No. 48622-9-11

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

JAMES VORHIES,

Petitioner

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Respondent

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

James Vorhies, Petitioner, asks this court to accept review of the Court of Appeals' Decision, dated July 5, 2017, designated in Part B of this petition.

B. COURT OF APPEALS' DECISION

The opinion of the Court of Appeals was filed on July 5, 2017. The Court of Appeals decision is a case of first impression. It considered RCW 41.26.470(9) which governs the grant of line-of-duty total disability benefits to members of the Law Enforcement Officers and Fire Fighters Retirement System, Plan 2 (LEOFF 2).[1] RCW 41.26.470(9) awards total disability benefits where a disabled member cannot "engage in substantial gainful activity." The Court of Appeals determined that considering whether a disabled LEOFF 2 member can actually obtain and maintain employment would improperly "import workers' compensation law into LEOFF." (Court of Appeals opinion, p. 13-1; Appendix A-13 through 17).

A copy of the decision is in the Appendix at pages A-1 through A-22.

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[1] LEOFF Plan 2 covers those law enforcement officers and fire fighters employed after October 1, 1977. RCW 41.26.030(22).

C. ISSUES PRESENTED FOR REVIEW

1. When making earning power determinations under RCW 41.26.470(9) is consideration of the ability to "obtain" employment as described in Leeper v. Department of Labor and Industries, 123 Wn.2d 803, 805-806, 872 P.2d 507 (1994), forbidden?

2. When making earning power determinations under RCW 41.26.470(9) is consideration of the ability to "maintain" employment, as described contained in Fochtman v. Department of Labor and Industries, 7 Wn.App 286, 298, 499 P.2d 255 (1972) forbidden?

3. Does a liberal construction of RCW 41.26.470(9)(b) authorize finding a LEOFF Plan 2 member capable of engaging in substantial gainful activity, even if the member cannot actually obtain or maintain gainful employment in the labor market?

4. Where chronic pain is the greatest limitation to a LEOFF 2 member's ability to engage in substantial gainful activity, is expert opinion, which specifically excludes consideration of pain, "substantial evidence" to support a conclusion that a member can

engage in substantial gainful activity pursuant to RCW 34.05.570(3)(e)?

5. In the absence of any proof of the existence of part time employment, is a conclusion that a member can engage in part-time employment supported by evidence that is substantial when viewed in light of the whole record within the meaning of RCW 34.05.570(3)(e)?

D. STATEMENT OF THE CASE

James Vorhies was a full-time law enforcement officer for the City of Sequim. (Administrative Record (AR) 2, Finding of Fact (FOF) 1). As such, he was a LEOFF 2 member. (AR 2, FOF 1).

He suffered on-duty injuries and on February 1, 2011, applied to the Department of Retirement Systems (DRS) for disability retirement benefits. (AR 2, FOF 3). DRS accepted his claim and approved his eligibility for line-of-duty disability retirement benefits, retroactive to January 1, 2011. (AR 8, FOF 3). However, DRS denied his application for total line-of-duty disability benefits, pursuant to RCW 41.26.470(9). (AR 2, FOF 3). DRS administratively reviewed its denial of total line-of-duty disability benefits to Mr. Vorhies and on October 3, 2012, his application was denied. (AR 2, FOF 4). He filed a Notice of Appeal with DRS. (AR 2, FOF 5). After hearings, DRS

entered the February 5, 2015 Final Order, which is at issue here. (AR 1-49).

Mr. Vorhies appealed the DRS order to the Thurston County Superior Court and the Superior Court reversed the decision of DRS (CP 200-201). DRS appealed. The Court of Appeals reversed the Superior Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. This case is one of first impression, regarding the construction of RCW 41.26.470(9). It potentially affects every LEOFF 2 law enforcement officer and firefighter in the State of Washington. This is an issue of substantial public interest which should be determined by the Supreme Court. If the Court of Appeals' decision stands, there will inevitably be first responders who will be denied benefits even though they cannot obtain or maintain employment. Review should be accepted. RAP 13.4(b)(4).

2. The Court of Appeals rejected consideration of whether a disabled LEOFF 2 member can obtain employment, in determining the degree of his or her loss of earning power. The Court rejected that consideration because it appears in Leeper v. Department of Labor and Industries, supra, which is a workers' compensation case. The Court of Appeals rejected the Leeper

analysis as precedent either directly or by analogy. Review should be accepted, pursuant to RAP 13.4(b)(1).

3. The Court of Appeals rejected consideration of whether a disabled law enforcement officer can maintain employment once hired, because that consideration was contained in Fochtman v. Department of Labor and Industries, supra, which is a workers' compensation case. The Court of Appeals rejected the Fochtman analysis as precedent either directly or by analogy. Review should be accepted, pursuant to RAP 13.4(b)(2).

4. The Court of Appeals did not apply liberal construction, to RCW 41.26.470(9), as is required by this Court's decision in Bowen v. Statewide Employees Retirement System, 72 Wn.2d 397, 433 P.2d 150 (1967). This presents an issue of substantial interest that should be determined by the Supreme Court. Review should be accepted pursuant to RAP 13.4(b)(1) and (4).

5. DRS makes Conclusions of Law about employability which ignore its own Findings of Fact. Are such conclusions supported by substantial evidence, pursuant to RCW 34.05.570(3)(e)? This is an issue of substantial public interest. Review should be accepted pursuant to RAP 13.4(b)(4).

1. Summary of Argument

This is a case of first impression construing RCW 41.26.470(9). DRS and the Court of Appeals rejected any consideration of whether Mr. Vorhies could obtain or maintain employment, in determining "...whether Mr. Vorhies was able to engage in substantial gainful activity earning more than $1,040.00 per month." RCW 41.26.470(9). Then,the Presiding Officer based the Final Order, denying benefits, upon the opinion of an expert who did not consider whether Mr. Vorhies could "obtain" employment; did not consider whether Mr. Vorhies could "maintain" employment; and rejected any consideration of Mr. Vorhies' pain.

DRS determined Mr. Vorhies could perform part-time employment in the absence of testimony that there were part-time jobs, in his labor market, that he could perform.

2. Argument

a. LEOFF 2 Disability is Measured by Earning Power

Most of our first responders, firefighters and law enforcement officers, are covered by the LEOFF Retirement System. Chapter 41.26 RCW. One of the stated purposes of Chapter 41.26 RCW is to ensure members are able ". . . to provide

for themselves and their dependents in case of disability . . ." RCW 41.26.020.

Mr. Vorhies has been granted line-of-duty disability benefits by DRS. (AR 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.[2]
> (Emphasis supplied)

Obviously, "substantial gainful activity" is defined in terms of earnings. One must be employed to earn.

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

[2] The entire statute is attached as Appendix 2.

enacted. Bowen v. State Wide City Employees Retirement System, supra.[3]

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.

RCW 41.26.470(9)(b) must be liberally construed. DRS regulations implementing that statute must, likewise, be liberally construed.

c. DRS Regulations Define Employment Terms, Not Physical Limitations

WAC 415-104-482(1) sets forth the five requirements for a catastrophic disability allowance.[4] The portion relevant to this case is 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

[3] 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)

[4] The entire WAC is attached as Appendix 3.

in any other kind of substantial gainful activity in the labor market; (Emphasis supplied).

WAC 415-04-482(13)(e) provides as follows:

(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. (Emphasis supplied).

The Final Order noted the close connection between two additional DRS rules and Department of Labor and Industries (DLI) rules as follows:

It is noted that two definitions, WAC 415-104-482(13)(c), 'labor market', and (13)(f), 'transferable skills', closely resemble definitions in chapter 296-19A WAC, which covers vocational rehabilitation services available through DLI, and could be derived from those workers' compensation regulations.

LEOFF	Workers' Compensation – Vocational Rehabilitation
WAC 415-104-482(13)(c) (2009)	WAC 296-19A-010(4) (2004)
(c) **Labor market** is the geographic area within reasonable commuting distance of where you were	(4) **What is an injured worker's labor market?** Generally, the worker's relevant labor market is the geographic area

last gainfully employed or where you currently live, whichever provides the greatest opportunity for gainful employment.	where the worker was last gainfully employed. The labor market must be within a reasonable commuting distance and be consistent with the industrially injured or ill worker's physical and mental capacities.
WAC 415-104-482(13)(f)	WAC 296-19A-010(7)
(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.	(7) **What is a transferable skill?** Transferable skills are any combination of learned or demonstrated behavior, education, training, work traits, and work-related skills that can be readily applied by the worker. They are skills that are interchangeable among different jobs and workplaces. Nonwork-related talents or skills that are both demonstrated and applicable may also be considered.

