

NO. 354021-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DONALD E. HOBSON, Appellant,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,
STATE OF WASHINGTON, Respondent.

BRIEF OF APPELLANT

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US DISTRICT COURT
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A. Assignments of Error

Assignment of Error

1. The trial court erred in affirming the Final Order After Further Hearing (Final Order) of the Department of Retirement Systems which denied the appellant, Donald E. Hobson, a Public Employees' Retirement System (PERS) disability retirement.

Issues Pertaining to Assignment of Error

1. What is the proper interpretation of "totally incapacitated for duty" entitling a PERS member to disability retirement?

2. Was the Department of Retirement Systems' denial of appellant's disability retirement benefits based on an erroneous interpretation or application of RCW 41.40.200, not supported by the record, or arbitrary and capricious?

B. Statement of the Case

Statement of Proceedings

The appellant (Hobson) filed an application with the Washington State Department of Retirement Systems (DRS) requesting a disability retirement.

On July 12, 2005, DRS issued a Final Order denying Hobson's application for disability retirement.¹

On July 21, 2005, Hobson filed a Petition for Review pursuant to RCW 34.05.510 et seq., seeking judicial review of the DRS order denying his disability retirement application.²

On September 26, 2006, the Thurston County Superior Court entered a "Judgment Affirming the Decision of the Department of Retirement Systems."³ Hobson appeals.⁴

Statement of Facts

Hobson is a former employee of the Department of Social and Health Services (DSHS), State of Washington. He is a member of PERS Plan I. On April 21, 2000, while working at the DSHS Child Study and Treatment Center (CSTC) as a Psychiatric Child Care Counselor (PCCC), Hobson was attacked by a patient. As a result of the injuries he received from this attack, and the exacerbation of previous injuries, the Department of Labor and Industries (L&I) determined Hobson to be

¹ CP 9-41.

² CP 5-41.

³ CP 226-28.

⁴ CP 229-32.

permanently disabled and qualified for a disability pension.⁵ Hobson has also qualified for social security disability retirement benefits.⁶ In 1990 he had earlier been disability retired from employment with the United States Government (Navy Department).⁷

Following the patient attack, Hobson's treating physician, Dr. Stump, advised DSHS that Hobson could not return to work in the same job at his former place of employment. He did indicate that at that time he believed Hobson could participate in vocational rehabilitation focusing on lighter-duty employment.⁸

Later that spring, Dr. Stump reported to DSHS that he disagreed that Hobson could perform the physical activities described in the job analysis because of specific physical limitations and objective medical findings.⁹

A vocational counselor (Johnson), arranged through L&I to assist Hobson, had been attempting to return Hobson to his employment at CSTC, but

⁵ CP 33, Final Order, dated July 12, 2005, p. 25, ¶ 80.

⁶ CP 31, Final Order, p. 23, ¶ 67.

⁷ CP 10, Final Order, p. 2.

⁸ CP 16, Final Order, p. 8, ¶ 32.

⁹ CP 18, Final Order, p. 10, ¶ 38.

concluded in May of 2001 that "Mr. Hobson is not able to work at this time due to his knee injury."¹⁰ In July of that year, Dr. Stump once again opined that Hobson could not return to CSTC even under a modified job analysis done by Mr. Johnson.¹¹ Two other IME physicians (reporting to L&I) also disagreed that Hobson could perform the physical activities described in Johnson's job analysis, and opined that Hobson "should not be exposed to further assault" and that "[t]hese restrictions are permanent."¹²

After October 2001 CSTC quit offering return to work options for Hobson.¹³ The department's expert, Mr. Johnson, testified:

Q: [by Ms. Thomsen] So the employer of injury was not able to provide Mr. Hobson with any kind of acceptably modified job or any other openings with the child care center; is that correct?

A: [by Mr. Johnson] That's correct.¹⁴

In late 2001 and early 2002, Hobson participated in a return to work career transitioning

¹⁰ CP 19, Final Order, p. 11, ¶ 40.

¹¹ CP 19, Final Order, p. 11, ¶ 41.

