n, 850 P.2d 1175, 1178 (Utah 1993), nor will an agency's findings of fact be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible Hurley v. Board of Review of Industrial Comm'n., 767 P.2d 524, 526-527 (Utah 1988.) It is the province of the agency, not the Appellate Court, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the agency to draw the inference. Albertsons Inc. v. Dept. of Employment Security, 854 P.2d 570, 575 (Utah App. 1993).

A. Petitioner Failed to Prove Physical Objective Medical Impairment.

Petitioner provided no evidence through accepted clinical diagnostic techniques that she suffers from any objective medically determinable impairment. While Petitioner has provided a laundry list of diagnoses and subjective complaints, these do not constitute

a “medically determinable impairment.” “Medically determinable impairment” is defined in U.C.A. § 49-9-103(6) as, “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.” Hence, Petitioner cannot prove impairment simply by reporting diagnoses or using self-reported symptoms, she must use accepted “clinical and laboratory diagnostic techniques” which show “anatomical” or “physiological” abnormalities.

Petitioner, even with her multiple physicians and medical records, failed to provide any evidence of medically determinable physical impairment that was not based on her self-reported signs and symptoms. While both Petitioner and her “consulting specialist” Dr. Bateman testified at the hearing that Petitioner’s main complaints are pain and fatigue, Petitioner provided no objective proof of such symptoms but merely parroted the reports by the Petitioner herself. Dr. Bateman admitted to specifically not performing any objective tests on Petitioner to prove impairment. She stated when asked about these objective tests for pain and fatigue,

Q: Now, did you test Ms Murphy for any of those –

A: No, because it’s irrelevant. Because they’re expensive and it doesn’t alter my treatment. Nor does it make the diagnosis, because they’re not considered as – you know, it’s not an accurate enough test for predictability, it’s insensitive and nonspecific. It’s not used clinically.

TR. 69: 22 - 70: 3.

Petitioner has provided no test, laboratory, or diagnostic technique which shows objective impairment, nor has she shown any objective inability to perform gainful employment. Additionally, Petitioner seems confused concerning the difference between a diagnosis and an impairment since Petitioner seems to assume that if she can prove a diagnosis, she has shown “physical impairment.” This is not true. “Impairment” necessarily implies a functional inability to do something, not merely a statement of subjective pain and fatigue. Even Petitioner’s own witness, Dr. Bateman, agreed that in order to determine impairment you have to look “at what they’ve been able to do, and see if their symptoms are consistent” TR. 81:23-24. This type of examination is exactly what the Board did in having Petitioner examined by Mr. Cory Davis, a physical therapist.

Although Petitioner failed to provide evidence of physical impairment, the LTD Program gave Petitioner the benefit of the doubt and had the Petitioner’s physical functional capacity tested by Mr. Cory Davis, a physical therapist. He testified at the hearing that according to the Petitioner’s objective abilities, she 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. Mr. Davis, after putting Petitioner through a series of physical tests over a two day period designed to simulate certain employment tasks, stated in his report:

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.

Respondent's Hearing Exhibit A, at 5-6 (emphasis added).

Because Petitioner has failed to show any physical impairment, and because the only objective findings show that Petitioner is able to perform "light duty" work, Petitioner does not suffer from a "medically determinable physical impairment" and does not meet the standard for "total disability."

B. Petitioner Failed to Prove a Complete Inability to Perform Reasonable Gainful Employment.

Even if the Petitioner could have proven a significant physical impairment, she still failed to prove that this impairment completely prevents her from engaging in reasonable employment. Reasonable employment for this Petitioner should consider the Petitioner's education, training and experience. U.C.A. §49-9-103(9). During the hearing, the testimony showed that reasonable employment for the Petitioner is sedentary or light duty work in a position requiring less than a post-graduate education. The Petitioner, although not without some self-perceived physical limitations, could engage in employment which meets these fairly lax restrictions since she has done so in the past many years in her

previous position as a Family/Child Care Specialist.

In reviewing Petitioner's educational and work background, Petitioner testified that she had a bachelor's degree in psychology from the University of Utah, and was successful in her career as a Family/Child Care Specialist. No testimony was heard to dispute the fact that engaging in counseling or another similar field requires more than a sedentary effort. Thus, given the education, training and experience of the Petitioner, the LTD Program correctly determined that the Petitioner does not and cannot meet her burden to prove the "complete inability" to perform "any occupation" due to her physical impairment. U.C.A. §49-9-103(9).