(AR 29, COL 16, footnote 34)[5]

[5] It is notable that Labor and Industries' definition of transferable skills specifically provides that "Nonwork-related talents or skills that are both demonstrated and applicable may also be considered." The LEOFF 2 rule does not contain this language. Ironically, the Final Order praises Ms. Berndt for "including skills acquired through activities other than paid employment" and criticizes Ms. Larson for apparently limiting her consideration to employment skills as required by the LEOFF 2 rule. (AR 46, Conclusion of Law (COL) 58)

All these rules make it obvious employment is not "gainful"[6] unless you can obtain it. Therefore, the fundamental object of both the workers' compensation system[7] and DRS' disability system is to provide total disability benefits to those who have lost earning power.[8]

The DRS Presiding Officer concluded that, since RCW 41.26.170(a) did not tie LEOFF 2 disability benefits to eligibility for or receipt of workers' compensation benefits, DRS is forbidden to consider workers' compensation cases, even by analogy.[9] (AR 28, COL 13 and 14).

d. Workers' Compensation Cases Can Provide Guidance Regarding Earning Power

In the workers' compensation context triers of fact frequently need to determine whether individuals are unable to

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[6] "Gainful" is defined as "Productive of (esp. financial) gain or profit; (of employment) paid, useful." 1 The New Shorter Oxford English Dictionary, 1051 (1993 ed.)

[7] Hubbard v. Department of Labor and Industries, 140 Wn.2d 35, 992 P.2d 1002 (2000); Franks v. Department of Labor and Industries, 35 Wn.2d 763, 215 P.2d 416 (1950) RCW 41.26.

[8] RCW 41.26.020 and RCW 41.26.470(9).

[9] This position would require rejecting other rules, not mentioned in Chapter 41.26 RCW, such as proximate cause. See, Shaw v. Department of Retirement Systems, 193 Wn.App 122, 371 P.3d 106 (2016) where the Court rejected the Presiding Officer's determination that employment must be the sole cause of disability. The court relied on Dillon v. Seattle Police Pension Bd, 82 Wn.App 168, 172-173, 916 P.2d 956 (1996) which quoted Dennis v. Department of Labor and Industries, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987).

perform any work at any gainful occupation." RCW 51.08.160. (Emphasis supplied).

Just like workers' compensation, WAC 415-104-482(1)(c) requires consideration of a disabled LEOFF 2 member's "transferable skills, and labor market" to determine whether the member can engage in gainful activity. WAC 415-104-482(13)(c) and (f).

In Leeper v. Department of Labor and Industries, supra, the Supreme 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.[10] (First emphasis in original,

[10] It is important to remember the labor market is competitive and disabled LEOFF members are competing for jobs with others who may not have the same physical or vocational limitations.

second emphasis supplied) Leeper, supra, page 818.

In Fochtman, supra, 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. (Emphasis supplied) Fochtman, supra, page 298.

LEOFF 2 "substantial gainful activity" is activity that produces average earnings, in excess of $1,040.00 per month. (AR 25, COL 8, Footnote 29). Only jobs which Mr. Vorhies can actually obtain and maintain are gainful and will produce earnings. However, the Presiding Officer and Court of Appeals rejected this well established body of workers' compensation law and determined that the ability to "obtain" and "perform" employment is meaningless. (AR 44, COL 55).

e. The Vocational Testimony Was Weighed Using An Erroneous Legal Interpretation

At the DRS hearing:

> Both parties presented testimony of vocational experts, Karin Larson in support of Mr. Vorhies' application and Barbara Berndt in support of the

Department's position. Both acknowledged that this appeal was the first time they had worked with LEOFF disability benefits. (AR 16, FOF 58).

Ms. Larson testified Mr. Vorhies "could not be expected to obtain and maintain employment, either full-time or part-time, and thus could not earn pay of $1040.00 per month or more." (Emphasis supplied). (AR 16, FOF 59).

Ms. Berndt testified that:

> . . . Mr. Vorhies is physically able to work nearly full-time in occupations with sedentary to light physical demands; jobs exist in his labor market at these physical demand levels and are generally available for someone willing to search for them; the types of jobs she identified would individually or in combination produce monthly earnings of at least $1040. . . (AR 19, FOF 64).

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:

> 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).

The Presiding Officer did not find that Ms. Berndt was more credible than Ms. Larson. Rather, the Presiding Officer rejected Ms. Larson's opinion because Ms. Larson was: "confused as to the legal standard applicable." As the Final Order described it:

> 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). (AR 45, COL 55).

Were it not for this fundamental mistaken view of the law, Ms. Larson's opinion would have been accepted and Ms. Berndt's would have been rejected.

f. The Final Order's Conclusions of Law Are Not Supported By Substantial Evidence Nor Consistent With DRS Rules

"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).

RCW 34.05.570(3) reads, in relevant portions, 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;

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 DRS' own rules.

g. The Final Order Finds Mr. Vorhies Has Constant Pain, But Does Not Take It Into Consideration

The Final Order finds that:

> 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; an 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. (AR 12, FOF 41).

Pain and its secondary effects are Mr. Vorhies' "disability." As the Final Order concludes:

> 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). (AR 40, COL 41).

Ms. Berndt, whose employability opinions were adopted: ". . . did not give any independent consideration to the effects of Mr. Vorhies' reported pain." (AR 22, FOF 67). Ms. Berndt also testified that her opinion did not include any decision about what condition was limiting Mr. Vorhies' activity. (Hearing Transcript p. 239, l. 7-11).

The Court of Appeals notes, about Ms. Berndt, that "she explained pain was not quantifiable and that an assessment of pain would determine whether a person could work." (Emphasis supplied). (Court of Appeals Dec p. 6). (Appendix 1, p. 6). Yet, in this case, Ms. Berndt did not assess or consider Mr. Vorhies' pain.

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 the situation, here. Ms. Berndt ignored pain which is the LEOFF disability.

h. There Is No Evidence There Are Part-Time Jobs Mr. Vorhies Can Perform

The Presiding Officer 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). (AR 53, COL 53).

There was no finding Mr. Vorhies could work eight hours a day. Ms. Berndt was asked about all of the jobs she identified and she testified:

> Q: How many of these jobs are part-time?
>
> A: That information wasn't available.
>
> Q: That would be true of all these categories you've listed, wouldn't that be correct?
>
> A: It could be. It could be that they're all full-time as well.
> (Hearing Transcript Day 2, p. 235, l. 4-9).

The Court of Appeals found Ms. Berndt's testimony was that "the jobs she identified would produce monthly earnings of at least $1,040 per month, at 15-30 work hours per week, depending on the rate of compensation" (Appendix 1, p.6). However, there is no evidence "15-30 hours a week" jobs exist.

F. CONCLUSION

The Court of Appeals improperly rejected the analysis of Leeper and Fochtman. The legal standards adopted by the Presiding Officer are not consistent with RCW 41.26.470 and WAC 415-104-482, as liberally construed. Using the wrong legal

standard led the Presiding Officer to reject persuasive evidence and adopt speculation. DRS' Conclusions of Law are inconsistent with the Findings of Fact. Review should be accepted to reverse the errors discussed. We ask this Court to affirm the Superior Court Order which reversed of the DRS Final Order.

Respectfully submitted this 1st day of August, 2017.

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CERTIFICATE OF MAILING:

I, Julie Hatcher, hereby certify, under penalty of perjury, that on the 1st day of August, 2017, I mailed a copy of Petitioner's Petition for Review, to the following:

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APPENDIX 1

Filed
Washington State
Court of Appeals
Division Two

July 5, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JAMES VORHIES, Respondent, v. DEPARTMENT OF RETIREMENT SYSTEMS OF THE STATE OF WASHINGTON, Appellant.	No. 48622-9-II PUBLISHED OPINION

MELNICK, J. — The Department of Retirement Systems (DRS) appeals the superior court's reversal of DRS's final order which denied James Vorhies's claim for catastrophic disability retirement benefits. It also appeals the superior court's award of attorney fees and costs.