¹² CP 24, Final Order, p. 16, ¶ 46.

¹³ CP 24, Final Order, p. 16, ¶ 48; and Exhibits 20 and 28.

¹⁴ August 26, 2003 Tr. p. 173, lines 16-20.

effort through the Washington State Department of Personnel.¹⁵ Throughout this time Hobson was unable to find employment even though he made numerous employment applications.¹⁶ In February 2002 Dr. Stump expressed the medical opinion that Hobson would be unable to frequently sit, stand, walk or carry, and believed that Hobson could not perform the physical activities in the job analysis for either a Teacher Assistant or a General Clerk.¹⁷ Dr. Stump also felt that Hobson could not perform the physical activities for a Financial Service Specialist 3 position developed by Mr. Johnson. Dr. Stump suggested a physical capacities evaluation be done on Hobson.¹⁸

On May 14, 2002, Dr. Stump wrote DRS, advising them that he was aware that Hobson had applied for disability retirement, and that:

it is my [Dr. Stump's] belief that Mr. Hobson does meet the requirements for total disability with reference to his State of Washington Employment.

I have reviewed multiple job analysis [sic] as submitted by the patient's vocational counselor, Bruce Johnson, Unfortunately,

¹⁵ CP 25, Final Order, p. 17, ¶ 51.

¹⁶ Exhibit 22.

¹⁷ CP 25, Final Order, p. 17, ¶ 52.

¹⁸ CP 26, Final Order, p. 18, ¶ 55.

Mr. Hobson has not qualified for any of the available positions.¹⁹

In June 2002 a Registered Physical Therapist (Ann Armstrong) performed a physical capacities evaluation on Hobson and concluded, "[b]ased on testing and the examiner's observations, it would be difficult for Mr. Hobson to return to work in any capacity. It is certain that he is not capable of working an 8 hour day."²⁰ She expressed the opinion that Hobson's limitations would likely not improve, but rather get progressively worse.²¹ Hobson's L&I vocational counselors could not identify a full-time employment opportunity for Hobson.²²

In September 2002 Hobson qualified for social security disability benefits.²³

In August 2003 L&I arranged for an Ability to Work Assessment to be done by Whittall Management Group. It was performed by a Certified Disability Management Specialist and Vocational Rehabilitation Counselor (Kabacy),²⁴ and by an Occupational

¹⁹ CP 26-27, Exhibit 31; see Final Order, pp. 18-19, ¶ 57.

²⁰ CP 29, Final Order, p. 21, ¶ 63; and Exhibit 36.

²¹ CP 29-30, Final Order, pp. 21-22, ¶ 64.

²² CP 30, Final Order, p. 22, ¶ 66.

²³ CP 31, Final Order, p. 23, ¶ 67.

²⁴ Exhibit 48.

Therapist (Casady).²⁵ Dr. Stump concurred with their finding that "Mr. Hobson retained the capacity for sedentary-level work activities up to six and one-half hours per day, but could not maintain 'reasonably continuous' (full-time) employment because of his physical limitations."²⁶ This was also consistent with the opinion of Dr. Staker, another of Hobson's physicians.²⁷ Additional therapy would not make Hobson more employable.²⁸ Cynthia Casady, an Occupational Therapist (retained by L&I to evaluate Hobson), testified:

Q: [by Ed Younglove] Well, I guess I'm just not sure what that means. Standards of employability, I mean, as I understand it, you were looking at whether or not Mr. Hobson could be employed in any capacity on a full-time basis essentially; is that correct?

A: [by Cynthia Casady] Yes.

Q: And your conclusion was that he could not?

A: Yes.²⁹

²⁵ Exhibit 47.

²⁶ CP 33, Final Order, p. 25, ¶ 79. Actually, the doctor's opinion was that Hobson could not maintain continuous full-time or part-time employment.

²⁷ January 5, 2005 Hearing Tr. p. 46, lines 3-16; and p. 42, lines 6-13.

²⁸ Jan. 5, 2005 Hearing Tr. p. 17, lines 4-11.

²⁹ Jan. 5, 2005 Hearing Tr. p. 35, lines 9-16.

