

FILED
COURT OF APPEALS
DIVISION II

2016 JUL 27 AM 9:45

STATE OF WASHINGTON

BY
DEPT

NO. 48622-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES VORHIES,

Respondent,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Appellant

BRIEF OF RESPONDENT

Wayne L. Williams, WSBA# 4145
Attorney for Respondent

Williams, Wyckoff & Ostrander, PLLC
P.O. Box 316
Olympia, Washington 98507
(360) 528.4800

TABLE OF CONTENTS

I. Introduction 1

II. Assignments Of Error 2

III. Issues Pertaining To Assignments Of Error 6

IV. Argument 8

 A. Law Enforcement Officers And Firefighters
 Retirement Disability Benefits 8

 B. Pension Statutes Are Liberally Construed
 In Favor of Members 10

 C. DRS Regulations Direct Consideration Of
 Obtaining Employment 11

 1. DRS Regulations Define Employment
 Terms 11

 2. Workers' Compensation Cases Provide
 Guidance 13

 D. Mr. Vorhies' Established Physical Limitations 16

 E. Summary of Established Facts About
 Physical Limitations 23

 F. Established Vocational Limitations 25

G. Expert Testimony Supports Mr. Vorhies' Position	26
1. Karin Larson's Vocational Testimony	26
2. Barbara Berndt's Vocational Testimony	32
H. Standard of Review	36
I. Conclusions Misinterpreted the Law and Were Not Supported by Substantial Evidence	38
1. Workers' Compensation Cases Establish A Connection With LEOFF	38
2. The Standard of Proof is More Probable Than Not	41
3. To Deny Benefits, A Disabled Member Must Be Able To Obtain And Perform Gainful Employment	43
4. Headaches Must Be Considered	44
5. The Previous DRS Finding That Mr. Vorhies Was Disabled In Line-Of-Duty Is <i>Res Judicata</i>	44
6. Mr. Vorhies' Current Skills Are The Measure Of Employability	45
7. Age Is A Valid Employment Consideration	46
8. No Proof Regarding Accommodation Is Required	47

J. Summary Of Legal Conclusions	48
V. Costs	49
A. Fees And Costs Should Be Awarded	49
VI. Conclusion	49

TABLE OF AUTHORITIES

<u>Adams v. Department of Labor and Industries,</u> 74 Wn.App. 626, 875 P.2d 8 (1994)	41
<u>Brown v. Department of Social and Health Services,</u> 190 Wn.App. 572, 360 P.3d 875 (2015)	49
<u>Bowen v. State Wide City Employees Retirement System,</u> 72 Wn.2d 397, 433 P.2d 150 (1967)	10
<u>Dennis v. Department of Labor and Industries,</u> 109 Wn.2d 467, 745 P.2d 1295 (1987)	39
<u>Dillon v. Seattle Police Pension Board,</u> 82 Wn. App. 168, 916 P.2d 956 (1996)	39, 42
<u>Fochtman v. Department of Labor and Industries,</u> 7 Wn.App. 286, 499 P.2d 255 (1972)	15
<u>Fuller v. Employment Security Department,</u> 52 Wn.App. 603, 762 P.2d 367 (1988)	16
<u>Gaines v. Department of Labor & Industries,</u> 1 Wn.App. 547,463 P.2d 269 (1969)	10
<u>Heidgerken v. State Department of Natural Resources,</u> 99 Wn.App. 380, 993 P.2d 934 (2000); rev. den. 141 Wn.2d 1015, 10 P.3d 1071 (2000)	38
<u>Kellum v. Department of Retirement Systems,</u> 61 Wn.App. 288, 810 P.2d 523 (1991)	10
<u>Leeper v. Department of Labor and Industries,</u> 123 Wn.2d 803, 872 P.2d 507 (1994)	13, 14

<u>Malland v. Department of Retirement Systems,</u> 103 Wn.2d 484, 694 P.2d 16 (1985)	45
<u>Moen v. Spokane City Police Department.,</u> 110 Wn. App. 714, 42 P.3d 456 (2002)	49
<u>Morrison v. Department of Retirement Systems,</u> 67 Wn.App. 419, 835 P.2d 1044 (1992)	11
<u>Price v. Department of Labor and Industries,</u> 101 Wn.2d 520, 682 P.2d 307 (1984)	44
<u>Shaw v. Department of Retirement Systems,</u> 193 Wn.App. 122, 371 P.3d 106 (2016)	39
<u>State Department of Ecology v. Douma,</u> 147 Wn.App. 143, 193 P.3d 1102 (2008)	37
<u>Tafoya v. Human Rights Commission,</u> 177 Wn.App. 216, 311 P.3d 70 (2013)	37
<u>Woldrich v. Vancouver Police Pension Board,</u> 84 Wn.App. 387, 928 P.2d 7423 (1996)	42

Other Authorities

WAC 415-104-480	11, 44
WAC 415-104-482 4, 5, 11, 12, 14, 27, 31, 32, 34, 36, 43, 44, 45, 47, 49	
RCW 4.84.340.....	49
RCW 4.84.350	49
RCW 4.84.010.....	49
RCW 34.05.570.....	36
RCW 41.26.030	8
RCW 41.26.470.....	6, 7, 8, 9, 40, 44, 45, 49
RCW 51.08.160.....	13
Washington Equal Access to Justice Act.....	49

I. INTRODUCTION

Mr. Vorhies is a former City of Sequim police officer who the Department of Retirement Systems (DRS) granted benefits, for a disability he incurred in the line of duty, as a member of the Law Enforcement Officers and Fire Fighters Retirement System (LEOFF).

However, DRS denied Mr. Vorhies the additional benefits provided to members who cannot engage in substantial gainful employment in their labor market. Mr. Vorhies appealed, hearings were held and the Department of Retirement Systems (DRS) Presiding Officer refused to consider evidence that Mr. Vorhies could not obtain or perform jobs. The Presiding Officer's ultimate Conclusion of Law was contained in Conclusion of Law No. 55. The relevant portion said:

Under WAC 415-404-482(1)(c), the primary concern is with an applicant's ability to engage in income-producing activity; making that requirement so much more specific, tying it to an applicant's ability to obtain, or perform the essential functions of, a particular position or type of position, would alter the pertinent eligibility requirements as well as the burden of proof. The test does is not whether an applicant can obtain any specific kind of work, only whether he can engage in some kinds of work that are available in his labor market. (Emphasis supplied)

This conclusion was so clearly wrong, the Superior Court specifically reversed it. (RP 26-28) The Superior Court also emphasized that one must be able to be successful in a job to be able to engage in it. (RP 31, lines 10-26) There were also other substantial errors, which justified the Superior Court's Order on Judicial Review of Department of Retirement Systems' Administrative Decision, which reversed the denial of benefits. (CP 200-201)

We are asking this court affirm to the Superior Court's reversal of the administrative decision and provide Mr. Vorhies the LEOFF benefits to which he is entitled.

II. ASSIGNMENTS OF ERROR

1. The Presiding Officer erred in adopting Conclusions of Law Nos. 11, 12, 13, 14, 15, 17, 18, 19, and ultimately so much of Conclusion of Law No. 20, as it states:

Washington State law governing LEOFF is the sole authoritative source in this forum. Should need arise to consult a source of authority external to LEOFF in deciding a claim for a catastrophic disability benefit, the governing provisions do not show an intent to apply or refer to the law of workers' compensation.

* * *

Because the provisions governing the catastrophic

disability benefit in LEOFF Plan 2 have express ties to the law of Social Security disability, but give no indication that the Department should interpret or apply them with reference to the law of workers' compensation, workers' compensation law is not consulted for this decision.¹

2. The Presiding Officer erred in adopting so much of Conclusion of Law No. 49, as states measurement of job skills includes skills which a disabled member "has capacity to quickly acquire."²

3. The Presiding Officer erred in adopting Conclusion of Law No. 50, which provides:

Mr. Vorhies has not met his burden of proving that he is so severely disabled by his cervical spine condition(s) that he is incapable of engaging in substantial gainful activity in his labor market.

4. The Presiding Officer erred in adopting so much of Conclusion of Law No. 53, as is states:

There is no evidence that the job classifications listed by Ms. Berndt require more education that [sic] Mr. Vorhies has, and he is equipped to learn and perform the tasks generally expected within these classifications by virtue of his varied

¹ The Conclusions are attached as Exhibit 1.

² The entire text of the Conclusion is attached as Exhibit 2.

transferable skills. Mr. Vorhies' transferable skills make it quite plausible that he could earn compensation greater than \$10.18 per hour, in which case fewer hours of work would be needed to reach the threshold. (Emphasis supplied).³

5. The Presiding Officer erred in adopting Conclusion of Law No. 55. The most significant and harmful language is as follows:

This confusion was most apparent where Ms. Larson opined on Mr. Vorhies' ability to be 'competitive' in his labor market, or to 'obtain' competitive employment. These are not express requirements for a catastrophic disability benefit, but appear to have been assumed or tacitly added by Ms. Larson to serve Mr. Vorhies' theory of the case. Under WAC 415-104-482(1)(c), the primary concern is with an applicant's ability to engage in income-producing activity; making that requirement so much more specific, tying it to an applicant's ability to obtain, or perform the essential functions of, a particular position or type of position, would alter the pertinent eligibility requirements as well as the burden of proof. The test does is not whether an applicant can obtain any specific kind of work, only whether he can engage in some kinds of work that are available in his labor market. (Emphasis supplied).⁴

6. The Presiding Officer erred in adopting so much of

³ The entire text of the Conclusion is attached as Exhibit 3.

⁴ The entire text of the Conclusion is attached as Exhibit 4.

Conclusion of Law No. 55, as states:

Another apparently unrecognized difference of concern was the inclusion of age as a factor in evaluating an applicant's ability to engage in substantial gainful activity. Ms. Larson twice expressed her opinion in response to questions that included Mr. Vorhies' age as a factor. A claimant's age may be a factor in Social Security disability or in workers' compensation, but an applicant's age is not an eligibility factor in WAC 415-104-482(1).⁵

7. The Presiding Officer erred in adopting so much of

Conclusion of Law No. 56, as states:

In much the same vein, she acknowledged that some employers provided accommodations, such as ergonomic work stations, chairs, different key board and headset, but avoided discussing possible accommodations ⁶

8. The Presiding Officer erred in adopting so much of

Conclusion of Law No. 32, as disregards headaches.⁷

9. The Presiding Officer erred in entering so much of

Conclusion of Law No. 58, as states:

She recognized that labor market surveys as prescribed for vocational rehabilitation services in

⁵ The entire text of the Conclusion is attached as Exhibit 4.

⁶ The entire text of the Conclusion is attached as Exhibit 5.

⁷ The entire text of the Conclusion is attached as Exhibit 6.

the workers' compensation program were not prescribed or needed in an appeal of a LEOFF catastrophic disability application.

10. Finally, the Presiding Officer erred in denying Mr. Vorhies LEOFF Plan 2 total duty disability retirement. (Final Order, p. 49)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In determining whether a disabled LEOFF 2 member is entitled to total disability benefits, pursuant to RCW 41.26.470, must evidence showing whether the member can obtain or perform gainful employment be rejected? Assignments of Error No. 5 and 9.

2. In determining whether a disabled LEOFF 2 member is entitled to total disability benefits, pursuant to RCW 41.26.470, must evidence showing the effect of the member's age on employment, be rejected? Assignment of Error No. 6.

3. In determining whether a disabled LEOFF 2 member is entitled to total disability benefits, pursuant to RCW 41.26.470, must workers' compensation case law be ignored? Assignments of Error No. 1 and 9.

4. In determining whether a disabled LEOFF 2 member is entitled to total disability benefits, pursuant to RCW

41.26.470, must the member be denied benefits if it is “quite plausible” the member “could” earn a certain amount? Assignment of Error No. 4.

5. In determining whether a disabled LEOFF 2 member is entitled to total disability benefits, pursuant to RCW 41.26.470, must a member show prospective employers will not make accommodations for the member’s disability? Assignment of Error No. 7.

6. In determining whether a disabled LEOFF 2 member is entitled to total disability benefits, pursuant to RCW 41.26.470, must a member be denied benefits if the member has the capacity to quickly acquire necessary job skills in the future? Assignment of Error No. 2.

7. In determining whether a disabled LEOFF 2 member is entitled to total disability benefits, pursuant to RCW 41.26.470, must headaches be ignored because there is no objective medical evidence of headaches? Assignment of Error No. 9.

IV. ARGUMENT

A. Law Enforcement Officers and Firefighters Retirement Disability Benefits

All Law Enforcement Officers and Firefighters who were employed after October 1, 1977 became members of the Law Enforcement Officers and Fire Fighters Retirement System (LEOFF) Plan 2. RCW 41.26.030(22). Mr. Vorhies, is a member of LEOFF Plan 2. His disability retirement benefits are governed by RCW 41.26.470, which provides three separate types of disability benefits:

- 1) Non-duty disability benefits for those who become totally incapacitated for continued employment, by an employer, in a LEOFF position. RCW 41.26.470(1).
- 2) Duty disability for the member who becomes disabled in the line-of-duty and can no longer work in a LEOFF position. RCW 41.26.470(7).
- 3) Total disability benefits for a member who is totally disabled in the line-of-duty and cannot sustain substantial gainful employment. RCW 41.26.470(9).

Obviously, the legislature recognized that first responders are subject to a special risk of suffering injuries in the line-of-duty, and should be compensated accordingly.