We conclude that DRS did not erroneously decline to apply workers' compensation law in its determination, apply an incorrect standard of proof, decline to consider headaches, and require Vorhies to show that prospective employers would not provide workplace accommodations for his disability. Because Vorhies is not the prevailing party in this appeal, we decline to award attorney fees. We affirm DRS's final order and, therefore, reverse the superior court.

FACTS

In 2004, the City of Sequim hired Vorhies as a full-time law enforcement officer. Vorhies became a member of the Washington State Law Enforcement Officers' and Firefighters' Retirement System (LEOFF) Plan 2. After suffering injuries during officer training and while on

duty, and undergoing two surgeries to relieve pain, Vorhies resigned as a law enforcement officer from the City of Sequim in December 2010.

Vorhies applied for workers' compensation benefits. The Department of Labor and Industries (L&I) accepted his claim for medical care and time loss for lumbar (back) strain and later closed his claim. In January 2011, Vorhies applied for Social Security Disability (SSD) benefits. The Social Security Administration (SSA) denied his application, denied it on reconsideration, and denied it again after a hearing on appeal.

In February 2011, Vorhies applied to DRS for disability retirement. DRS accepted Vorhies's cervical spine (neck) injury as the basis for his application and approved his eligibility for line-of-duty or "duty" disability retirement benefits, effective retroactive to January 1, 2011. Administrative Record (AR) at 8. DRS denied his application for the enhanced benefit of total line-of-duty or "catastrophic" disability benefits. AR at 2.

DRS reconsidered Vorhies's application for catastrophic disability benefits, but denied it. Vorhies petitioned DRS for administrative review of the denial, and in October 2012, his application was again denied. He subsequently filed a notice of appeal to DRS.

During a three-day hearing, Vorhies; two vocational experts, Karin Larson and Barbara Berndt; and Vorhies's primary care physician, Dr. Michael Crim, testified. In February 2015, DRS entered a final order denying Vorhies catastrophic disability retirement benefits. The findings of fact in the final order are summarized as follows.

Vorhies earned his GED (General Educational Development) in California and worked for a period of time as a laborer in residential construction. He started his own subcontracting painting business. Upon moving to Washington, he and his father started their own successful painting

business. Vorhies learned to use a software program to manage the bookkeeping. Also, he restored cars and motorcycles as a hobby.

When the painting business was slow, Vorhies drove trucks used for refueling and refilling pesticide tanks for helicopters. Vorhies taught himself how to repair and maintain helicopter engines and rotor blades. He also learned basic flying skills. Vorhies always had an aptitude for "figuring [things] out." AR at 4. In addition to running a painting business, Vorhies and his father became licensed nuisance wildlife control operators and trapped animals as a paid service. Vorhies developed two new types of traps and applied for patents. He sold his rights to one of the traps while the patent was pending. The patent for the second trap was still pending at the time of the DRS hearing.

In 2004, Crim conducted a medical exam on Vorhies and assessed him as being in "really good shape." AR at 5. Two years later, Vorhies saw Crim for neck and arm pain which Vorhies traced back to an unreported injury during basic law enforcement training. Vorhies developed radiculopathy and, in 2008, had an anterior cervical discectomy and a spinal fusion.

Later in 2008, Vorhies had a car accident while on duty. He reported to Crim that he continued to have moderate to severe neck pain that interfered with his sleep. However, a post-operative exam showed progress with the cervical fusion and showed no signs of damage to the fusion site. Vorhies took pain medication as needed, received massage therapy, and anticipated starting physical therapy.

Vorhies continued to experience neck pain. In 2009, he received steroid injections, and ultimately underwent a second neck surgery. Vorhies returned to work, but on light duty. In September 2010, Vorhies's neck pain worsened and he took extended medical leave. Crim would not approve Vorhies's return to law enforcement duty and another physician from whom Vorhies

sought a second opinion agreed. Crim notified the City of Sequim that Vorhies's condition appeared to be a permanent disability, and Vorhies could not be released back to work without extreme restrictions due to the condition of his spine. Vorhies resigned from the police force approximately one month later.

As part of Vorhies's application for LEOFF disability retirement, Crim submitted a medical report to DRS, and in a progress note, opined that Vorhies was "100% disabled from his current job" and that changing jobs due to his neck injury and ongoing pain issues was the best alternative. AR at 8. While DRS approved Vorhies's application for LEOFF line-of-duty disability, it stated that Vorhies was "not disabled for all employment, but only for continued employment as a police officer." AR at 8. DRS denied catastrophic disability benefits.

In 2011, Crim opined in another progress note that a formal psychological evaluation conducted on Vorhies confirmed the "absence of any untoward psychopathology." AR at 9. Vorhies received a physical capacities evaluation (PCE)[1] in 2011 and again in 2013. The two evaluations did not differ greatly. The 2011 report noted that sometime after the evaluation, Vorhies described having a severe migraine headache which increased his neck pain and affected his sleep. Crim provided no testimony regarding headaches.

According to the PCEs, Vorhies was able to alternately sit, stand, and walk 6.5-7.5 hours for 3 hours at a time; alternately stand and walk 30 minutes at a time for up to 2.5 hours; walk 20 minutes at a time for up to 1.3 hours intermittently; stand 15 minutes at a time for up to 1.5 hours intermittently; and sit 1.5 hours at a time for up to 5 hours intermittently. He could kneel occasionally, crouch frequently, bend or stoop, climb stairs and turn his back, but he could seldom turn his neck. Based on the results of the PCEs, Vorhies could not perform a full range of light

[1] The PCEs measured Vorhies's activity tolerance and his ability to perform basic activities.

duties, but was expected to perform light duties at somewhat reduced levels. Crim also believed Vorhies could perform some type of "very limited" work. AR at 12.

At the time of the hearing, Vorhies could do light housekeeping and take care of himself without assistance. He watched television most of his waking hours, and walked once or twice a short distance to his parents' house. He could drive and mow the lawn, though he could only drive the lawnmower one hour per day. Vorhies could type slowly, send e-mails, search the Internet, and use Microsoft Word and Excel. Vorhies had confidence he could learn to use computer programs if he had time to study the instructions. Vorhies had no trouble following instruction, but doubted his ability to multitask.

Also at the time of the hearing, Vorhies had not looked for any paid employment since his retirement. He believed he could not be employed because his work experience involved jobs requiring physical labor and no workplace would accept the pace at which he worked. Vorhies took five prescribed medications for nerve pain, blood pressure, and sleep. His neck and shoulder pain interfered with his sleep, and when the pain radiated into his neck after extended activity, he had headaches. He perceived his pain symptoms to be worsening.

Neither Larson nor Berndt had previously worked with LEOFF disability retirement benefits. Larson opined that Vorhies would not be able to obtain competitive gainful employment in the Sequim-Port Angeles area because of his physical restrictions and limited transferable skills obtained from his work experience. She did not identify jobs in the labor market that Vorhies could obtain; instead, she testified to a number of jobs he could not obtain. Larson testified that Vorhies could not compete in the labor market and could not obtain and maintain either full- or part-time employment. She also opined that Vorhies could not earn pay of $1,040 per month or

more—the minimum monthly earnings to disqualify him from receiving LEOFF catastrophic disability benefits.[2]

Berndt opined that Vorhies had transferrable skills and abilities that could be applied to a list of occupations she researched using the Department of Employment Security's database. She did not independently consider the effects of Vorhies's reported pain, but stated that she would take into account a medical judgment that pain interfered with Vorhies's ability to work. She explained that pain was not quantifiable and that an assessment of the pain would determine whether a person could work. The assessment would also determine whether treatment could assist the person.

Berndt further opined that Vorhies's varied work history and skills demonstrated that he was a "creative individual who can reinvent himself into various occupations." AR at 22. Although she could not distinguish the listed occupations between full-time and part-time work, she said that based on the medical opinions, Vorhies could resume full-time work or near full-time work. She acknowledged that Vorhies had limitations, but that he was not "totally work-disabled" for light or sedentary occupations, and that he possessed the skills and physical abilities to earn the threshold earning capacity. AR at 19.