Jennifer Kabacy, a Certified Disability Management Specialist, testified:

Q: [by Ed Younglove] And was it your opinion then that Mr. Hobson was not able to work in any job for which he was qualified by training or experience?

A: [by Jennifer Kabacy] Yes.³⁰

The Whittall Management Group Vocational Closing Report for L&I stated:

In summary, the PBPCE evaluator recommended that Mr. Hobson is not able to sustain full-time work in any capacity, and that his capacities are not likely to improve. Dr. Staker deferred to Dr. Stump, who concurred with the recommendations of the PBPCE evaluator. Consequently, VRC recommends that Mr. Hobson is not able to work on a full time basis due to the direct effects of his industrial injury. Mr. Hobson is not able to benefit from further vocational services.³¹

C. Summary of Argument

An individual who is totally incapacitated for duty is eligible for a PERS disability retirement. RCW 41.40.200. "Totally incapacitated for duty" means either (1) an inability to perform the employee's job, or (2) an inability to perform any other work the individual is qualified for by training or experience. RCW 41.40.010(28).

³⁰ Jan. 5, 2005 Hearing Tr. p. 48, lines 2-5.

³¹ Exhibit 46 (0000007).

After being attacked by a patient at the CSTC where he was employed, Hobson could no longer do his job without serious risk of further injury. Even Hobson's employer agreed he could not perform the functions of his previous job because the job necessarily involved a substantial risk of further injury to Hobson, making him unable to perform the job.

At best, Hobson could perform other work only on a part-time, intermittent basis for which there is no established job market.

Hobson is totally incapacitated within the meaning of the statute (RCW 41.40.200), qualifying him for a disability retirement.

D. Argument

Hobson's appeal asserts that, in denying his disability retirement, DRS has erroneously interpreted or applied the law; the DRS decision is not supported by substantial evidence; or the DRS decision is arbitrary and capricious. See RCW 34.05.570(3)(d), (e) and (i).

In reviewing administrative action, the Court of Appeals sits in the same position as the superior court, applying the standards of the Administrative Procedure Act (APA), RCW 34.05, directly to the record before the agency. Shaw v. Department of

Empl. Sec., 46 Wn. App. 610, 613, 731 P.2d 1121 (1987). Under the APA, factual findings are subject to the "substantial evidence" standard, in which relief is granted if the order is "not supported by evidence that is substantial when viewed in light of the whole record before the court". RCW 34.05.570(3)(e). Questions of law are reviewed de novo, RCW 34.05.570(3)(d), although substantial weight is granted the agency's view of the law "if it falls within its expertise in that special field of law". Macey v. Department of Empl. Sec., 110 Wn.2d 308, 313, 752 P.2d 372 (1988). In mixed questions of law and fact, the agency's factual findings are entitled to the same level of deference accorded under any other circumstance, and questions of law are subject to the same de novo review. Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 858 P.2d 494 (1993). The burden of demonstrating that an agency action is invalid rests on the party asserting invalidity [reference to named party omitted]. RCW 34.05.570(1)(a).

Evans v. State Dept. of Employment Sec., 72 Wn.App. 862, 865, 866 P.2d 687 (1994).

The issues in this case are the proper interpretation of "totally incapacitated for duty," and its application to Hobson's physical incapacities. These are issues of law and mixed issues of law and fact, both of which are reviewable de novo, supra.

RCW 41.40.200 governs PERS duty disability retirement.

(1) Subject to the provisions of RCW 41.40.310 and 41.40.320, upon application of a member, or his or her employer, **a member who becomes totally incapacitated for duty** as the natural and proximate result of an accident occurring in the actual performance of duty or who becomes totally incapacitated for duty and qualifies to receive benefits under Title 51 RCW as a result of an occupational disease, as now or hereafter defined in RCW 51.08.140, while in the service of an employer, without willful negligence on his or her part, **shall be retired** subject to the following conditions:

(a) That the medical adviser, after a medical examination of such member made by or under the direction of the medical adviser, shall certify in writing **that the member is mentally or physically totally incapacitated for the further performance of his or her duty and that such member should be retired;**

(b) That the director concurs in the recommendation of the medical adviser;

(c) That no application shall be valid or a claim thereunder enforceable unless, in the case of an accident, the claim is filed within two years after the date upon which the injury occurred or, in the case of an occupational disease, the claim is filed within two years after the member separated from service with the employer; and

(d) That the coverage provided for occupational disease under this section may be restricted in the future by the legislature for all current and future members.

