

NO. 48622-9

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JAMES VORHIES,

Respondent,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,
STATE OF WASHINGTON,

Appellant.

**BRIEF OF APPELLANT
DEPARTMENT OF RETIREMENT SYSTEMS**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENT OF ERROR.....2

III. COUNTERSTATEMENT OF THE ISSUES2

IV. STATEMENT OF THE CASE3

 A. LEOFF Plan 2 Provides Catastrophic Disability Benefits To Members Who Are LEOFF Duty Disabled And Cannot Perform Any Substantial Gainful Activity3

 B. The Department Granted Mr. Vorhies A LEOFF 2 Duty Disability, But Denied His Claim For A Catastrophic Disability.....5

 C. Mr. Vorhies’ Education, History Of Employment And Transferrable Skills Demonstrate His Ability To Work.....7

 1. Mr. Vorhies possesses a wide range of interests, hobbies, and talents.7

 2. Mr. Vorhies further developed his already considerable skills at the Sequim Police Department.....8

 3. Mr. Vorhies can engage in multiple daily activities.....9

 4. Mr. Vorhies was able to testify for over two hours without apparent distress.10

 D. Expert Testimony Agreed On Mr. Vorhies’ Physical Capabilities11

 1. Mr. Vorhies’ doctor testified that Mr. Vorhies is able to work.....11

 2. Vocational experts agreed that Mr. Vorhies can sit, stand, and walk on an almost full-time basis.....13

3.	The vocational experts disagreed regarding Mr. Vorhies' ability to engage in substantial gainful activity.	15
V.	ARGUMENT	19
A.	Courts Give Deference To Agency Interpretation When Reviewing A Challenge To A Final Order	19
B.	The Department Correctly Interpreted The Law When It Denied Mr. Vorhies' Claim For LEOFF 2 Catastrophic Disability	21
C.	Objective And Vocational Evidence Prove That Mr. Vorhies Is Capable of Substantial Gainful Activity	23
1.	Mr. Vorhies' ability to reinvent himself supports a finding that he has transferable skills.	24
2.	Mr. Vorhies' daily activities objectively demonstrate his ability to work.	25
3.	The Presiding Officer correctly found that Barbara Berndt, the Department's vocational expert, was more credible than Mr. Vorhies' expert.	27
4.	The Presiding Officer correctly rejected Mr. Vorhies' arguments that age and headaches should be considered.	30
D.	Public Pension Law, Not Workers' Compensation Law, Governs LEOFF Plan 2 Catastrophic Disability Determinations	32
1.	The Department of Retirement Systems and the Department of Labor and Industries are unique agencies established for unique purposes.	33
2.	The test for benefits in workers' compensation claims is different from that in public pension disability claims.	34

3.	Workers' compensation law does not apply because it imposes a different burden than public pension disability law.	38
4.	The legislature knows how to incorporate workers' compensation law and did so in a limited situation not applicable here.....	39
E.	The Superior Court Erred In Granting Attorney Fees And Costs To Mr. Vorhies Because The Department's Final Order Was Substantially Justified.....	41
F.	Mr. Vorhies Is Not Entitled To Fees On Appeal Because The Department's Final Order Was Substantially Justified.....	43
VI.	CONCLUSION	43

APPENDIX

Appendix A: Department of Retirement Systems' Final Order

TABLE OF AUTHORITIES

Cases

<i>Alpha Kappa Lambda Frat. v. Washington State Univ.</i> , 152 Wn. App. 401, 216 P.3d 451 (2009).....	29
<i>Avellaneda v. State</i> , 167 Wn. App. 474, 273 P.3d 477 (2012).....	21
<i>Bakenhus v. City of Seattle</i> , 48 Wn.2d 695, 296 P.2d 536 (1956).....	33
<i>Dillon v. Seattle Police Pension Bd.</i> , 82 Wn. App. 168, 916 P.2d 956 (1996).....	40
<i>Freeburg v. City of Seattle</i> , 71 Wn. App. 367, 859 P.2d 610 (1993).....	29
<i>Hamilton v. Dep't of Labor & Indus.</i> , 111 Wn.2d 569, 761 P.2d 618 (1988).....	35
<i>Herr v. Dep't of Labor & Indus.</i> , 74 Wn. App. 632, 875 P.2d 11 (1994).....	38
<i>Kali v. Bowen</i> , 854 F.2d 329 (9th Cir. 1988).....	41, 43
<i>Kettle Range Conservation Grp. v. Dep't of Nat'l Res.</i> , 120 Wn. App. 434, 85 P.3d 894 (2003).....	41
<i>Kreidler v. Eikenberry</i> , 111 Wn.2d 828, 766 P.2d 438 (1989).....	40
<i>Lyons v. Dep't of Labor & Indus.</i> , 186 Wn. App. 518, 347 P.3d 464 (2015).....	43
<i>Manor v. Nestle Food Co.</i> , 131 Wn.2d 439, 932 P.2d 628 (1997), <i>cert. denied</i> , 523 U.S. 1102 (1998).....	35

<i>Marler v. Dep't of Ret. Sys.</i> , 100 Wn. App. 494, 997 P.2d 966, review denied, 141 Wn.2d 1012 (2000).....	1, 23, 36, 37
<i>Price v. Dep't of Labor & Indus.</i> , 101 Wn.2d 520, 682 P.2d 307 (1984).....	32
<i>Raven v. Dep't of Soc. & Health Servs.</i> , 177 Wn.2d 804, 306 P.3d 920 (2013).....	42, 43
<i>Shaw v. Dep't of Ret. Sys.</i> , 193 Wn. App. 122, 371 P.3d 106 (2016).....	19, 21, 37
<i>Silverstreak, Inc. v. Dep't of Labor & Indus.</i> , 159 Wn.2d 868, 154 P.3d 891 (2007).....	41, 43
<i>Taylor v. City of Redmond</i> , 89 Wn.2d 315, 571 P.2d 1388 (1977).....	39
<i>Tucker v. Dep't of Ret. Sys.</i> , 127 Wn. App. 700, 113 P.3d 4 (2005).....	19
<i>U.S. West Commc'n, Inc. v. Util. & Transp. Comm'n</i> , 134 Wn.2d 48, 949 P.2d 1321 (1997).....	30
<i>Young v. Dep't of Labor & Indus.</i> , 81 Wn. App. 123, 913 P.2d 402 (1996).....	35

Statutes

RCW 4.84.340-.360	43
RCW 4.84.350	42
RCW 4.84.350(1).....	41
RCW 34.05.461(3).....	30
RCW 34.05.570(3)(d)	20
RCW 34.05.570(3)(e)	20

RCW 34.05.570(3)(h)	20, 21
RCW 41.26.030(22).....	3
RCW 41.26.270	39
RCW 41.26.420	3
RCW 41.26.470(2).....	39
RCW 41.26.470(9).....	2, 4, 20, 34
RCW 41.26.470(9)(b)	4, 21
RCW 41.26.470(10).....	4
RCW 41.26.470-.480	4
RCW 51.08.150	35
RCW 51.08.160	34

Rules

RAP 2.5(a)	22
------------------	----

Regulations

WAC 415-104-482.....	passim
WAC 415-104-482(1).....	5, 30
WAC 415-104-482(1)(c)	23
WAC 415-104-482(13)(d)	34
WAC 415-104-482(13)(e)	23

I. INTRODUCTION

Based on the extensive record, the Department of Retirement Systems correctly held that Mr. Vorhies is not entitled to a *total* line-of-duty catastrophic disability benefit—a benefit reserved for those with the severest of disabilities. Mr. Vorhies failed to meet his burden of proving that he could not engage in any other substantial gainful activity, which is a requirement to receive a catastrophic disability benefit.

The Department’s order is supported by expert vocational testimony that Mr. Vorhies possessed transferrable work skills, work existed in his geographical area, and the work would pay more than the minimum wage required by the catastrophic disability standards. Testimony from Mr. Vorhies’ doctor further supported the Department’s conclusion that he could perform work under the catastrophic disability standard. Objective medical data also supports the Department’s order.

Despite the overwhelming evidence in the record, Mr. Vorhies asks the Court to reverse the Department’s Final Order based on workers’ compensation law. Workers’ compensation law does not apply to a public pension disability benefits analysis where the standards for disability under the two systems are different. *Marler v. Dep’t of Ret. Sys.*, 100 Wn. App. 494, 503, 997 P.2d 966, *review denied*, 141 Wn.2d 1012 (2000).

This Court should affirm the Department’s Final Order.

II. ASSIGNMENT OF ERROR

The Superior Court abused its discretion by awarding attorney fees to Mr. Vorhies because the Final Order denying catastrophic benefits to Mr. Vorhies was substantially justified, and the Superior Court provided no explanation for its action.

III. COUNTERSTATEMENT OF THE ISSUES

Issue 1: Under the error of law standard governing judicial review under the Administrative Procedure Act (APA), did the Department correctly conclude that Washington State law governing Law Enforcement Officers' and Firefighters' Retirement System (LEOFF) 2, not workers' compensation law, is the only authoritative source for determining catastrophic benefits? (Vorhies' Assignments of Error 1, 9).

Issue 2: Under the error of law standard governing APA judicial review, did the Department correctly conclude that catastrophic benefit eligibility under RCW 41.26.470(9) and WAC 415-104-482 rests on an objective determination of the claimant's ability to *perform* or *engage* in any substantial gainful activity as stated in the statute and rule rather than a subjective standard of whether a claimant believes that he cannot *obtain* or *keep a job*? (Vorhies' Assignments of Error 5, 9).

Issue 3: Under the error of law standard governing APA judicial review, did the Department correctly conclude that the claimant does not meet his burden by relying on subjective beliefs that he would not be successful at a job or be able to obtain a job? (Vorhies' Assignments of Error 1, 3, 7).

Issue 4: Under the error of law standard governing APA judicial review, did the Department correctly conclude that it has authority to weigh a claimant's ability to earn income when deciding a claimant's eligibility for a LEOFF Plan 2 "catastrophic disability" benefit? (Vorhies' Assignment of Error 4).

Issue 5: Under the error of law standard governing APA judicial review, did the Department correctly conclude that under WAC 415-104-482, the Department has authority to determine how greatly to weigh evidence relating to a claimant's age when deciding a claimant's eligibility for a LEOFF Plan 2 "catastrophic disability" benefit? (Vorhies' Assignment of Error 6).

Issue 6: Under the error of law standard governing APA judicial review, did the Department correctly conclude that it has authority to determine how greatly to weigh a claimant’s subjective statements regarding pain, unrelated to the granting of prior benefits and not characterized by any objective medical data, when deciding a claimant’s eligibility for a LEOFF Plan 2 “catastrophic disability” benefit? (Vorhies’ Assignment of Error 9).

Issue 7: Under the error of law standard governing APA judicial review, did the Department correctly conclude that it has authority to determine how greatly to weigh testimony delivered by expert witnesses for a LEOFF Plan 2 “catastrophic disability” benefit? (Vorhies’ Assignment of Error 7).

Issue 8: Under the error of law standard governing APA judicial review, did the Department correctly conclude that it has authority to determine how greatly to weigh a claimant’s existing skillset and ability to acquire additional skills when deciding a claimant’s eligibility for a LEOFF Plan 2 “catastrophic disability” benefit? (Vorhies’ Assignment of Error 2).

Issue 9: Under the standard governing judicial review of an agency’s final order, did the trial court abuse its discretion by awarding attorney fees when the Department was substantially justified in its decision? (Department’s Assignment of Error 1).

IV. STATEMENT OF THE CASE

A. LEOFF Plan 2 Provides Catastrophic Disability Benefits To Members Who Are LEOFF Duty Disabled And Cannot Perform Any Substantial Gainful Activity

The Law Enforcement Officers’ and Firefighters’ (LEOFF)

Retirement System 2 covers full-time officers and firefighters employed after October 1, 1977. RCW 41.26.030(22). LEOFF 2 members generally qualify for retirement based on age and years of service. RCW 41.26.420. If a member is totally incapacitated before qualifying for retirement, the

member may be eligible for a duty disability retirement, if (1) the member can prove that the disability was incurred in the line of duty, and (2) the disability totally incapacitates the member for continued employment in a LEOFF-eligible position. RCW 41.26.470-.480.

LEOFF 2 members granted a *duty* disability benefit may also qualify for a *catastrophic* line-of-duty disability benefit.¹ This enhanced benefit entitles the member to a monthly retirement allowance equal to 70 percent of the member's final average salary and reimbursement for certain medical insurance premiums. RCW 41.26.470(9), (10). This benefit is reserved for the most seriously disabled LEOFF members. WAC 415-104-482. To receive the benefit, the member must first be granted a LEOFF 2 duty disability and must also demonstrate that 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).

The substantial gainful activity standard is met by demonstrating that the disability "is so severe" that the member cannot perform any LEOFF-covered work and, in addition, cannot "engage in any other kind" of activity that pays the relevant dollar threshold amount based on Social

¹ WAC 415-104-482 refers to the total line-of-duty retirement benefit as a "catastrophic" benefit. Both "total line-of-duty" and "catastrophic" are interchangeable for the purposes of this brief.

Security disability standards.² WAC 415-104-482. The Department determines whether the member can engage in substantial gainful activity by considering the member's education, transferrable skills, and the local labor market. WAC 415-104-482(1).

B. The Department Granted Mr. Vorhies A LEOFF 2 Duty Disability, But Denied His Claim For A Catastrophic Disability

After working six years as a law enforcement officer for the City of Sequim, Mr. Vorhies retired on a LEOFF 2 duty disability based on injuries to his neck (cervical spine). FOF 32 (AR 36).³ Mr. Vorhies had reported neck and left arm pain in 2006, which he believed resulted from an injury sustained during basic law enforcement training in 2004 or 2005. FOF 15 (AR 5); (AR 406). He had reported additional neck pain after being injured during a police field investigation. FOF 16 (AR 5). Because treatment did not resolve his pain, Mr. Vorhies resigned from the Sequim Police. FOF 25 (AR 7). After resigning, Mr. Vorhies received commendations for his professionalism, dedication, and achievement as a patrol officer and narcotics detective. FOF 12 (AR 4).

² The annually-adjusted amount at the time of the administrative hearing and subsequent brief, based on the 2013 federal Social Security Disability standard, was \$1,040. <http://www.ssa.gov/oact/cola/sga.html> (last accessed July 22, 2016). The 2016 standard is \$1,130.

³ "FOF" refers to the Findings of Fact in the Department's Final Order. "COL" refers to the Conclusions of Law in the Final Order. The Final Order is in the administrative record filed with this Court at CAR 1 – 49, and is attached to this brief as Appendix A. The administrative record is designated "AR" and the clerk's papers are "CP."

Mr. Vorhies applied for LEOFF Plan 2 duty disability in February 2011. FOF 28 (AR 7). In May 2011, the Department granted him a duty disability, retroactively dated to January 2011, based *only* on symptoms and conditions relating to his neck (cervical spine). FOF 31 (AR 8). The Department determined that Mr. Vorhies could not perform his full duties as a police officer because of his neck symptoms, but found that he was not disabled from other forms of employment. FOF 38 (AR 11). The Department disapproved Mr. Vorhies for “catastrophic” benefits (AR 02).