Berndt stated that jobs that met Vorhies's physical abilities existed in Vorhies's labor market and were generally available if he was willing to search for them. The jobs she identified would produce monthly earnings of at least $1,040 per month, at 15-30 work hours per week, depending on the rate of compensation.

[2] WAC 415-104-482(1)(c), (13)(d).

The conclusions of law in the final order stated, in relevant part:

> 11 . . . Appellant . . . urg[es] [DRS] 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[s] and agency rule provisions governing the LEOFF Plan 2 catastrophic disability benefit.
>
> . . . .
>
> 53 . . . 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. . . . [H]e is equipped to learn and perform the tasks generally expected within these [jobs] by virtue of his varied transferable skills. [His] 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 . . . 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. . . . The test . . . 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.
>
> . . . .
>
> 58 . . . Berndt's report and testimony are given greater credit as the undersigned finds them more appropriate to the catastrophic disability rule and more reliable.

AR at 27, 44-46.

Vorhies filed a petition for review of DRS's final order with Thurston County Superior Court. The superior court entered a written order, reversing DRS's final order.

The superior court also awarded Vorhies attorney fees and costs. The court stated that it considered the parties' arguments from a legal standpoint and believed Vorhies argued a "good faith position . . . consistent[ly] throughout." RP (Feb. 19, 2016) at 8.

DRS appeals the superior court's order.

ANALYSIS

I. Standard of Review

We review a final agency order under RCW 34.05.570(3). In reviewing an administrative action, we sit in the same position as the trial court and apply the Administrative Procedure Act (APA) standards directly to the agency's administrative record. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The party challenging an agency's action must prove the decision's invalidity, and our review is limited to the record before the agency. *Tucker v. Dep't of Ret. Sys.*, 127 Wn. App. 700, 705, 113 P.3d 4 (2005); RCW 34.05.570(1)(a), .558. Relief may be granted based on an agency's erroneous interpretation or application of the law. RCW 34.05.570(3)(d).

We review a challenge to an agency's statutory interpretation and legal conclusions de novo. *Tucker*, 127 Wn. App. at 705. We give "great weight to an agency's interpretation of the laws it administers, and an agency charged with the administration and enforcement of a statute may interpret ambiguities within the statutory language through the rule making process." *Shaw v. Dep't of Ret. Sys.*, 193 Wn. App. 122, 133, 371 P.3d 106 (2016). Although we give substantial weight to an agency's interpretation of the law it administers, the agency's interpretation is not binding. *City of Pasco v. Dep't of Ret. Sys.*, 110 Wn. App. 582, 587, 42 P.3d 992 (2002).

We evaluate a statute's plain language to determine legislative intent. *Tucker*, 127 Wn. App. at 705. We examine the statute as a whole and our statutory interpretation must not create an absurd result. *Tucker*, 127 Wn. App. at 705-06. Given the remedial nature of pension statutes, we liberally construe statutory ambiguities in favor of the intended beneficiary. *Morrison v. Dep't of Ret. Sys.*, 67 Wn. App. 419, 427, 835 P.2d 1044 (1992).

II. Legal Principles

Chapter 41.26 RCW provides a system for the payment of death, disability, and retirement benefits to law enforcement officers and firefighters and their beneficiaries. RCW 41.26.020. The statute provides for retirement benefits for LEOFF Plan 2 members who become "totally disabled" in the line of duty:

> 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.

RCW 41.26.470(9)(b).

These qualifying members are entitled to receive a retirement allowance equal to 70 percent of their final average salary. RCW 41.26.470(9). This allowance is offset by any wage-replacement or disability benefits provided through workers' compensation and SSD benefits. RCW 41.26.470(9)(a), (b).

As part of its implementation of chapter 41.26 RCW, DRS adopted administrative rules governing the administration of the LEOFF system. *See* WAC 415-104-015. Under the administrative rules, LEOFF Plan 2 members may be eligible for catastrophic disability retirement benefits as authorized by RCW 41.26.470(9):

> (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 . . .;
>
> (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.

WAC 415-104-482(1).

In determining whether a member is eligible for catastrophic disability, DRS considers information submitted by the applicant, his or her physician and employer, plus other information available to DRS, including medical information, L&I, and SSA determinations. WAC 415-104-482(4). The LEOFF plan administrator determines an applicant's eligibility for catastrophic disability benefit and the rule directs DRS to "rely substantially" on SSA determinations. WAC 415-104-482(5). The rule also provides:

> (13) **Definitions.** As used in this section:
> . . . .
> (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.
> (d) **Substantial gainful activity** means any activity that produces average earnings . . . 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.[3] 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.
> (e) **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.

WAC 415-104-482(13).

Whether Vorhies's disability renders him unable to perform or engage in any substantial gainful activity in the labor market within the meaning of RCW 41.26.470(9) and WAC 415-104-482(1)(c) forms the center of the dispute in this case.

III. Interpretation & Application of the Law

Vorhies argues that DRS's final order was not supported by substantial evidence when viewed in light of the whole record. Findings of fact are reviewed for substantial evidence.

[3] The parties agree that the amount of earnings to determine "substantial gainful activity" applicable in this case is $1,040 per month. AR at 43.

Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 352, 172 P.3d 688 (2007). However, Vorhies assigns error to none of DRS' findings of fact. Because unchallenged DRS's factual findings are considered verities on appeal, *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015), Vorhies's substantial evidence challenge fails. We limit our review to whether the conclusions of law flow from the unchallenged factual findings. *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 21, 277 P.3d 685 (2012).

Vorhies also seems to challenge DRS's credibility determination regarding the vocational experts. However, we do not review credibility determinations. *Scheeler v. Dep't of Emp't. Sec.*, 122 Wn. App. 484, 490-91, 93 P.3d 965 (2004). We limit our review to Vorhies's overarching argument that, pursuant to RCW 34.05.570(3)(d) and (h), DRS erroneously interpreted or applied the law and the final order was inconsistent with agency rules.

A. Workers' Compensation Law is Not Directly Applicable

Vorhies argues that DRS erred when it refused to apply workers' compensation law to its catastrophic disability determination. We disagree.

When interpreting a statute, we first look to its plain language. *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). If the statutory language is plain and unambiguous, the statute's meaning is derived from the wording itself. *HomeStreet*, 166 Wn.2d at 451.

LEOFF is administrated by DRS. RCW 41.50.055. DRS adopted administrative rules to implement three different disability benefits authorized by RCW 41.26.470: (1) non-duty disability retirement; (2) line-of-duty disability retirement; and (3) catastrophic duty disability retirement. *See* WAC 415-104-485, -480, -482.

In contrast, the workers' compensation program is administered by L&I under title 51 RCW. It generally provides benefits for workers whose ability to maintain their covered employment has been affected by work-related injuries or diseases.

LEOFF Plan 2 members are also covered by parts of the workers' compensation program. RCW 41.26.480. There are only two references to workers' compensation under LEOFF. RCW 41.26.470(2) addresses the condition for cancelling a disability retirement benefit if the retiree is no longer entitled to benefits under workers' compensation. RCW 41.26.470(9) provides that the amount of catastrophic disability benefit shall be offset by temporary disability wage replacement benefits or permanent total disability benefits the retiree also receives under workers' compensation. Neither of these references directs LEOFF plan administrators to apply workers' compensation law in their disability retirement determinations. And the legislature has not created any other connection between workers' compensation and LEOFF in the LEOFF statute. *See* RCW 41.26.470.

The LEOFF statute for catastrophic disability and its implementing rule are unambiguous. RCW 41.26.470(9)(b); WAC 415-104-482. The test is whether the member can "engage in" any substantial gainful activity, not whether a member can perform or "obtain" gainful employment. WAC 415-104-482(1)(c). The meaning of "engage" is unambiguous and plain on its face. Vorhies argues that the LEOFF standard should be based on his ability to obtain employment, but this is a different standard applied to the determination of a different type of benefit under workers' compensation law. That an eligibility determination is based on the applicant's ability to obtain employment appears nowhere in the LEOFF rules for catastrophic benefit determinations.