(Emphasis supplied.) RCW 41.40.200(1).

RCW 41.40.010(28) defines the term "totally incapacitated for duty" as follows:

(28) "Totally incapacitated for duty" means total *inability to perform the duties of a member's employment or office or any other work for which the member is qualified by training or experience.*

(Emphasis supplied.)

The purpose of the law is to protect an injured worker from loss of the ability to earn future retirement benefits, and to preserve the retirement benefits the employee would have earned but for the disability.

In her decision, the DRS Presiding Officer concluded that Hobson had been injured in the course of his duties, and those injuries have had damaging and lasting effects on him and placed significant limitations on his abilities to perform employment. However, she also concluded that the evidence did not establish that Hobson was "totally incapacitated" for either his previous employment at CSTC or for any other employment for which he is qualified.³²

³² CP 41, Final Order, p. 33, ¶ 30.

As to whether Hobson could perform his previous duties as a PCCC at CSTC, the decision states:

In this case, DRS has essentially conceded that Mr. Hobson is unable to return to his employment at CSTC. However, the record here does not prove that Mr. Hobson's situation meets this prong of the definition of "totally incapacitated for duty." This is because the basis of Mr. Hobson's doctor(s)' refusal to approve his return to employment at CSTC was the exposure to and risk of re-injury, and not total inability to perform the duties of the employment, as the definition requires.³³

The decision's interpretation of the statutory requirement is flawed. It cannot be seriously contested that as a PCCC, or even as a supervisor, Hobson would not be at great risk of being involved in restraining others or protecting himself or others from patients at CSTC. Despite the evidence being clear that Hobson could not sustain such an involvement without serious health damage, the Examiner concluded that Hobson is not incapable of performing the job. This is like saying that an individual whose doctor has limited their lifting to 50 pounds cannot work at a job which requires the individual from time to time to

³³ CP 35, Final Order, p. 27, ¶ 11.

lift 100 pounds. The individual might be able to lift the 100 pounds, but only at serious risk to their health. Because of the unacceptable risk of injury, rather, we would say that the person is incapacitated from that work.

DSHS did not feel Hobson could return to his previous job. DSHS concluded, based on medical documentation provided by Hobson's three treating physicians, that Hobson could not return to his job of injury.³⁴ This was noted in the employer's portion of the Disability Retirement Application in March of 2002. Further, his employer stated it could not protect him from physical violence due to the nature of the facility. The trial court also agreed that Hobson "cannot safely return to his former job position."³⁵ The DRS decision to the contrary is based on an erroneous application of the statute, not supported by evidence in the record, and arbitrary and capricious.

The second basis for the DRS decision is that because Hobson retained the capacity to perform some light-duty work approximately half-time, even

³⁴ CP 25-26, Finding of Fact, pp. 17-18, ¶ 53.

³⁵ CP 225 (Letter Opinion). The agency has not cross-appealed this part of the trial court's decision.

though the evidence apparently was undisputed he cannot perform any job on a reasonably continuous basis, Hobson was not totally incapacitated. He was therefore ineligible for a disability retirement pension.

Is an employee who is capable of performing some limited part-time work ineligible to receive a disability pension?

DRS's interpretation of eligibility for a disability retirement, as announced in this case, is so limited as to effectively preclude any person from ever qualifying for a disability retirement. If "totally incapacitated for employment" does not mean full-time employment, does that mean that an individual capable of working for two hours a day is automatically barred? How about thirty minutes a day? Something less? Is it a logical interpretation of the statute that an individual who can work for brief periods of time, in which they would earn much less than their disability retirement, is barred from eligibility?