Mr. Vorhies has already been granted line-of-duty disability benefits by DRS. (Finding of Fact No. 31)⁸ The only remaining question is whether he is totally disabled within the meaning of RCW 41.26.470(9)(b) which provides in relevant part:

A member is considered totally disabled if he or she is unable to perform any substantial gainful activity due to a physical or mental condition that may be expected to result in death or that has lasted or is expected to last at least twelve months. Substantial gainful activity is defined as average earnings in excess of eight hundred sixty dollars a month in 2006 adjusted annually as determined by the director based on federal social security disability standards.⁹ The department may require a person in receipt of an allowance under this subsection to provide any financial records that are necessary to determine continued eligibility for such an allowance. A person in receipt of an allowance under this subsection whose earnings exceed the threshold for substantial gainful activity shall have their benefit converted to a line-of-duty disability retirement allowance as provided in subsection (7) of this section.

⁸ References to Findings of Fact and Conclusions of Law are to the DRS Final Order

⁹ All parties agree "substantial gainful employment" for purposes of this case has increased to earning more than \$1,040.00 per month. Final Order, p. 25, footnote 29.

Any person in receipt of an allowance under the provisions of this section is subject to comprehensive medical examinations as may be required by the department under subsection (2) of this section in order to determine continued eligibility for such an allowance.

The statutory language contemplates that a member entitled to total disability benefits may subsequently earn more than the minimum or recover to such an extent that they would earn more than the minimum. Until that happens, they are entitled to receive total disability benefits.

B. Pension Statutes Are Liberally Construed In Favor of Members

In cases involving pensions, doubt should be resolved in favor of the party for whose benefit the pension statute was enacted. Bowen v. State Wide City Employees Retirement System, 72 Wn.2d 397, 433 P.2d 150 (1967). A similar rule applies in the workers' compensation context, where statutes are construed in favor of the claimant for whose benefit the act was passed. Gaines v. Department of Labor & Industries, 1 Wn.App. 547, 463 P.2d 269 (1969); Kellum v. Department of Retirement Systems, 61 Wn.App. 288, 810 P.2d 523 (1991). Clearly, the provision of total disability benefits was enacted for Mr. Vorhies and other law enforcement officers covered by the act and must be interpreted in their favor.

In Morrison v. Department of Retirement Systems, 67 Wn.App. 419, 426, 835 P.2d 1044 (1992), the court found that "any ambiguities in the standard by which to determine disability should be construed in Morrison's favor given the remedial nature of pension statutes, which Washington Courts liberally construe in favor of the intended beneficiary." Morrison at 427.

C. DRS Regulation Direct Consideration Of Obtaining Employment

1. DRS Regulations Define Employment Terms

WAC 415-104-482(1)(a)(b)(c)(d) and (e) set forth the five requirements for a catastrophic disability allowance.

(1) Am I eligible for a catastrophic disability

allowance? You are eligible for a catastrophic disability allowance if the department determines all of the following are true:

(a) You incurred a physical or mental disability in the line of duty, as defined in WAC 415-104-480;

(b) You separated from LEOFF-eligible employment due to your disability;

(c) Your disability is so severe that you are unable to do your previous LEOFF eligible work, and considering your education, transferable skills, and work experience, you cannot engage in any other kind of substantial gainful activity in the labor market;

(d) Your condition has lasted or is expected to last at least twelve months, or your condition is expected to result in death; and

(e) Your disability is not the result of your criminal conduct committed after April 21, 1997.

Subsections (a) , (b) , the first portion of (c) and (d) have been met, as determined by the grant of duty disability retirement to Mr. Vorhies. (Conclusions of Law No. 34 and 35, pp. 37-38) Subsection (e) is not at issue. The only dispute concerns WAC 415-104-482(1)(c) which provides:

(c) Your disability is so severe that you are unable to do your previous LEOFF eligible work, and considering your education, transferable skills, and work experience, you cannot engage in any other kind of substantial gainful activity in the labor market;

WAC 415-04-482(13)(c), (e) and (f) provide as follows:

(c) **Labor market** is the geographic area within reasonable commuting distance of where you were last gainfully employed or where you currently live, whichever provides the greatest opportunity for gainful employment.

(e) **Substantial gainful activity** means any activity that produces average earnings, as defined in (b) of this subsection, in excess of eight hundred sixty dollars a month in 2006, adjusted annually as determined by the department based on federal Social Security disability standards. Wages count toward earnings when they are earned, not when you

receive them. Self-employment income counts when you receive it, not when you earn it.

(f) **Transferable skills** are any combination of learned or demonstrated behavior, education, training, work traits, and skills that you can readily apply. They are skills that are interchangeable among different jobs and workplaces. (Emphasis in original)

2. Workers' Compensation Cases Provide Guidance

These same concepts apply in the workers' compensation context where triers of fact are frequently called upon to determine whether individuals are totally and permanently disabled. RCW 51.08.160 defines the term "permanent total disability" as meaning ". . . a condition permanently incapacitating the worker from performing any work at any gainful occupation." (Emphasis supplied)

In Leeper v. Department of Labor and Industries, 123 Wn.2d 803, 872 P.2d 507 (1994) it was argued that one did not need to consider whether an injured worker could obtain employment, only whether he or she could perform employment, in the abstract. The Supreme Court warned against equating the availability of general work in the labor market with the ability of a particular individual to obtain that work. The Court said:

The opinion in *Graham* rests on an incorrect assumption: the general *availability* of light or sedentary jobs in the labor market implies a *particular* injured worker can obtain such a job. This assumption disregards the vocational evidence unique to an individual claimant. By equating the availability of general work with the ability to obtain it, the Court of Appeals in *Graham* presumes the very question the trier of fact must answer — can this claimant obtain work in the competitive labor market. Our cases require the trier of fact to judge in each case whether a particular individual is totally disabled, especially where medical evidence of the injured worker's ability to perform work may conflict with vocational evidence of the worker's inability to obtain work because of the workplace injury. The words "or obtain" under these circumstances are not superfluous. (Emphasis in original) Leeper v. DLI, 123 Wn.2d at 818.

Just like workers' compensation, WAC 415-104-482(1)(c) requires consideration of a disabled LEOFF 2 member's "education, transferable skills, and work experience" to determine whether the member can obtain employment. We cannot understand why WAC 415-104-482(13)(c) would define "labor market," in terms of geographic extent as well as availability of gainful employment, unless the trier of fact is to determine whether there is employment which the individual LEOFF 2 member can obtain. Since many of the same factors go into a permanent total

disability determination under the workers' compensation laws, cases interpreting those laws are helpful in deciding this case.

In Fochtman v. Department of Labor and Industries, 7

Wn.App. 286, 298, 499 P.2d 255 (1972) the court said:

We conclude that a prima facie case of total disability may be established by medical testimony as to severe limitations imposed on a claimant's ability to work coupled with lay testimony concerning his age, education, training and experience and the testimony of an employment or vocational expert as to whether he is able to maintain gainful employment on the labor market with a reasonable degree of continuity. If those conditions are met the medical expert need not make the conclusion that the injured workman is totally and permanently disabled.

The jobs that are to be considered in determining whether Mr. Vorhies is capable of substantial gainful activity are those which are within a reasonable commuting distance of Sequim, Washington.

Since substantial gainful activity means any activity that produces average earnings, in excess of \$1,040.00 per month, we should only consider jobs which Mr. Vorhies can actually obtain, as those jobs are the only ones that produce earnings. Jobs which produce earnings are the only employments that are "gainful." However, the Presiding Officer rejected this well established body

of workers' compensation law and determined that the ability to "obtain" and "perform" employment is meaningless. (Conclusion of Law 55)

We think the evidence presented in this case clearly shows that Mr. Vorhies is, unfortunately, unable to engage in substantial gainful activity producing earnings in excess of \$1,040.00 per month. His physical limitations and limited transferrable skills, either individually or together, prevent him from engaging in substantial gainful activity, in his labor market.

D. Mr. Vorhies' Established Physical Limitations

The Presiding Officer made certain Findings of Fact with which we take no issue. Therefore, they are verities on appeal. Fuller v. Employment Security Department, 52 Wn.App. 603, 762 P.2d 367 (1988). The findings relating to his disability at the time of hearing are:

1) Mr. Vorhies underwent an anterior cervical discectomy and fusion at the C5-C6 vertebra. (Finding of Fact No. 15) In July of 2009, Mr. Vorhies had a second neck surgery, a hemilaminectomy and medial facetectomy to relieve the effects of

radiculitis and radiculopathy secondary to foraminal stenosis at the C4-C5 vertebra. (Finding of Fact No. 18)

2) On November 18, 2010, the attending physician, Dr. Crim, notified the City of Sequim that he could not release Mr. Vorhies to return to work without extreme restrictions, and that his MRI scan showing lumbar disc injuries and new abnormalities in both his cervical and thoracic spine put him “at high risk for further spinal damage.” (Finding of Fact No. 26)

3) Mr. Vorhies underwent a physical capacities evaluation (PCE) in July of 2011. (Finding of Fact No. 34)¹⁰ The following limitations were noted:

sit: 4 hours, intermittently, 45-60 minutes at a time (in a chair with cervical and upper extremity support)

stand: 2 hours, intermittently, 30 minutes at a time

walk: 1 hour 20 minutes, intermittently, 20 minutes at a time

alternately sit/stand/walk: 7 hours, 3.5 hours at a time

alternately stand/walk: 3 hours, 40 minutes at a time

The following activities were seldom [1-5% of an 8-hour day] to occasionally:

¹⁰ Mr. Vorhies has at least these limitations. Dr. Crim testified Mr. Vorhies would have to change position every 20 minutes (Finding of Fact no. 42). Dr. Crim testified a 2013 PCE was close to the limitations he would impose.

twist/turn his neck |
bend his neck (Finding of Fact No. 34)

After the 2011 PCE, Mr. Vorhies described having a severe migraine headache "in the back of [his] neck going to the base of the skull" on the day of the evaluation, inability to sleep that night, even with pain medication, and greatly increased neck and left shoulder soreness (but no headache) the next day. (Finding of Fact No. 35) Mr. Vorhies had similar but worse complaints which were noted after the 2013 PCE (Finding of Fact No. 39)

Ms. Casady, who conducted both PCEs, characterized Mr. Vorhies' performance as "high effort." (Finding of Fact Nos. 35 and 39)

4) After the August 28, 2011 PCE, Ms. Casady said Mr. Vorhies would not be able to sustain gainful vocational activity on a reasonably continuous basis, pointing out that he showed "below-competitive productivity levels on work sample activity," had shown poor body mechanics and posture (a safety concern), needed to frequently change positions, was using narcotic medications daily for pain control, "demonstrates

significant limitations of the left arm and hand," and had a history of migraine headaches. (Finding of Fact No. 37)

5) Dr. Crim has 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. 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 the chronic pain, including anxiety, depression and high blood pressure. Though Mr. Vorhies' experience of pain intensity varies, overall Dr. Crim said Mr. Vorhies' pain is worse since January 2011; an MRI scan done in August 2012 showed continued worsening of the disk disease and arthritic conditions. Dr. Crim testified Mr. Vorhies' reports of pain are credible and consistent with his own observations of Mr. Vorhies over time, in the clinic and around town, with imaging studies and other specialists' reports. (Finding of Fact No. 41)

6) Medications were prescribed for sleep, blood pressure, nerve pain and anxiety, and "breakthrough pain;"¹¹ Mr.

¹¹ Despite Mr. Vorhies' reluctance to resume using narcotic pain medication, in December 2013 Dr. Crim was prescribing a new narcotic medication for

Vorhies also used non-prescription anti-inflammatory medications for pain. Dr. Crim expected that Mr. Vorhies will need neck surgery again, but nerve conduction studies would be required first to rule out other causes of pain. (Finding of Fact No. 41)

7) Dr. Crim agreed with the results of the 2013 PCE report, which he considered well-validated. Dr. Crim believed that the neurological consultants who have examined Mr. Vorhies accepted the results as well. He testified that the report accurately described Mr. Vorhies' physical abilities, and the activity limits identified there were close to the restrictions he would place on lifting, and on length of time in one position or activity. He estimated that Mr. Vorhies would need to change position every 20 to 45 minutes. (Finding of Fact No. 42) Dr. Crim does not expect that Mr. Vorhies' spinal conditions will improve, and he does expect that they will worsen. (Finding of Fact No. 45) The Presiding Officer accepted Dr. Crim's hearing testimony over any prior inconsistent opinions. (Conclusion of Law No. 44, p. 41)

8) The Presiding Officer did not make any finding that questioned the accuracy or truthfulness of Mr. Vorhies' testimony.

"breakthrough pain", on a short-term basis; he had no information on Mr. Vorhies' experience with it. (Finding of Fact 41, p. 12, footnote 15).

9) Mr. Vorhies is limited in his day to day activities. He watches television, usually from a sofa or recliner; he will often walk once or twice to his parents' house, a distance of approximately 100-200 feet, where he also watches television from a recliner. He performs light housekeeping such as preparing a simple dinner, 15 minutes or so of kitchen cleanup, and using the automatic washer and dryer at home to do his personal laundry as needed. In season, he mows the lawns at his house and his parents' house, using his father's riding lawnmower with power steering. This takes about three hours in total, and intensifies pain in his back and neck, so he does it up to an hour per day over several days, and only when necessary, which he testified is less often than weekly. (Finding of Fact No. 46)

10) Mr. Vorhies experiences the most pain in his neck area. He has muscle spasms in his left shoulder and numbness, tingling, and occasional loss of control in his left arm and hand. The neck and shoulder pain interferes with sleep, so most nights he gets intermittent sleep of six hours or less in total. When pain "radiates up" from his neck, often following some extended activity, he gets "really bad" headaches. When it

"radiates down", he experiences pain farther down his spine.

