

NO. 94824-1

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES VORHIES,

Petitioner,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,
STATE OF WASHINGTON,

Respondent.

REPLY TO ANSWER TO PETITION FOR
DISCRETIONARY REVIEW

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Aware that RAP 13.4(d) constrains this reply, we will be brief.

I. PERFORMING GAINFUL ACTIVITY REQUIRES A JOB

The Department of Retirement Systems (DRS) argues we are trying to make an entirely new argument by using the word “maintain” to describe a disabled LEOFF 2 member’s ability to remain employed.¹

RCW 41.26.470 (9) awards catastrophic benefits to those who are “unable to perform any substantial activity” producing earnings of a certain amount. In this context, we see the words “maintain”, “keep” and “perform” to be synonymous. If a disabled LEOFF 2 member manages to get a job, is it probable the member will be able to successfully “perform,” “maintain” or “keep” that job? If not, the member will not be able to earn the required amounts.

The greater question is how DRS can justify ignoring the ability to “perform” a job? Of course, DRS has also failed to justify ignoring whether a disabled member can “obtain” a job.

¹ Answer to Petition for Review, page 13.

II. MR. VORHIES' CONSTANT PAIN IS CERVICAL NOT A HEADACHE.

DRS describes our argument regarding pain, as being limited to "headache pain."² Actually, our argument is based directly on the Presiding Officer's Finding of Fact 41, which states:

At the hearing in December 2013 Dr. Crim testified with respect to Mr. Vorhies' neck condition as follows:

He diagnosed post-surgical arthritis causing bone spurring on top of early-onset (likely genetic and pre-existing) osteoarthritis, also causing bone spurring; and intervertebral disk disease at the C5 vertebra. He opined that the first cervical spine injury occurred at the police academy, in line with the opinion of the neurological specialist to whom Mr. Vorhies was first referred in 2006.

The effects of these conditions are chronic pain in Mr. Vorhies' neck and shoulder from narrowing of passages for nerves, and shoulder pain corresponding to disk disease at C5; and secondary effects of chronic pain, such as anxiety, depression and high blood pressure. Though Mr. Vorhies' experience of pain intensity varies, overall Dr. Crim believed Mr. Vorhies' pain is worse since January 2011; and MRI scan done in August 2012 showed continued worsening of the disk disease and arthritic conditions. Dr. Crim thought Mr. Vorhies' reports of pain credible, consistent with his own observations of Mr. Vorhies over time, in the clinic and around town, and with imaging studies and specialists' reports. (Emphasis supplied). (CAR 12).

² Answer to Petition for Review, pages 13-14.

The Presiding Officer accepted Dr. Crim's hearing testimony, in Conclusion of Law 43, saying:

Where opinions given by Dr. Crim before his testimony varied from his testimony regarding Mr. Vorhies' physical capacities, capability for employment, and the possibility of treatment for his cervical spine condition(s) and chronic pain associated with them, Dr. Crim's hearing testimony has been accepted here over any prior inconsistent opinions. (Emphasis supplied). (CAR 41).

In Conclusion of Law 40, the Presiding Officer states that:

Mr. Vorhies experiences constant neck pain. According to Dr. Crim, Mr. Vorhies' pain intensity is not static, but will 'wax and wane depending on a variety of factors,' with 'good days and bad days'; overall, the general condition of his cervical spine is likely to deteriorate; and it is not reasonable to expect that Mr. Vorhies will be pain free, but it is a reasonable goal to have pain that is manageable. Dr. Crim accepts Mr. Vorhies' descriptions of the intensity of his pain because they are consistent with his own observations of Mr. Vorhies, both in clinic and in other settings in the Sequim area. (Emphasis supplied). (CAR 40).

In Conclusion of Law 41, the Presiding Officer states, in relevant part:

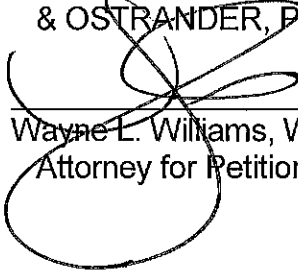
The disability for WAC 415-104-482(1)(c) is the impairment in Mr. Vorhies' functioning as a result of the pain in his neck due to his cervical spine condition(s) and physical deconditioning from his limited activity. (Emphasis supplied). (CAR 40).

The constant cervical pain, and its secondary effects of "anxiety, depression and high blood pressure;" is the pain to which we refer. This is also the pain the DRS' vocational witness ignored.

DRS has made no argument that justifies ignoring Mr. Vorhies constant and disabling cervical pain in assessing his employability.

Respectfully submitted this 29th day of September, 2017.

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CERTIFICATE OF MAILING:

I, Julie Hatcher, hereby certify, under penalty of perjury, that on the 29th day of September, 2017, I mailed a copy of Petitioner's Reply to Answer to Petition for Discretionary Review, to the following:

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