Hobson submits that DRS's interpretation of the statute is overly restrictive with regard to the term "totally incapacitated for employment."

There is nothing in the statute which would suggest that "employment" is other than "full-time" employment. Any other interpretation leads to an absurd result, whereby an individual capable of performing any type of employment for any period of time is disqualified.

In Dillard v. Washington Public Employees Retirement System, 23 Wn.App. 461, 597 P.2d 428 (1979), the Court directed the Department to award a Western State Hospital employee a disability retirement under RCW 41.40.200, on the basis that she was totally incapacitated for duty as a result of being subjected to tension and strain from her work. Although the case turned on whether the "routine" stresses and tension constituted an "accident," there is no suggestion in the case that the employee could not be totally disabled if she could perform any kind of work, on a less than full-time basis, for example, in a less-tense environment.

In Marler v. DRS, 100 Wn.App. 494, 997 P.2d 966 (2000), the Court stated the purpose of the PERS I duty disability retirement as:

Its [RCW 41.40.200] duty-related disability retirement provisions were designed prima-

rily to maintain a member's ability to continue earning service credit toward a service retirement when that member has been forced to resign from the productive workforce due to a job-related disability. . . .

100 Wn.App. at 498. The employee in Marler suffered an acute lumbar muscle spasm to his lower back while cutting brush with a chainsaw. Although the issue in the case was the applicability of the two-year statute of limitations to Marler's DRS total disability claim, the Court found the statute of limitations began because Marler was aware that he was unable to return to his prior employment or other qualified work because of the injury. The Court stated:

Because of his back problems, Marler could not return to his former work after that second injury. Marler testified that he was willing to consider other types of employment, but he was unable to come up with anything. As a result, he did not attempt other jobs.

Id. at 500-01.

Although the Court's analysis does not turn on whether or not Marler was totally incapacitated, but rather on the timing of his claim, at no point did the Court indicate that his claim would have been denied because he was not totally incapacitated. The overwhelming evidence in this

case of Hobson's incapacitating disability is compelling compared to the evidence in Marler.

In fact, no case has held that the term "totally incapacitated," as utilized in RCW 41.40.200, means less than full-time gainful employment. This is the only logical interpretation of the statute.

While admittedly the L&I standard for disability and the DRS standard are not identical, particularly in the absence of any case law guidance on the DRS standard, it is appropriate to look at some of the principles announced by the Court with regard to the L&I disability standard.

The leading case on the character and quantum of evidence required to establish a prima facie case of permanent total disability is Kuhnle v. Dept. of Labor & Indus., Supra [12 Wn.2d 191, 120 P.2d 1003 (1942)]. The court held that the statutory language requiring the claimant to prove that he is incapable of performing any work at any gainful employment does not require that he be physically helpless. The intent of the act is to insure against loss of wage earning capacity. A workman's wage earning capacity may be destroyed although he still has some capacity to perform minor tasks. A workman is totally and permanently disabled if he is not able to perform work for which he is qualified with a reasonable degree of continuity.

Kuhnle adopted the 'odd lot' doctrine which is now the rule in virtually every jurisdiction. See 2 A. Larson, The Law of Work-

men's Compensation, s 57.51 (1971). That rule is well summarized in Lee v. Minneapolis Street Ry., 230 Minn. 315, 41 N.W.2d 433, 436 (1950): An employe [sic] who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled.

Fochtman v. Dept. of Labor and Industries, 7 Wn.App. 286, 292, 499 P.2d 255 (1972).

With regard to testimony such as that of Casady and Kabacy, the Fochtman court stated:

Although we do not exclude other testimony, we find that testimony of a vocational consultant or employment expert who would consider medical evidence of loss of function and physical impairment, his own findings obtained in testing the injured workman, facts relative to the labor market, and his conclusion as to whether the injured workman was so handicapped as a result of the injury that he could not be employed regularly in any recognized branch of the labor market, is desirable, relevant and admissible to establish total disability.

Id. at 295-96.