Mr. Vorhies filed a Notice of Appeal for a hearing under the APA. At the conclusion of a multiple day hearing, the Presiding Officer issued a Final Order denying Mr. Vorhies catastrophic benefits because he had not met his burden of proof that he was unable to engage in any substantial gainful activity in his labor market. COL 50 (AR 43). Though he was found disabled from LEOFF 2 employment, he was not found disabled from other forms of employment. FOF 38 (AR 11). Experts from both parties and Mr. Vorhies’ doctor agreed on Mr. Vorhies’ physical capabilities. FOF 42 (AR 12); FOF 61 (AR 16-17); FOF 66 (AR 20-21). Though the experts disagreed on whether Mr. Vorhies can engage or perform substantial gainful activity, the Department carefully weighed the testimony of each expert and determined that Mr. Vorhies could indeed do so. COL 50 (AR 44). On judicial review, the Thurston County Superior

Court reversed the Final Order. The Department timely filed its Notice of Appeal to this Court.

C. Mr. Vorhies' Education, History Of Employment And Transferrable Skills Demonstrate His Ability To Work

The Presiding Officer concluded that Mr. Vorhies retains the ability to engage in multiple daily activities, possesses significant interests, hobbies, and talents, and has shown repeatedly that he can further develop those skills. FOF 6-14 (AR 24-28).

1. Mr. Vorhies possesses a wide range of interests, hobbies, and talents.

From an early age, Mr. Vorhies displayed aptitude for vehicular and technological hobbies. He assembled a bicycle, built a car motor, and even fixed a broken computer with no prior knowledge of a how a computer worked. (AR 464); (AR 463); (AR 458). Mr. Vorhies continued to use his familiarity with technology and vehicles to advance his career. FOF 13 (AR 4); (AR 463-469). He maintains an understanding of helicopter repair and maintenance, has basic helicopter flight skills, and at one point possessed a student's pilot license. (AR 466); FOF 9 (AR 3); (AR 478). He also knows how to drive refueling trucks. FOF 9 (AR 3); (AR 477).

When he was younger, Mr. Vorhies and his father developed a small business as state-licensed nuisance wildlife control operators. (AR

403). Mr. Vorhies created new types of animal traps, filed two patent applications, and perfected a GPS-based trapping mechanism to remotely notify the end user whether a trap had been triggered. FOF 8 (AR 3); (AR 555). Even after retirement, he continued casually trapping animals, with three or four mole trapping jobs in 2013. FOF 8 (AR 3); (AR 474).

Mr. Vorhies has owned another small business as well. For example, earlier in his career he owned and operated a painting business for everything from buildings to vehicles. FOF 7 (AR 2-3); (AR 401). He performed job estimates, maintained the books, and managed the finances through a Quicken program. FOF 7 (AR 2-3); (AR 402).

Mr. Vorhies can assemble a computer as well as operate a computer system, and use Microsoft Office programs including Word and Excel. (AR 458). He believes he possesses the capacity to learn additional computer programs. FOF 48 (AR 13); (AR 459).

2. Mr. Vorhies further developed his already considerable skills at the Sequim Police Department.

Mr. Vorhies was a provisional/reserve police officer with the City of Sequim's Police Department (Sequim Police) from 1999 to 2004. He joined the Sequim Police in September 2004, completed his basic training in 2005, and worked as a full time officer until December 2010. FOF 1, 11, 25 (AR 2); (AR 4); (AR 7).

While employed by the Sequim Police, Mr. Vorhies acquired additional skills, including “report writing, use of guns, investigation (including witness interviewing) and observation.” FOF 12 (AR 4); (AR 456). He used desktop and portable computers to author reports and to perform research. FOF 12 (AR 4); (AR 460). He spearheaded a transition to electronic timekeeping for Sequim police officers after creating an Excel-based timecard spreadsheet that could be submitted electronically. FOF 12 (AR 4); (AR 460); (AR 563).

Around 2007, Mr. Vorhies transitioned to the position of detective. FOF 11 (AR 4). In this role, he performed field work such as serving search warrants, engaging in nighttime surveillance with thermal imaging equipment, and “night hiking to observe incoming boat traffic.” FOF 11 (AR 4); (AR 409-10). He also performed some desk work, including writing reports and search warrant requests, and contacted witnesses for investigative purposes. FOF 11 (AR 4); (AR 457); (AR 459).

3. Mr. Vorhies can engage in multiple daily activities.

A typical day for Mr. Vorhies now involves watching television at home most of the waking day. FOF 46 (AR 13); (AR 417). He walks the 100-200 feet to his parents’ home twice a day to visit his parents. FOF 46 (AR 13); (AR 417); (AR 437-440). He participates in household tasks and chores, including cooking dinner, operating a barbeque, using a meat

smoker, cleaning laundry, and light housekeeping duties. FOF 46 (AR 13); (AR 415-17). He also mows the lawn, though he admits mowing takes him longer to complete than it used to. FOF 46 (AR 13); (AR 415). He bathes himself without assistance and completes other grooming tasks without assistance. FOF 46 (AR 13); (AR 455). Additionally, Mr. Vorhies continues to drive his automatic-transmission car for several hours at a time, and occasionally drives his 1967 manual-transmission truck for errands. FOF 46 (AR 13); (AR 429).

4. Mr. Vorhies was able to testify for over two hours without apparent distress.

The Presiding Officer observed that Mr. Vorhies' testified for "well over two hours, with one approximately ten minute break." FOF 51 (AR 14). She also noted his stiffness during the hearing, describing that his "head [was] often turned about thirty degrees to his left, holding himself somewhat stiffly with occasional movement such as gentle rocking or shifting forward or backward in the chair." FOF 51 (AR 14). She described him as "consistently articulate and courteous, well able to follow conversation and to understand and carefully answer questions without obvious effort or need for additional direction." FOF 51 (AR 14).

D. Expert Testimony Agreed On Mr. Vorhies' Physical Capabilities

In addition to Mr. Vorhies' daily activities, behavior, and skills, objective medical data also supported the Department's conclusion that Mr. Vorhies can engage in substantial gainful activity. Both parties' experts agreed on his physical capabilities as established by a physical capacities evaluation, as did Mr. Vorhies' own doctor. While the experts disagreed as to whether Mr. Vorhies was unable to engage in any other substantial gainful activity under the LEOFF 2 catastrophic disability standard, the Presiding Officer found the Department's expert more credible and affirmed the denial of catastrophic benefits.

1. Mr. Vorhies' doctor testified that Mr. Vorhies is able to work.

Dr. Michael Crim, M.D., has treated Mr. Vorhies since at least 2004. FOF 14 (AR 4, 5); (AR 656). Dr. Crim testified that Mr. Vorhies' neck injury created pain in Mr. Vorhies' neck and shoulder from "narrowing of passages for nerves, and shoulder pain corresponding to disk disease at C5 [neck],⁴ and secondary effects of chronic pain, such as anxiety, depression, and high blood pressure." FOF 41 (AR 12); (AR 662).

⁴ Dr. Crim provided additional detail regarding the C5 vertebra (where the neck connects to spinal column near the base of the skull) in his description of Mr. Vorhies' neck compression from arthritis. (AR 691)

Dr. Crim stated that Mr. Vorhies' pain levels fluctuate "back and forth." FOF 41 (AR 12); (AR 659). He further stated that the pain is increasing because of disk disease and arthritic conditions, rather than injuries caused by external factors. (AR 688-89). Dr. Crim suggested that the effectiveness of further treatment was unknown, yet he was still providing Mr. Vorhies with a number of further treatments to reduce pain. FOF 41 (AR 12); (AR 672). Dr. Crim's suggested treatment plan was intended to achieve a "certain level of function with manageable pain, and control of blood pressure and anxiety." FOF 45 (AR 13); (AR 662); (AR 675-76).

Despite those limitations, he testified that Mr. Vorhies could perform some type of "very limited" work, and did not believe Mr. Vorhies was unable to perform any work. FOF 43 (AR 12, 13); (AR 670). Dr. Crim clarified that he certified Mr. Vorhies as permanently disabled from police work, but not from all work. FOF 43 (AR 12-13); (AR 663-664). Dr. Crim reviewed the 2013 physical capacities evaluation performed by the same party that performed a separate physical capacities evaluation on Mr. Vorhies in 2011, and agreed with the findings. FOF 42 (AR 12); FOF 39 (AR 11); FOF 34 (AR 9); (AR 664). Dr. Crim believed a vocational expert would be better suited to answer exactly which employment types suited Mr. Vorhies' capabilities. FOF 43 (AR 12, 13); (AR 665).

2. Vocational experts agreed that Mr. Vorhies can sit, stand, and walk on an almost full-time basis.

The only objective measure of Mr. Vorhies' physical capabilities comes in the form of two physical capacities evaluations ordered by Mr. Vorhies' attorney. Because this type of evaluation examines the physical capabilities of the person undergoing the evaluation, it provides a baseline regarding Mr. Vorhies' abilities, such as lifting, bending, standing, sitting, or other factors. (AR 158). An independent evaluator from an industrial rehabilitation services company conducted both evaluations—one in 2011 and one in 2013. FOF 34 (AR 9). The Presiding Officer noted that "the conclusions in the two reports do not differ greatly." COL 45 (AR 41). Dr. Crim, along with vocational experts Barbara Berndt and Karin Larson, confirmed that the 2013 evaluation accurately assessed Mr. Vorhies' physical abilities and limitations. COL 44 (AR 41); (AR 665); (AR 602); (AR 500). Additionally, because of the minimal differences between the two evaluations, the Presiding Officer found the explanation of Mr. Vorhies' neck injury discussed in the 2011 evaluation to be helpful as well in evaluating Mr. Vorhies' case.

The 2011 physical capacities evaluation concluded that

Mr. Vorhies could do the following:

- Sit for four hours intermittently or from 45-60 minutes at a time in a properly supported chair.

- Stand for two hours intermittently or 30 minutes at a time.
- Walk 80 minutes intermittently or twenty minutes at a time.
- Alternately sit/stand/walk for seven hours or 3.5 hours at a time.
- Stand and walk for three hours intermittently or forty hours at a time, and occasionally climb stairs for 5-33% of an eight hour day.
- Kneel on a frequent or continuous basis.
- Bend/stoop, crouch, or squat on a frequent or continuous basis.
- Twist/turn his low back, operate foot controls on a continuous basis, and perform fine manipulation.
- Operate hand controls with his right hand frequently or continuously, and operate controls with his left hand occasionally or frequently.

FOF 35-36 (AR 9-10)

The only tasks rated as “seldom,” which means tasks he can do less than five percent of an eight hour day, were twisting/turning his neck and bending his neck. FOF 35 (AR 9-10).

The 2013 physical capacities evaluation concluded that

Mr. Vorhies possesses the following physical abilities:

- Sit, stand, and walk for three hours at a time.
- Sit, stand, and walk for a total of 6.5 to 7.5 hours per day in an eight hour work day. FOF 46 (AR 41-42).
- Sit intermittently throughout the day between four to five hours total if he changes sitting positions in the chair frequently and makes use of a chair with cervical and upper extremity support. (AR 278).

Based on these physical capacities evaluations, Mr. Vorhies possesses the physical capabilities to work between 32.5 and 37.5 hours per week if he alternates sitting, standing, and walking, or 20 to 25 hours a week sitting only. (AR 278).

3. The vocational experts disagreed regarding Mr. Vorhies' ability to engage in substantial gainful activity.

Vocational expert Barbara Berndt testified on behalf of the Department regarding Mr. Vorhies' ability to engage in substantial gainful activity. Ms. Berndt's firm, Industrial Rehabilitation Consultants, LLC, provides expert opinions and forensic testimony in workers' compensation and other employment-related areas. (AR 576-84).

Ms. Berndt reviewed Mr. Vorhies' medical and legal records in light of Mr. Vorhies employment experience and current situation. She met with Mr. Vorhies and interviewed him about his employment history along with his skills and physical capacities. FOF 66 (AR 20); (AR 586).

In forming her opinion, Ms. Berndt relied on both the 2011 and the 2013 physical capacities evaluations. *Id.* She noted that having two physical capacities evaluations to compare was unusual, and considered it significant that the two physical capacities evaluations "were nearly the same" and that Dr. Crim agreed with the 2013 physical capacities evaluation results. As the Presiding Officer noted, "In [Ms. Berndt's] judgment, in a case where medical opinion varies, two similar physical capacities evaluations combined with the concurrence of a worker's physician is a 'rock solid' basis for determining the worker's physical

limitations for purposes of a vocational assessment.” FOF 67 (AR 21); (AR 641).

Ms. Berndt drafted a written report detailing how each source of information she used in her evaluation corresponded to Mr. Vorhies’ “physical issues.” Ms. Berndt performed a labor market analysis to identify jobs within a reasonable commuting distance from Mr. Vorhies’ home and provided data listing the jobs. FOF 66 (AR 20-21); (AR 639). She conducted her analysis before reaching a conclusion as to whether Mr. Vorhies could engage in substantial gainful activity. (AR 542); (583-584).

Ms. Berndt noted that Mr. Vorhies cannot engage in work requiring the physical rigor of some of his previous occupations. She identified jobs consistent with Mr. Vorhies’ 2013 physical capacities evaluation and indicated that her list was not “exhaustive.” FOF 67, (AR 21-22); (AR 596-597). She provided job options from seventeen different categories. FOF 66 (AR 20-21). She cited amusement/recreation attendant, cashier, vehicle cleaner, crossing guard, counter attendant, demonstrator/promoter, non-police dispatcher, interviewer, reception/information clerk, security guard, bill and account collector, counter/rental clerk, file clerk, gambling surveillance, parking lot attendant, protective service worker, and claims adjuster/investigator.

Some categories, such as reception/information clerk and cashier, contained significant openings (60 and 129 respectively) while other categories had much fewer. FOF 66 (AR 21). Ms. Berndt further testified that Mr. Vorhies had the physical capabilities to work nearly full-time, that jobs existed in his labor market within his range of his physical capabilities, and that such jobs would pay greater than or equal to \$1,040 per month. FOF 64 (AR 19); (AR 605-606).

Vocational rehabilitation counselor Karin Larson, Mr. Vorhies' expert witness, provided testimony that the Presiding Officer found largely unhelpful in explaining Mr. Vorhies' capabilities. The Presiding Officer identified several deficiencies in Ms. Larson's testimony, starting with Ms. Larson forming an opinion about Mr. Vorhies before commencing the bulk of work on evaluating his case. Ms. Larson did not provide a written vocational assessment to the Presiding Officer. FOF 59 (AR 16). Ms. Larson contacted only three employers. FOF 61 (AR 17). She also evaluated counties far outside commuting distance for Mr. Vorhies, rather than counties within his commuting area. COL 57 (AR 46).

Unlike Ms. Berndt, Ms. Larson performed no labor market analysis, instead opting to provide a "labor market survey," which is a specialized type of investigation used for tracking physician approval of particular jobs for workers' compensation cases. FOF 67 (AR 16-17); (AR

489-90). The Presiding Officer found this analysis provided too little information to be helpful. Ms. Larson testified that, in her opinion, Mr. Vorhies would not be able to obtain competitive gainful employment in the Sequim/Port-Angeles area based upon his “police work, his work experience, his transferrable skills, and his physical capacities.” FOF 59, 62 (AR 16-17); (AR 498). Ms. Larson conceded that Mr. Vorhies possessed the capability of performing some work for a limited time period and was capable of enhancing his work skills and of learning new skills. FOF 62 (AR 17-19); (AR 528-29).