(Finding of Fact No. 52)

11) At the time of the hearing, Mr. Vorhies regularly took five prescribed medications, Gabapentin (Neurontin), a non-narcotic nerve pain medication that also lowers anxiety; two medications for control of blood pressure; Trazodone for sleep and control of blood pressure; and Omeprazole for gastroesophageal reflux disease (GERD). (Finding of Fact 52)

12) Mr. Vorhies is "spent" after two hours of repetitious activity. He does not believe he could perform a security job that alternated 30 minutes of walking with 30 minutes of sitting, because after two hours it would cause a headache and he would have to lie down. He says he has not been able to find anything that he can do for more than two hours, because of the pain in his neck. He reports that he performs all tasks at a much slower pace than he used to and, from his personal experience, he believes that no workplace would accept that pace. (Finding of Fact 56)

13) Christi Vorhies, Mr. Vorhies' wife, described him as intelligent and creative, but a "mono-tasker," meaning that he concentrates on doing one thing at a time, and has not shown

the ability to handle multiple tasks at once. Both Christi and Mr. Vorhies' son, Jordan Vorhies, described Mr. Vorhies as far less active than he was formerly. Jordan recalled working on vehicles, hiking and camping with his father, things that Mr. Vorhies no longer does. (Finding of Fact No. 57)

14) Mr. Vorhies only "... has the physical capacity to engage in income-producing activity for less than five hours per day in a standard five-day work week, the most that would be required at the lowest wage." (Emphasis supplied). (Conclusion 53, page 44)¹²

E. Summary Of Established Facts About Physical Limitations

Mr. Vorhies can sit for four hours intermittently, 20-45 minutes at a time in a chair with neck support and arms. He can stand for two hours intermittently, 30 minutes at a time. He can walk for one hour and 20 minutes intermittently, 20 minutes at a time. He can physically alternately sit/stand/walk for seven hours a day, but only three and a half hours at a time. He can only seldom, one to five percent of an eight hour day, twist or turn his neck or bend his neck.

¹² Please note this finding, alone, justifies granting total disability benefits, since there is no evidence he could obtain part time employment paying more than the lowest wage.

After his PCE, which only lasted three and one half hours, Mr. Vorhies experienced a severe migraine headache in the back of his neck going to the base of his skull on the day of the evaluation, an inability to sleep that night, even with pain medication, and greatly increased neck and left shoulder soreness the next day.

Mr. Vorhies is only able to function between the sedentary and light-weight handling categories on a less-than reasonably-continuous basis. When tested, he showed below-competitive productivity levels, poor body mechanics and posture, and needed to frequently change positions. He has significant limitations of his left arm and hand.

Mr. Vorhies has post-surgical arthritis, chronic pain in his neck and shoulder from narrowing passages for nerves, shoulder pain corresponding to disc disease at C5, and secondary effects of chronic pain of anxiety, depression and high blood pressure. He takes medication for sleep, blood pressure, nerve pain, anxiety and break through pain.

Mr. Vorhies needs to change position every 20 to 45 minutes. Mr. Vorhies has muscle spasms in his left shoulder,

numbness, tingling and occasional loss of control of his left arm and hand. Most nights he gets intermittent sleep of six hours or less in total. When pain radiates from his neck, often following some extended activity, he gets really bad headaches. He is "spent" after two hours of repetitious activity.

Mr. Vorhies can only engage in income producing activity for less than five hours a day in a standard work week.

F. Established Vocational Limitations

The Presiding Officer summarized Mr. Vorhies' education and experience as follows:

Education and experience Mr. Vorhies' education and work experience are somewhat limited. His formal education does not extend beyond high school, and the content of his later training for law enforcement work is not known. His work experience as a building painter, nuisance wildlife trapper, mechanic and equipment operator/driver, and narcotics detective all required physical work at levels higher than the light to sedentary level that this record indicates he now can do. His education and work experience have not equipped him with significant clerical skills or even medium proficiency with computer software that would easily suit him for general office work. Thus the focus shifts to his transferable skills.
(Conclusion of Law 48)

G. Expert Testimony Supports Mr. Vorhies' Position

1. Karin Larson's Vocational Testimony

Karin Larson is a vocational rehabilitation counselor. (Hearing Transcript p. 107, l. 2-3) She has a bachelor's degree in psychology and a master's degree in counseling psychology. (Hearing Transcript p. 107, l. 5-7) Ms. Larson is nationally certified as a rehabilitation counselor and a member of the International Association of Rehabilitation Professionals. (Hearing Transcript p. 107, l. 7-10) She has been working as a vocational rehabilitation counselor for over 20 years. (Hearing Transcript p. 107, l. 19-20)

In reviewing Mr. Vorhies' vocational situation, she reviewed records from Dr. Crim, an independent medical evaluation, records of Dr. Hutton, Dr. Nora, Dr. Tomski, PAC Wilkes, PAC Buller, Dr. Herzog, a physical capacity evaluation from 2011, a physical capacity evaluation from 2013, the Petition Decision in this matter, reports from Barbara Berndt, interrogatories, Social Security information, and a Microsolutions testing evaluation. (Hearing Transcript p. 109, l. 20 to p. 110, l. 6) She also reviewed deposition transcripts from Mr. Vorhies, Dr. Crim, Jordan Vorhies, Christi Vorhies, and Mr. Vorhies' father.

(Hearing Transcript p. 110, l. 15-19) Ms. Larson also obtained information from the Washington State Gambling Commission and performed labor market contacts of her own. (Hearing Transcript p. 110, l. 7-10)

Ms. Larson met with Mr. Vorhies on two occasions. (Hearing Transcript p. 110, l. 21-25) She spoke with Dr. Crim about neck flexion and extension to determine whether Mr. Vorhies would be able to do clerical work looking at a computer monitor and keyboard. (Hearing Transcript p. 111, l. 15-24) Dr. Crim advised her that would be a difficult posture for Mr. Vorhies to sustain. (Hearing Transcript p. 112, l. 2-4) She confirmed that Dr. Crim concurred with the 2013 Physical Capacities Evaluation restrictions on standing and walking. (Hearing Transcript p. 112, l. 9-16)

She did a labor market survey of employers within Mr. Vorhies' labor market which she felt encompassed a reasonable commuting distance. (Hearing Transcript p. 113, l. 21 to p. 114, l. 24) WAC 415-104-482(13)(c) She also considered some employment information from Grays Harbor and Lewis Counties. (Hearing Transcript p. 114, l. 10-16)

She determined that Mr. Vorhies did not have the physical ability to serve in a security guard position. (Hearing

Transcript p. 117, l. 1-22) Ms. Larson determined that he did not have the transferrable skills to be employed in a clerical position. (Hearing Transcript p. 117, l. 23 to p. 118, l. 3) She had testing performed, which showed Mr. Vorhies did have some computer skills with outdated programs. (Hearing Transcript p. 119, l. 2-3) However, he didn't have touch-type keyboarding skills and could only type less than 15 words per minute. (Hearing Transcript p. 119, l. 11-16)

When asked to assume that substantial gainful employment is employment that would allow one to earn more than \$1,040.00 per month, and based upon Mr. Vorhies' age, education, transferable skills, work experience and physical limitations, she offered her opinion on his ability to obtain and perform substantial gainful employment from January 1, 2011 forward as follows:

A: That given his work as a policeman, his work experience, his transferable skills, and his physical capacities, he is not able to obtain employment and meet the requirement for substantial gainful activity.

Q: And if you're unable to obtain the type of employment in -- any particular employment, does it matter whether that employment is full-time or part-time?

A: It does not. If you physically cannot perform the job because of physical

restrictions that you have – that have been placed upon you, at that point it rules out that job. And whether you could obtain work in that job, either on a part-time basis or a full-time basis, no longer is an issue. (Hearing Transcript p. 122, l. 1-13)

Ms. Larson described the physical limitations that were of particular significance for Mr. Vorhies' situation as follows:

A: I think significantly -- what physical requirements are significant are the stand and walk. He can stand -- he can be on his feet for half an hour at one time, at which point he would need to change position. And he can do that off and on for a two-and-a-half-hour period in an eight-hour day.

Also, twisting of the neck, turning of the neck, bending of the neck, which would be the flexion/extension of the neck, is seldom to occasional. That also is fairly significant if you're looking at any type of clerical work.

The standing/walking is significant if you're looking at any type of security work that requires walking, cashiering, counter attendant work, cleaning up a vehicle, running -- an amusement/recreation attendant, a crossing guard, a demonstrator, a parking lot attendant, a protective service worker, or even perhaps a claims adjustor who has to go out and perform estimates on cars.
(Hearing Transcript 124 l. 22 to 125 l. 13)

Ms. Larson testified that Mr. Vorhies would not be able to obtain employment as an amusement/recreation attendant.
(Hearing Transcript p. 126, l. 19 to p. 127, l. 2) That he would not

be able to obtain employment as a cashier. (Hearing Transcript p. 127, l. 13-15) That he would not be employable as a cleaner of vehicles. (Hearing Transcript p. 127, l. 16-25) That he would not be employable as a crossing guard. (Hearing Transcript p. 128, l. 1-3) She noted that crossing guards only work from an hour and a half to two hours a day. (Hearing Transcript p. 128, l. 4)

Ms. Larson testified that he would not be employable as a counter attendant. (Hearing Transcript p. 128, 25 to p. 129, l. 7) She testified that he would not be employable as a demonstrator/promoter. (Hearing Transcript p. 129, l. 8-18) She testified that he would not be employable as a dispatcher. (Hearing Transcript p. 129, 19 to p. 130, l. 12) She testified he would not be employable as an interviewer. (Hearing Transcript p. 130, l. 21 to p. 131, l. 5) Ms. Larson testified that Mr. Vorhies would not be employable as a counter and rental clerk or a file clerk. (Hearing Transcript p. 132, l. 11 to p. 133, l. 16) He would not be employable in gaming surveillance or as a parking lot attendant. (Hearing Transcript p. 134, l. 2 to p. 135, l. 3) She testified he would not be employable as a protective service worker or a claims adjuster/investigator. (Hearing Transcript p. 135, l. 9 to p. 136, l. 9)

She testified that he would not be employable as a reception or information clerk. (Hearing Transcript p. 131, l. 6-9)

Ms. Larson testified about the clerical jobs in the Sequim area that:

In his area, because he lives in Sequim and Port Angeles, they're smaller labor markets. What you will generally see are that anybody who works in an office that requires clerical work, they do more than just receptionist work. They will do the scheduling and greeting people, but they might also be doing the billing, they might also be doing the checkout. So you have to be multifaceted when you work in a smaller labor market. (Hearing Transcript p. 131, l. 13-21)

Ms. Larson testified there were no other jobs that Mr. Vorhies could obtain and perform given the factors of his experience, training, age, education and physical limitations. (Hearing Transcript p. 137, l. 15-20)

She read a portion of WAC 415-104-482. (Hearing Transcript p. 157, l. 7-8) She expressed her opinion that:

My opinion is, and if I should use the word 'engage,' I will and shall, he cannot engage, given his education, transferable skills, work experience, in any kind of substantial gainful activity in the labor market given -- including due to his physical capacities.

(Hearing Transcript p. 157, l. 22 to p. 157, l. 1)

2. Barbara Berndt's Vocational Testimony

Barbara Berndt is also a vocational rehabilitation counselor. (Hearing Transcript p. 199, l. 22-23) As with Ms. Larson, Ms. Berndt testified that this is the very first LEOFF case that she has ever worked on. (Hearing Transcript p. 246, l. 10-12)

Ms. Berndt testified that she understood the standard for a LEOFF 2 catastrophic disability. (Hearing Transcript p. 213, l. 5-7) However, she testified that "I did not see anything in the WAC and RCW that I reviewed about labor market." (Hearing Transcript p. 213, l. 21-22) Ms. Berndt again testified there was no mention of labor market that she was aware of in the LEOFF system.¹³ (Hearing Transcript p. 234, l. 10-13)

She testified that Mr. Vorhies was capable of substantial gainful employment in a variety of positions. She testified that she gathered her job information for Mr. Vorhies' labor market from Employment Security data. (Hearing Transcript p. 226, l. 16 to p. 227, l. 1) Ms. Berndt was unable to testify whether the jobs were full or part time. (Hearing Transcript p. 234, l. 21 to p. 235, l. 22)

¹³ WAC 415-04-482(13)(c) defines "labor market." See page 12, supra.

The Presiding Office established that Mr. Vorhies
only:

. . .has the physical capacity to engage in
income-producing activity for less than five
hours per day in a standard five-day work
week, the most that would be required at the
lowest wage. (Emphasis supplied)
Conclusion of Law No. 53, p. 44.

Therefore, Ms. Berndt's testimony does not support the conclusion
Mr. Vorhies can work part time jobs.