C. In Contrast to Petitioner's Lack of Evidence Showing Objective Medical Impairment, the Board Provided Substantial Evidence Supporting the Hearing Officer's Decision that Petitioner Failed to Meet the Statutory Requirements for Total Disability.

The Board's decision denying Petitioner disability benefits was supported by substantial evidence. The hearing officer heard testimony from the Board's witness, Mr. Cory Davis, that Petitioner could physically perform employment tasks in at least the sedentary category. On Direct examination Mr. Davis testified,

Q: And is it your opinion that [Petitioner] is able to perform, physically perform some occupation based on your observations?

A: Based on what I – what I observed, I felt that she would be capable of a light, and probably more comfortably capable of at least a sedentary type job.

TR 102:3-8. Mr. Davis based his conclusion on a two day functional capacity

examination performed on the Petitioner. This examination was specifically designed to determine whether Petitioner could function in the workplace.

Mr. Davis' report specifically concludes,

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.

Respondent's Hearing Exhibit A, at 5-6. Mr. Davis testified at the hearing concerning Petitioner's specific restrictions on sitting, standing, walking, and lifting:

Q: Okay. Going back to the specifics of the report, on page two you talked about [Petitioner's] sitting restrictions. What would you say her limitations were in sitting?

A: She sat through the intake interview, over – well, 100 minutes is what I put in the report. And repeated that at another time during the test, during another activity she again sat for a total of 23 minutes.

Q: What about her standing limitations?

A: Standing was fairly consistently self-limited, anywhere from 14 to 19 minutes were the two instances that we recorded. She felt she – she preferred to take breaks and sit after that period of time.

Q: And walking it says her that she walked for .23 miles on a treadmill. What limitations does that – do you perceive from that?

A: She walked a full ten minutes. Her pace was, by what I would consider, a normal pace, just a normal, comfortable walking pace. It was probably slightly slow, but not excessively. But she was able to walk that full amount of time. She did – she did comment, and I did comment in the report that she felt this was the maximum she'd be able to do at one time.

TR. 96:20 - 97:16. In regards to lifting, Mr. Davis testified:

Q: So on that lifting, this is page four, you have her lifting in – of a box, 12 inches to a knuckle, 35 pounds?

A: Uh-huh.

Q: What does that 35 pounds, what does that put – what category does that put her in?

A: Thirty-five pounds based on the – the chart that I use for determining where people are going to be placed as far as their physical demand characteristic of work, would actually be into the median category.

Q: Higher than the light category?

A: Yes.

TR: 100:8 - 19.

In addition to Mr. Davis' specific testimony that Petitioner could perform sedentary or light duty work, Petitioner's witness, Dr. Bateman, specifically testified that Petitioner's complaints of pain and fatigue were subjective and based on Petitioner's own statements of signs and symptoms.

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

A: 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 - 82:7. Even Dr. Bateman admits that Petitioner's main problems of pain and

fatigue are subjective complaints, and cannot be used as the basis for determining a “medically determinable impairment.”

Hence, with the only health care professional, Mr. Davis, which testified to Petitioner’s specific physical abilities opining that Petitioner could perform sedentary or light duty work following an exhaustive two day examination, and with Petitioner’s own “consulting” physician admitting that pain and fatigue are subjective diagnoses, the Board presented substantial evidence to support its decision that Petitioner failed to meet the statutory standard for “total disability.”

### CONCLUSION

The Board hereby asks this Court to reject Petitioner’s appeal in its entirety. Petitioner failed to show that the Board misapplied the hearsay rule in its Order. Petitioner failed to show that the Board incorrectly applied the burden of proof in its Order. Finally, Petitioner failed to show prove that the Board did not provide substantial evidence in determining that Petitioner failed to meet the criteria for “total disability” under U.C.A. § 49-9-103(9).

DATED this 9<sup>th</sup> day of September, 2003.



DAVID B. HANSEN  
Howard, Phillips & Andersen

**CERTIFICATE OF MAILING**

I hereby certify that on this the 8<sup>th</sup> day of September, 2002, I mailed a true and correct copy of the above **Appellee's Brief**, postage pre-paid, to the following:

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

  
David Hansen

## ADDENDUM A

ump sum or in monthly amounts, and the total of the payments so made shall be a full discharge and release to the system from any further claims.

(2) All continuing monthly benefits payable to beneficiaries upon the death of an active member shall be paid on the first day of the month following the date of death of the member.