The Presiding Officer accepted Ms. Berndt’s report as providing a better understanding and application of LEOFF 2 catastrophic disability benefit law when compared to Ms. Larson’s report. In addition, the Presiding Officer found Ms. Larson’s report inconsistent with the 2011 and 2013 physical capacity examinations, which had supported the finding that Mr. Vorhies possessed the capability to engage in any other substantial gainful activity. Therefore, the Presiding Officer determined that Mr. Vorhies failed to meet his burden.

V. ARGUMENT

A. Courts Give Deference To Agency Interpretation When Reviewing A Challenge To A Final Order

The Court reviews “a challenge to an agency’s statutory interpretation and legal conclusions de novo, giving substantial weight to an agency’s interpretation of the law it administers.” *Shaw v. Dep’t of Ret. Sys.*, 193 Wn. App. 122, 371 P.3d 106, 109 (2016) (citing *Tucker v. Dep’t of Ret. Sys.*, 127 Wn. App. 700, 705, 113 P.3d 4 (2005)). An agency “charged with the administration and enforcement of a statute may interpret ambiguities within the statutory language through the rule making process.” *Shaw*, 371 P.3d at 112.

The party challenging an agency’s Final Order has the burden to prove the invalidity of the final action. *Id* at 109. As the party challenging the Department’s Final Order, Mr. Vorhies bears the burden of demonstrating that the Department erroneously interpreted or applied the law. He challenges the Department’s Final Order on three alleged errors: (1) the Final Order erroneously interpreted or applied the law under RCW 34.05.570(3)(d); (2) the Final Order is not supported by substantial evidence under RCW 34.05.570(3)(e); and (3) the Final Order is inconsistent with an agency rule under RCW 34.05.570(3)(h). Mr. Vorhies fails to establish the invalidity of the Final Order on any of these bases.

First, Mr. Vorhies claims the agency has “erroneously interpreted or applied the law,” but he fails to specify how he believes the Presiding Officer did so. He appears to argue that RCW 34.05.570(3)(d) (erroneously interpreting or applying the law) is met if RCW 34.05.570(3)(e) (no substantial evidence) or RCW 34.05.570(3)(h) (inconsistent with an agency rule) is met. He claims “The order is not supported by substantial evidence in light of the whole record before the court and is inconsistent with agency rules.” (Resp. Op. Br. 37). This is not the correct standard for showing an erroneous interpretation or application of law. The Presiding Officer correctly interpreted and applied RCW 41.26.470(9) and WAC 415-104-482. There was no legal error in this adjudicative proceeding.

Second, Mr. Vorhies’ challenge based on substantial evidence fails because he has not assigned error to any of the Presiding Officer’s findings of fact, which should be considered verities on appeal. He also agrees that many findings of fact are correct and, therefore, verities on appeal.⁵ Although Mr. Vorhies states that the Final Order “is not supported by substantial evidence,” he fails to provide any argument or citation to authority in support of an assignment of error. This precludes

⁵ These Findings of Fact include numbers 15, 18, 26, 34, 35, 37, 39, 41, 42, 45, 46, 48, 52, 53, 56, and 57, which he submits are verities on appeal. Resp. Op. Br. 16-25.

the Court from considering any such alleged error. *Avellaneda v. State*, 167 Wn. App 474, 482 n.5, 273 P.3d 477 (2012).

Lastly, Mr. Vorhies relies on an incorrect standard of review regarding application of an agency rule. RCW 34.05.570(3)(h) is violated only when the order itself 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.” Here, Mr. Vorhies argues that the Final Order is not consistent with the *factual findings* made by the Presiding Officer. But he does not argue that the Final Order is inconsistent with an *agency rule*. The Department’s interpretation of its own rule receives substantial judicial deference. *Shaw*, 371 P.3d at 112. Mr. Vorhies’ argument fails as a matter of law.

B. The Department Correctly Interpreted The Law When It Denied Mr. Vorhies’ Claim For LEOFF 2 Catastrophic Disability

To receive catastrophic line-of-duty disability benefits, the member must demonstrate that 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). The “substantial gainful activity” standard is met by demonstrating that the disability is “so severe” that the member cannot perform any LEOFF-covered work and cannot engage in

“any other kind” of activity that pays the relevant dollar threshold. WAC 415-104-482. The Department correctly interpreted the law when it applied its catastrophic duty disability rule requiring a showing that the member cannot engage in any other kind of activity paying the relevant dollar threshold.

Mr. Vorhies argues for an application of the catastrophic duty disability rule that incorporates a different standard which is derived from workers’ compensation. (Resp. Op. Br. 41, 43-44).⁶ This is not the correct standard; nonetheless, Mr. Vorhies bases much of his argument on his ability to “obtain” employment, a term derived from workers’ compensation, not LEOFF. While Mr. Vorhies believes that he cannot “obtain” employment, the Presiding Officer correctly noted that the word “obtain” exists nowhere in the requirements for catastrophic benefits. COL 55 (AR 45). Even if workers’ compensation law applied to the present situation, Mr. Vorhies provided only speculation as to whether he could “obtain” employment. Mr. Vorhies presented no evidence regarding failed attempts to “obtain” employment, and the testimony of his expert witness provided little helpful information. The Presiding Officer correctly

⁶ At no point has Mr. Vorhies challenged WAC 415-104-482 through a petition for declaratory judgment or in the context of any other review proceeding under the Administrative Procedure Act. To the extent that Mr. Vorhies challenges WAC 415-104-482 in this proceeding, this Court should decline to review his claim under RAP 2.5(a).

rejected Mr. Vorhies' attempt to redefine the statutory standard for catastrophic benefits. COL 20 (AR 31).

Mr. Vorhies' attempt to rewrite the standard of whether one can "engage in any other substantial gainful activity" into whether one can "engage in employment" directly conflicts with the statute, the rule, and the Department's interpretation of the qualifications for catastrophic benefits. As discussed below in Section D, reliance on workers' compensation law is improper where the standards for the two different schemes of benefits are different. *Marler*, 100 Wn. App. at 502-03. Here, the standard for determining catastrophic benefits is whether the member can "engage" in substantial gainful activity, WAC 415-104-482(1)(c), not "obtain" substantial gainful activity. The Court should reject Mr. Vorhies' erroneous interpretation of the rule.

C. Objective And Vocational Evidence Prove That Mr. Vorhies Is Capable of Substantial Gainful Activity

In evaluating a claimant's ability to engage in substantial gainful activity, WAC 415-104-482(1)(c) considers education, transferrable skills, and work experience to be of paramount importance. Transferrable skills, according to WAC 415-104-482(13)(e), include "any combination of learned or demonstrated behavior, education, training, work traits, and skills that you can readily apply." The rule paints the evaluation in a broad

context, allowing for the Department to review the totality of a claimant's skillset.

1. Mr. Vorhies' ability to reinvent himself supports a finding that he has transferable skills.

In this broad context, the Presiding Officer evaluated Mr. Vorhies' skillset based upon his career, hobbies, and skills prior to, during, and after he joined the Sequim Police Department. FOF 6-15 (AR 2-6). The Presiding Officer noted the skills, abilities, and technological know-how that Mr. Vorhies implemented and improved upon during his time with the Sequim Police. FOF 11, 12 (AR 4). She also considered the tasks, activities, and business ventures that Mr. Vorhies engaged in after retiring from Sequim Police. FOF 8 (AR 3). Based on his broad, varied skillset, the Presiding Officer correctly concluded that Mr. Vorhies possessed significant transferrable skills and, as a result, had not met his burden to show that he could not engage in any other substantial gainful activity. COL 53 (AR 44).

Mr. Vorhies disagrees with the Presiding Officer's reliance on his extensive set of transferrable skills. (Resp. Op. Br. 37). Mr. Vorhies minimizes his own business skills, his outside-the-box thinking, and his analysis abilities. He demands that his ability to adapt to a new setting be ignored and replaced with "what he can do now," (Resp. Op. Br. 46),

despite the admission from his own vocational expert that he possessed the ability to enhance his work skills and learn new skills now. FOF 62 (AR 17-19). Mr. Vorhies fails to explain how his ability to continually adapt to new settings and reinvent himself time and time again cannot be considered a transferrable skill.

2. Mr. Vorhies' daily activities objectively demonstrate his ability to work.

Mr. Vorhies' daily life demonstrates that he possesses the ability to complete multiple household tasks on a regular basis. Mr. Vorhies bathes himself. (AR 455). He can walk the 100-200 feet to and from his parents' home twice a day. (AR 435-436). He can do laundry (AR 446-447). He can mow the lawn. (AR 446) He can cook and can clean (AR 414); (AR 443). Despite Mr. Vorhies' neck injury, he continues to drive a vehicle to run errands (AR 441). Mr. Vorhies' testimony and the testimony of his family members illustrated that while he does take additional time to perform daily tasks, he still manages to complete them. These tasks and chores demonstrate that he still maintains the ability to participate in many activities necessary to his daily life without assistance.

These activities further translate into abilities that Mr. Vorhies can perform in work outside the home. Continuous kneeling, squatting, and operating controls, as shown in the 2013 physical capacities evaluation,

apply to Mr. Vorhies' daily life, where he positions his body in such a way to grab laundry, cook food, or operate the meat smoker. (AR 416). He also uses the appliances in his house, which require the ability to operate controls. (AR 417). Thus, these abilities that Mr. Vorhies displays on a daily basis, from walking to his parents' house to operating a vehicle, demonstrate that a job identified by Ms. Berndt, such as one who cleans cars, is certainly within the realm of Mr. Vorhies' physical capabilities. The 2013 and 2011 physical capacities evaluations objectively demonstrate that Mr. Vorhies possesses the capabilities for near or full time work despite his neck injury.

While Mr. Vorhies' ability to do daily tasks and activities illustrates his physical capabilities, the most objective measure of Mr. Vorhies' physical capabilities comes from the 2011 and 2013 physical capacities evaluations. The unchallenged 2013 physical capacities evaluation confirms that Mr. Vorhies can lift ten pounds from floor to waist, 12.5 pounds from knee to waist, 7.5 pounds from waist to chest, and 7.5 pounds from waist to shoulder using his right upper extremity. He also can "frequently or continuously" kneel, crouch, squat, and maneuver certain types of hand-operated controls. FOF 35-36 (AR 9-10). These physical abilities support the Presiding Officer's finding that there are jobs available in his geographical area that require the physical skills that

Mr. Vorhies can perform. As stated above, Mr. Vorhies' household abilities are consistent with the objective medical data in the physical capacities evaluation, and even more importantly, match the jobs identified by Ms. Berndt as being within Mr. Vorhies' abilities.

3. The Presiding Officer correctly found that Barbara Berndt, the Department's vocational expert, was more credible than Mr. Vorhies' expert.

After considering and comparing the testimony of both Mr. Vorhies' vocational expert, Karin Larson, and the Department's vocational expert, Barbara Berndt, the Department found Mr. Berndt to be more creditable.⁷ COL 58 (AR 46).

The Presiding Officer correctly expressed concern over several deficiencies in Ms. Larson's testimony. COL 54-57 (AR 44-46). First, and most notably, the Presiding Officer found that Ms. Larson spent most of her testimony criticizing Ms. Berndt's report rather than supplying useful evidence in support of her contention that no "realistic employment opportunities for someone with his physical capacities and transferable skills [exists]." COL 54 (AR 44). The Presiding Officer was also concerned that Ms. Larson attempted to shift the burden of proof from Mr. Vorhies, who bore the burden to prove that he cannot engage in

⁷ The Final Order determined that Ms. Berndt's report and testimony should be "given greater credit," which the Department understands to mean that the Presiding Officer found Ms. Berndt to be more creditable. COL 58 (AR 46).

substantial gainful activity, to the Department to have to prove that he can. COL 54 (AR 44).

Second, the Presiding Officer concluded Ms. Larson's testimony displayed a mistaken view of the eligibility requirements for LEOFF catastrophic disability. COL 55 (AR 45). The Presiding Officer noted that Ms. Larson blended the term "gainful employment," a term of art from Labor and Industries, with "substantial gainful activity," which is a specifically-defined term in Department pension law. She noted that "when our state legislature chose to use the term 'substantial gainful activity,' it was intending to designate something other than 'gainful employment' (or 'substantial gainful employment') for workers' compensation, however closely those terms may resemble each other in common usage." COL 55 (AR 45).

Third, the Presiding Officer found that Ms. Larson's "treatment of Mr. Vorhies' physical abilities was too selective to merit great credit." COL 56 (AR 45). The Presiding Officer dismissed Ms. Larson's testimony as too narrow to be useful because it did not focus on what Mr. Vorhies *could* do but rather focused on what Mr. Vorhies *could not* do. Mr. Vorhies challenges this conclusion of law in his argument, but his argument lacks clarity. He appears to be stating that the Presiding Officer denied his claim because he did not provide proof that an employer could

accommodate his ailments. But the Presiding Officer had simply noted the lack of usefulness of Ms. Larson's comments.

Fourth, the Presiding Officer discounted Ms. Larson's testimony because she "offered meager support" for her opinion, noting that Ms. Larson performed only a limited labor market survey (contacting three employers of security guards in the Sequim-Port Angeles area). COL 57 (AR 46). Her testimony, the Presiding Officer noted, consisted largely of "surmise regarding what individual positions within job classifications might require" in the northern Olympic Peninsula. COL 57 (AR 46). That made it difficult, the Presiding Officer noted, to "rely on her experience with labor market surveys and knowledge of the labor market."⁸ *Id.*

Reviewing courts have a limited role when asked to review a finding of credibility by an adjudicative officer, and must accept the "factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 610 (1993). "It is not a reviewing court's task to weigh credibility," *Alpha Kappa Lambda Frat. v. Washington State Univ.*, 152 Wn. App. 401, 418, 216 P.3d 451 (2009).

⁸ The Presiding Officer also raised concerns regarding Ms. Larson's failure to discuss possible work accommodations that employers provide, COL 56 (AR 46), a conclusion which Mr. Vorhies dismisses as requiring him to prove that an employer would not accommodate any physical limitation. It bears repeating that Mr. Vorhies has the statutory burden in this appeal to prove the Final Order's invalidity.

Reviewing courts will not “substitute our judgment for that of the agency.” *U.S. West Commc’n, Inc. v. Util. & Transp. Comm’n*, 134 Wn.2d 48, 62, 949 P.2d 1321 (1997). In light of this strong prohibition against revisiting credibility determinations, the strongly supported testimony given by Ms. Berndt, and the deficiencies in Ms. Larson’s analysis, the Final Order correctly determined Ms. Berndt’s testimony was more credible. The Presiding Officer heard the testimony of both experts and read their written reports. The Presiding Officer’s role is to determine credibility under RCW 34.05.461(3). She did so, finding Ms. Berndt more credible. COL 58 (AR 46). As a consequence, the Final Order’s conclusion that Mr. Vorhies can engage in substantial gainful activity, based on Ms. Berndt’s conclusions, must also be viewed as more credible.