The LEOFF rules seem to recognize L&I's separate responsibility for work-related injury and disease claims by advising LEOFF disability retirement applicants that DRS "consider[s]"

determinations made by L&I.[4] However, the rules do not direct how DRS is to use the information, nor do they direct DRS to use the information at all. Specifically, regarding the determination for catastrophic benefits, workers' compensation is only referenced by advising applicants that DRS "consider[s]" L&I determinations, and that catastrophic benefits are offset by other disability benefits, including workers' compensation and SSD. WAC 415-104-482(4)(b), (8).

The definitions of LEOFF terms "[l]abor market" and "[t]ransferable skills," WAC 415-104-482(13), closely resemble workers' compensation terms defined in L&I regulations for vocational rehabilitation. *See* WAC 296-19A-010(4). However, there is no indication that the LEOFF rule for catastrophic disability retirement simply adopted L&I language, nor does it reference L&I rules.

In support of his argument that the two statutory schemes are connected, Vorhies points out that workers' compensation law defines "'permanent total disability'" as a "'condition permanently incapacitating the worker from performing any work at any gainful occupation.'" Resp't's Br. at 13 (quoting RCW 51.08.160). He cites to *Leeper v. Department of Labor & Industries*, a workers' compensation case which held that evidence of a worker's inability to obtain employment was relevant to determining if an injury left a worker permanently and totally disabled. 123 Wn.2d 803, 805-06, 872 P.2d 507 (1994). There, the court reasoned that availability of jobs in the labor market does not imply that the worker can obtain such a job because it disregards potential vocational evidence unique to the worker. *Leeper*, 123 Wn.2d at 818.

Vorhies also cites to *Fochtman v. Department of Labor & Industries*, another workers' compensation case where the court held that total disability may be established by expert testimony as to whether the worker is able to "maintain gainful employment" in the labor market. 7 Wn.

[4] WAC 415-104-482(4)(b); WAC 415-104-480(5)(a); WAC 415-104-485(5)(a).

App. 286, 298, 499 P.2d 255 (1972). He further cites to our recent opinion in *Shaw v. Department of Retirement Systems*, which discussed LEOFF duty disability retirement determinations. 193 Wn. App. at 130. *Shaw* held that a worker was required to prove that his mental disease arose naturally and proximately from his employment for purposes of determining whether the workers' disability was incurred in the line of duty. 193 Wn. App. at 130-33.

These cases, however, interpret workers' compensation law or address LEOFF benefits not at issue in this case. DRS need not rely on worker's compensation law in making its determination in this case.

Vorhies further asserts that because "substantial gainful activity" means any activity producing average earnings in excess of $1,040 per month, we should only consider jobs in which Vorhies can actually obtain and, thus, produce earnings. Resp't's Br. at 15. He equates the LEOFF language, "engage in" substantial gainful activity with workers' compensation language, "obtain gainful employment."

However, the test under the LEOFF rules is whether his disability is "so severe" that he "cannot engage in any other kind of substantial gainful activity in the labor market." WAC 415-104-482(1)(c). Whether Vorhies is or is not employed, or whether he has tried nor not tried to obtain employment, is not determinative for catastrophic disability retirement benefits.

There are some similarities in language between the two statutory schemes, and LEOFF makes limited reference to workers' compensation in its statutes and rules. However, workers' compensation is a unique statutory scheme where the type of benefits differ and the eligibility for benefits is analyzed differently. LEOFF authorizes catastrophic disability retirement benefits on its own terms, independent of benefits available through workers' compensation. The two statutory schemes maintain separate identities unless expressly stated in the statutes. *See Taylor*

v. City of Redmond, 89 Wn.2d 315, 318-20, 571 P.2d 1388 (1977). By its express terms, LEOFF statutes and rules do not require DRS to apply workers' compensation law when determining eligibility for catastrophic disability retirement benefits.

For these reasons, we decline to import workers' compensation law into the LEOFF statutory scheme for catastrophic disability benefits, and to redefine DRS's explicit standards. Because workers' compensation law does not apply to LEOFF catastrophic disability determinations, and because the LEOFF statute and rule are plain on their face, we conclude that DRS did not erroneously apply or interpret the law.

B. Standard of Proof

Vorhies next argues that DRS's final order erroneously contained the incorrect standard of proof when it concluded that his "'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.'" Resp't's Br. at 41 (quoting AR at 44)[5]. We disagree.

A LOEFF retiree challenging a DRS decision bears the burden of proof to show that the decision is invalid. RCW 34.05.570(1)(a); WAC 415-08-420(2). Pursuant to WAC 415-04-035, the retiree "must provide sufficient information to outweigh the information that the plan administrator used in making the administrative determination that is being reviewed."[6] Vorhies misunderstands the standard of proof and misinterprets the final order.

[5] Vorhies incorrectly cites to conclusion of law 52. The correct conclusion of law is 53, to which he properly assigned error.

[6] This standard appears to be the same as the "preponderance of the evidence" standard, which requires that the "evidence establish the proposition at issue is more probably true than not true." *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005).

A closer review of DRS's conclusion of law 53 in its entirety shows that DRS employed the correct standard of proof:

> *It would take . . . 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.*

AR at 44 (emphasis added). Only after this conclusion does the final order state: "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." AR at 44 (emphasis added).

The final order clearly concludes that Vorhies had the skills and education to reach the $1,040 per month threshold if he worked at the lowest wage for five hours per day in a standard five-day work week. The relevant analysis and conclusion ends there. The subsequent statement that it is plausible that Vorhies could earn compensation *greater* than the lowest wage is not the central thrust of this conclusion. We, therefore, conclude that DRS's final order was based on the correct standard of proof.[7]

[7] In support of his argument, Vorhies cites to *Dillon v. Seattle Police Pension Bd.*, 82 Wn. App. 168, 916 P.2d 956 (1996), and *Woldrich v. Vancouver Police Pension Bd.*, 84 Wn. App. 387, 928 P.2d 423 (1996). However, neither *Dillion* nor *Woldrich* involved the requirements for LEOFF catastrophic disability benefits. Those cases determined that the test for whether a disability was incurred in the line of duty for duty disability retirement was whether the disability arose naturally and proximately from the LEOFF member's employment. *Dillon*, 82 Wn. App. at 171; *Woldrich*, 84 Wn. App. at 390. These cases are irrelevant to Vorhies's assignment of error.

C. "Obtain and Perform Gainful Employment"

Vorhies next contends that in order to deny LEOFF catastrophic disability benefits, the applicant must be able to "obtain and perform gainful employ[]ment." Resp't's Br. at 43. He argues that the test outlined in the final order is "simply wrong," and that if a person cannot get a job, it does not matter that the person might be able to physically perform that job. Resp't's Br. at 43. He further argues that if a person can get a job, but cannot be competitive or perform in the job, it is not gainful employment.

Vorhies provides no substantive argument or authority to support this contention. RAP 10.3(a)(6); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 808, 225 P.3d 213 (2009). Further, and as discussed above, the test is not whether Vorhies can obtain employment. The test is whether Vorhies can engage in substantial gainful activity; that is, whether he can engage in some kinds of work that are available in his labor market. Whether Vorhies can obtain any specific kind of work not determinative, nor is whether or not he is employed.[8] Vorhies asserts the incorrect test. We, therefore, conclude that DRS did not erroneously apply or interpret the law.[9]

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[8] Vorhies also argues that because Berndt was unable to testify whether the jobs she found were full-or part time, and because the Final Order stated he could engage in income-producing activity for "'less than five hours per day in a standard five-day work week,'" Berndt's testimony did not support the conclusion that he could work part-time jobs. Resp't's Br. at 33 (quoting AR 44). This argument is incorrect.

Berndt opined that Vorhies could resume full-time work or near full-time work. She stated that there were jobs in his labor market that used his skills and physical abilities. She also opined that he possessed the skills and physical abilities to earn the threshold earning capacity. The final order did state that Vorhies was able to engage in income-producing activity "for less than five hours a day in a standard five-day work week." AR at 44. But this was in reference to the conclusion that, in order to meet the $1,040 per month threshold, Vorhies only needed to work 24 hours a week, at the lowest wage, in order to meet the threshold earning capacity. Therefore, Berndt's opinion did support the conclusion that Vorhies could work part-time jobs.