As to school guards, she had not contacted employers
and would not know whether a guard would be required to attempt
to physically protect a child. (Hearing Transcript p. 248, l. 19 to p.
249, l. 8)

She conceded that whether Mr. Vorhies could do a
particular security job would depend on the type of restraint of
others employers allowed their workers to do, and that she did not
have that information, although it would be helpful. (Hearing
Transcript p. 236, l. 21 to p. 237, l. 11)

She testified that her opinion did not include any
decision on her part of what condition was limiting Mr. Vorhies'
activity. (Hearing Transcript p. 239, l. 7-11) Ms. Berndt testified
that in reaching her opinion, she did not consider pain or the effect

of sleep or pain on concentration. (Hearing Transcript p. 249, l. 23 to p. 250, l. 12)

Ms. Berndt's opinion failed to take into account the "effects of Mr. Vorhies reported pain." (Finding of Fact 67, p. 22)

This failure is inconsistent with the Presiding Officer's Conclusions of Law 33, 40 and 41, regarding Mr. Vorhies' neck condition, that:

1) The resulting physical effects appear similar, that is, nerve pain from inflammation of, or pressure on, the nerves connected to the spinal cord in the cervical segment of the spine, because compression or narrowing (stenosis) of the areas of the spine where the nerves connect, or pass through the spinal column, and compression of the disk spaces between the vertebrae. (Conclusion of Law No. 33, page 37).

2) "Mr. Vorhies experiences constant neck pain."

(Conclusion of Law No. 40, p. 40).

c) 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. (Conclusion of Law No. 41, p. 40).

Since Ms. Berndt's opinion did not take Mr. Vorhies' pain into account, it did not address the central element of the case.

Imagine a member who was found to have lost his leg. If a vocational counselor offered opinions that he was employable, but failed to consider the loss of his leg, that opinion would be worthless. That is our situation, here. Ms. Berndt ignored the major limiting factor, as found by the Presiding Officer.

Most remarkably, Ms. Berndt testified:

Q: If Mr. Vorhies has the physical capacity to perform a job but does not have the transferable skills necessary to be hired or successful, in your opinion is he nonetheless able to engage in substantial gainful employment?

A: Yes.
(Hearing Transcript p. 253, l. 21 to p. 254, l. 1)

Ms. Berndt also testified, to the opposite proposition, as follows:

Q: If Mr. Vorhies can obtain a job, but because of his physical limitations or experience he wouldn't likely be successful in that job, would that change your opinion as to his ability to engage in it for LEOFF purposes?

A: No.
(Hearing Transcript p. 261, l. 20-24)

These opinions were apparently adopted by the Presiding Officer, as describing the legal test for LEOFF 2 total disability, in Conclusion of Law No. 55.

Ms. Berndt was not familiar with the labor market definition of WAC 415-104-482. She did not consider Mr. Vorhies' main limitation of chronic pain in reaching her opinions. The Presiding Officer found Mr. Vorhies could only engage in part-time employment. Ms. Berndt did not distinguish between part-time and full-time jobs, does not provide support for conclusions concerning part-time employment. She would find a person employable in jobs they cannot obtain and in jobs they cannot successfully perform.

H. Standard of Review

Since this is an administrative appeal, it is controlled by RCW 34.05.570(3) which governs review of agency orders in adjudicative proceedings.

That relevant portions of that statute read as follows:

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

* * *

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

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

* * *

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency;

In this particular case, the Presiding Officer has erroneously interpreted and applied the law. The order is not supported by substantial evidence in light of the whole record before the court and is inconsistent with agency rules. The Presiding Officer so misapplied the law that it is not consistent with her own factual findings.

“Substantial evidence” means evidence of a sufficient quantity to persuade fair-minded persons of the truth or correctness of the order. Tafoya v. Human Rights Commission, 177 Wn.App. 216, 311 P.3d 70 (2013); State Department of Ecology v. Douma, 147 Wn.App. 143, 193 P.3d 1102 (2008).

In reviewing Conclusions of Law, the court's review is *de novo*, and the court's word is final. Heidgerken v. State Department of Natural Resources, 99 Wn.App. 380, 993 P.2d 934 (2000); rev. den. 141 Wn.2d 1015, 10 P.3d 1071 (2000). We urge nothing more than that you to give a sensible interpretation to the laws providing benefits to disabled first responders.

I. Conclusions Misinterpreted the Law and Were Not Supported By Substantial Evidence

The Presiding Officer construed the law in ways which, if taken seriously, would prevent almost everyone from receiving a catastrophic disability benefit. Some of the legal interpretations are clearly wrong and justify reversal on their own. Others are cumulative.

1. Workers' Compensation Cases Establish A Connection With LEOFF

First, the Presiding Officer rejects any use of the case laws relating to workers' compensation as not being of assistance (Conclusion of Law No. 11), notwithstanding that both DRS and DLI use almost an identical definition of "labor market," both consider transferable skills and both systems are designed to determine and award benefits for loss of earning capacity.

This court has found that workers' compensation cases can be applied, by analogy, to determine whether injured LEOFF members have sustained on duty injuries. Shaw v. Department of Retirement Systems, 193 Wn.App. 122, 371 P.3d 106 (2016). Shaw cited Dillon v. Seattle Police Pension Board, 82 Wn. App. 168, 916 P.2d 956 (1996), which solidified the connection between LEOFF and workers' compensation. It specifically determined that an injury "incurred in the line of duty" is equivalent to an injury incurred "in the course of employment" as used in workers' compensation cases. Dillon at P. 171. The Dillon court held that "a worker shows his disease was proximately caused by his work if he establishes he would not have contracted the disease, but for the aggravating condition of his job." The Dillon and Shaw decisions both cited Dennis v. Department of Labor and Industries, 109 Wn.2d 467, 477, 745 P.2d 1295 (1987). Since there are no reported LEOFF catastrophic disability cases and by ignoring analogous cases, the Presiding Officer had no guidance at all.

The Presiding Officer reviewed the references to workers' compensation in LEOFF 2 law. (Conclusions of Law 13-16) The Presiding Officer then concludes:

This review of the references to workers' compensation in the provisions governing LEOFF Plan 2 disability retirement benefits indicates that RCW 41.26.470 authorizes those benefits on its own terms, independently of benefits available through workers' compensation; it does not indicate that the Department is to apply law of workers' compensation when it determines eligibility for disability retirement benefits in LEOFF. (Conclusions of Law 17)

The fact that the legislature did not require application of workers' compensation law or principles does not mean the legislature prohibited consideration of that body of law.

It also bears noting that RCW 41.26.470(2) which governs first responders in receipt of duty disability retirement benefits, such as those Mr. Vorhies is receiving, can only have those benefits terminated in the following circumstances:

Any member who receives an allowance under the provisions of this section shall be subject to such comprehensive medical examinations as required by the department. If such medical examinations reveal that such a member has recovered from the incapacitating disability and the member is no longer entitled to benefits under Title 51 RCW, the retirement allowance shall be canceled . . .

(Emphasis supplied)

Why would the statute require DRS to accept a DLI decision that an injured worker is still entitled to benefits because he or she can no longer engage in gainful employment, if DRS is supposed to use entirely different standards to make that same decision?

As we have said, total disability means the inability to perform or obtain regular gainful employment. In assessing that, a Court has said that "a worker is not totally disabled solely because of inability to return to his or her former occupation. However, total disability does not mean that the worker must have become physically or mentally helpless or must perform employment which causes serious discomfort or pain, or endangers his life or health." (Emphasis supplied) Adams v. Department of Labor and Industries, 74 Wn.App. 626, 630, 875 P.2d 8 (1994).

2. The Standard of Proof is More Probable Than Not

One of the two critical Conclusions of Law is that portion of Conclusion of Law No. 52¹⁴, that said:

There is no evidence that the job classifications listed by Mr. Berndt require more education than Mr. Vorhies has, and he is equipped to learn and perform the tasks

¹⁴ The entire text of the Conclusion is attached as Exhibit 7.

generally expected within these classifications by virtue of his varied transferable skills. Mr. Vorhies' transferable skills make it quite plausible that he could earn compensation greater than \$10.18 per hour, in which case fewer hours of work would be needed to reach the threshold. (Emphasis supplied)

Imagine a proposal as follows:

- a. Will you marry me?
- b. Do you love me?
- c. It is quite plausible that I could.

Admittedly, the proper standard of "more probable than not" also lacks romance but it provides considerably more certainty.

The courts have already found that the necessary proof of disability in LEOFF is more probable than not. Dillon, supra, determined that the LEOFF cases required the same level of proof as workers' compensation cases. Woldrich v. Vancouver Police Pension Board, 84 Wn.App. 387, 928 P.2d 423 (1996) also adopted the "more probable than not" standard for LEOFF cases.

Since it is only plausible and not probable Mr. Vorhies could obtain part time employment, paying more than \$10.18 an hour, he must be granted benefits.

The other critical Conclusion of Law is No. 55, discussed below.

3. To Deny Benefits, A Disabled Member Must Be Able To Obtain And Perform Gainful Employment

The most appalling conclusion is Conclusion of Law 55, page 45, where the Presiding Officer rejected Ms. Larson's testimony by saying:

This confusion was most apparent where Ms. Larson opined on Mr. Vorhies' ability to be 'competitive' in his labor market, or to 'obtain' competitive employment. These are not express requirements for a catastrophic disability benefit, but appear to have been assumed or tacitly added by Ms. Larson to serve Mr. Vorhies' theory of the case. Under WAC 415-104-482(1)(c), the primary concern is with an applicant's ability to engage in income-producing activity; making that requirement so much more specific, tying it to an applicant's ability to obtain, or perform the essential functions of, a particular position or type of position, would alter the pertinent eligibility requirements as well as the burden of proof. The test does is not whether an applicant can obtain any specific kind of work, only whether he can engage in some kinds of work that are available in his labor market. (Conclusion of Law 55)

This is simply wrong. If a person cannot get a job, does it matter that, in the abstract, the person might be able to

physically perform that job? If a person can get a job, but cannot be competitive or perform in the job, is that "gainful" employment?

4. Headaches Must Be Considered

The Presiding Officer did not consider headaches because there is no objective medical evidence concerning diagnosis, origin, frequency, or severity of the headaches' effects on Mr. Vorhies functioning or plan for treatment. (Conclusion of Law No. 32) Neither RCW 41.26.470 or WAC 415-104-482 call for a plan for treatment, nor do they call for objective medical evidence. We all know headaches exist, but cannot be objectively measured. Chronic pain also exists, but cannot be objectively measured. Courts do not require objective findings for conditions which cannot be assessed objectively. Price v. Department of Labor and Industries, 101 Wn.2d 520, 682 P.2d 307 (1984).

5. The Previous DRS Finding That Mr. Vorhies Was Disabled In Line-of-Duty Is Res Judicata

The Presiding Officer is mistaken when she says that "Previous retirement for duty disability under WAC 415-104-480 does not by itself prove that any of the elements of WAC 415-104-482(1) are met, . . ." (Conclusion of Law No. 35) Obviously, the earlier finding is *res judicata* between Mr. Vorhies and DRS. To

say it is not, is to ignore the obvious. A member's duty disability benefits can only be terminated if a comprehensive medical examination shows the member has recovered from the disability and he or she is no longer entitled to workers' compensation benefits. RCW 41.26.470(2). If finding the member had a disability, incurred in the line of duty, was not binding, the benefits could be cancelled at any time. There would be no need for a medical examination. This case should be governed by Malland v. Department of Retirement Systems, 103 Wn.2d 484, 694 P.2d 16 (1985), which dealt with a LEOFF Plan 1 member. We see no indication the Legislature intended a LEOFF Plan 2 member be treated differently. Therefore, *res judicata* or issue preclusion should apply here, just as it did in Malland.

6. Mr. Vorhies' Current Skills Are The Measure Of Employability

The Presiding Officer says Mr. Vorhies' "education and work experience have not equipped him with significant clerical skills or even medium proficiency with computer software that would easily suit him for general office work." (Conclusion of Law No. 48) However, she concludes that:

The labor market in Clallam and Jefferson counties has reported employment in

classifications in which at least some jobs would require only sedentary to light physical activity, and for which Mr. Vorhies already has skills to perform the typical duties or has the capacity to quickly acquire them. (Emphasis supplied)
(Conclusion of Law 49)

As to this last portion of the conclusion, it requires Mr. Vorhies to show that, not only is he currently unemployable, but that he could not be trained, in the future, to have additional skills which might make him employable.

The Presiding Officer says Mr. Vorhies is “equipped to learn and perform the tasks generally expected within certain jobs by virtue of his various transferable skills.” (Emphasis supplied)
(Conclusion of Law No. 53) This mistakenly concentrated on what he might learn to do, in the future, as opposed to what he can do now.

7. Age Is A Valid Employment Consideration

The Presiding Officer says:

Another apparently unrecognized difference of concern was the inclusion of age as a factor in evaluating an applicant's ability to engage in substantial gainful activity. Ms. Larson twice expressed her opinion in response to questions that included Mr. Vorhies' age as a factor. A claimant's age may be a factor in Social Security

disability¹⁵ or in workers' compensation, but an applicant's age is not an eligibility factor in WAC 415-104-482(1). (Conclusion of Law 55, p. 45)

However, given a choice between two competitive potential employees, an employer might well chose the younger one who can serve longer in the position. There is nothing in the statute or regulations forbidding considering age.

8. No Proof Regarding Accommodations Is Required

The Presiding Officer questions Ms. Larson's vocational opinions because she focused on the severe restrictions that prevent Mr. Vorhies from performing certain job functions. Obviously, the most substantial limitations such as standing, walking and neck flexion, remove whole fields of employment from reasonable consideration.