4. The Presiding Officer correctly rejected Mr. Vorhies’ arguments that age and headaches should be considered.

Mr. Vorhies takes issue with the Final Order’s finding that “an applicant’s age is not an eligibility factor in WAC 415-104-482(1).” (Resp. Op. Br. 46, 47). Mr. Vorhies presented no evidence at the hearing that he applied for and lost employment based on his age.⁹ Further, he presented no evidence that his age affected the results of his physical

⁹ For example, he references age as a factor in Social Security disability, but fails to explain how the existence of age as a factor in Social Security disability determinations affected whether he could engage in substantial gainful activity under WAC 415-104-482(1).

capacities evaluations.¹⁰ The Presiding Officer correctly acknowledged that WAC 415-104-482 makes no mention of an age requirement for eligibility purposes. COL 55 (AR 45).

The Presiding Officer also correctly disregarded Mr. Vorhies' argument regarding the disabling effect of headaches. COL 32 (AR 36). The Presiding Officer noted that Mr. Vorhies did not apply for a disability benefit based on his claimed headaches, nor did he provide any objective findings related to the headaches, such as any mention of diagnosis, origin, frequency or severity, or how headaches affected Mr. Vorhies' functioning. Dr. Crim also provided no testimony regarding headaches. Thus, the Presiding Officer disregarded the symptoms of headaches as "separate from arm and neck pain" physical problems for which he received duty disability and which serve as the basis for determining whether he qualifies for catastrophic disability. COL 32 (AR 36).

Though Mr. Vorhies did not list headaches in his LEOFF 2 catastrophic disability application, he attempts to make headaches a relevant factor now by treating the headaches as "psychological conditions." He argues that Labor and Industries case law applicable to psychological conditions applies to LEOFF 2 determinations of

¹⁰ Mr. Vorhies' history of employment shows the opposite to be true. Mr. Vorhies joined the Sequim Police Department as a reserve officer after decades of working in other fields and eventually gained full time officer status in 2004 (CAR 253), when he was almost 40 years of age.

catastrophic disability. (Resp. Op. Br. 44). Mr. Vorhies misapplies the objective-subjective test for psychological conditions under *Price v. Department of Labor & Industries*, 101 Wn.2d 520, 682 P.2d 307 (1984). *Price* is inapplicable because (i) it involves interpretation of Labor and Industries law, not public pension law; (ii) it applies to symptoms of psychiatric injury that are necessarily subjective in nature; and (iii) the issue in *Price* involved a jury instruction that precluded expert testimony based on subjective complaints, an issue not relevant here. The Presiding Officer properly excluded headaches from consideration of Mr. Vorhies' application for catastrophic disability benefits.¹¹

D. Public Pension Law, Not Workers' Compensation Law, Governs LEOFF Plan 2 Catastrophic Disability Determinations

Having failed to establish that he is entitled to LEOFF Plan 2 catastrophic disability benefits under the laws governing public pensions, Mr. Vorhies argues that workers' compensation law should govern his benefit determination. Washington courts have rejected the application of workers' compensation standards to public pension determinations. They are administered by two separate, unique agencies governed by two

¹¹ Mr. Vorhies also makes an argument that res judicata applies to his case. (Resp. Op. Br. 44). The Department granted Mr. Vorhies a duty disability for his neck injury. No disagreement exists between the parties regarding the duty disability Mr. Vorhies receives for his neck injury.

separate, unique sets of laws, which establish different tests for benefits determinations and have different burdens of proof. For these reasons, the Court should likewise reject such an application.

1. The Department of Retirement Systems and the Department of Labor and Industries are unique agencies established for unique purposes.

The Department of Retirement Systems manages and protects billions of dollars in retirement benefits for members across the State of Washington. It is responsible for providing retirement benefits to those who are entitled to benefits under the public pension laws in Title 41 RCW. These pension benefits provide retirement income that only becomes payable at retirement, thus it is a form of “deferred compensation for services rendered.” *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 698, 296 P.2d 536 (1956).

In contrast, workers’ compensation benefits allow claimants to make claims while still employed, rather than having to retire first to receive a benefit. Thus, it acts as a form of wage replacement.¹² Because the Department’s pensions are aimed at retirement rather than wage replacement, as workers’ compensation is structured, attempting to analyze one under the rules of the other produces distorted results.

¹² <http://www.lni.wa.gov/Main/AboutLNI/?F=MainFooter> last visited 07/26/2016.

2. The test for benefits in workers' compensation claims is different from that in public pension disability claims.

For LEOFF 2 catastrophic duty benefits, which require a showing that the claimant cannot engage in any "substantial gainful activity," the legislature and the Department have defined the term "substantial gainful activity" in both statute and rule.

As discussed above in Section B, RCW 41.26.470(9) defines substantial gainful activity 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." WAC 415-104-482(13)(d) further defines "substantial gainful activity" as "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."

In contrast, the Industrial Insurance Act governing workers' compensation defines the phrase "permanent total disability" with reference to "substantial gainful employment." RCW 51.08.160 defines "permanent total disability" as the "loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing *any work at any*

gainful occupation.” (Emphasis added). Permanent disability for workers’ compensation benefits does not require that a claimant be absolutely helpless to receive benefits. *Young v. Dep’t of Labor & Indus.*, 81 Wn. App. 123, 130, 913 P.2d 402 (1996). RCW 51.08.150 defines “permanent partial disability” as “loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments were severed where repair is not complete, or any other injury known in surgery to be permanent partial disability.” Substantial gainful activity is manifestly different from substantial gainful employment, and the Court should not conflate the two.

In light of these differences in statutory purposes and language, Washington courts view the Industrial Insurance Act, which governs Labor and Industries under Title 51, as a “unique piece of legislation.” *Hamilton v. Dep’t of Labor & Indus.*, 111 Wn.2d 569, 572, 761 P.2d 618 (1988) (citation omitted). The Washington State Supreme Court has made clear that decisions made by Labor and Industries pursuant to its workers’ compensation law are limited “to the purview of Title 51, and do not and cannot affect the common law or other statutory law” *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 454, 932 P.2d 628 (1997), *cert. denied*, 523 U.S. 1102 (1998). Retirement disability benefits are determined by

“other statutory law.” Thus, workers’ compensation cases have no bearing on determining eligibility for LEOFF 2 retirement disability.

This Court has also rejected attempts by claimants to merge workers’ compensation disability requirements with the Department’s public pension definitions on the grounds that such attempts would “exceed any authority and go beyond the previous interpretation of these acts and their relationship.” *Marler v. Dep’t of Ret. Sys.*, 100 Wn. App. at 502. In *Marler*, a member of the Public Employees Retirement System (PERS) applied for PERS duty disability benefits after the statute of limitations for those benefits had passed. He argued that his Labor and Industries case tolled the statute of limitations and that in the very least he should be able to toll his public pension disability application pending the outcome of his Labor and Industries proceedings. When the court rejected that argument, Mr. Marler then tried to argue that res judicata in his Labor and Industries claim bound the Department. The court rejected that argument too, stating that “there are two distinct requirements of proof” between workers’ compensation and the Department’s duty disability. *Id.* at 503. Like the Supreme Court, this Court limited workers’ compensation to Title 51 and declined to intertwine the public pension benefits determinations and workers’ compensation proceedings.

Though *Marler* dealt with a comparison between PERS 1 duty disability benefits and workers' compensation, not LEOFF 2 catastrophic duty disability and workers' compensation, the Court's reasoning still applies to the present case. The Court based its reasoning in *Marler* on the essential differences between workers' compensation law and public pension law. Like the claimant in *Marler*, Mr. Vorhies tries to impose Labor and Industries case law and standards on the Department, even though the benefit types are incongruent.

Because workers' compensation standards differ from the Department's standards, "different results [in benefit determinations] under these standards are not inconsistent." *Marler*, 100 Wn. App. at 504. Thus, the Department's denial of Mr. Vorhies' catastrophic disability application is wholly proper regardless of how it fits with workers' compensation law. Further, Mr. Vorhies concedes that the legislature did not require application of workers' compensation principles to public pension law, (Resp. Op. Br. 40), but still attempts to force the Department to rely on workers' compensation case law. The Department has declined to do so, and Washington courts give substantial weight to an agency's interpretation of the law that it administers. *Shaw*, 371 P.3d at 112.

3. Workers' compensation law does not apply because it imposes a different burden than public pension disability law.

The Court should also decline to impose the workers' compensation burden of proof to that applicable for LEOFF 2 benefits. For workers' compensation, the "odd lot doctrine" places the initial burden of proof on the claimant to establish a prima facie case that he or she "cannot perform light or sedentary work of a general nature," at which point the burden shifts to Labor and Industries to prove some specialty work exists in the job market that the claimant can both perform and obtain. *Herr v. Dep't of Labor & Indus.*, 74 Wn. App 632, 636, 875 P.2d 11 (1994).

In contrast, LEOFF 2 contains no such burden shifting. The burden rests upon the claimant to prove that he or she cannot engage in any substantial gainful activity. LEOFF 2 contains no "odd lot doctrine." LEOFF 2 catastrophic benefits are subject to medical evaluations and can be revoked upon medical determinations that a claimant is no longer catastrophically disabled. The differences between LEOFF catastrophic benefits and workers' compensation benefits support the conclusion that the two systems of benefits are governed by different sets of laws.

4. The legislature knows how to incorporate workers' compensation law and did so in a limited situation not applicable here.

Mr. Vorhies points to an area of extremely limited interaction between LEOFF and workers' compensation to support his contention that the two are intertwined. That limited interaction is found in RCW 41.26.470(2), which authorizes comprehensive medical examinations of members receiving benefits. If a member recovers from an "incapacitating disability" and becomes no longer eligible for workers' compensation benefits, the Department may also cancel that member's retirement benefits. Mr. Vorhies relies on this statute as legislative intent to adopt worker's compensation to public pension law, but this argument lacks merit. It shows nothing more than that the legislature intended overlap between the two regimes in that circumstance only. The Supreme Court confirmed that conclusion in *Taylor v. City of Redmond*, 89 Wn.2d 315, 318, 571 P.2d 1388 (1977). In *Taylor*, the Court explained that LEOFF and workers' compensation maintain separate identities unless expressly authorized under statute, because RCW 41.26.270 "remov[ed] law enforcement officers and fire fighters from coverage under the workmen's compensation act." The Court recognized that rather than blending the two systems, the legislature took affirmative steps to treat LEOFF as a set of laws distinct from workers' compensation. *Taylor*, 89 Wn.2d at 319.

In addition, in contrast to workers' compensation law, which is inapplicable to LOEFF 2 disability benefits, the Department has specifically applied federal Social Security law to these benefits. The Presiding Officer noted that WAC 415-104-482 mentions a substantial reliance on Social Security Administration determinations. This direct reference to substantial reliance in one area shows that the Department's rules allow substantial reliance on another body of law when such has been written into the rule. The Department could have relied on workers' compensation case law in its WAC, but chose not to do so. *See Kreidler v. Eikenberry*, 111 Wn.2d 828, 834, 766 P.2d 438 (1989) (express mention of one thing in law "implies the exclusion of another"). In light of such an absence, there is no basis to disregard the Department's rules.

Finally, the Court should reject Mr. Vorhies' reliance on *Dillon v. Seattle Police Pension Board*, 82 Wn. App 168, 171, 916 P.2d 956 (1996) because *Dillon* relates to a proximate cause determination as to whether a Labor and Industries' disability arose "naturally and proximately" out of employment and did not involve the requirements for LOEFF 2 catastrophic benefits. Mr. Vorhies makes no arguments regarding symptoms he claims arose from his employment, and the holding of *Dillon* does not apply to Department-derived determinations of whether to provide or how to calculate catastrophic benefits.

E. The Superior Court Erred In Granting Attorney Fees And Costs To Mr. Vorhies Because The Department's Final Order Was Substantially Justified

A court should not award attorney fees to a qualified party that prevails in a review of agency action when the court finds “the agency action was substantially justified or that circumstances make an award unjust.” RCW 4.84.350(1). “Substantially justified” means “justified to a degree that would satisfy a reasonable person.” *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007).

An agency’s action may be substantially justified even when the agency’s action is ultimately determined by the court to be unfounded. “This may occur, for example, when the agency’s determination, though ultimately unsupported by the evidence, was made on the best available evidence at the time of the decision.” *Kettle Range Conservation Grp. v. Dep’t of Nat’l Res.*, 120 Wn. App. 434, 469-70, 85 P.3d 894 (2003).

The mere failure to prevail on judicial review does not create a presumption that the agency’s position was unreasonable or not substantially justified. *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988). When a case involves a close question of statutory interpretation, Washington courts regularly find agency action to be reasonable and “substantially justified” even if the agency’s action is ultimately found

incorrect by the court. *Raven v. Dep't of Soc. & Health Servs.*, 177 Wn.2d 804, 809, 306 P.3d 920 (2013).

Here, the Department's Final Order carefully considered the testimony of several witnesses, including vocational and medical witnesses, and a significant amount of documentary evidence. The 49-page Final Order was based on a three-day hearing. The Presiding Officer detailed her reasoning, and based her decision on a reasonable evaluation of the totality of Mr. Vorhies' transferrable skills, physical capabilities, expert testimony, and objective medical data from the uncontested physical capacities evaluations and Dr. Crim's testimony. COL 48-58 (AR 42-46). In addition, the issues raised in Mr. Vorhies' administrative appeal were issues of first impression for which the Presiding Officer had no previous final orders, interpretive statements or case law for guidance. COL 10 (AR 26-27).

The Presiding Officer presented a reasonable and substantial Final Order that correctly interpreted the law. Mr. Vorhies disagreed with none of the Final Order's findings of fact. The Department met its burden of proof that its decision was "substantially justified." As such, an award of fees would only make such an award "unjust." RCW 4.84.350.

Finally, the superior court provided no reasoning for its decision that the Department's actions were not substantially justified. Thus, the

superior court abused its discretion in granting an award to Mr. Vorhies.

Raven, 177 Wn.2d at 833.

F. Mr. Vorhies Is Not Entitled To Fees On Appeal Because The Department's Final Order Was Substantially Justified

An award for attorney fees and costs is a separate analysis from whether a party prevails in an administrative action. *Kali*, 854 F.2d at 332. Substantial justification is based on the “strength of the factual and legal basis for the action, not the manner of the investigation and the underlying legal decisions.” *Silverstreak*, 159 Wn.2d at 892. However, as stated above, the Department’s findings and conclusions were substantially justified. The Department based its decision to deny Mr. Vorhies’ application for catastrophic benefits on many well-supported reasons. A reasonable person would conclude the same based on Mr. Vorhies’ failure to meet his burden of proof. *Lyons v. Dep’t of Labor & Indus.*, 186 Wn. App. 518, 542, 347 P.3d 464 (2015) (quoting *Silverstreak*, 159 Wn.2d at 892). Mr. Vorhies is not entitled to fees or costs on appeal under RCW 4.84.340-.360.

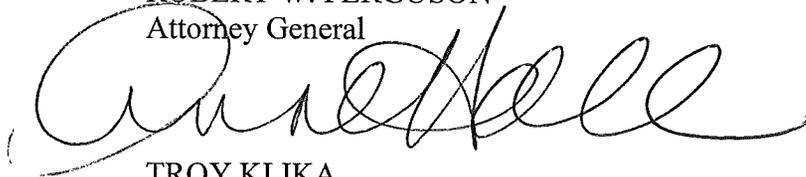
VI. CONCLUSION

Mr. Vorhies failed to meet his burden to show he was unable to engage in any other gainful activity and therefore failed to meet the statutory requirement for receiving LEOFF 2 catastrophic disability

benefits. Objective medical data and expert testimony demonstrated that he possesses the physical capabilities and transferrable skills to engage in substantial gainful activity earning more than \$1,040 per month. Workers' compensation law is inapplicable to LEOFF 2 catastrophic disability determinations. This Court should reject Mr. Vorhies' arguments in support catastrophic benefits, affirm the Department's Final Order, and deny his request for attorney fees.