[9] RCW 41.26.470(9) does not use the terms "obtain" or "employment."

D. Headaches

Vorhies next argues that DRS erroneously failed to consider headaches in its eligibility determination.

However, Vorhies did not assert headaches or a psychiatric condition as a disability in his LEOFF disability retirement application. The only disability at issue is Vorhies's neck pain, a physical disability for which he received duty disability retirement benefits. Because Vorhies did not assert headaches as a disability and because headaches did not form the basis of his LEOFF disability retirement application, we conclude that DRS did not err when it did not consider headaches in its eligibility determination.

E. Res Judicata

Vorhies next argues that DRS's final order erroneously concluded that his duty disability retirement does not by itself prove that any of the elements for catastrophic disability retirement are met. He seems to argue that the previous DRS finding for duty disability retirement benefits is res judicata for catastrophic disability retirement benefits.[10]

As a threshold matter, Vorhies does not assign error to conclusion of law 35 on which this argument is based, nor does he list it as an issue pertaining to an assignment of error. RAP 10.3(a)(4). Providing little argument, he cites no authority other than *Malland v. Department of Retirement Systems*, which clarified that the application of res judicata does not contravene the purposes of the LEOFF statute and that it is limited to the terms of the statute. 103 Wn.2d 484, 490-91, 694 P.2d 16 (1985).

[10] Vorhies's argument here is unclear. DRS does not seem to address the issue and briefly states that there is no disagreement that Vorhies receives duty disability for his neck injury.

Even if we review the issue, there is no res judicata in this case. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 865-66, 93 P.3d 108 (2004). While DRS's previous approval of Vorhies's duty disability retirement benefits may prove some elements of catastrophic disability retirement eligibility, it is not res judicata of the central element—that his disability is "so severe" that he "cannot engage in any other kind of substantial gainful activity in the labor market." WAC 415-104-482(1)(c). This element is not required for duty disability benefits and was not addressed in the previous DRS determination. WAC 415-104-480(1). Therefore, there is no res judicata as to Vorhies's eligibility under WAC 415-104-482(1) for catastrophic disability benefits.

F. Current Skills

Vorhies next argues that DRS's final order erroneously concluded that he "'has the capacity to quickly acquire'" the skills to perform the typical duties of some jobs. Resp't's Br. at 46 (quoting AR at 43). He argues that DRS mistakenly concentrated on what he might learn to do in the future, as opposed to what he is able to do now. We disagree.

In determining eligibility for catastrophic disability benefits, DRS considers the applicant's transferable skills which, by its broad definition, includes skills that the applicant can readily apply in addition to "any combination of *learned or demonstrated behavior*." WAC 415-104-482(13)(e) (emphasis added). Vorhies's ability to quickly acquire and learn new skills and his creative thinking are examples of demonstrated behaviors.

Further, DRS did not focus its analysis solely on Vorhies's capacity to acquire new skills. It also concluded that Vorhies "already has skills to perform the typical duties" of at least some jobs requiring only sedentary to light physical activity. AR at 43. We, therefore, conclude that DRS's final order did not erroneously apply the law.

G. Age

Vorhies next argues that DRS erroneously failed to consider his age when it concluded that an applicant's age is not an eligibility factor in WAC 415-104-482(1). He argues that when given a choice between two competitive potential employees, an employer might choose the younger candidate who can serve in the position longer. He further argues that nothing in the statute or rule forbids DRS from considering age.

Both RCW 41.26.470(9) and WAC 415-104-482 make no mention that an applicant's age is a factor DRS is required to consider when determining eligibility. While the statute and rule does not forbid DRS from considering age, this does not in turn mean that it is error if DRS does not consider it. Further, Vorhies presented no evidence that, for example, he applied for and lost employment due to his age, or that his age affected the results of his PCEs.[11] He also provided no authority in support of his arguments. RAP 10.3(a)(6); *Satomi*, 167 Wn.2d at 808. Because DRS is not required to consider age as a factor in its determinations for catastrophic disability retirement, we conclude that DRS did not erroneously apply the law.

H. Workplace Accommodations

Vorhies next argues that DRS erroneously concluded that he must prove that an employer would not provide workplace accommodations when attempting to employ him on a part-time basis. He argues that nothing in the statute or rule requires proof of potential accommodations and that the only reasonable approach is to determine what jobs normally require and whether he can obtain such jobs and perform within those requirements. We disagree.

[11] Larson testified using age as a factor in evaluating an applicant's ability to engage in substantial gainful activity. DRS acknowledged her testimony but concluded that a "claimant's age may be a factor in [SSD] or in workers' compensation, but an applicant's age is not an eligibility factor in WAC 415-104-482(1)." AR at 45.

Vorhies directs us to a specific sentence in conclusion of law 56:

> In much the same vein, [Larson] acknowledged that some employers provide accommodations such as ergonomic workstations, chairs, different keyboards and headsets, but avoided discussing possible accommodations.

AR at 46.

When this statement is read within the context of the entire final order, Vorhies's inference is incorrect. This statement was made in reference to Larson's discussion on the severity of Vorhies's disability and the labor market. The final order discussed several weaknesses in Larson's testimony, and pointed out that Larson did not consider the full content of the PCEs in reaching her opinions. Ultimately, DRS gave Berndt's testimony "greater credit" over Larson's testimony. AR at 46.

DRS did not require Vorhies to prove that an employer would not provide workplace accommodations to be eligible for catastrophic disability benefits. Nor is the "reasonable approach" Vorhies asserts the correct test in determining eligibility for catastrophic disability retirement benefits. We, therefore, conclude that DRS did not erroneously apply the law.

IV. Attorney Fees

Lastly, Vorhies argues that pursuant to the Equal Access to Justice Act (EAJA), we should affirm the superior court's award for attorney fees and costs. He also requests that we award him costs and fees in this appeal pursuant to the EAJA and RAP 18.1.

Under the EAJA, a court awards attorney fees and other expenses to a qualified party that prevails on judicial review of an agency action, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. RCW 4.84.350(1); *ZDI Gaming, Inc. v. Wash. State Gambling Comm'n*, 151 Wn. App. 788, 812-13, 214 P.3d 938, *aff'd*, 173 Wn.2d 608 (2012).

Because of our conclusion affirming DRS's Final Order, we reverse the superior court's award for attorney fees. And because Vorhies is not the prevailing party in this appeal, we decline to award attorney fees.

We affirm DRS's final order and, therefore, reverse the superior court.

Melnick, J.

We concur:

Bjorgen, C.J.

Lee, J.

APPENDIX 2

RCW 41.26.470

Earned disability allowance—Cancellation of allowance—Reentry—Receipt of service credit while disabled—Conditions—Disposition upon death of recipient—Disabled in the line of duty—Total disability—Reimbursement for certain payments—Disabled while providing emergency management services.

(1) A member of the retirement system who becomes totally incapacitated for continued employment by an employer as determined by the director shall be eligible to receive an allowance under the provisions of RCW **41.26.410** through **41.26.550**. Such member shall receive a monthly disability allowance computed as provided for in RCW **41.26.420** and shall have such allowance actuarially reduced to reflect the difference in the number of years between age at disability and the attainment of age fifty-three, except under subsection (7) of this section.

(2) 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 and the member shall be restored to duty in the same civil service rank, if any, held by the member at the time of retirement or, if unable to perform the duties of the rank, then, at the member's request, in such other like or lesser rank as may be or become open and available, the duties of which the member is then able to perform. In no event shall a member previously drawing a disability allowance be returned or be restored to duty at a salary or rate of pay less than the current salary attached to the rank or position held by the member at the date of the retirement for disability. If the department determines that the member is able to return to service, the member is entitled to notice and a hearing. Both the notice and the hearing shall comply with the requirements of chapter **34.05** RCW, the administrative procedure act.

(3) Those members subject to this chapter who became disabled in the line of duty on or after July 23, 1989, and who receive benefits under RCW **41.04.500** through **41.04.530** or similar benefits under RCW **41.04.535** shall receive or continue to receive service credit subject to the following:

(a) No member may receive more than one month's service credit in a calendar month.

(b) No service credit under this section may be allowed after a member separates or is separated without leave of absence.