We conclude that a prima facie case of total disability may be established by medical testimony as to severe limitations imposed on a claimant's ability to work coupled with lay testimony concerning his age, education, training and experience and the testimony of an employment or vocational expert as to whether he is able to maintain gainful employment on the labor market with a reasonable degree of continuity. If those conditions are met the

medical expert need not make the Conclusion that the injured workman is totally and permanently disabled.

Id. at 298.

Casady's PCE concluded Hobson could do sedentary work on a "less-than reasonably continuous basis."³⁶ This is consistent with Dr. Stump's earlier opinion and also is consistent with the foregoing state case analysis of an individual who is totally disabled.

The federal courts have interpreted similar retirement qualification provisions. In Helms v. Monsanto Company, Inc., 728 F.2d 1416 (11th Cir. 1984), the Court refused to adopt as arbitrary and capricious an interpretation of "totally disabled" which would require a finding of absolute helplessness. The decision would require only the inability to perform "*substantial* services with reasonable regularity," allowing the individual to "earn a reasonably substantial income rising to the dignity of an income or livelihood, even though the income is not as much as he earned before the disability. [Citation omitted.] . . ." Helms at 1421-22.

³⁶ Exhibit 46 (0000017).

This is consistent with Social Security's total disability requirement of the inability "to engage in any substantial gainful activity" Chapman v. IRS, 1982 WL 10708 (U.S. Tax Court), 44 T.C.M. (CCH) 554 (1982).³⁷

The federal courts have consistently rejected literal interpretations effectively rendering disability plan benefits meaningless, e.g., Brasher v. Prudential Insurance Co., 771 F.Supp. 280 (1991) (court rejected strict policy "total disability" definition in favor of the Helms test, supra, which the court held presented a question of fact). In Madden v. ITT Long Term Disability Plan, 914 F.2d 1279 (1990), the Ninth Circuit held that language similar to the definition of "total disability" in RCW 41.40.010(28) was even more liberal (in favor of the employee qualifying for benefits) than the Helms test because of the additional limitation that the work be work that the employee was qualified for by education, experience or training.

³⁷ Hobson has already qualified for a social security disability, supra.

DRS's application would deny benefits to any employee who could perform any work for any amount of time, regardless of any risks to the employee of further injury. Such a standard is clearly unreasonable and is inconsistent with the obvious benefits of the disability statute's provisions.

DRS ignores this issue. It fails to address, much less attempt to answer, if it is not marketable employment an individual must be disabled from, just how much part-time qualifies, e.g., a minute, an hour, half-time, three-quarters time? The only standard which makes any sense in fulfilling the disability retirement purposes is comparable, full-time or at least substantial income-producing employment. The evidence is overwhelming: this Hobson cannot do. The record contains no evidence of a job market of jobs Hobson could perform with his physical limitations.³⁸

Research into legislative history regarding the meaning of the statutory provision "totally

³⁸ DRS's reference to a general clerk job in Kitsap County (DRS's Brief, p. 11, lines 1-3) is in error. The position was in Port Townsend, in Jefferson County, many miles from Hobson, who had limited driving ability.

incapacitated for duty" found in RCW 41.40.010(28) reveals little of any substance.

The phrase "totally incapacitated for duty" was a part of the original text of the State Employees' Retirement Act (Act), as it related to retirement based upon disability in the line of duty. SB 16, 30th Leg. Sess., 1947 Laws of Wash. ch. 274 § 21. The appellant has been unable to locate any legislative history back to the original legislation that addresses this term.

The statutory definition in RCW 41.40.010(28) was not codified until 1965. SB 223, 39th Leg. Sess., 1965 Laws of Wash. ch. 155 § 1. The bill defined the condition as "total inability to perform the duties of a member's employment or office or any other work for which the member is qualified by training or experience." Although the subsection reference number for the definition has changed over the years, the text of this definition adopted in 1965 has not been legislatively altered.