RESPECTFULLY SUBMITTED this 27th day of September,
2016.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Anne Hall", written over the typed name of Anne Hall.

TROY KLIKA
Assistant Attorney General
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Attorneys for Appellant
Department of Retirement Systems

PROOF OF SERVICE

I certify that I served a copy of this document, via U.S. Mail, postage prepaid, through Consolidated Mail Services, and courtesy copy via email, on the following:

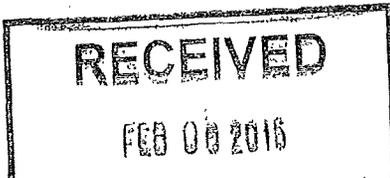
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of September, 2016, at Tumwater, WA.


Carrie A. Parker, Legal Assistant

APPENDIX A



Office of the Attorney General
 Government Operations Division

CERTIFICATION OF MAILING

I, the undersigned, have this day served a copy of this document upon the parties of record in this proceeding by mailing each of them a copy through the United States Postal Service, postage prepaid. Dated at Olympia, Washington, this 5th day of February, 2015.

Renee Scott
 Renee Scott, Appeals Coordinator
 Department of Retirement Systems
 Olympia, Washington

WASHINGTON STATE DEPARTMENT OF RETIREMENT SYSTEMS
 BEFORE THE PRESIDING OFFICER

In re the Appeal of) Docket No. 12-L-006
)
JAMES VORHIES)
) **FINAL ORDER**
)
for LEOFF Plan 2 disability retirement:)
catastrophic)

STATEMENT OF THE CASE

Appellant James Vorhies, formerly a member of the Washington State Law Enforcement Officers' and Firefighters' Retirement System (LEOFF), now retired for line-of-duty disability, requested a hearing before the Department of Retirement Systems to pursue his claim for a retirement benefit for total disability in the line of duty.

Attorneys Robert Strohmeyer and Wayne Williams represented Mr. Vorhies in this appeal. Assistant Attorneys General Anne Hall and Tsering Kheyap represented the Department of Retirement Systems.

A hearing was held in Port Angeles, Washington, on October 31, 2013, at which Mr. Vorhies appeared, and continued on November 1, 2013. The hearing concluded with additional testimony in Sequim, Washington, on December 18, 2013.

ISSUE

Whether Mr. Vorhies is entitled to receive a LEOFF Plan 2 retirement allowance under RCW 41.26.470(9) for total disability in the line of duty.

RESULT

Mr. Vorhies has not shown that he is entitled to receive a LEOFF Plan 2 retirement allowance for total disability in the line of duty.

FINDINGS OF FACT

Mr. Vorhies and LEOFF

1. After nearly six years of service to the City of Sequim, Washington (City) as a reserve and provisional law enforcement officer, James Vorhies was hired by the City in September 2004 as a full-time salaried law enforcement officer. With this position he became a member of the Law Enforcement Officers' and Firefighters' Retirement System (LEOFF), in Plan 2.
2. Mr. Vorhies resigned his law enforcement position with the City in December 2010. He has not since held any LEOFF eligible position.
3. On February 1, 2011, Mr. Vorhies applied to the Department of Retirement Systems (the Department) for retirement for disability. On May 10, 2011, the Department's LEOFF plan administrator approved his application for retirement for line-of-duty disability, effective January 1, 2011. The plan administrator disapproved his application as to an enhanced benefit for **total** line-of-duty disability ("catastrophic"¹ disability benefit).

The Department reconsidered Mr. Vorhies' application for a catastrophic disability benefit, but again denied it on or about September 27, 2011.

4. Mr. Vorhies petitioned the Department for administrative review of the denial. In a decision issued on or about October 3, 2012, the Department's petitions examiner also denied Mr. Vorhies' claim, concluding that he had not shown that he met the requirements for a catastrophic disability benefit.
5. On December 3, 2012, Mr. Vorhies filed a Notice of Appeal for a hearing before the Department to pursue his claim that he does qualify for "catastrophic disability retirement benefits pursuant to RCW 41.26.470(8)".

Education and Work Experience to 2004

6. Mr. Vorhies attended public schools and earned a GED and a high school diploma in California. He worked for a brief time as a pizza cook in or about 1983, then worked as a laborer in residential construction, including framing, siding and painting. When he showed special talent for painting, a construction contractor for whom he worked helped him start his own subcontracting painting business.
7. In 1989, Mr. Vorhies moved from California to the north Olympic Peninsula area of Washington State. His parents moved to the same area soon after, and he and his father worked together painting as a business. They painted residential and commercial structures, primarily for construction contractors. "At times", when they

¹ The enhanced line-of-duty disability retirement benefit at issue here is termed "catastrophic" in the Department's implementing rule, WAC 415-104-482.

needed help, they employed one of Mr. Vorhies' cousins. Mr. Vorhies started a painting business of his own, doing, in his words, "[A]ll sorts of painting . . . you name it, I've painted it", including vehicles. The painting business was successful without need for commercial advertising, with a good reputation in the community for timeliness and quality of work. Mr. Vorhies used a commercial financial software program to manage the basic bookkeeping, such as paying expenses and supplier invoices, and invoicing and collecting payment for services. He used an accounting service for tax returns.

8. While Mr. Vorhies and his father had their painting business, they also trapped nuisance animals, particularly raccoons and moles, continuing a hobby developed in California. They became licensed as nuisance wildlife control operators, trapping nuisance animals as a paid service. This work involved setting traps on or in the ground, or in a dwelling for animals such as squirrels, then retrieving traps and disposing of any trapped animals. Mr. Vorhies developed a new type of trap with a radio transmitter that signaled when the trap had been activated. When he applied for a patent for this trap, Mr. Vorhies and his father formed a named business, Haven Trapping. Mr. Vorhies sold his rights to this trap while the patent application was still pending; he testified that he "lost money" on it because the amount he received from the sale was less than the cost of applying for the patent through an attorney. He also developed a new type of wire-cage trap, and applied for a patent on it; that application was still pending at the time of the hearing. He denied that this business was "lucrative", saying only that it was seasonal, he and his father had enough traps to serve about three residences at a time, and earnings could vary between \$200 and \$1000 per month when it was active. Though Haven Trapping no longer exists as a corporation or licensed entity, Mr. Vorhies continues that activity on a casual basis; without promotion or advertising he had three or four mole trapping jobs in 2013.
9. When painting business was slow in 2001 and 2002, Mr. Vorhies went to Arkansas for about nine months to work for a friend's brother who had a business using helicopters to spray pesticide on cotton crops. Mr. Vorhies was hired to drive a "nurse truck" for refueling and refilling pesticide tanks. The helicopters broke down frequently and needed constant inspection and maintenance, so Mr. Vorhies also learned how to repair and maintain their engines and rotor blades, and some basic flying skills.
10. Mr. Vorhies lives in Sequim, in Clallam County. In January 1999 he became a reserve law enforcement officer with the Sequim Police Department, then later a provisional officer. Though this service did not qualify for LEOFF membership and service credit, it involved successful performance of many tasks normally performed by regular City law enforcement officers.

Work Experience with City of Sequim

11. After the City hired Mr. Vorhies as a full-time salaried law enforcement officer, he entered basic law enforcement training, which he completed in the first half of 2005. After about two and a half years as a patrol officer, in March 2007 he became a detective assigned to the Olympic Peninsula Narcotics Enforcement Team (OPNET), a multiagency task force combating marijuana growing operations and the import of illegal drugs such as methamphetamine. Work tasks included some typically done at a desk, such as writing reports and requests for search warrants, and some investigative contacts, but most work was done "in the field", including serving search warrants, nighttime surveillance with thermal imaging equipment, and night hiking to observe incoming boat traffic. OPNET detectives involved in closing down a marijuana growing operation were expected to remove for storage as evidence all the items found, often a large amount of plant material and equipment such as containers and electrical and hydroponic growing systems.
12. During his reserve and professional law enforcement service, Mr. Vorhies was trained in report writing, use of guns, investigation (including witness interviewing) and observation. He used computers, both desktop and laptop, for reports and research. He was required to do only minimal filing of paper documents. He spent "awhile" devising a way for SPD officers to report their work hours electronically, allowing streamlined reporting and supervisory approval by email, using a Microsoft Excel spreadsheet.

After his resignation, Mr. Vorhies was formally commended for his professionalism, dedication and achievement as a patrol officer and narcotics detective.

Hobby Skills

13. Since he was a boy, when he took apart and reassembled a bicycle, Mr. Vorhies has shown an aptitude for "figuring [things] out". When he had his painting business, he salvaged a laptop computer discarded by a local computer business, and, without prior experience, was able to get it functioning again.

Since his early teens, Mr. Vorhies' main hobby and interest has been working on cars and motorcycles, especially those made before the 1960's. He has restored both and has built hot rods, including body work and painting, and has a 1950 Ford that he has partially restored. On at least one occasion, at the request of a superior officer, he repaired a vehicle he used in his OPNET law enforcement work by replacing the vehicle's alternator.

Medical History 2004-2010

14. Mr. Vorhies' primary care physician is Dr. Michael Crim, MD, who is board certified in family medicine and maintains a practice in family medicine in Sequim,

Washington. Though Dr. Crim's clinic records go back only to 2004, Mr. Vorhies recalls that he has seen Dr. Crim since moving to the Sequim area.

Dr. Crim examined Mr. Vorhies in September 2004, as part of a pre-employment screening for the full-time law enforcement position with the City. Dr. Crim characterized this physical examination as "normal" and considered Mr. Vorhies then to be in "really good shape".²

15. In May 2006 Mr. Vorhies saw Dr. Crim for neck pain and left arm pain and numbness, which Mr. Vorhies traced back to an unreported injury during basic law enforcement training ("the academy") in late 2004 or early 2005. These symptoms persisted. By early 2008, neurological specialists attributed his symptoms to radiculopathy (disease of the nerve roots), described by Dr. Crim in later clinic notes as "significant cervical disc disease",³ in his cervical spine at the C6 vertebra. Mr. Vorhies had surgery on March 5, 2008, an anterior cervical discectomy and fusion at the C5-C6 vertebrae, which reduced the pain symptoms. In July 2008 Mr. Vorhies returned to full duty as a detective.
16. On or about August 14, 2008, Mr. Vorhies was assisting with a field investigation when he dove down an embankment to avoid an oncoming vehicle, and fell into a wire fence (the fence incident). At about this time he reported to Dr. Crim that he continued to experience moderate to moderately severe neck pain that interfered with his ability to sleep.
17. At a post-operative examination in October 2008, a physician assistant reviewed recent x-rays showing satisfactory progress of the cervical fusion. She reported to Dr. Hutton, M.D., that Mr. Vorhies had been taking prescribed narcotic medication as needed for neck pain, had been receiving massage therapy, and was expected to start physical therapy. At that exam Mr. Vorhies described hurting his neck in the fence incident, and he reported new numbness and tingling along his right ulnar nerve. The examining physician assistant saw no sign of damage to the fusion site or hardware from the fence incident.
18. Mr. Vorhies continued to experience pain in his neck and left arm and hand. In early March 2009, he received steroid injections in his neck, on diagnoses of cervical degenerative disk disease and cervical radiculopathy. The injections did not reduce his arm pain, and reduced his neck pain only briefly. In July 2009 Mr. Vorhies had a second neck surgery, a hemilaminectomy and medial facetectomy, to relieve the effects of radiculitis and radiculopathy secondary to foraminal stenosis at the C4-C5 cervical vertebrae. This surgery effectively relieved pain in his arm. Mr. Vorhies had physical therapy as part of recovery from both surgeries.
19. Mr. Vorhies returned to work for the City, but on light duty. In October 2009 he again received injections to relieve muscle spasms in the back of his neck.

² Testimony of Crim, hearing transcript (TR) 293, 21-23.

³ Exhibit D-8; see also text at note 11.

20. On September 7, 2010, Mr. Vorhies assisted in dismantling a marijuana growing operation, lifting and carrying heavy items. This activity intensified existing pain in his lower back, which he thought could have been caused by recent work he had done on a friend's car, to the point that he could not walk. He was examined at the emergency room of a local hospital that night, and underwent a magnetic resonance imaging (MRI) scan of his lumbar spine. He was absent from work for at least three days on personal sick leave.
21. During September 2010 Mr. Vorhies also experienced worsening neck pain, and pain in his upper back, and underwent two more MRI scans, of the cervical and thoracic segments of his spine. From September 22, 2010, he was absent from work on sick leave or extended medical leave.

In early October 2010 he received an epidural steroid injection which relieved the lumbar pain.

22. Dr. Crim was unwilling to approve Mr. Vorhies' return to law enforcement duty with the City, and on October 14, 2010, Mr. Vorhies sought a second opinion from Dr. Mark Tomski, M.D., at the Swedish Medical Center pain clinic. According to his clinic note, Dr. Tomski, a physiatric physician, saw Mr. Vorhies for evaluation and management of "chronic diffuse spinal pain" with a recent "flare of neck pain". Reviewing the recent treatment for lumbar pain as well as earlier treatment for neck pain, Dr. Tomski described the September 7, 2010, MRI scan as showing "degenerative disk disease at L1-L2 and L3-L4 along with annular disk bulge", and the September 29, 2010, cervical MRI scan as showing "a C4-5 disk protrusion, which slightly deforms the anterior cord, as well as C5-C6 small disk perfusion touching the cord". Dr. Tomski agreed with Dr. Crim that Mr. Vorhies did "not appear to have the physical capacities to return to his job as a police officer". He "developed a treatment plan . . . to help [Mr. Vorhies] . . . cope and make transition [sic] to understanding this reality". His clinic note reflects that during his examination of Mr. Vorhies he observed signs of depression, and he recommended referral to pain management psychology and that Dr. Crim prescribe antidepressant medication. He also suggested that a physical capacities evaluation be performed if needed "to objectively quantify [Mr. Vorhies'] inability to return to the police force".⁴
23. By letter of November 18, 2010, Dr. Crim notified the City regarding Mr. Vorhies, ". . . due to the physical condition of his spine and the risk of further serious injury, I cannot release him back to work without extreme restrictions. At this time Jim has a disability that appears to be permanent in nature." His letter indicated that he based his decision on Mr. Vorhies' report of worsening neck pain and the results of the recent MRI scans showing lumbar disk injuries and "new abnormalities in both his Cervical and Thoracic spine" that put him "at high risk for further spinal damage".⁵

⁴ Exhibit A-8.

⁵ Exhibit A-9.

24. Dr. Crim later noted that, after the September 29, 2010, cervical MRI scan, "Injection and physical therapy were attempted without significant improvement [in the complaints of neck pain]. The patient was compliant with [physical therapy] and showed good faith efforts in attempting rehab".⁶
25. Mr. Vorhies did not return to work with the City, and resigned his position on December 15, 2010.