(c) Employer contributions shall be paid by the employer at the rate in effect for the period of the service credited.

(d) Employee contributions shall be collected by the employer and paid to the department at the rate in effect for the period of service credited.

(e) State contributions shall be as provided in RCW **41.45.060** and **41.45.067**.

(f) Contributions shall be based on the regular compensation which the member would have received had the disability not occurred.

(g) The service and compensation credit under this section shall be granted for a period not to exceed six consecutive months.

(h) Should the legislature revoke the service credit authorized under this section or repeal this section, no affected employee is entitled to receive the credit as a matter of contractual right.

(4)(a) If the recipient of a monthly retirement allowance under this section dies before the total of the retirement allowance paid to the recipient equals the amount of the accumulated contributions at the date of retirement, then the balance shall be paid to the member's estate, or such person or persons, trust, or organization as the recipient has nominated by written designation duly executed and filed with the director, or, if there is no such designated person or persons still living at the time of the recipient's death, then to the surviving spouse or domestic partner, or, if there is neither such designated person or persons still living at the time of his or her death nor a surviving spouse or domestic partner, then to his or her legal representative.

(b) If a recipient of a monthly retirement allowance under this section died before April 27, 1989, and before the total of the retirement allowance paid to the recipient equaled the amount of his or her

accumulated contributions at the date of retirement, then the department shall pay the balance of the accumulated contributions to the member's surviving spouse or, if there is no surviving spouse, then in equal shares to the member's children. If there is no surviving spouse or children, the department shall retain the contributions.

(5) Should the disability retirement allowance of any disability beneficiary be canceled for any cause other than reentrance into service or retirement for service, he or she shall be paid the excess, if any, of the accumulated contributions at the time of retirement over all payments made on his or her behalf under this chapter.

(6) A member who becomes disabled in the line of duty, and who ceases to be an employee of an employer except by service or disability retirement, may request a refund of one hundred fifty percent of the member's accumulated contributions. Any accumulated contributions attributable to restorations made under RCW **41.50.165**(2) shall be refunded at one hundred percent. A person in receipt of this benefit is a retiree.

(7) A member who becomes disabled in the line of duty shall be entitled to receive a minimum retirement allowance equal to ten percent of such member's final average salary. The member shall additionally receive a retirement allowance equal to two percent of such member's average final salary for each year of service beyond five.

(8) A member who became disabled in the line of duty before January 1, 2001, and is receiving an allowance under RCW **41.26.430** or subsection (1) of this section shall be entitled to receive a minimum retirement allowance equal to ten percent of such member's final average salary. The member shall additionally receive a retirement allowance equal to two percent of such member's average final salary for each year of service beyond five, and shall have the allowance actuarially reduced to reflect the difference in the number of years between age at disability and the attainment of age fifty-three. An additional benefit shall not result in a total monthly benefit greater than that provided in subsection (1) of this section.

(9) A member who is totally disabled in the line of duty is entitled to receive a retirement allowance equal to seventy percent of the member's final average salary. The allowance provided under this subsection shall be offset by:

(a) Temporary disability wage-replacement benefits or permanent total disability benefits provided to the member under Title **51** RCW; and

(b) Federal social security disability benefits, if any;

so that such an allowance does not result in the member receiving combined benefits that exceed one hundred percent of the member's final average salary. However, the offsets shall not in any case reduce the allowance provided under this subsection below the member's accrued retirement allowance.

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. 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.

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.

(10)(a) In addition to the retirement allowance provided in subsection (9) of this section, the retirement allowance of a member who is totally disabled in the line of duty shall include reimbursement for any payments made by the member after June 10, 2010, for premiums on employer-provided medical insurance, insurance authorized by the consolidated omnibus budget reconciliation act of 1985 (COBRA), medicare part A (hospital insurance), and medicare part B (medical insurance). A member

who is entitled to medicare must enroll and maintain enrollment in both medicare part A and medicare part B in order to remain eligible for the reimbursement provided in this subsection. The legislature reserves the right to amend or repeal the benefits provided in this subsection in the future and no member or beneficiary has a contractual right to receive any distribution not granted prior to that time.

(b) The retirement allowance of a member who is not eligible for reimbursement provided in (a) of this subsection shall include reimbursement for any payments made after June 30, 2013, for premiums on other medical insurance. However, in no instance shall the reimbursement exceed the amount reimbursed for premiums authorized by the consolidated omnibus budget reconciliation act of 1985 (COBRA).

(11) A member who has left the employ of an employer due to service in the national guard, military reserves, federal emergency management agency, or national disaster medical system of the United States department of health and human services and who becomes totally incapacitated for continued employment by an employer as determined by the director while performing service in response to a disaster, major emergency, special event, federal exercise, or official training on or after March 22, 2014, shall be eligible to receive an allowance under the provisions of RCW **41.26.410** through **41.26.550**. Such member shall receive a monthly disability allowance computed as provided for in RCW **41.26.420** except such allowance is not subject to an actuarial reduction for early retirement as provided in RCW **41.26.430**. The member's retirement allowance is computed under RCW **41.26.420**, except that the member shall be entitled to a minimum retirement allowance equal to ten percent of such member's final average salary. The member shall additionally receive a retirement allowance equal to two percent of such member's average final salary for each year of service beyond five.

[**2016 c 115 § 3**; **2013 c 287 § 2**; **2010 c 259 § 2**. Prior: **2009 c 523 § 6**; **2009 c 95 § 1**; **2006 c 39 § 1**; **2005 c 451 § 1**; **2004 c 4 § 1**; **2001 c 261 § 2**; **2000 c 247 § 1104**; **1999 c 135 § 1**; **1995 c 144 § 18**; **1993 c 517 § 4**; **1990 c 249 § 19**; prior: **1989 c 191 § 1**; **1989 c 88 § 1**; **1982 c 12 § 2**; **1981 c 294 § 9**; **1977 ex.s. c 294 § 8**.]

NOTES:

Short title—2013 c 287: "This act may be known as the Wynn Loiland act." [**2013 c 287 § 1**.]

Short title—2010 c 259: "This act may be known as the Jason McKissack act." [**2010 c 259 § 1**.]

Effective date—2006 c 39: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 14, 2006]." [**2006 c 39 § 3**.]

Effective date—2005 c 451: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 13, 2005]." [**2005 c 451 § 2**.]

Application—2004 c 4 § 1: "This act applies to all members, subject to section 1 of this act, who become or became disabled in the line of duty on or after January 1, 2001." [**2004 c 4 § 2**.]

Effective date—2001 c 261 § 2: "Section 2 of this act takes effect March 1, 2002." [**2001 c 261 § 5**.]

Effective dates—Subchapter headings not law—2000 c 247: See RCW **41.40.931** and **41.40.932**.

Application—1999 c 135 § 1: "Section 1 of this act applies to any member who received a disability retirement allowance on or after February 1, 1990." [**1999 c 135 § 2.**]

Purpose—1993 c 517: See note following RCW **41.26.420**.

Findings—1990 c 249: See note following RCW **2.10.146**.

Severability—1981 c 294: See note following RCW **41.26.115**.

Legislative direction and placement—Section headings—1977 ex.s. c 294: See notes following RCW **41.26.410**.

*Disability leave supplement for law enforcement officers and firefighters: RCW **41.04.500** through **41.04.550**.*

APPENDIX 3

WAC 415-104-482

What is the LEOFF Plan 2 catastrophic disability allowance?

Under RCW **41.26.470**, two types of disability retirement are available to members of LEOFF Plan 2 who become disabled in the line of duty: Duty disability retirement benefits as described in WAC **415-104-480** and catastrophic disability retirement benefits as described in this section. If you are not eligible for a catastrophic disability allowance under this section, you may still be eligible for duty disability benefits.

(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. See RCW **41.26.061**.

(2) **If I am receiving a retirement allowance for service, can I qualify for a catastrophic disability allowance?** You are eligible for a catastrophic disability allowance in lieu of your service retirement allowance if the department determines you meet the eligibility requirements in subsection (1) of this section.

(3) **How do I request a catastrophic disability allowance?** To request a catastrophic disability allowance, please contact the department of retirement systems. You, your physician, and your employer will be required to provide information regarding your catastrophic disability.