The Presiding Officer says:

In much the same vein, she [Ms. Larson] acknowledged that some employers provide accommodations such as ergonomic work stations, chairs, different keyboards and headsets, but avoided discussing possible accommodations. (Conclusion of Law 56, p. 46)

¹⁵ Exhibit D-5, p. 6.

In other words, Mr. Vorhies must prove an employer would not provide these accommodations in an attempt to employ Mr. Vorhies on a part-time basis. There is nothing in the statute or regulations requiring proof of potential accommodations. Obviously, neither Ms. Larson nor anyone else could testify as to what each particular employer would be willing to do to hire Mr. Vorhies for a part-time job. The only reasonable approach is to determine what such jobs normally require and whether Mr. Vorhies can obtain the job and perform within those requirements. Ms. Larson did just that.

J. Summary of Legal Conclusions

If we take each of the Presiding Officer's legal conclusions at face value, then in order for Mr. Vorhies or any other disabled law enforcement officer to receive catastrophic retirement benefits, he would have to prove:

- 1) That he does not have the ability to acquire or learn the skills, required for each potential job.
- 2) That every prospective employer would not accommodate his disability.
- 3) That, in the future, his condition or skills will not improve enough to allow the member to physically perform substantial gainful activity.

4) Even if he could not obtain or perform a job, he would have to prove he could not physically engage in every single job in his labor market.

V. COSTS

A. Fees And Costs Should Be Awarded

We ask this Court to affirm the Superior Court's Judgment Awarding Attorney's Fees and Costs, pursuant to the Washington Equal Access to Justice Act, RCW 4.84.340 and RCW 4.84.350 and RCW 4.84.010. (CP 207-209) The trial court's award must be affirmed, absent an abuse of discretion. Brown v. Department of Social and Health Services, 190 Wn.App. 572, 360 P.3d 875 (2015). Moen v. Spokane City Police Department., 110 Wn. App. 714, 42 P.3d 456 (2002). No such abuse occurred here.

We ask this Court to award costs and fees for services before this Court, based upon the Washington Equal Access to Justice Act and RAP 18.1. An award is supported by the Declarations of James Vorhies, Wayne Williams and Paul Neal (CP 215; CP 216-219 and CP 220-221, respectively).

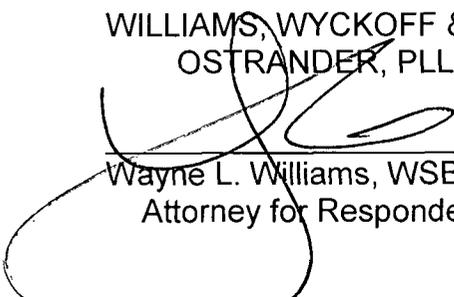
VI. CONCLUSION

The legal standards adopted by the Presiding Officer are not consistent with RCW 41.26.470 and WAC 415-104-482. The Presiding Officer rejected helpful analogous workers' compensation case law. The Presiding Officer used the wrong standard of proof. Using the wrong legal standards led the Presiding Officer to reject persuasive evidence and adopt

speculation. The Superior Court's reversal must be affirmed. Mr. Vorhies is entitled to catastrophic disability benefits.

DATED this 26th day of July, 2016.

WILLIAMS, WYCKOFF &
OSTRANDER, PLLC



Wayne L. Williams, WSBA# 4145
Attorney for Respondent

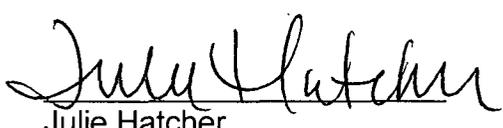
CERTIFICATE OF MAILING

I, Julie Hatcher, hereby certify that a true and correct copy of Brief of Respondent, was mailed and emailed on this date to each of the following:

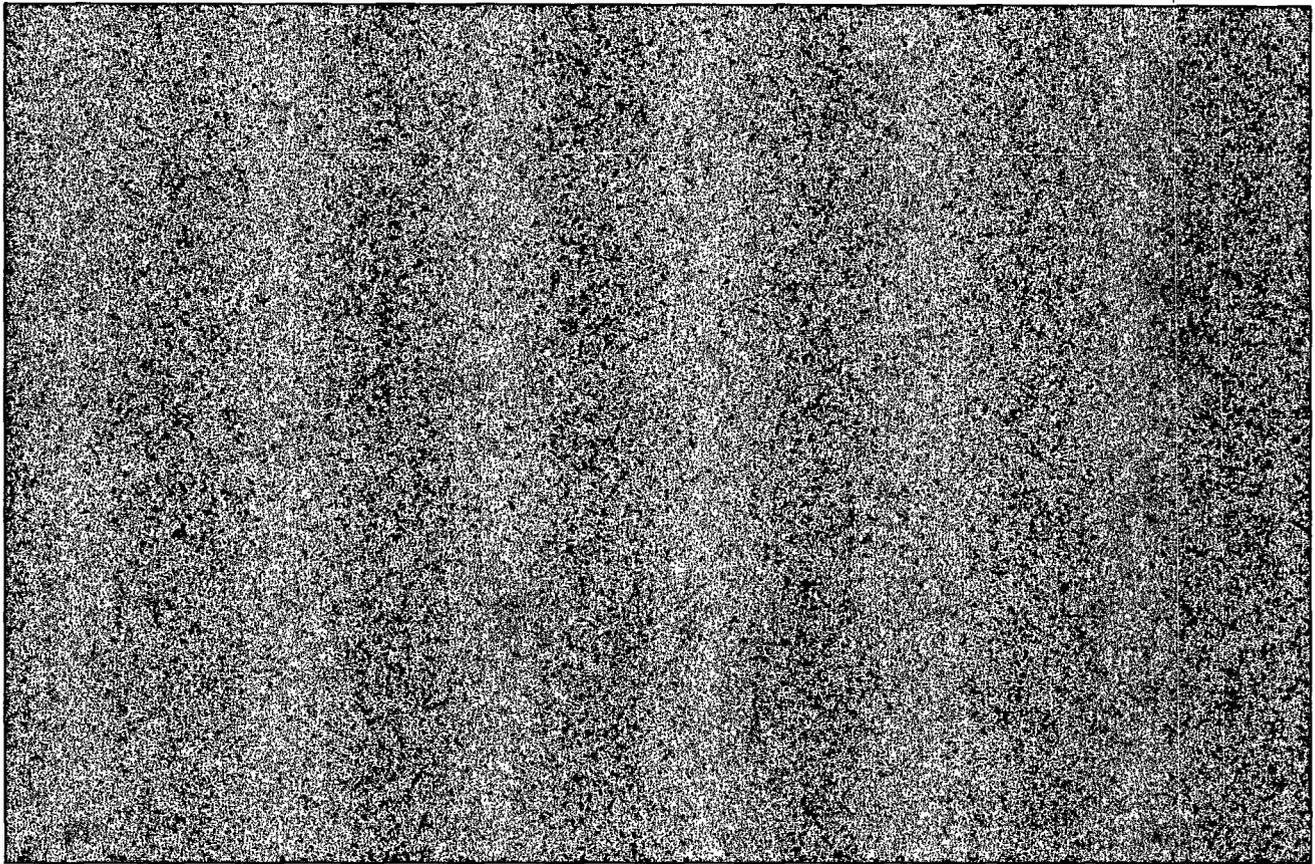
Anne Hall
Office of the Attorney General
P.O. Box 40123
Olympia, Washington 98504-0108
anneh@atg.wa.gov

Troy Klika
Office of the Attorney General
P.O. Box 40123
Olympia, Washington 98504-0108
troyk@atg.wa.gov

DATED this 26th day of July, 2015.



Julie Hatcher



11. In his briefs the Appellant cites several state court opinions, urging the Department to interpret and apply RCW 41.26.470(9) and WAC 415-104-482 by reference to the law of workers' compensation. This approach is not adopted here because it is not supported by these statute and agency rule provisions governing the LEOFF Plan 2 catastrophic disability benefit, as explained below.

a. LEOFF Disability Benefits and Workers' Compensation

12. As outlined above, RCW 41.26.470 authorizes disability benefits for LEOFF Plan 2 members. Under another section of the LEOFF statute, RCW 41.26.480, Plan 2 members are also covered by the Washington State program of workers' compensation ("industrial insurance as provided by Title 51 RCW"). RCW 41.26.470 and RCW 41.26.480 were both originally enacted as sequential sections of the same 1977 legislation.³¹

The workers' compensation program, administered by the Washington State Department of Labor and Industries (DLI), has been in effect for over a century. It generally provides benefits for workers whose ability to maintain their covered employment has been affected by work-related injury or disease.

³¹ Laws of 1977, ex. sess., ch. 294, §§ 8, 9.

LEOFF authorizes retirement for disability, and some ancillary benefits, for its members. The LEOFF system first took effect in 1970, when the workers' compensation program already had a well-developed legal history. The Department of Retirement Systems assumed responsibility for administering LEOFF in or about 1976.

i. LEOFF Statute

13. The LEOFF statute does not tie eligibility for disability retirement benefits to eligibility for or receipt of workers' compensation benefits.

RCW 41.26.470 has only two direct references to workers' compensation under Title 51. Subsection (2) preserves an early amendment³² addressing the conditions for stopping a benefit; a disability retirement benefit may be canceled if the retiree is "no longer entitled to benefits under Title 51 RCW" and medical examinations done for the Department show that the retiree "has recovered from the incapacitating disability". Under subsection (9), which in 2006 authorized the catastrophic disability benefit, the amount of the benefit may be offset by any workers' compensation benefits the retiree also receives.

14. RCW 41.26.470 has been amended more than a dozen times since 1981, when it first referenced workers' compensation benefits in what is now subsection (2). Yet the only other mention of workers' compensation is in subsection (9), and that reference only limits the total amount a retiree would receive, by coordinating the two types of benefit. Neither of these references would involve workers' compensation law in the determination of LEOFF disability benefits. Throughout a lengthy history of amendment, the legislature has not created any other connection between the workers' compensation program and LEOFF disability benefits in RCW 41.26.470.³³

ii. Rules

15. In its rules implementing disability benefits authorized by RCW 41.26.470, the Department advises applicants that it will "consider . . . information from and determinations made by the department of labor and industries . . ." when it decides an applicant's eligibility for retirement for disability. WAC 415-104-480(5)(a) (duty disability retirement); 415-104-482(4)(b) (catastrophic duty disability

³² Laws of 1981, ch. 294, §9.

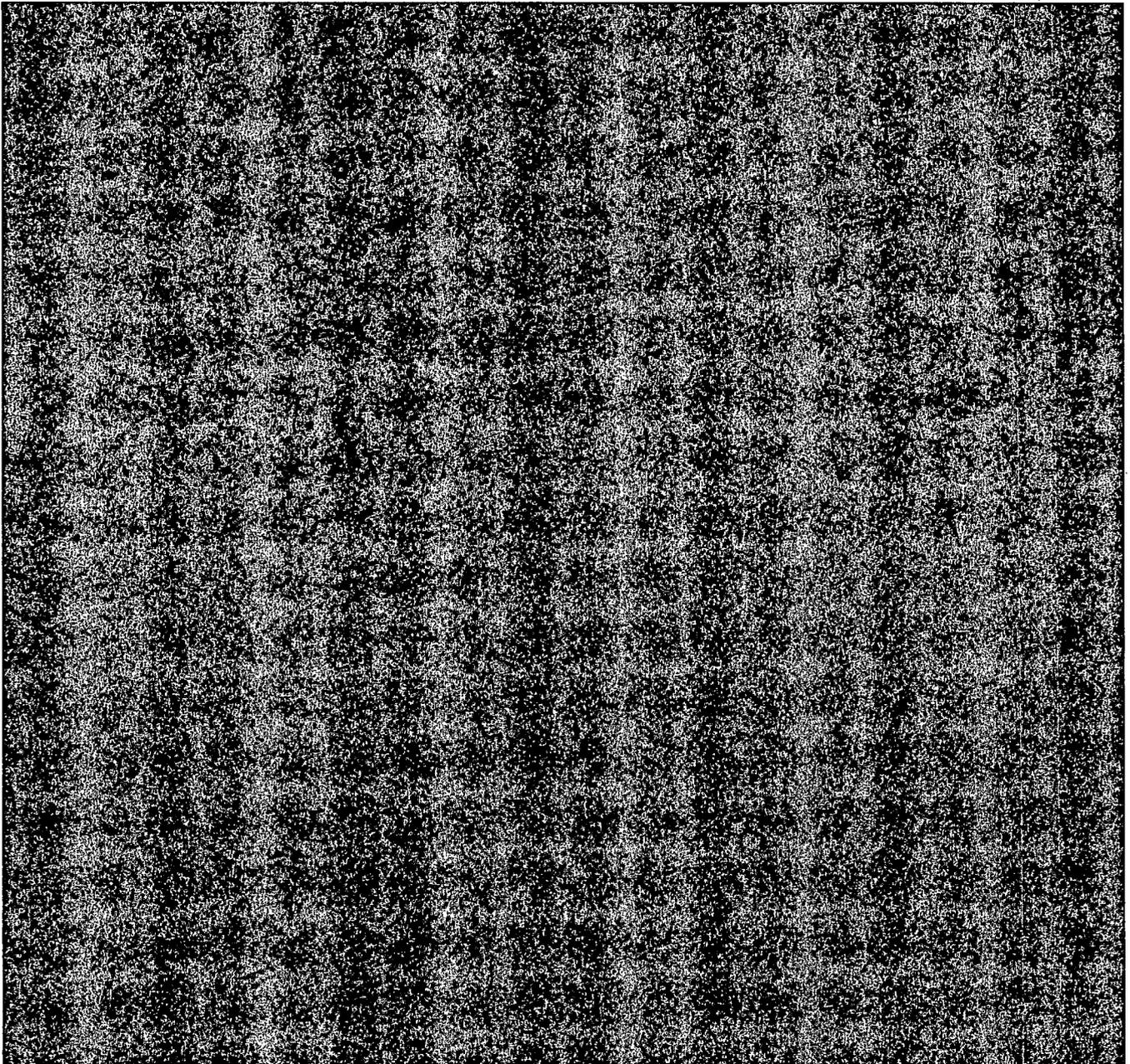
³³ This is in contrast to LEOFF special death benefits, which are authorized using language directly tied to Title 51 RCW, and depend upon DLI's determination of eligibility.