Post-Employment Benefit Applications and Evaluations

26. *Workers' Compensation* In late December 2010 Mr. Vorhies applied for workers' compensation benefits. The Department of Labor and Industries (DLI) accepted his claim for medical care and time loss benefits, for lumbar strain. DLI closed this claim in June 2011, without any ratable impairment for the lower back injury.
27. *Social Security* In January 2011 Mr. Vorhies applied for Social Security disability (SSD) benefits. The Social Security Administration (SSA) denied his application (initially in June 2011, on reconsideration in October 2011, and on appeal after hearing January 9, 2013).
28. *LEOFF* On February 1, 2011, Mr. Vorhies applied to the Department for LEOFF retirement for disability. A LEOFF Plan 2 member applies for disability retirement by means of a three-part Department form. The applicant completes Part 1 with specified personal information. The applicant's employer, or former employer, submits Part 2, the employer's statement and report, directly to the Department. Part 3, a medical report, is also submitted directly to the Department by a physician or other licensed care provider.⁷ The Part 3 form has prompts and spaces for history of injury and/or disability, present complaints, examination findings, diagnosis and conclusions.
29. Dr. Crim signed the Part 3 medical report on January 11, 2011. In his report he listed the two neck surgeries as part of the "history" segment, described "present complaints" as "cervical neck pain [with] radiculopathy", and stated his diagnoses as "cervalgia" (diagnostic code 723.1, likely intended to indicate "cervicalgia", or neck pain), and degenerative disk [disease with] "an[n]ular disk bulge/protrusion" (724.9, 724.5). In the "Physician Conclusions" portion, Dr. Crim checked boxes to indicate that Mr. Vorhies was totally incapacitated for continued employment as of September 8, 2010, as a result of accident or disease in performance of duty, and that the incapacity was likely to be permanent. He also responded "no" to the question whether further treatment or examination was indicated.
30. On January 18, 2011, Dr. Crim approved a "Progress Note" document from a clinic visit of January 5, subtitled "Disability review", in which he stated,

⁶ Exhibit D-8.

⁷ WAC 415-104-480(4)(a); WAC 415-104-485(3)(a).

Despite surgery, PT [physical therapy], OT [occupational therapy], Jim's neck is still too symptomatic to be able to withstand the rigors of his current job, detective with the Sequim Police Department. His cervical pain continues [to be] substantial, and I don't [see] it changing in the near or long term. If he were to be in an altercation with a suspect in his line of work, there's a very real possibility of permanent neurological injury. If there are other positions in the [police] department that he can do, that would be my [preference]. But I believe changing jobs altogether because of his neck injury and ongoing pain issues is the best alternative. I therefore believe that he should be declared 100% disabled from his current job.⁸

31. In May 2011, the Department approved Mr. Vorhies' application for LEOFF retirement for line-of-duty disability, retroactive to January 1, 2011. In recommending approval of retirement for duty disability, the Department's staff medical advisor focused on Mr. Vorhies' neck (cervical spine) conditions and symptoms, which she regarded as "severe enough to incapacitate [him] from performing the full duties of a police officer", and sufficiently linked to an injury during basic law enforcement training. While noting "documented abnormalities in [Mr. Vorhies'] cervical, thoracic and lumbar spines", the medical advisor expressly did not base her recommendation on "the low back symptomology", which in her judgment had not clearly originated in performance of law enforcement duties. Relying on Dr. Crim's and Dr. Tomski's opinions, and particularly on Dr. Crim's written opinions between mid-November 2010 and mid-January 2011, including the January 2011 "Progress Note", the medical advisor concluded, "Mr. Vorhies is not disabled for all employment, but only for continued employment as a police officer". The LEOFF plan administrator adopted the recommendations of the Department's medical advisor, approving retirement for duty disability only, and denying "catastrophic benefits".⁹

2011 Evaluations and Medical Opinion

32. Clinical Psychologist John T. Lloyd evaluated Mr. Vorhies in April 2011, in connection with Mr. Vorhies' claim for SSD benefits. Dr. Lloyd diagnosed pain disorder with both psychological factors and a general medical condition (listing in "chief complaints" neck, shoulder and arm pain, arm weakness and numbness, and lower back pain). Noting that Mr. Vorhies denied experiencing depression, Dr. Lloyd scored his "global functioning" at 70, observing only that he had "mild difficulties with social and occupational functioning". He reported that "Mr. Vorhies would benefit from being able to do an activity. From a psychological point of view, he is capable of doing simple tasks, complex tasks, and tasks requiring good judgment. He is also capable of doing tasks requiring social skills".¹⁰

⁸ The Progress Note, Exhibit D-12, does not identify the specific reason for a "disability review", which could have been related to any of Mr. Vorhies' benefits applications.

⁹ Exhibit D-10, pp. 7-8.

¹⁰ Exhibit D-7, pp. 3-4.

33. Between July 20 and July 28, 2011, Dr. Crim authored another "Progress Note", also subtitled "Disability review", in which he summarized some of the treatment history of Mr. Vorhies' "cervical disease" and stated,

. . . A formal psychological evaluation confirmed absence of any untoward psychopathology (malingering, etc.).

The consensus of [Mr. Vorhies'] medical team to date is this. 1. [Mr. Vorhies] was lucky he did not have a catastrophic outcome from the July 2009 accident. 2. He has shown on exam and imaging studies progression of significant cervical spine disease to the extent that he cannot perform his prior job as a detective in narcotics without significant risk of a catastrophic neurologic complication involving his neck. 3. There are no other medical or psychological problems complicating this neck injury. 4. It is unlikely [Mr. Vorhies] will ever be able to resume his prior job because of these on the job injuries.

On a more than likely basis [sic], the patient's continued neck pain originated in the Police Academy and worsened with another on the job injury resulting in two surgeries and now chronic debility, both at home and at work.¹¹

34. Also in July 2011 Dr. Crim referred Mr. Vorhies to Capen Industrial Rehabilitation Services in Bremerton, Washington, to evaluate his physical capacities. On July 28, 2011, Registered Occupational Therapist Christina Casady performed a performance-based physical capacities evaluation (PCE). Her report listed the pertinent diagnoses as "Lumbosacral (Joint)(Ligament) Sprain, Neck Sprain, Degeneration of Thoracic or Thoracolumbar Disc, Degeneration of Thoracic or Lumbar Intervertebral Disc", and recorded that the nature of the injury, as reported by Mr. Vorhies, was to the neck and upper back.
35. Ms. Casady's report recorded that Mr. Vorhies is right-hand dominant. The report's activity tolerance profile projected that he would have the ability to do the following in an eight-hour workday:

sit: 4 hours, intermittently, 45-60 minutes at a time
(in a chair with cervical and upper extremity support)
stand: 2 hours, intermittently, 30 minutes at a time
walk: 1 hour 20 minutes, intermittently, 20 minutes at a time
alternately sit/stand/walk: 7 hours, 3.5 hours at a time
alternately stand/walk: 3 hours, 40 minutes at a time

¹¹ Like Exhibit D-12, this Progress Note, Exhibit D-8, does not identify the specific reason for a "disability review", and the rest of the record does not make clear what the reference to "the July 2009 accident" might be. It is assumed here that the reference was intended to be to the fence incident of August 14, 2008. Mr. Vorhies underwent his second neck surgery on July 13, 2009, nearly a year later (Exhibit A-5).

and the ability to do the following at least occasionally [5-33% of an 8-hour day]:

- climb stairs
- kneel (frequently or continuously)
- bend/stoop
- crouch/squat (frequently or continuously)
- twist/turn his low back
- operate foot controls (continuously)
- perform fine manipulation
- operate hand controls (right hand, frequently or continuously, left hand, occasionally or frequently)

and the following seldom [1-5% of an 8-hour day] to occasionally:

- twist/turn his neck
- bend his neck

The report also noted a telephone conversation with Mr. Vorhies sometime after the evaluation, in which he described having a severe migraine headache "in the back of [his] neck going to the base of the skull" the day of the evaluation, inability to sleep that night, even with pain medication, and greatly increased neck and left shoulder soreness (but no headache) the next day.

36. In the recommendations and conclusions section of her report, Ms. Casady characterized Mr. Vorhies' performance as "high effort", and concluded that he could handle weight up to 16 pounds frequently and up to 32 pounds occasionally, "between the **sedentary** and **light** weight handling categories on a less-than reasonably-continuous basis". After reviewing a description of the job duties of a police patrol officer for the City of Sequim, she expressed her opinion that he did not have the physical tolerances to consistently perform some duties of that job, such as prolonged sitting in a patrol car, running and subduing individuals.
37. In an addendum of August 28, 2011, Ms. Casady expanded on her opinion that Mr. Vorhies would not be able to sustain gainful vocational activity on a reasonably-continuous basis, pointing out that he showed "below-competitive productivity levels on work sample activity", had shown poor body mechanics and posture (a safety concern), needed to frequently change positions, was using narcotic medications daily for pain control, "demonstrates significant limitations of the left arm and hand", and had a history of migraine headaches.¹²

Second LEOFF Decision

38. In September 2011 the Department's medical advisor and LEOFF plan administrator reconsidered Mr. Vorhies' eligibility for a catastrophic disability benefit in light of the July 2011 PCE results, Dr. Crim's July 2011 Progress Note, and the report of an independent medical examination (IME) done for DLI in April 2011. On

¹² Exhibits A-15-A, -B.

September 27, 2011, the LEOFF plan administrator signed a "Disability Action Sheet" concurring with the medical advisor's apparent conclusion that the medical reports continued to show that Mr. Vorhies could not return to police duties, but was not disabled from "sustained gainful employment".¹³

2013 Evaluation and Medical Opinion

39. At Mr. Williams' request, Ms. Casady again evaluated Mr. Vorhies' physical capacities on May 10, 2013. Her report of this PCE listed the following in the space for diagnoses: "Neck, Left Shoulder, Left Arm, Low Back, Stenosis in Back". It recorded that the nature of the injury, as reported by Mr. Vorhies, was to the neck and lower back, and again that he is right-hand dominant.

A few of the tests differed, but the categories of capacities tested were the same as for the 2011 PCE. The activity tolerance profile projected that Mr. Vorhies would have slightly more ability to sit at one time, and slightly less ability to stand at one time, but the same ability to walk; about the same ability to alternately sit, stand and walk (6.5-7.5 hours, 3 hours at a time) and somewhat less ability to alternately stand and walk (2.5 hours, 30 minutes at a time). No change was projected in the ability to twist, turn or bend the neck. The 2013 PCE report noted that Mr. Vorhies had good body mechanics, but decreased range of motion for low back extension and forward flexion. It included his reports of pain in the lower back in walking and climbing activities that were not present in the first PCE report.

In this second report Ms. Casady noted a follow-up conversation with Mr. Vorhies of May 15, 2013, in which he described having a migraine headache with vomiting after the evaluation, broken sleep, and increased soreness in his lower back (but no headache) the day after the evaluation.

40. In her 2013 recommendations/conclusions, Ms. Casady again characterized Mr. Vorhies' performance as "high effort", and concluded that he could handle weight up to 12.5 pounds frequently and up to 25 pounds occasionally, again "between the **sedentary** and **light** weight handling categories on a less-than reasonably-continuous basis", though he "would be precluded from the full range of light duties, as described in the Dictionary of Occupational Titles, due to limited standing and walking tolerances".

Comparing the results of the 2011 PCE with the results of the 2013 PCE, Ms. Casady concluded, "In addition to significant limitations of the neck, the limitations of his low back have increased significantly; and the tolerance for weight handling, standing, and operating foot controls have decreased since the last PCE".¹⁴

¹³ Exhibit D-6.

¹⁴ Exhibit A-17, p. 2.

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

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

The effects of these conditions are chronic pain in Mr. Vorhies' neck and shoulder from narrowing of passages for nerves, and shoulder pain corresponding to disk disease at C5; and secondary effects of chronic pain, such as anxiety, depression and high blood pressure. Though Mr. Vorhies' experience of pain intensity varies, overall Dr. Crim believed Mr. Vorhies' pain is worse since January 2011; 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.

Dr. Crim has not ruled out further treatment for Mr. Vorhies. Though chronic pain and its secondary effects are treatable, he was uncertain how effective treatment will be in Mr. Vorhies' case. Medications were prescribed for sleep, blood pressure, nerve pain and anxiety, and "breakthrough pain";¹⁵ Mr. Vorhies also used non-prescription anti-inflammatory medications for pain; his blood pressure was under good control as a result of prescribed medication and cessation of smoking. A soft cervical collar was being tried to support the neck area. Dr. Crim recommended physical therapy for spinal strengthening, but, for safety reasons, only as prescribed by specialists in neurology or physical therapy because of spinal instability. He has suggested a trial of acupuncture for pain relief. He expected that Mr. Vorhies will need neck surgery again, but nerve conduction studies would be required first to rule out other causes of pain.

42. Regarding Mr. Vorhies' physical capacities, Dr. Crim agreed with the results of the 2013 PCE report, which he considered well-validated, and he believed that the neurological consultants who have examined Mr. Vorhies accepted the results as well. He believed that the report accurately described Mr. Vorhies' physical abilities, and the activity limits identified there were close to the restrictions he would place on lifting, and on length of time in one position or activity. He estimated that Mr. Vorhies might need to change position every 20 to 45 minutes.
43. Regarding possible employment, Dr. Crim thought that Mr. Vorhies was capable of some type of "very limited" work; he did not believe Mr. Vorhies was incapable of any work. He would defer to vocational experts to evaluate whether suitable types

¹⁵ Despite Mr. Vorhies' reluctance to resume using narcotic pain medication, in December 2013 Dr. Crim was prescribing a new narcotic medication for "breakthrough pain", on a short-term basis; he had no information on Mr. Vorhies' experience with it.

of employment exist for someone with Mr. Vorhies' background and physical capacities, but the physical demands of potential employment would have to be in line with the limitations in the 2013 PCE report. Dr. Crim clarified that opinions he had given in 2011 and 2012 that Mr. Vorhies was permanently disabled, or could not return to work in any capacity, were directed to a return to police work.

44. With respect to Mr. Vorhies' lumbar spine conditions, Dr. Crim diagnosed disk disease and some osteoarthritis, but less than in the neck. Epidural injections have had clear cut benefits.
45. Dr. Crim does not expect that Mr. Vorhies' spinal conditions will improve, and he does expect that they will worsen, particularly the arthritis in the neck; reasonable goals of treatment are a certain level of function with manageable pain, and control of blood pressure and anxiety.

Mr. Vorhies' Current Activities and Abilities

46. Mr. Vorhies does not need assistance with daily personal care tasks. During a typical weekday, he watches television most of his waking hours, usually from a sofa or recliner in the living room of his home; he will often walk once or twice to his parents' house, a distance of approximately 100-200 feet, where he also watches television from a recliner. At home he performs light housekeeping such as preparing a simple dinner, which may include using a barbeque or smoker, 15 minutes or so of kitchen cleanup, and using the automatic washer and dryer at home to do his personal laundry as needed. He drives his automatic-transmission car, and sometimes his 1967 manual-transmission pickup truck, to run limited errands in the local area, but does only minimal shopping by himself, such as picking up prescriptions or a few items for dinner. In season he mows the lawns at his house and his parents' house, using his father's riding lawnmower with hydraulically-controlled power steering. This takes about three hours in total, and intensifies pain in his back and neck, so he does it up to an hour per day over several days, and only when necessary, which he testified is less often than weekly.
47. Mr. Vorhies now works on vehicles only for household transportation. He is not attempting to continue with the restoration of the 1950 Ford. He has been able to repair more recently manufactured vehicles by studying manuals, and, for computerized systems, by using a plug-in device to obtain diagnostic codes, then looking up the codes on the Internet. He estimates it takes him three times as long to complete a repair as it did before he had neck problems; he takes breaks because of the pain and limited motion in his neck.
48. Mr. Vorhies can send and receive email and search the Internet. He can use Microsoft Word to create documents and Microsoft Excel to create and use spreadsheets. He is confident that he can learn to use computer programs given time to study the instructions.