1997

**49-1-608. Benefits and money in the fund exempt from taxation — Exceptions.**

The benefits accrued or paid to any beneficiary of any system administered by the retirement office and the accumulated contributions, money, and securities in the fund created by this title are exempt from any state, county, or municipal tax, except that the retirement allowance, a refund of contributions, or other benefits subject to the federal income tax, which are received by a member or beneficiary of any system administered by the board and which have not been taxed is subject to Title 59, Chapter 10.

1989

**49-1-609. Nonassignability of benefits or payments — Exemption from legal process — Deduction of amounts owed.**

(1) Except as provided in Subsection (4), the right of any member or beneficiary to any benefit, payment, or any other right accrued or accruing to any person under this title and the assets of the fund created by this title are not subject to alienation or assignment by the member or beneficiary and are not subject to attachment, execution, garnishment, or any other legal or equitable process.

(2) This section may not be construed to prohibit the administrator from deducting medical or other insurance premiums from a retiree's allowance as requested by the retiree providing that any request is within limitations and rules prescribed by the board.

(3) (a) Notwithstanding Subsection (1), the retirement board shall provide for the division of a member's service retirement allowance, continuing monthly death benefit, or refund of contributions upon termination to former spouses and family members pursuant to an order of a court of competent jurisdiction with respect to domestic relations matters on file with the retirement office.

(b) The court order shall specify the manner in which the retirement allowance or refund of contributions shall be partitioned, whether as a fixed amount or as a percentage of the benefit.

(c) The board may also provide for the division of a member's defined contribution account.

(d) Once benefit payments under a domestic relations order begin, the period for which the payment shall be made may not be altered.

(e) Benefit payments to an alternate payee shall begin at the time the member or beneficiary begins receiving benefit payments.

(f) The alternate payee shall receive benefits in the same form as benefits are received by the member.

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

(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.

2001

**49-1-610. Right of appeal to hearing officer — Council review of hearings — Further board review — Rules of procedure applied — Judicial review.**

(1) (a) All members of a system, plan, or program under this title shall acquaint themselves with their rights and obligations as members.

(b) A member shall request a ruling by the administrator on any benefit claim or legal right under this title.

(c) Any person who is dissatisfied by a ruling of the administrator 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.

(d) The hearing officer shall:

(i) be hired by the executive director after consultation and review with the membership council; and

(ii) follow the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act.

(2) (a) (i) The hearing officer shall hear and determine all facts pertaining to applications for benefits under any retirement system, plan, or program under this title and all matters pertaining to the administration of the system.

(ii) The membership council may examine the record of the hearing, provide a recommendation to the board, and recommend any necessary changes in retirement policy or procedure to the Legislature.

(b) (i) If the executive officer of the board cannot determine from the records or other information available the length of service, compensation, or age of any member, the executive officer may estimate, for the purpose of any determination required to be made, any of these factors.

(ii) The board shall review all decisions of the hearing officer.

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

(4) Any applicant may file an application for reconsideration according to the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act, 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 board; or

(d) that the applicant has discovered new material evidence that could not, with reasonable diligence, have been discovered or procured at the hearing.

(5) A member 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.

2001

**49-1-611. Additional plans authorized — Subject to federal and state laws — Rules to implement this provision — Costs of administration — Limitations on eligibility — Protection of tax status.**

(1) The board may establish and administer additional benefit plans under Sections 401(k) and 457 of the Internal Revenue Code. Employee and employer contributions shall be permitted according to the provisions of these plans as established by the board. The amount of these accumulated contributions, together with dividend or interest credits, are vested in the member, and are nonforfeitable.

(2) Earnings credited to accounts established as a result of this action shall be at a rate fixed by the board.

(3) Contributions shall be invested as provided by contract in accordance with federal and state law.

(4) The board may establish rules to implement and administer this section. Costs of administration may be paid from the interest earnings of the funds accrued as a result of deposits or as an assessment against each account, to be decided by the board. All funds and deposits may be invested as a separate account or accounts in the Utah State Retirement Investment Fund.

## ADDENDUM B

under the Public Safety Retirement Act who are covered under a long-term disability program offered by a political subdivision which is substantially equivalent to the program offered by the state under this chapter. The program shall be administered by the executive officer of the board through the retirement office, under the policies and rules promulgated by the board.