2) The benefit under this section shall be paid only when death occurs: (a) As a result of injuries sustained in the course of employment; or (b) as a result of an occupational disease or infection that arises naturally and proximately out of employment covered under this chapter. *The determination of eligibility for the benefit shall be made consistent with Title 51 RCW by the department of labor and industries.* The department of labor and industries shall notify the department of retirement systems by order under RCW 51.52.050. . . .

RCW 41.26.048. (Emphasis added.)

retirement); 415-104-485(5)(a) (non-duty disability retirement). Here the Department recognizes DLI's separate responsibility for claims based on work-related injuries and illnesses under Title 51 RCW.

Though these provisions advise that the Department will consider DLI information and determinations (presumably of eligibility for or extent of workers' compensation benefits), they do not direct how the Department uses the information; they do not even direct that it use the information at all. These provisions do not encourage the use of workers' compensation law, even by analogy, in determinations of eligibility for LEOFF disability retirement benefits.



17. This review of the references to workers' compensation in the provisions governing LEOFF Plan 2 disability retirement benefits indicates that RCW 41.26.470 authorizes those benefits on its own terms, independently of benefits available through workers' compensation; it does not indicate that the Department is to apply law of workers' compensation when it determines eligibility for disability retirement benefits in LEOFF.

b. LEOFF Catastrophic Disability and Social Security Disability

18. In contrast, RCW 41.26.470(9), and the Department's implementing rule, WAC 415-104-482, show more significant connections to the federal Social Security Disability (SSD) program.

i. LEOFF Statute

RCW 41.26.470(9) describes total disability for the catastrophic disability benefit as follows:

A member is considered totally disabled if he or she is unable to perform any substantial gainful activity due to a physical or mental condition that may be expected to result in death or that has lasted or is expected to last at least twelve months.

This subsection in 2006 brought into LEOFF some criteria the federal Social Security Administration (SSA) uses to decide claims for SSD benefits,³⁵ as can be seen from Exhibit D-5, the SSA decision denying Mr. Vorhies' SSD claim (January 9, 2013).

The term "substantial gainful activity" itself matches a term used in the SSD program, and RCW 41.26.470(9) expressly ties the term "substantial gainful activity" to a federal standard for earnings in SSD.

Substantial gainful activity is defined as average earnings in excess of eight hundred sixty dollars a month in 2006 adjusted annually as determined by the director based on federal social security disability standards.

RCW 41.26.470(9) also directs that a LEOFF catastrophic disability benefit be offset by any SSD benefit the retiree receives where the total of the benefits would exceed a set limit, just as it does with workers' compensation benefits.

Despite the close correspondence, the later-adopted LEOFF Plan 2 catastrophic disability rule did not reference the DLI rule, or simply adopt the DLI rule language, but altered and restated the definitions for LEOFF.

³⁵ For comparison, a federal regulation central to SSD sets out the "basic definition of disability" as follows: "The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months". 20 CFR § 404.1505(a). The SSA Decision, Exhibit D-5, p. 1, substitutes "engage in" for "do".

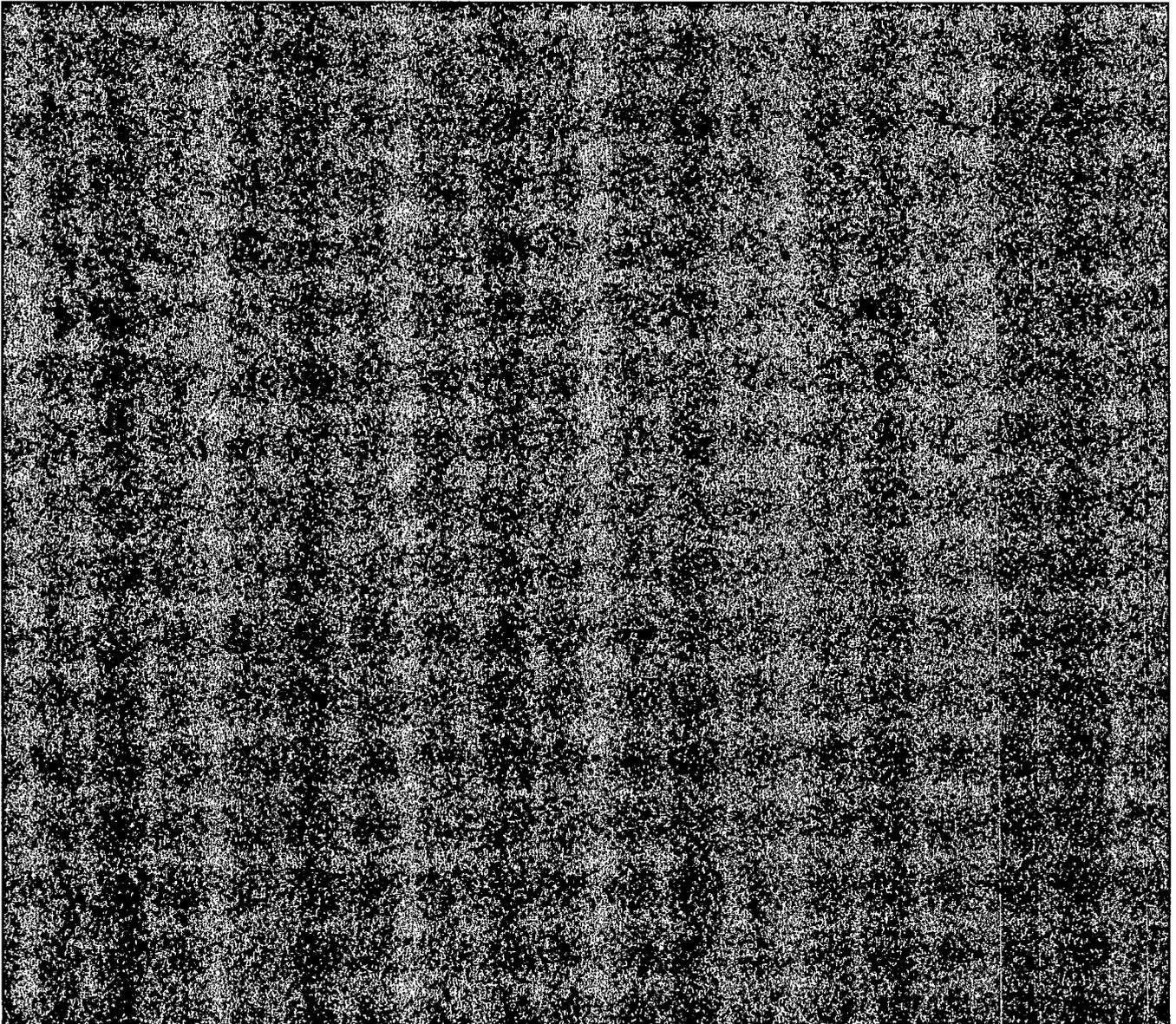
ii. Rule

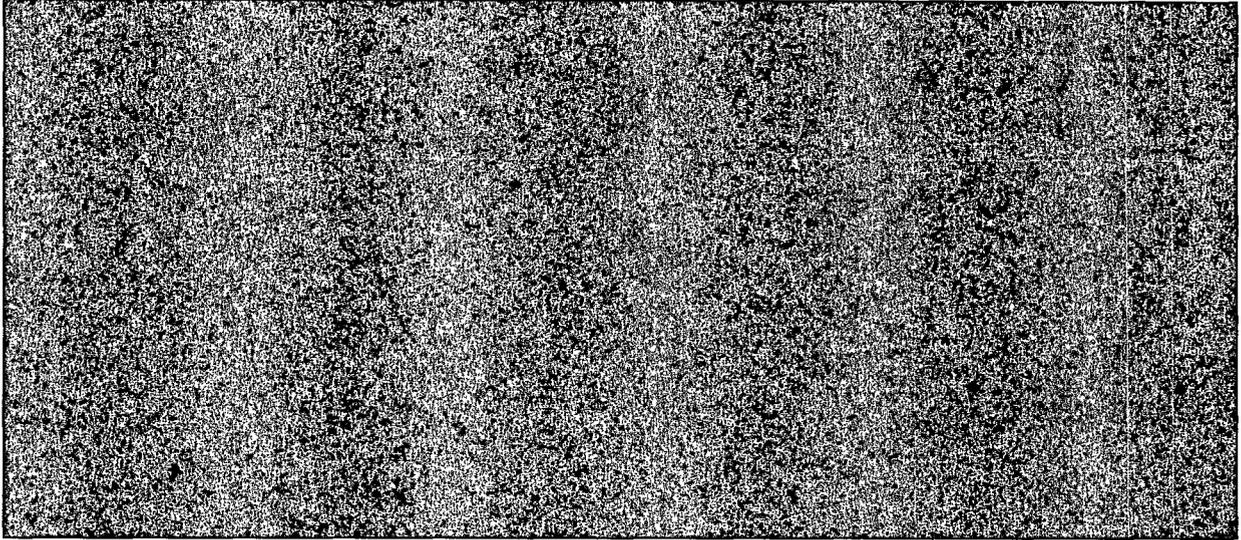
19. WAC 415-104-482(1) echoes many of these elements, and incorporates more of the federal elements in definitions in WAC 415-104-482(13).

Notably, in subsection (5) this rule expressly authorizes Department reliance on SSA determinations.

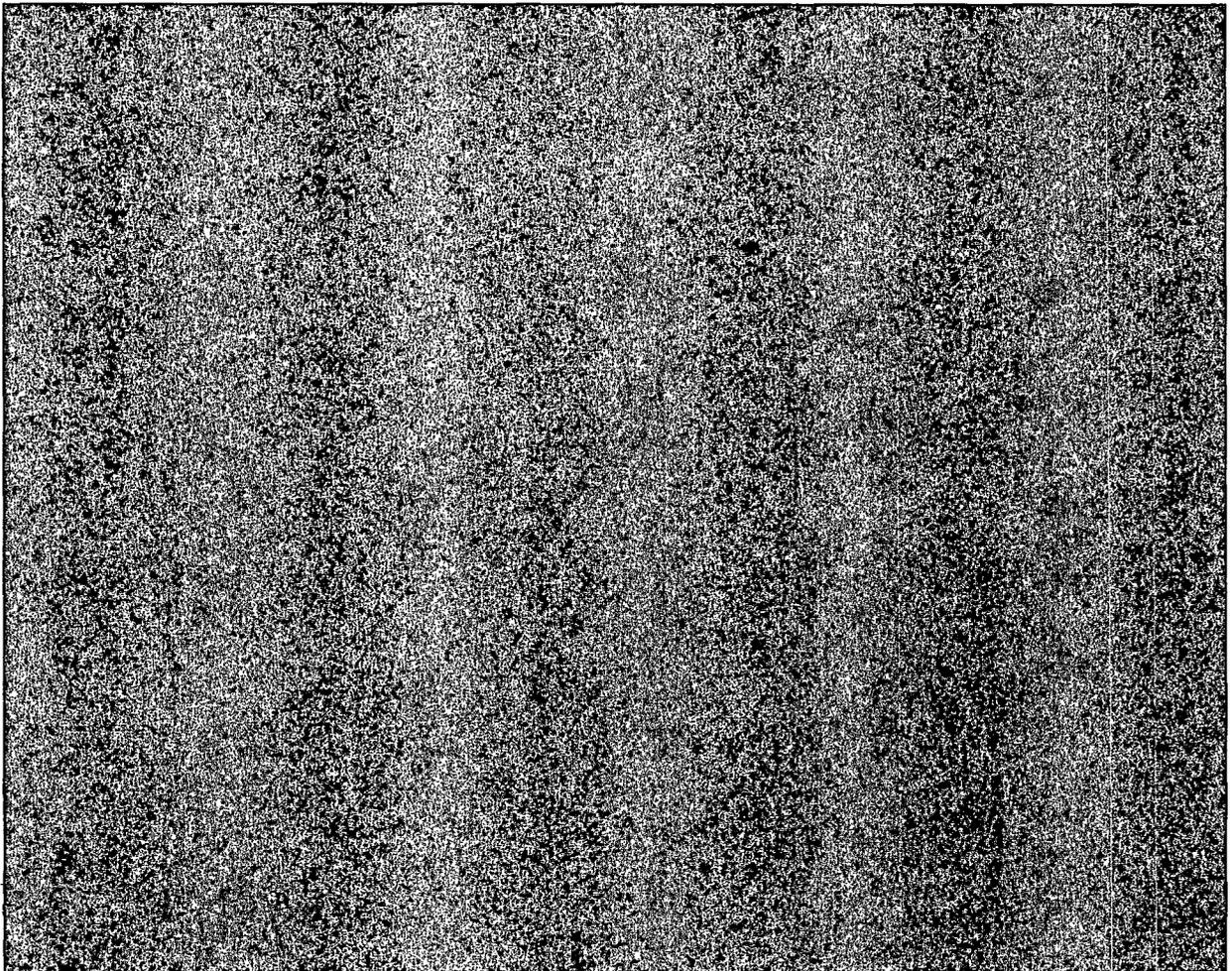
(5) **Who determines my eligibility?** The LEOFF plan administrator determines your eligibility for a catastrophic disability benefit. *The plan administrator will rely substantially on determinations that have been made by the Social Security Administration [SSA] unless there is information available that would produce a different determination.*