(4) **What information will the department use to determine whether I am entitled to an allowance under this section?** The department will consider information submitted by you, your physician, and your employer, and information otherwise available to the department, including:

(a) Medical and vocational information;

(b) Information from and determinations made by the department of labor and industries, the Social Security Administration, or an employer;

(c) Your job description at the time you separated from LEOFF Plan 2 service;

(d) Financial records;

(e) Your membership records, maintained by the department; and

(f) Any other relevant information.

(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 unless there is information available that would produce a different determination.

(6) **What are my options if my request is denied?** If your request is denied, you have the following options:

(a) You may apply for duty disability benefits under WAC **415-104-480**; and/or

(b) You may petition for review under chapter **415-04** WAC.

(7) **If my request is approved, when will my monthly allowance begin to be paid?** If your request is approved, you will begin to receive a catastrophic disability allowance in the month following the approval. Your first payment will include a retroactive payment of benefits that have accrued, but not yet been paid. The date your allowance for catastrophic disability accrues is determined as follows:

(a) If you separated from LEOFF Plan 2 employment due to a catastrophic disability, your allowance will accrue from the first of the month following your separation date.

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(b) If you are receiving a duty disability allowance or a service retirement allowance, and you are subsequently approved for a catastrophic disability, your allowance will accrue from:

(i) The first of the month following the month in which a specific, one-time event, verified by medical records, occurred that clearly caused your duty disability to become a catastrophic disability; or

(ii) If the department determines there is not a one-time event that caused your disability to become catastrophic, the first of the month following the month in which the department receives your request for a catastrophic disability allowance.

Example: John has been receiving a duty-disability allowance under WAC **415-104-480** since June 1, 2005, when he separated service as a firefighter due to a back injury he incurred in the line of duty.

Example of (b)(i) of this subsection: A one-time event. On January 15, 2007, John accidentally twisted his back causing a catastrophic disability. Because John's catastrophic disability was clearly the result of a specific one-time event, his catastrophic disability allowance will accrue from February 1, 2007, the first of the month following the month in which the event occurred.

Example of (b)(ii) of this subsection: No specific event. John's back gradually worsened until his disability qualified as a catastrophic disability. On May 15, 2007, John applied for a catastrophic disability allowance. His allowance will accrue from June 1, 2007, the first of the month following the month the department received his application.

(8) **How much is a catastrophic disability allowance?** The base catastrophic disability allowance is equal to seventy percent of your final average salary (FAS).

(a) Your allowance combined with other disability benefits, such as Title **51** RCW benefits or Social Security disability benefits, may not exceed one hundred percent of your FAS. If necessary, your catastrophic disability allowance will be reduced so that your combined allowance does not exceed one hundred percent of your FAS. Any such adjustment will be applied prospectively. Your catastrophic disability allowance will not be reduced below your accrued retirement allowance as defined in subsection (13) of this section.

(b) If you choose a benefit option with a survivor feature as described in WAC **415-104-215**, the allowance calculated in (a) of this subsection will be actuarially reduced to cover the cost of providing benefits over two lifetimes.

(c) If you have been retired for at least one year by July 1st of each year, you will receive a cost-of-living adjustment each July based on the percentage change, if any, in the consumer price index.

Example: Michael separates from service on June 1, 2005, and is approved for a catastrophic disability allowance. Since his FAS is $5,800, Michael's catastrophic disability allowance from the department is $4,060 per month ($5,800 x 70% = $4,060). Michael is also approved for a Social Security benefit in the amount of $1,800 per month. Michael's combined benefit equals $5,860 ($4,060 + $1,800). This is $60 over 100% of his FAS ($5,860 - $5,800), so Michael's catastrophic disability benefit will be reduced by that amount; his new monthly benefit from the department is $4,000 ($4,060 - $60). In January 2006, Michael received a 4.1% COLA for his Social Security benefit. The department will recalculate his benefit as follows:

January 2006 Social Security benefit, with COLA	$1,800 x 4.1% = $73.80 + $1,800	**= $1,873.80**
Total combined	$4,060 + $1,873.80	**= $5,933.80**

benefit		
Amount over 100% of FAS	$5,933.80 - $5,800	**= $133.80**

Since Michael's combined benefit is $133.80 over 100% of his FAS, his catastrophic disability benefit will be reduced by that amount. His new monthly benefit from the department is $3,926.20 ($4,060 - $133.80). Michael's benefit cannot be reduced more than the amount of his accrued retirement allowance. To determine his accrued retirement allowance, the department multiplies Michael's FAS, $5,800, by his years of service credit, 30, by 2% ($5,800 x 30 x 2%). Michael's accrued retirement allowance is $3,480. Since his benefit does not fall below his retirement allowance, Michael will receive $3,926.20 from the department per month.

In July 2006, Michael received a 3% COLA for his catastrophic disability benefit. The department will recalculate his benefit as follows:

July 2006 catastrophic disability benefit, with COLA	$5,800 x 3% = $174 + $5,800 = $5,974 x 70%	**= $4,181.80**
Total combined benefits	$4,181.80 + $1,873.80	**= $6,055.60**
Amount over 100% of FAS	$6,055.60 - $5,974	**= $81.60**

Since Michael's combined benefit is $81.60 over 100% of his FAS, his catastrophic disability benefit will be reduced by that amount. His new monthly benefit from the department is $4,100.20 ($4,181.80 - $81.60). This is compared to his accrued retirement allowance, $3,584.40 ($5,974 x 30 x 2%); since his benefit does not fall below his retirement allowance, Michael will receive $4,100.20 from the department per month.

(9) **Is my catastrophic disability allowance taxable?** You should consult with your tax advisor regarding all payments you receive from the department. The department does not:

(a) Guarantee that payments are exempt from federal income tax;

(b) Guarantee that it was correct in withholding or not withholding taxes from disability payments;

(c) Represent or guarantee that any particular federal or state income, payroll, personal property or other tax consequence will occur because of its determination; or

(d) Assume any liability for your compliance with the Internal Revenue Code.

(10) **If I withdrew my contributions prior to December 2, 2004, and am approved for a catastrophic disability allowance, what will I receive?** You may apply for a catastrophic disability allowance even if you withdrew your accumulated contributions prior to December 2, 2004. If you are approved for a catastrophic disability allowance, your monthly allowance will be calculated as follows:

(a) If you repay the entire amount you withdrew plus interest, in a lump sum payment, you will receive a monthly allowance calculated according to subsection (8) of this section.

(b) If you do not repay the entire amount you withdrew, your monthly allowance will be actuarially reduced to offset the amount of your previous withdrawal.

(11) **Can my catastrophic disability allowance be discontinued?** Your catastrophic disability allowance will be discontinued if:

(a) Medical/vocational examination, or other information commonly available or provided to the department by an employer, reveals that your disability no longer prevents you from performing substantial gainful activity; or

(b) Your earnings exceed the threshold for substantial gainful activity.

The department may require or offer to provide comprehensive medical/vocational examinations and/or submission of earnings information to evaluate your eligibility for continued benefits. You are required to contact the department if your medical/vocational or financial situation changes.

(12) **If my catastrophic disability allowance terminates, may I qualify for duty disability benefits?** If you are no longer eligible for a catastrophic disability allowance, but have a disability that prevents you from returning to a LEOFF-eligible position, the department will determine if you qualify for duty disability benefits under WAC **415-104-480**.

(a) The department may request additional information from you, your physician, or others upon which to base the determination.

(b) If the department determines you are eligible, you will begin receiving a duty disability allowance under WAC **415-104-480** in lieu of your catastrophic disability allowance.

(13) **Definitions.** As used in this section:

(a) **Accrued retirement allowance** means a duty disability monthly allowance under WAC **415-104-480**.

(b) **Earnings** are any income or wages received, which are reportable as wages or self-employment income on IRS form 1040.

(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.

(d) **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.

(e) **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.

[Statutory Authority: RCW **41.50.050**(5). WSR 16-06-069, § 415-104-482, filed 2/25/16, effective 3/27/16. Statutory Authority: RCW **41.50.050**(5) and **41.26.470**. WSR 09-17-035, § 415-104-482, filed 8/10/09, effective 9/10/09.]