1987

**49-9-103. Definitions.**

(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) "Educational institution" means a political subdivision or an instrumentality of a political subdivision, an instrumentality of the state, or any combination of these entities, which is primarily engaged in educational activities or the administration or servicing of educational activities. The term includes the State Board of Education and any instrumentality of the State Board of Education, institutions of higher education and their branches, school districts, and vocational and technical schools.

(3) "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.

(4) "Employee" means any regular full-time employee of an employer who participates in any system administered by the board, except those employees exempt from coverage under Section 49-9-102.

(5) "Maximum benefit period" means the maximum period of time the monthly disability income benefit will be paid for any continuous period of total disability.

(6) "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 of symptoms.

(7) "Physician" means a legally qualified physician.

(8) "Rehabilitative employment" means any board-approved occupation or employment for wage or profit, for which the employee is reasonably qualified by education, training, or experience, in which the employee engages while unable to perform his occupation as a result of injury or illness.

(9) "Total disability" means the complete inability, due to medically determinable physical or mental impairment, to engage in the employee's regular occupation during the elimination period and the first 24 months of disability benefits. Thereafter, "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. "Total disability" exists only if during any period of "total disability" the employee is under the regular care of a physician other than the employee.

2000

**PART 2****THE PROGRAM AND FUND****49-9-201. Creation of program.**

There is created for employees of employers participating in any system administered by the board, unless otherwise exempted under this chapter, the "Public Employees' Long Term Disability Program."

1988

**49-9-202. Creation of trust fund.**

There is created the "Public Employees' Disability Trust Fund" for the purpose of paying the benefits and costs of

administering this program. The fund shall consist of all money paid into it in accordance with this chapter, whether in the form of cash, securities, or other assets, and of all money received from any other source. Custody, management, and investment of the fund shall be governed by Title 49, Chapter 1.

1987

**49-9-203. Eligibility for membership in the program.**

(1) All employers participating in any system administered by the board may cover their employees under this chapter, except employees covered under the Firefighters' Retirement Act.

(2) If an employer elects to cover any of his eligible employees under this chapter, all of those employees shall be covered, except employees covered under the Firefighters' Retirement Act.

(3) Nothing in this chapter requires any political subdivision or educational institution to be covered by this chapter.

1992

**PART 3****CONTRIBUTIONS****49-9-301. 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' Disability Trust Fund.

(2) Upon the board's recommendation, the Legislature shall adjust the premium rate to maintain adequate funding for the disability trust fund.

1994

**49-9-302. Rates established on basis of agency experience — Limitations — Annual report to governor and Legislature.**

The board shall establish the contribution rate based on the experience of the various public agencies and political subdivisions participating in the program, which rate may not exceed 1% of salaries and wages and shall report annually to the governor and the Legislature the current contribution rates assessed to the public agencies and political subdivisions.

1987

**PART 4****BENEFITS****49-9-401. Disability benefits — Proof required — Eligibility.**

(1) Upon receipt of proof by the board from the employer that an employee has become totally disabled as a result of:

(a) accidental bodily injury which is the sole cause of disability and is sustained while this chapter is in force;

(b) disease or illness causing total disability commencing while this chapter is in force; or

(c) physical injury resulting from external force or violence as a result of the performance of duty, the fund will pay to the employee a monthly disability benefit for each month the total disability continues beyond the elimination period, not to exceed the maximum benefit period.

(2) Successive periods of disability which: (a) result from the same or related causes, (b) are separated by less than six months of continuous full-time work at the individual's usual place of employment, and (c) commence while the individual is an employee covered by this chapter, shall be considered as a single period of disability. The inability to work for a period less than 15 consecutive days may not be considered as a

## ADDENDUM C

under the Public Safety Retirement Act who are covered under a long-term disability program offered by a political subdivision which is substantially equivalent to the program offered by the state under this chapter. The program shall be administered by the executive officer of the board through the retirement office, under the policies and rules promulgated by the board.

1987

**49-9-103. Definitions.**

(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) "Educational institution" means a political subdivision or an instrumentality of a political subdivision, an instrumentality of the state, or any combination of these entities, which is primarily engaged in educational activities or the administration or servicing of educational activities. The term includes the State Board of Education and any instrumentality of the State Board of Education, institutions of higher education and their branches, school districts, and vocational and technical schools.

(3) "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.

(4) "Employee" means any regular full-time employee of an employer who participates in any system administered by the board, except those employees exempt from coverage under Section 49-9-102.