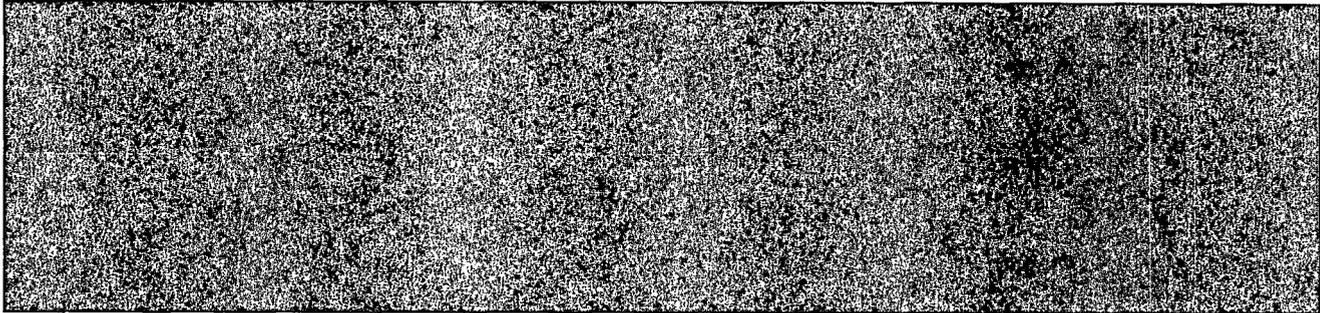
(Emphasis added.)





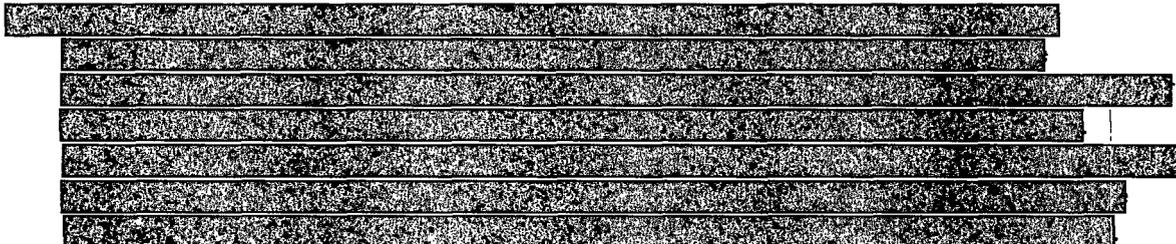
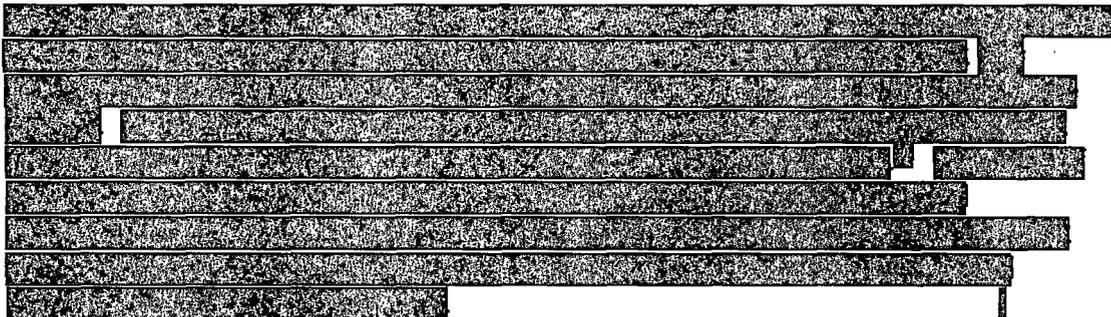
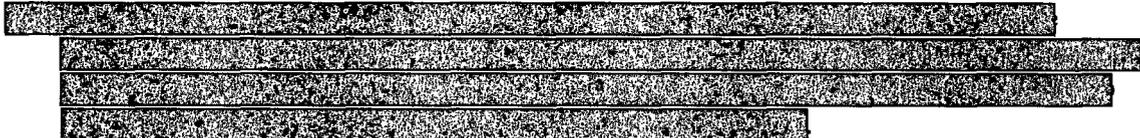
49. The labor market in Clallam and Jefferson counties has reported employment in classifications in which at least some jobs would require only sedentary to light physical activity, and for which Mr. Vorhies already has skills to perform the typical duties or has the capacity to quickly acquire them.

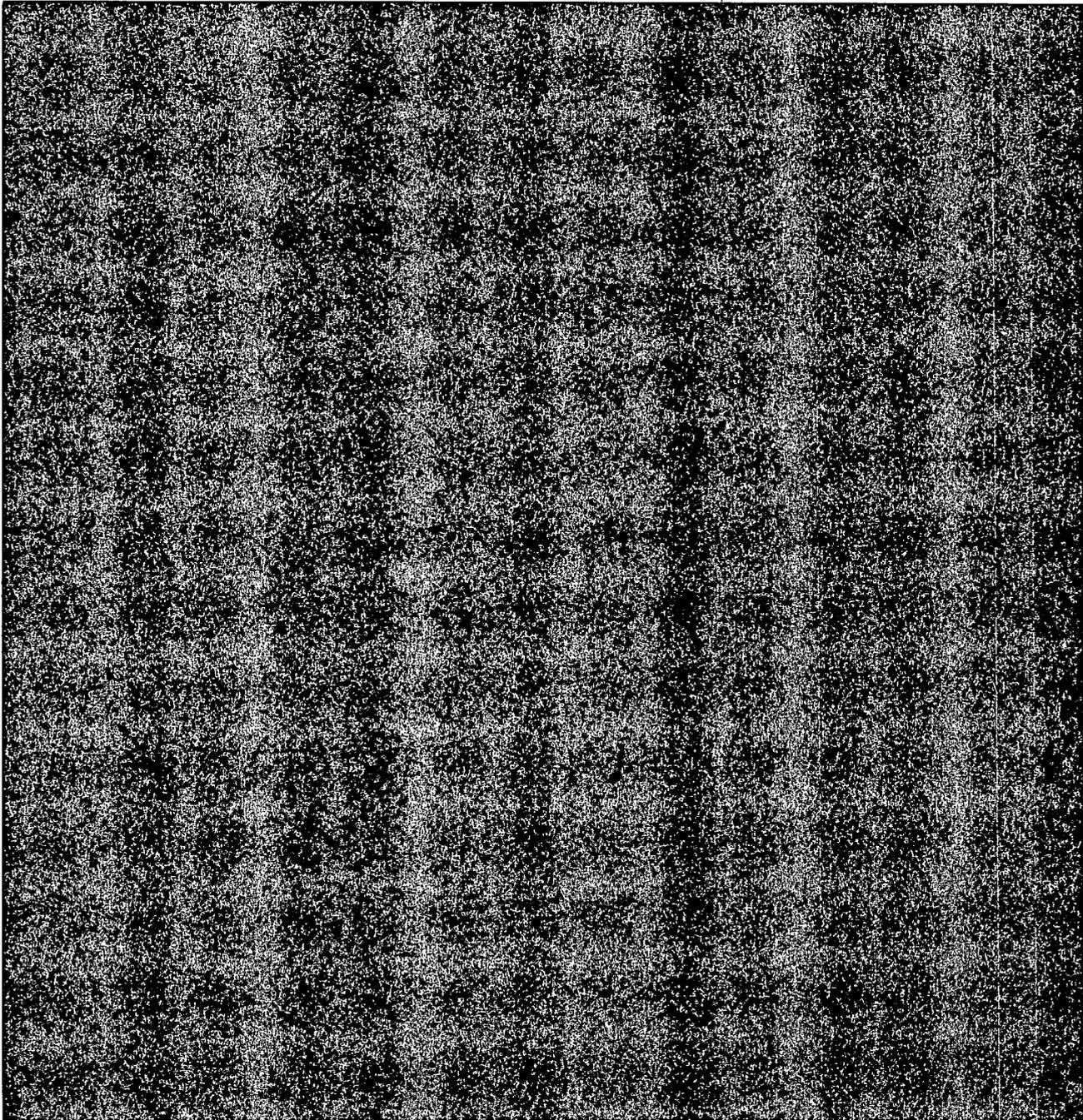




53. Mr. Vorhies has not proven that he cannot so engage. It would take just over 100 hours of work per month, or just under 24 hours per week, at the lowest wage appearing in Ms. Berndt's job classification list, \$10.18 per hour, to reach the \$1040 per month threshold. Alternately walking, standing and sitting, he has the physical capacity to engage in income-producing activity for less than five hours a day in a standard five-day work week, the most that would be required at the lowest wage.

There is no evidence that the job classifications listed by Ms. Berndt require more education that Mr. Vorhies has, and he is equipped to learn and perform the tasks generally expected within these classifications by virtue of his varied transferable skills. Mr. Vorhies' transferable skills make it quite plausible that he could earn compensation greater than \$10.18 per hour, in which case fewer hours of work would be needed to reach the threshold.





55. Second, Ms. Larson's testimony displayed a mistaken view of the eligibility requirements for LEOFF catastrophic disability. With few exceptions, she expressed the results of her research and her opinions in terms of employability for the purposes of vocational rehabilitation services for workers' compensation. LEOFF Plan 2 has always separately provided for workers' compensation coverage for its members, but the LEOFF duty and catastrophic disability provisions have neither directed use of workers' compensation law nor adopted its terminology.



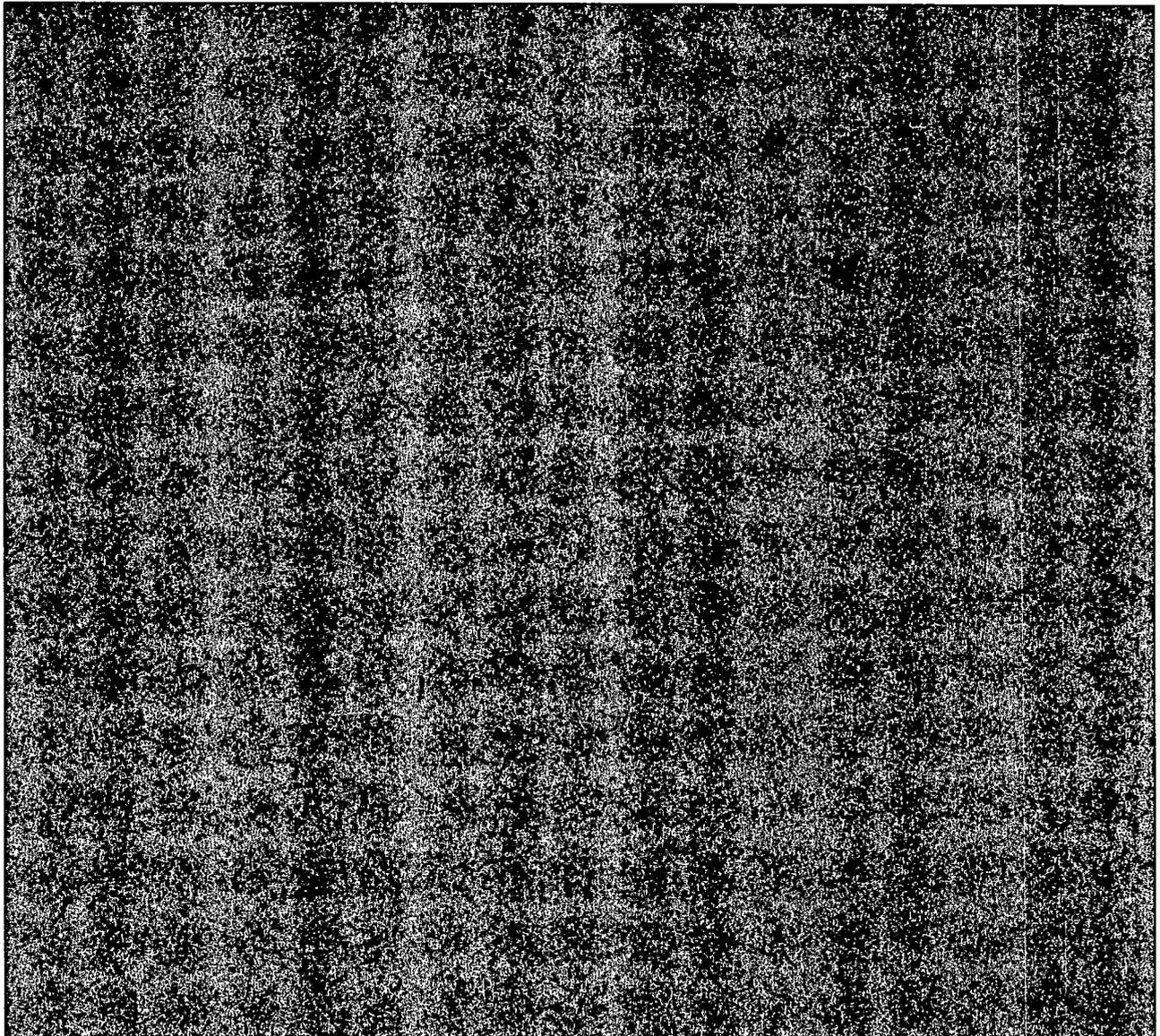
Where the authorizing statute subsection and the implementing rule show significant connections to a federal disability program rather than to workers' compensation, it is error to render opinions in terms defined and used in workers' compensation; those terms designate different concepts in another statutorily-authorized program. It is assumed here, for example, that when our state legislature chose to use the term "substantial gainful activity", it was intending to designate something other than "gainful employment" (or "substantial gainful employment") for workers' compensation, however closely these terms may resemble each other in common usage.⁵² Ms. Larson was able to identify and read into the record crucial terms of the catastrophic disability rule, but taken in total her testimony did not show that she recognized any significant differences between the provisions governing that benefit and the standards that govern her practice in vocational rehabilitation.