49. Mr. Vorhies has never been able to type by touch; he types using one finger of each hand while looking at the keyboard ("hunt and peck"). Because of his slow typing speed, when he worked as a law enforcement officer he often finished typing reports using his laptop computer at home outside of work hours.
50. Mr. Vorhies understands most of what he views on news programs. He reads infrequently and generally only for information; he will use his lifted knees to hold reading material while he is in a reclining position to avoid flexing his neck downward.

Appearance at Hearing

51. At hearing the undersigned took Mr. Vorhies' testimony for well over two hours, with one approximately 10-minute break. During direct examination, referring to the constant pain in his neck, he stated, "Right now it's hurting me pretty good".¹⁶

He gave his testimony seated in a standard upholstered conference room chair, his head often turned about 30 degrees to his left, holding himself somewhat stiffly with occasional movement such as gentle rocking or shifting forward or backward in the chair.

The undersigned observed Mr. Vorhies to be consistently articulate and courteous, well able to follow conversation and to understand and carefully answer questions without obvious effort or need for additional direction.

Mr. Vorhies' Testimony -- Report of Physical Symptoms and Medication

52. Though he has chronic lower back pain, Mr. Vorhies experiences most pain in his neck area. He has muscle spasms in his left shoulder, and numbness, tingling, and occasional loss of control in his left arm and hand. The neck and shoulder pain interferes with sleep, so most nights he gets intermittent sleep of six hours or less in total. When pain "radiates up" from his neck, often following some extended activity, he gets "really bad" headaches. When it "radiates down", he experiences pain farther down his spine. He understands from his doctors that there is not enough space between his cervical vertebrae to allow further steroid injections there for pain relief.

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

¹⁶ TR 47.

-- Self-description and Outlook

53. Mr. Vorhies acknowledges that he usually has no trouble following instructions, and can work comfortably on his own and with others. His attention pattern is to focus on only one thing at a time, so he doubts his ability to multitask, or effectively manage more than one task at a time. When his blood pressure is high he can become confused and have difficulty concentrating.
54. Mr. Vorhies describes himself as "more or less ambidextrous", that is, he is left-hand dominant and left-eye dominant, but he uses his right hand for fine-motor tasks such as writing.

In his own estimation, he can sit for "quite a while", walk for 30 minutes at a time, and stand for 15 to 20 minutes at a time. He can drive his automatic-transmission car for between an hour and two hours at a time without a problem. After that, to continue driving he must take breaks to walk or lie down.

55. He perceives his pain symptoms as worsening, and believes that they will continue to worsen because the underlying spinal conditions are degenerative.
56. Mr. Vorhies has not sought paid employment since he resigned his City position and has no vocational goals. He believes that he cannot be employed because his work experience was in jobs that required physical labor, but now because of the pain in his neck he is limited in the time he can stand and move, and he is "spent" after two hours of repetitious activity. He does not believe he could perform a security job that alternated thirty minutes of walking with thirty minutes of sitting, because after two hours it would cause a headache and he would have to lie down. He says he has not been able to find anything that he can do for more than two hours because of the pain in his neck. He reports that he performs all tasks at a much slower pace than he used to, and, from his personal experience, he believes that no workplace would accept the pace at which he works now.

Christi and Jordan Vorhies' Testimony

57. Christi Vorhies, Mr. Vorhies' wife of 27 years, and Jordan Vorhies, his 24-year-old son, testified in support of Mr. Vorhies' application. They confirmed that Mr. Vorhies is outstandingly knowledgeable and talented in vehicle mechanics and restoration. Both saw him as successful in the jobs he had had, well-liked by coworkers and supervisors. Jordan described his father as innovative and a keen observer. Christi described him as intelligent and creative, but a "mono-tasker", meaning that he concentrates on doing one thing at a time, and has not shown ability to handle multiple tasks at once.

Both described Mr. Vorhies as far less active than he was formerly. Jordan recalled working on vehicles, hiking and camping with his father, things that Mr. Vorhies no longer does. Christi could not identify when the changes occurred, but

mentioned that Mr. Vorhies is no longer "always doing something" as he was before, does not work around their own house, and does not help his parents around their house as he often used to.

Vocational Experts

58. 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.

Karin Larson

59. *Conclusions* The record does not indicate that Ms. Larson produced a written vocational assessment or report. She testified to her opinion that Mr. Vorhies would not be able to obtain competitive gainful employment in the Sequim-Port Angeles area because of restrictions on his physical activities and limited transferable skills from his work experience. She could not identify jobs in that labor market that he could obtain and for which he could be expected to perform the essential functions; because he is not able to be competitive in that labor market, he could not be expected to obtain and maintain employment, either full-time or part-time, and thus could not earn pay of \$1040 per month or more.
60. *Qualifications and experience* Ms. Larson obtained her master's degree in counseling psychology, and her registration with the state Department of Labor and Industries (DLI) as a vocational rehabilitation provider in 1989. Since then she has worked as a vocational rehabilitation counselor in Port Townsend and Aberdeen, Washington. Since 2007, she has been part owner of Vocational Rehab Specialists in Aberdeen. Her firm primarily performs assessments of, and interventions and employment plans for, individuals claiming workers' compensation benefits through DLI, and affected employers. She attained her national certification as a rehabilitation counselor (CRC) in 2006, and since then has testified in workers' compensation appeals before the Board of Industrial Insurance Appeals (BIIA) and in some personal injury lawsuits, in which approximately three-quarters of her appearances were for plaintiffs.
61. *Method* Ms. Larson reviewed some of Mr. Vorhies' medical records, including chart notes from Drs. Crim and Tomski, and the 2011 and 2013 Capen PCE reports. From the 2013 PCE report she accepted that Mr. Vorhies has the following physical limitations: standing 15 minutes at a time, up to 1.5 hours in an eight-hour day; walking 20 minutes at a time, up to one and one-third hours in an eight-hour day; alternately standing and walking (30 minutes at a time, up to two and one-half hours in an eight-hour day); sitting for one and one-half hours at a time, up to five hours in an eight-hour day; lifting 10 to 25 pounds occasionally and up to 12.5 pounds frequently; restrictions on bending and stooping; and only seldom to occasional turning or extension of the neck. She consulted with Dr. Crim

to confirm that he agreed with the standing, walking and neck flexion tolerances set out in the 2013 PCE report.

Ms. Larson met with Mr. Vorhies twice, once in his home, for about three hours in total. She arranged for a professional evaluation of his computer skills, from which she accepted that he can use a mouse, can type about 15 words per minute on a standard keyboard, and has some ability to use outdated versions of office software and to search databases.

Ms. Larson testified to making three contacts with employers in the Sequim-Port Angeles area in Mr. Vorhies' case. She obtained information from Pierce County Security, the Port of Port Angeles, and Seven Cedars Casino about their security positions, from which she learned that Pierce County Security and the port both required their security employees to be able to patrol on foot, and both the casino and the port required security employees, including casino employees who might perform only video surveillance, to be able to lift at least 40 pounds. She was unable to contact the Port Angeles and Sequim school districts concerning their employment of crossing guards, so relied on information from North Mason School District (which had no crossing guard positions) and from unspecified school districts in Grays Harbor and Lewis counties (where crossing guard duties were performed by paraeducator school staff). She based her opinions in part on knowledge gained from her experience exploring clerical work as a lighter-duty alternative for workers injured performing heavier labor, and labor market surveys concerning parking lot attendants she had done in other cases.

62. *Testimony* Ms. Larson expressed her ultimate opinion in the following exchange:

Q Okay. Now, in this particular case, we have agreed, I believe, that substantial gainful employment is employment that would allow you to earn more than \$1040 a month. Operating on that assumption and based upon Mr. Vorhies' age, education, transferable skills, and work experience, as well as the physical limitations he has, can you form an opinion on a more probable than not basis as to whether he's capable of obtaining and performing substantial gainful employment from January 1, 2011, forward?

A Yes.

Q And what is your opinion?

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

Ms. Larson described a "labor market survey" as a survey of employers in a labor market to obtain specific information such as their total number of employees, number of employees in particular positions, the physical demands, duties and essential functions of particular positions, and date of most recent hire. She

characterized her contacts with employers concerning security and crossing guard positions, above, as labor market surveys.

With respect to possible clerical work, Ms. Larson observed from her experience that the Sequim-Port Angeles area, within a reasonable commuting distance of Mr. Vorhies' home in Sequim, is a smaller labor market, in which clerical positions will often involve a wide range of tasks and skills, and office employees must be "multifaceted", or able to perform multiple functions. She regarded Mr. Vorhies' neck motion restrictions as a significant problem, noting Dr. Crim's opinion that it would be difficult for Mr. Vorhies to sustain a posture "looking at a computer monitor and a keyboard" because of limited neck flexion. She testified to her opinion as follows:

Q And based upon your discussions with Mr. Vorhies, the medical reports, and the testing you had done, do you have an opinion as to whether Mr. Vorhies could be – could obtain reasonably continuous gainful employment in a clerical position?

A Yes.

Q And what is that opinion?

A I do not believe that he could obtain competitive gainful employment in the clerical sector.¹⁷

Ms. Larson further opined that Mr. Vorhies probably could not be employed in occupational categories listed in the report developed by Ms. Berndt, below. After reading descriptions of typical job duties in each category, she judged that Mr. Vorhies probably could not obtain or perform jobs in those occupations, for one or more of the following reasons: (1) she doubted that paid positions existed in the relevant labor market that required only the duties described for the category (e.g., amusement/recreation attendant, crossing guard, file clerk, parking lot attendant); (2) considering the medical restrictions on standing, walking and neck flexion, she did not believe that he could physically perform tasks required for jobs in the category (e.g., amusement/recreation attendant, cashier, vehicle cleaner, crossing guard, counter attendant, demonstrator/promoter, dispatcher, counter and rental clerk, file clerk, security (requiring lifting and/or patrol), parking lot attendant, protective service worker (retail store security), claims adjuster/investigator); or (3) she did not believe that he had sufficient training or current skills to perform essential functions of jobs in the category (e.g., reception/information clerk, bill and account collector, dispatcher, demonstrator/promoter (requiring use of multiline phone or other clerical skills), interviewer (requiring coordinating and supervision of clerical staff), claims adjuster/investigator).

¹⁷ TR 121.

She then testified,

Q Are there jobs, other than the ones we've talked about, that you feel Mr. Vorhies could obtain and perform given the factors I mentioned before, his work experience, his training, his age, his education, his physical limitations?

A No, I don't believe that there is [sic].¹⁸

She acknowledged on cross-examination that Mr. Vorhies could perform the functions of a retail greeter, for up to 2.5 hours per day, and that Mr. Vorhies was capable of "building on . . . his current skill sets",¹⁹ and of learning new skills, such as computer and mechanical skills.

63. *Transferable skills* Ms. Larson opined that Mr. Vorhies has the following transferable skills from his basic education or from jobs he has had: estimating and bidding painting jobs (structures), customer service, performing basic mathematical calculations, billing, collecting payment and money transactions, keenly observing the environment, investigating situations and incidents (such as analyzing causes of a vehicle collision), supervising others, and working on a team or collaboratively with others.

Barbara Berndt

64. *Conclusions* Ms. Berndt reached the following "vocational conclusions" as stated in her written Vocational Evaluation report of September 30, 2013:

Mr. Vorhies has skills and abilities that can be transferred to occupations outlined in the body of this report. According to the preponderance of medical opinions he can resume full-time work or, according to his demonstrated abilities in two Physical Capacity Evaluations he can work in near full-time work. . . . Jobs exist in his labor market which utilizes [sic] his employment skills and his physical abilities. Mr. Vorhies may have limitations but he is not totally work-disabled for Light or Sedentary occupations. The standard for substantial gainful activity in 2013 is \$1040 per month earning capacity and it is my opinion Mr. Vorhies possesses skills and physical capabilities of earning within this definition.

Consistent with these conclusions in her report, she testified to her opinion 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 for between 15 and 30 work hours per week, depending on the rate of compensation.

¹⁸ TR 137.

¹⁹ TR 152-153.

65. *Qualifications and experience* Ms. Berndt obtained her master of education degree in guidance and counseling, with emphasis in rehabilitation counseling. She maintains four certifications, all with continuing education requirements, as a vocational expert through the American Board of Vocational Experts, and as a vocational rehabilitation counselor (CRC), disability management specialist and case manager through the Commission on Rehabilitation Counselor Certification. Maintaining the vocational expert certification requires knowledge of, though not necessarily experience working in, federal programs with disability benefits, including Social Security.

Ms. Berndt has been the owner or co-owner of Industrial Rehabilitation Consultants, LLC, in Tacoma, Washington, since 1983. Workers' compensation is Industrial Rehabilitation Consultants' primary business, but the firm also offers expert opinion and forensic testimony on a variety of issues in other employment-related areas. Ms. Berndt's main area of expertise is workers' compensation as administered by Washington State DLI, with which she has been registered as a vocational rehabilitation provider since 1982. In her consultant work she assesses employability and earning capacity for various types of civil litigation and benefits claims, and she consults, and works directly with clients, on a range of vocational assessments and return-to-work plans.

66. *Method* Acting as a vocational expert in this matter, Ms. Berndt followed her established process of reviewing a variety of medical and legal records to assemble a full picture of Mr. Vorhies' employment experience and current circumstances. In her written report she detailed the sources of information she reviewed with respect to Mr. Vorhies' "physical issues"; these included reports from Drs. Crim and Tanski, and the 2011 and 2013 PCE's. She used the 2013 PCE report conclusions as the best description of Mr. Vorhies' physical abilities and limitations, though she was aware that Dr. Crim had given more restrictive opinions in the past, and that a 2011 IME had produced a less restrictive opinion of his physical capacities.

In Ms. Berndt's experience a personal interview with an injured worker is not necessary to a valid assessment, but she prefers to incorporate a personal interview when possible. She interviewed Mr. Vorhies about his employment history, skills and physical capacities.

Ms. Berndt identified Mr. Vorhies' labor market as an area "within reasonable commuting distance", that is, Clallam County and adjacent Jefferson County. She performed a labor market analysis, for which she searched databases maintained by the state department of Employment Security to obtain data indicating numbers of jobs by job classification in those counties. This is statistical information from employer payroll tax reports that she considers valid and reliable for professional use. She gathered additional information from websites of individual employers in those counties. The information she collected does not distinguish between part-time and full-time jobs within a job classification, or identify what particular

qualifications and skills might be needed for employment and successful performance in individual positions.