(5) "Maximum benefit period" means the maximum period of time the monthly disability income benefit will be paid for any continuous period of total disability.

(6) "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 of symptoms.

(7) "Physician" means a legally qualified physician.

(8) "Rehabilitative employment" means any board-approved occupation or employment for wage or profit, for which the employee is reasonably qualified by education, training, or experience, in which the employee engages while unable to perform his occupation as a result of injury or illness.

(9) "Total disability" means the complete inability, due to medically determinable physical or mental impairment, to engage in the employee's regular occupation during the elimination period and the first 24 months of disability benefits. Thereafter, "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. "Total disability" exists only if during any period of "total disability" the employee is under the regular care of a physician other than the employee.

2000

**PART 2****THE PROGRAM AND FUND****49-9-201. Creation of program.**

There is created for employees of employers participating in any system administered by the board, unless otherwise exempted under this chapter, the "Public Employees' Long Term Disability Program."

1988

**49-9-202. Creation of trust fund.**

There is created the "Public Employees' Disability Trust Fund" for the purpose of paying the benefits and costs of

administering this program. The fund shall consist of all money paid into it in accordance with this chapter, whether in the form of cash, securities, or other assets, and of all money received from any other source. Custody, management, and investment of the fund shall be governed by Title 49, Chapter 1.

1987

**49-9-203. Eligibility for membership in the program.**

(1) All employers participating in any system administered by the board may cover their employees under this chapter, except employees covered under the Firefighters' Retirement Act.

(2) If an employer elects to cover any of his eligible employees under this chapter, all of those employees shall be covered, except employees covered under the Firefighters' Retirement Act.

(3) Nothing in this chapter requires any political subdivision or educational institution to be covered by this chapter.

1992

**PART 3****CONTRIBUTIONS****49-9-301. 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' Disability Trust Fund.

(2) Upon the board's recommendation, the Legislature shall adjust the premium rate to maintain adequate funding for the disability trust fund.

1994

**49-9-302. Rates established on basis of agency experience — Limitations — Annual report to governor and Legislature.**

The board shall establish the contribution rate based on the experience of the various public agencies and political subdivisions participating in the program, which rate may not exceed 1% of salaries and wages and shall report annually to the governor and the Legislature the current contribution rates assessed to the public agencies and political subdivisions.

1987

**PART 4****BENEFITS****49-9-401. Disability benefits — Proof required — Eligibility.**

(1) Upon receipt of proof by the board from the employer that an employee has become totally disabled as a result of:

- (a) accidental bodily injury which is the sole cause of disability and is sustained while this chapter is in force;
- (b) disease or illness causing total disability commencing while this chapter is in force; or

(c) physical injury resulting from external force or violence as a result of the performance of duty, the fund will pay to the employee a monthly disability benefit for each month the total disability continues beyond the elimination period, not to exceed the maximum benefit period.

(2) Successive periods of disability which: (a) result from the same or related causes, (b) are separated by less than six months of continuous full-time work at the individual's usual place of employment, and (c) commence while the individual is an employee covered by this chapter, shall be considered as a single period of disability. The inability to work for a period less than 15 consecutive days may not be considered as a

## ADDENDUM D

der the Public Safety Retirement Act who are covered under long-term disability program offered by a political subdivision which is substantially equivalent to the program offered the state under this chapter. The program shall be administered by the executive officer of the board through the retirement office, under the policies and rules promulgated by the board.

1987

9-103. Definitions.

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

(2) "Educational institution" means a political subdivision or instrumentality of a political subdivision, an instrumentality of the state, or any combination of these entities, which primarily engaged in educational activities or the administration or servicing of educational activities. The term includes the State Board of Education and any instrumentality of the State Board of Education, institutions of higher education and their branches, school districts, and vocational and technical schools.

(3) "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.

(4) "Employee" means any regular full-time employee of an employer who participates in any system administered by the board, except those employees exempt from coverage under section 49-9-102.

(5) "Maximum benefit period" means the maximum period of time the monthly disability income benefit will be paid for any continuous period of total disability.

(6) "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 of symptoms.

(7) "Physician" means a legally qualified physician.

(8) "Rehabilitative employment" means any board-approved occupation or employment for wage or profit, for which the employee is reasonably qualified by education, training, or experience, in which the employee engages while unable to perform his occupation as a result of injury or illness.