This confusion was most apparent where Ms. Larson opined on Mr. Vorhies' ability to be "competitive" in his labor market, or to "obtain" competitive employment. These are not express requirements for a catastrophic disability benefit, but appear to have been assumed or tacitly added by Ms. Larson to serve Mr. Vorhies' theory of the case. Under WAC 415-104-482(1)(c), the primary concern is with an applicant's ability to engage in income-producing activity; making that requirement so much more specific, tying it to an applicant's ability to obtain, or perform the essential functions of, a particular position or type of position, would alter the pertinent eligibility requirements as well as the burden of proof. The test does is not whether an applicant can obtain any specific kind of work, only whether he can engage in some kinds of work that are available in his labor market.

Another apparently unrecognized difference of concern was the inclusion of age as a factor in evaluating an applicant's ability to engage in substantial gainful activity. Ms. Larson twice expressed her opinion in response to questions that included Mr. Vorhies' age as a factor. A claimant's age may be a factor in Social Security disability⁵³ or in workers' compensation, but an applicant's age is not an eligibility factor in WAC 415-104-482(1).

[REDACTED]

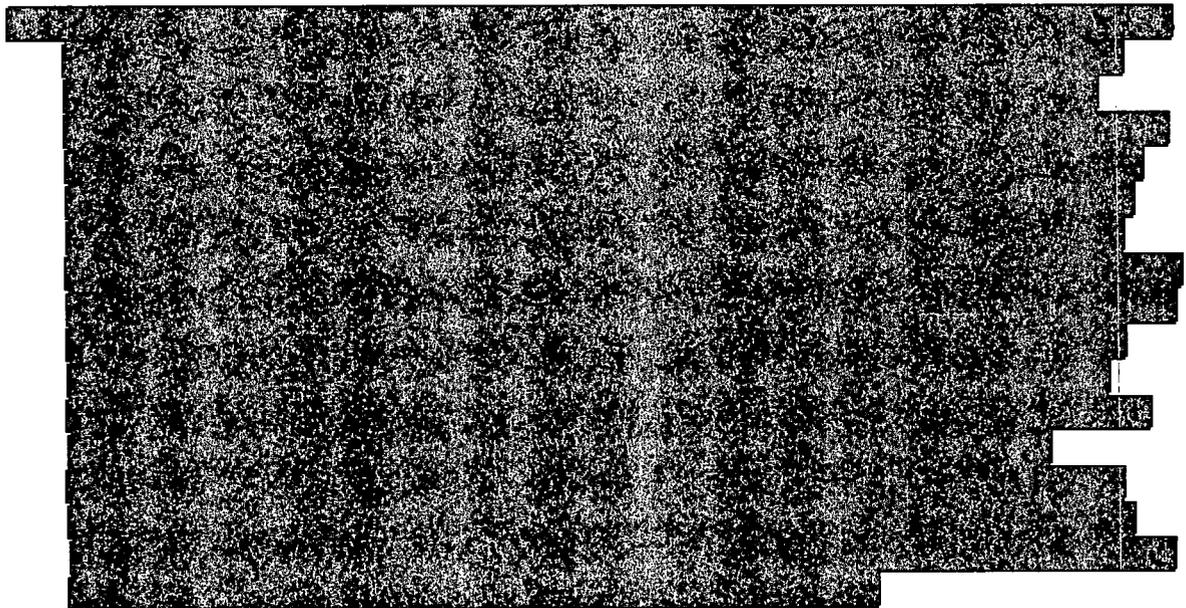
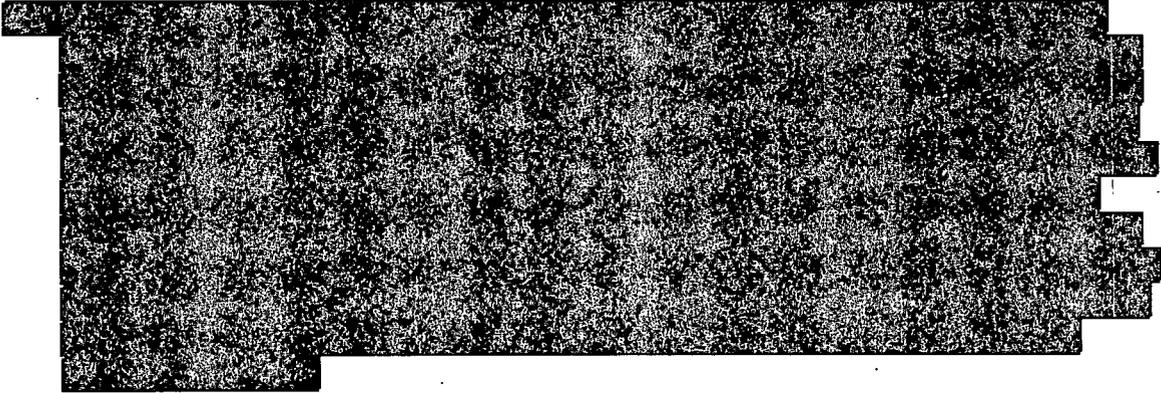
[REDACTED]

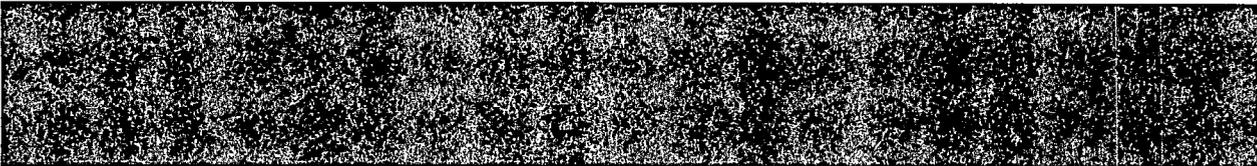


56. Third, Ms. Larson's treatment of Mr. Vorhies' physical abilities was too selective to merit great credit. Of course she was engaged to appear in this matter to help prove that Mr. Vorhies cannot engage in substantial gainful activity. However, the persuasiveness of her opinions suffered from an overly narrow focus. She viewed the standing, walking and neck flexion limitations in the PCE's as particularly significant, the neck flexion for clerical work and the standing and walking for many other job classifications listed in Ms. Berndt's report. Thus focusing on the more severe restrictions in the PCE activity tolerance profile as a bar to being hired or performing job functions, she did not effectively address what Mr. Vorhies *can* do,



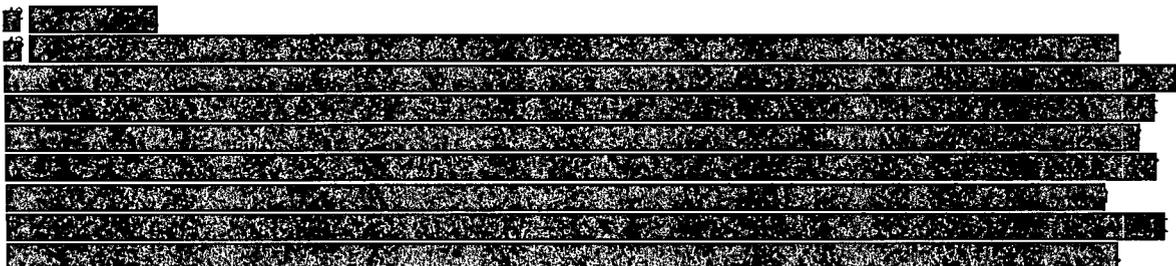
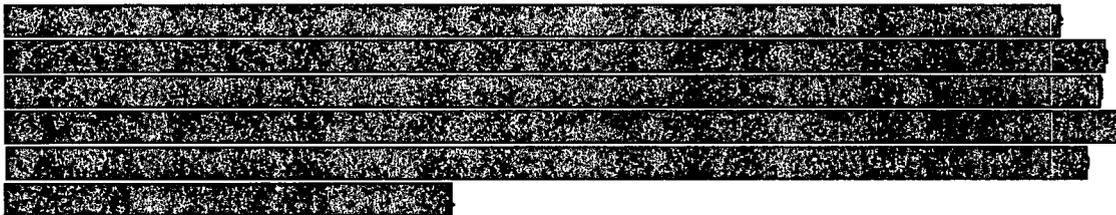
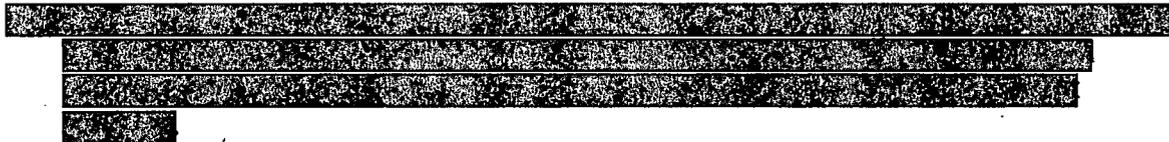
his capacities, where the profile identified areas in which his tolerances were better. She especially did not address the identified ability to alternately sit, stand and walk for three hours at a time, up to 7.5 hours per day, or the fact that Mr. Vorhies is much less restricted in the use of his right hand and arm, and is either right-hand dominant (PCE's) or ambidextrous with use of his right hand for fine-motor tasks (his own testimony). For example, she would limit Mr. Vorhies to a maximum of 2.5 hours per day as a retail greeter, apparently on the assumption that such a position could be performed only on one's feet. In determining whether an applicant meets the requirements of WAC 415-104-482(1), what he can do is as important as what he cannot do. Ms. Larson's opinions that Mr. Vorhies' physical limitations prevent him from obtaining or performing so many types of jobs lack force where it cannot be seen that she considered the full content of the PCE's. In much the same vein, she acknowledged that some employers provide accommodations such as ergonomic workstations, chairs, different keyboards and headsets, but avoided discussing possible accommodations.





32. Of the physical conditions apparent from the record, the "disability" for subsection (1)(c) is further limited to the effects of the condition(s) of Mr. Vorhies' cervical spine, without regard to GERD, headaches or condition(s) of his lumbar spine. GERD is disregarded because it was not mentioned in either Mr. Vorhies' application for LEOFF disability or Notice of Appeal, and Dr. Crim provided no information regarding it. GERD most concerns Mr. Vorhies in connection with the effects of narcotic pain medications, but there is no indication that Mr. Vorhies was taking narcotic pain medication at the time of the hearing, or that medication he testified to taking as prescribed for control of GERD is ineffective.

Headaches are disregarded as a condition separate from arm and neck pain for similar reasons. They were not mentioned in either Mr. Vorhies' application for LEOFF disability or Notice of Appeal. Headaches, which Mr. Vorhies described to Capen personnel as "migraines", appear in the 2011 and 2013 PCE's, reported in notes of follow-up telephone calls with Mr. Vorhies, and in his own testimony, as an effect of physical activity. However, the record contains no objective medical evidence concerning diagnosis, origin, frequency or severity of headaches, effects on Mr. Vorhies' functioning, or plan for treatment. Dr. Crim did not mention headaches in his testimony.



[REDACTED]

52. Mr. Vorhies is not employed and there is only slight evidence that he has income reportable as wages or self-employment income for federal income tax purposes. Thus he must prove that he *cannot engage in* substantial gainful activity, or activity that *would produce* average earnings of at least \$1040 per month, considering his education, transferable skills and work experience.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

NO. 48622-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES VORHIES,)	
)	DECLARATION OF SERVICE
Respondent,)	
)	
vs.)	
)	
DEPARTMENT OF RETIREMENT)	
SYSTEMS,)	
)	
Appellant.)	
_____)	

I, Julie Hatcher, hereby declare, under penalty of perjury, that on the 26th day of July, 2016, a true and correct copy of Brief of Respondent was mailed and emailed, to the following:

Anne Hall
Assistant Attorney General
P.O. Box 40123
Olympia, Washington 98504-0123
anneh@atg.wa.gov

Troy Klika
Assistant Attorney General
P.O. 40123
Olympia, Washington 98504-0123
troyk@atg.wa.gov

Dated this 27th day of July, 2016.


Julie Hatcher