There is legislative history related to SB 223, but little of this material relates to the meaning of this statutory definition. This may

be, in part, due to the fact that SB 223 was reasonably large in scope and made several substantive changes to the Act. Among those changes were a liberalization of the Board's investment authority, a deletion of any limitation on interest rates payable on accounts, a change in the number of years in which an account vests, and elimination of a six-month probationary period.³⁹ It would appear that the scope of these other provisions robbed any individual attention the definition of "totally incapacitated for duty" would have otherwise received. The aforementioned memorandum from Director Baker does provide, with regard to this provision (now RCW 41.40.010(28)), that:

A new subsection is added, defining "totally incapacitated for duty" to mean total inability to perform the duties of a member's employment or office or any other work for which the member is qualified by training or experience. The definition clarifies the Act and assists the Board in handling the disabled member's benefit upon rehabilitation, **partial entry into gainful employment**, or suspension of the benefit upon return to employment.

³⁹ See Appendix A, Memo from Department Director Lloyd Baker, from the Legislative Files of Governor Evans, SB 223 (1965).

(Emphasis supplied.) Appendix A, ¶ 1. The emphasized comment would seem to imply that even an individual's partial entry back into employment would have to be at least to some "gainful employment."

Governor Evans received a memorandum from his legal staff, following passage of the legislation before he signed it. The memo advised the Governor that "A new subsection is added defining 'totally incapacitated for duty' as an inability to perform a member's work."⁴⁰

There do not appear to be any further references to this definition in either the House or Senate Journal. There is no enlightening material in the DRS Legal Issue Files, as annexed and stored at the State Archives. Unfortunately, the minutes of any Floor debate or Legislator's comments are unavailable this far back. It is unclear what precipitated the state employees' retirement system to address this issue in 1965, 18 years after the term was first referenced in

⁴⁰ See Appendix B, Memo to Governor Evans, Gov. Evans' Legislative Files, SB 223 (1965) (with Governor Evans' personal notes).

statute, and connected to a host of other unrelated amendments.

SB 223 was passed unanimously in both the House and Senate,⁴¹ and the entirety of amendments contained within SB 223 were sponsored at the request of the Agency.⁴²

Appellant would respectfully submit that while there is a dearth of legislative history reflecting the Legislature's intention in providing a definition of "totally incapacitated for duty," the Legislature did apparently intend that a person precluded from "gainful employment" would qualify as "totally incapacitated for duty."

The dictionary defines "gainful" as "productive of gain: profitable (~ employment)." Webster's Ninth New Collegiate Dictionary. This definition supports Hobson's disability retirement application since he was disabled in terms of performing any gainful employment. Thus, the limited legislative history which is available

⁴¹ See Appendix C.

⁴² See Appendix B.

supports the position that Hobson qualifies for a DRS total disability retirement.

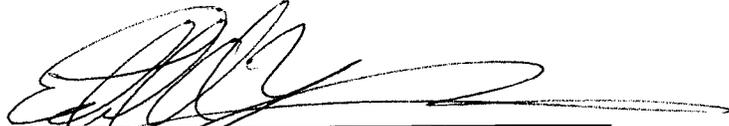
E. Conclusion

The Final Order of DRS is contrary to law, is not supported by the record, and is arbitrary and capricious and should be reversed. Hobson should be granted a PERS I disability retirement on the basis that he is "totally incapacitated for duty" within the meaning of RCW 41.40.200.

DATED this 30th day of November, 2006.

Respectfully submitted,

YOUNGLOVE LYMAN & COKER, P.L.L.C.



Edward Earl Younglove III
WSBA#5873
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, Carla C. Flynn, being first duly sworn upon oath, deposes and says: That I am employed by the law firm of Younglove Lyman & Coker, P.L.L.C. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the 30th day of November, 2006, I did file and serve the Brief Of Appellant by sending the same by ABC Legal Service to:

Court Of Appeals – Division II
950 Broadway #300
M/S TB-06
Tacoma, WA 98402

Nicole M. Potebnya, AAG
Government Operations Division
7141 Cleanwater Drive SW
PO Box 40108
Tumwater, WA 98501

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STATE
DIVISION
BY

DATED this 30 day of November, 2006

YOUNGLOVE LYMAN & COKER, P.L.L.C.,



Carla C. Flynn, Legal Assistant