(9) "Total disability" means the complete inability, due to a medically determinable physical or mental impairment, to engage in the employee's regular occupation during the elimination period and the first 24 months of disability benefits. Hereafter, "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. "Total disability" exists only if during any period of "total disability" the employee is under the regular care of a physician other than the employee.

2000

PART 2

THE PROGRAM AND FUND

9-9-201. Creation of program.

There is created for employees of employers participating in any system administered by the board, unless otherwise exempted under this chapter, the "Public Employees' Long Term Disability Program."

1988

9-9-202. Creation of trust fund.

There is created the "Public Employees' Disability Trust Fund" for the purpose of paying the benefits and costs of

administering this program. The fund shall consist of all money paid into it in accordance with this chapter, whether in the form of cash, securities, or other assets, and of all money received from any other source. Custody, management, and investment of the fund shall be governed by Title 49, Chapter 1.

1987

49-9-203. Eligibility for membership in the program.

(1) All employers participating in any system administered by the board may cover their employees under this chapter, except employees covered under the Firefighters' Retirement Act.

(2) If an employer elects to cover any of his eligible employees under this chapter, all of those employees shall be covered, except employees covered under the Firefighters' Retirement Act.

(3) Nothing in this chapter requires any political subdivision or educational institution to be covered by this chapter.

1992

PART 3

CONTRIBUTIONS

49-9-301. 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' Disability Trust Fund.

(2) Upon the board's recommendation, the Legislature shall adjust the premium rate to maintain adequate funding for the disability trust fund.

1994

49-9-302. Rates established on basis of agency experience — Limitations — Annual report to governor and Legislature.

The board shall establish the contribution rate based on the experience of the various public agencies and political subdivisions participating in the program, which rate may not exceed 1% of salaries and wages and shall report annually to the governor and the Legislature the current contribution rates assessed to the public agencies and political subdivisions.

1987

PART 4

BENEFITS

49-9-401. Disability benefits — Proof required — Eligibility.

(1) Upon receipt of proof by the board from the employer that an employee has become totally disabled as a result of:

(a) accidental bodily injury which is the sole cause of disability and is sustained while this chapter is in force;

(b) disease or illness causing total disability commencing while this chapter is in force; or

(c) physical injury resulting from external force or violence as a result of the performance of duty, the fund will pay to the employee a monthly disability benefit for each month the total disability continues beyond the elimination period, not to exceed the maximum benefit period.

(2) Successive periods of disability which: (a) result from the same or related causes, (b) are separated by less than six months of continuous full-time work at the individual's usual place of employment, and (c) commence while the individual is an employee covered by this chapter, shall be considered as a single period of disability. The inability to work for a period less than 15 consecutive days may not be considered as a

period of disability shall be considered

(3) The board in determining disability benefits shall determine if the disability.

(4) (a) Except as provided in this section, benefits shall be determined under the terms of the disability benefit plan.

(b) If an employee is disabled as a result of a term disability, the employee shall be entitled to the same benefits as if the employee were covered by a term disability benefit plan.

(5) Benefits shall be determined under the terms of the disability benefit plan.

(6) Medical benefits shall be determined under the terms of the disability benefit plan.

to enrollment of the employee in the Public Employees' Disability Trust Fund.

49-9-402. Calculation of benefits.

(1) (a) The regular monthly disability benefit shall be calculated as follows: (i) the actual salary paid to the employee at the time of disability; (ii) the percentage of salary paid to the employee at the time of disability; (iii) the percentage of salary paid to the employee at the time of disability; (iv) the percentage of salary paid to the employee at the time of disability.

(b) Payment of disability benefits shall be made on a regular basis.

(2) The monthly disability benefit shall be reduced by any amount received from any source following the date of disability if the employee is entitled to a disability benefit.

(a) Social Security benefits shall be reduced by the amount of the disability benefit.

(b) The disability benefit shall be reduced by the amount of any increase in the Consumer Price Index.

(c) The disability benefit shall not be further reduced by any amount determined by the board.

(d) The disability benefit shall be reduced by the amount of any other disability benefit received by the employee.

(e) The disability benefit shall be reduced by the amount of any other disability benefit received by the employee.

(f) The disability benefit shall be reduced by the amount of any other disability benefit received by the employee.

(g) The disability benefit shall be reduced by the amount of any other disability benefit received by the employee.

(h) The disability benefit shall be reduced by the amount of any other disability benefit received by the employee.

(4) (a) In order to be eligible for a disability benefit, the employee must have been employed by the government for a period of not less than 15 consecutive days.

the employee