From the PCE conclusions and her database research Ms. Berndt developed a report with a list of "employment options", comprising 17 job classifications with variable sedentary to light physical requirements "where the ability to change positions between sitting, standing and walking occurs", and which had reported positions in Clallam and Jefferson counties, as follows: amusement and recreation attendants, cashiers, cleaners of vehicles, crossing guards, counter attendant, demonstrator/promoter, dispatcher (not police), interviewer, reception/information clerk, security guard, bill and account collector, counter and rental clerk, file clerk, gaming surveillance, parking lot attendant, protective service worker, and claims adjuster/investigator. The number of positions reported in the classifications varied widely, as did the annual reported openings for positions, from 60 for receptionist/information clerk and 129 for cashiers to 2 each for gaming surveillance and parking lot attendants. In her discussion of transferable skills, Ms. Berndt cited previous experience and particular skills that she thought Mr. Vorhies could transfer to jobs in most of the listed classifications, and, in the discussion of "job options" following the list, opined that Mr. Vorhies would be most likely to find employment suited to his skills and abilities in security-related occupations.

67. *Testimony* Though in her report she expressed concerns about consistency between Ms. Casady's conclusions and findings, Ms. Berndt testified that she relied on the results of the PCE's. She noted that having two PCE's to compare was unusual; she thought it significant that the two "were nearly the same", and that Dr. Crim, Mr. Vorhies' primary care physician, ultimately agreed with the 2013 PCE results. In her judgment, in a case where medical opinion varies, two similar PCE's combined with the concurrence of a worker's physician is a "rock solid" basis for determining the worker's physical limitations for purposes of a vocational assessment. In accepting the PCE conclusions limiting Mr. Vorhies to activities with sedentary to light physical demands, Ms. Berndt understood "sedentary" to mean "being able to sit most of the time or change positions frequently throughout the day", and "light" to mean restricted to "lifting up to 20 pounds".

Ms. Berndt performed a labor market analysis, not a labor market survey. She is familiar with the differences in goals and method between a labor market analysis and a labor market survey, because she performs both as client needs dictate. She describes a labor market survey as a specialized type of investigation specific to the Washington State workers' compensation program, for the purpose of tracking physician approval of particular jobs for individual claimants. When acting as a vocational rehabilitation counselor for workers' compensation claims Ms. Berndt decides whether an injured worker is able to return to work, or requires additional training or other assistance; labor market surveys would then be done as needed according to DLI regulations, which direct the collection of data about particular positions by means of focused interviews with a minimum number of currently active employers (a "positive labor market").

Ms. Berndt did not consider the list of job classifications in her written report to be exhaustive employment options for Mr. Vorhies. She listed classifications in which jobs were available in his labor market, and which she judged to be consistent with his physical capacities and limitations in the 2013 PCE summary. She believed that in jobs in these classifications Mr. Vorhies would be able to sit down, and pointed out that the PCE allowed for nearly full-time work with alternate sitting, standing and walking. She also testified that in her experience employers were typically willing to make simple physical adjustments to accommodate employees in performing their jobs, in light of the requirements of the Americans with Disabilities Act. With respect to security-related jobs, she believed that at least some security guard, gaming surveillance and protective service worker jobs would require limited physical activity in the sedentary to light range. In connection with the cleaner of vehicles classification, Ms. Berndt also noted that the PCE projected that Mr. Vorhies could kneel, crouch or squat on a frequent basis, that is, 34-66% of a workday or approximately 40 times per hour, could reach with his right hand continuously, and would be able to bend or stoop and turn his back or neck occasionally.

Ms. Berndt opined that Mr. Vorhies also was capable of performing jobs in the job classifications in her report because of his personal abilities and transferable skills. She also did not view her inventory of Mr. Vorhies' transferable skills as exhaustive. She saw him as having a varied work history, referring to the employment history in her report, which came in part from her interview with him. That history included several shorter-term jobs, including private security work and various aspects of construction, in addition to the jobs Mr. Vorhies mentioned in his testimony. This history demonstrated to Ms. Berndt that Mr. Vorhies is a "creative individual who can reinvent himself into various occupations".²⁰

Ms. Berndt did not give any independent consideration to effects of Mr. Vorhies' reported pain. She testified that she would take into account a medical judgment that pain interfered with Mr. Vorhies' ability to work, but before accepting it would pursue clarification. She explained,

Pain is not quantifiable. . . Pain has many components . . . There is medical. There is physical from deconditioning . . . There are medication issues. There are sleep issues. But there's also a psychological component. And all of these factors have to be looked at in whether a person is not capable due to pain or if some sort of treatment can be able to restore that person. . . So you need to know the source of pain and whether it's from a physical or psychological component.

68. *Transferable skills* Ms. Berndt opined that Mr. Vorhies has the following transferable skills: customer service, "people skills", negotiation skills, mechanical, troubleshooting and problem-solving skills, knowledge of tools and construction

²⁰ TR 215.

equipment and methods, estimating and bidding for work, thorough knowledge of Clallam and Jefferson counties, thorough knowledge of teamwork, observation, investigation and interviewing skills, knowing how to abide by and enforce rules and regulations, and entrepreneurial and small business management skills, including money handling, account collection, basic accounting, marketing and promotion, and record keeping.

CONCLUSIONS OF LAW

Preliminary Matters

Jurisdiction and Authority

1. The Department of Retirement Systems (the Department) has jurisdiction over the parties and the subject matter of this appeal.²¹
2. The Department administers LEOFF, implementing the provisions of chapter 41.26 RCW,²² which provides for an actuarial reserve system for the payment of death, disability and retirement benefits to law enforcement officers and firefighters, and to their beneficiaries.²³ As part of its implementation of chapter 41.26 RCW, the Department has adopted rules governing unique aspects of LEOFF administration.²⁴
3. This proceeding is conducted under the Washington State Administrative Procedure Act (WAPA), chapter 34.05 RCW. The Presiding Officer enters this Final Order for the Department, as the Director's designee.²⁵

Burden of Proof

4. In administrative appeals before the Department, the person requesting a hearing bears the burden of proof.²⁶ Mr. Vorhies thus bears the burden of proof in this appeal, in which he contests the denial of a catastrophic disability retirement benefit;²⁷ the Department's rule governing the benefit, WAC 415-104-482, does not modify the burden of proof set in the procedural rule.

²¹ Chapters 41.50 RCW and 41.26 RCW; WAC 415-04-050(1), 415-08-020(1).

²² RCW 41.50.055.

²³ RCW 41.26.020.

²⁴ Chapter 415-104 WAC; WAC 415-104-005, 415-104-015.

²⁵ RCW 41.50.060; RCW 34.05.425(1)(b), 34.05.461(1)(b); WAC 415-08-025.

²⁶ WAC 415-08-420(2).

²⁷ In this Order, "benefit" will be used to designate a "retirement allowance", or a fixed amount of money payable monthly to a retiree for his or her lifetime. The LEOFF statute does not define the frequently-used term "retirement allowance", and uses "benefits" to refer to both retirement allowances and lump sum payments of accumulated contributions, without further distinction or definition. The introductory paragraph of WAC 415-104-482 appears to treat the terms as equivalent.

Clarifying Statutory References

5. Mr. Vorhies filed his Notice of Appeal in 2012 to pursue his claim to a catastrophic disability benefit under RCW 41.26.470. Citations to subsection (8) of RCW 41.26.470 appear in that Notice, the Department's petition decision, and in other record documents. For this proceeding, however, citation to the statute section is proper only to subsection (9), where the catastrophic retirement allowance has appeared since 2009.²⁸ Thus, Mr. Vorhies' claim is treated here as raised solely under subsection (9).

Analysis

I. Law Governing LEOFF Catastrophic Disability Retirement

A. Overview

1. Statute and Rule Provisions

a. LEOFF Disability Under RCW 41.26.470

6. The LEOFF statute, chapter 41.26 RCW, authorizes retirement for disability as well as retirement for service. For members of LEOFF Plan 2, RCW 41.26.470 sets out different benefits for the two main types of disability retirement, earned (non-duty) and line-of-duty. The provisions governing these types of disability benefits are briefly reviewed here as context for the more specific terms that will be applied to the claim in this appeal.

Under RCW 41.26.470(1), a member who becomes incapacitated for employment covered by LEOFF may retire with an 'earned [non-duty] disability' benefit regardless how the incapacity arose.

(1) A member of the retirement system who becomes totally incapacitated for continued employment by an employer . . . shall be eligible to receive an allowance under the provisions of RCW 41.26.410 through 41.26.550 . . .

Laws of 1977, ch. 294, § 8.

²⁸ The catastrophic benefit was designated subsection (8) of RCW 41.26.470 when first enacted in 2006. In 2009, the state legislature added a new subsection (8) to RCW 41.26.470, not related to the catastrophic benefit. The language governing the catastrophic benefit did not change, but with the new subsection (8), the catastrophic benefit provision became subsection (9). Laws of 2009, ch. 95, § 1.

7. RCW 41.26.470(6) and (7) provide separate retirement benefits for members who become disabled in the line of duty.

(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. . . . 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

Laws of 2004, ch. 4, § 1.

8. Mr. Vorhies receives a duty disability retirement benefit under subsection (7). In this appeal he claims a retirement benefit under subsection (9), for **total** disability in the line of duty.

(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.

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. . . .

Laws of 2006, ch. 39, § 1.²⁹

b. Department Rules

9. The Department adopted three rules implementing different disability benefits authorized by RCW 41.26.470. WAC 415-104-485 implements non-duty disability retirement as authorized by RCW 41.26.470(1); WAC 415-104-480 implements duty disability retirement as authorized by RCW 41.26.470(6) and (7); and WAC 415-104-482 implements catastrophic duty disability retirement as authorized by RCW 41.26.470(9).

²⁹ The undersigned was unable to locate an official Department determination or adoption of an annual adjustment to the 2006 monthly threshold amount. The Department refers instead to annually adjusted standards published on a website maintained by the Social Security Administration. The parties agreed to use of the 2013 adjusted earnings standard published there, \$1040 per month, and it has been accepted for use here as consistent with the intent of the statutory direction.

WAC 415-104-482 details eligibility for the catastrophic disability benefit as follows:

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 subsection (13) of this section;
- (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 41.26.061.³⁰

10. In this appeal the focus of the parties' arguments is WAC 415-104-482(1)(c), which addresses the severity of a disability. It must be "so severe that . . . [the applicant] cannot engage in any other kind of substantial gainful activity in the labor market". Subsection (13) of the rule provides some definitions to guide the application of subsection (1)(c).

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

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

³⁰ Select sections of chapter 415-104 WAC use the term "you", without definition, in addressing LEOFF members (including former and prospective members) and LEOFF retirees; some sections specify the members or retirees to whom they are addressed. WAC 415-104-482 does not, but from the context of the rule itself, and by reference to WAC 415-104-480, cited in the introductory paragraph, "you" in this section is taken as meaning an applicant for a catastrophic disability benefit, who may be a LEOFF member, or may be retired a former member.

- (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) **Line of duty** means any action or activity performed in the service of your employer that is required or authorized by law, rule, regulations, or condition of employment or service.
- (e) **Substantial gainful activity** means any activity that produces average earnings, as defined in (b) of this subsection, in excess of eight hundred sixty dollars a month in 2006, adjusted annually as determined by the department based on federal Social Security disability standards. Wages count toward earnings when they are earned, not when you receive them. Self-employment income counts when you receive it, not when you earn it.
- (f) **Transferable skills** are any combination of learned or demonstrated behavior, education, training, work traits, and skills that you can readily apply. They are skills that are interchangeable among different jobs and workplaces.

There do not appear to be any Department orders or interpretive statements, or Washington State court opinions, which have addressed the provisions of RCW 41.26.470(9) or WAC 415-104-482.

2. Other Sources of Law

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

a. LEOFF Disability Benefits and Workers' Compensation

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

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

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

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

i. LEOFF Statute

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

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

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

ii. Rules

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

³² Laws of 1981, ch. 294, §9.

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

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

RCW 41.26.048. (Emphasis added.)

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

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

16. WAC 415-104-480(13)(b) (duty disability retirement) and 415-104-485(13)(b) (non-duty disability retirement) restate the condition in RCW 41.26.470(2) that the Department may cancel a LEOFF disability retirement benefit when the retiree is "no longer entitled to workers' compensation benefits under Title 51 RCW". Neither rule otherwise mentions workers' compensation.

However, WAC 415-104-482 (catastrophic disability retirement) does not restate that condition, so, for this benefit, there is no corresponding express requirement in subsection (11) that a retiree's continued entitlement to workers' compensation benefits be determined before his benefit can be canceled. Instead, in this rule, a second reference to workers' compensation occurs in subsection (8), addressing only the amount of a catastrophic disability allowance. In line with RCW 41.26.470(9), 415-104-482(8) directs the offset of the two types of benefit so that the total amount a retiree receives stays within the statutory limit. This is the extent of express reference to workers' compensation in this rule.³⁴

³⁴ 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 last gainfully employed or where you currently live, whichever provides the greatest opportunity for gainful employment.	(4) What is an injured worker's labor market? Generally, the worker's relevant labor market is the geographic area 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.

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

b. LEOFF Catastrophic Disability and Social Security Disability

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

i. LEOFF Statute

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

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

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

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

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

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

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

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

ii. Rule

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

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

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

(Emphasis added.)

c. Conclusion

20. Washington State law governing LEOFF is the sole authoritative source in this forum. Should need arise to consult a source of authority external to LEOFF in deciding a claim for a catastrophic disability benefit, the governing provisions do not show an intent to apply or refer to the law of workers' compensation. The statute section authorizing disability retirement benefits in LEOFF Plan 2, and the Department's implementing rules, contain limited references to workers' compensation, which do not direct the Department to consider or apply the law of workers' compensation when it determines eligibility for those benefits. The Department's rules state only that it will consider information from and determinations of the DLI, without stating to what effect it will do so. The rules say the same with respect to determinations of the SSA; but, for the catastrophic disability benefit, WAC 415-104-482(5) specifies that the Department may *rely substantially on* a determination of the SSA (presumably concerning eligibility for SSD benefits). Thus, for the catastrophic disability benefit, SSA determinations have a potentially determinative effect not given to workers' compensation determinations. The rule makes this distinction while echoing several terms in the SSD law, and it implements a statute subsection that also makes express reference to SSD. Because the provisions governing the catastrophic disability benefit in LEOFF Plan 2 have express ties to the law of Social Security disability, but give no indication that the Department should interpret or apply them with reference to the law of workers' compensation, workers' compensation law is not consulted for this decision.

B. WAC 415-104-482(1)(c)

21. As already noted, the focus in this appeal is subsection (1)(c) of WAC 415-104-482. That subsection is not read in isolation, but in its context, within the subsection, section and WAC chapter in which it occurs, and with reference to the pertinent subsection of the authorizing statute.

WAC 415-104-482(1)(c) states:

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

(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. . . .

In order to gauge the severity of disability under this subsection, it is desirable to identify an applicant's disability.

1. Disability for WAC 415-104-482(1)(c)

22. Neither the LEOFF statute nor the Department's rules supply a definition of "disability" for use in applying the terms of WAC 415-104-482. As explained below, for this decision, the term "disability" in subsection (1) will mean a measurable impairment³⁶ in an individual applicant's physical or mental function due to a qualifying health condition.

Though the LEOFF provisions do not supply a definition of "disability" for use in WAC 415-104-482, the catastrophic disability provisions do describe some aspects of a disability to be assessed for severity. A disability may be either physical or mental, WAC 415-104-482(1)(a). A disability is distinct from its causal condition. In RCW 41.26.470(9), disability must be due to a physical or mental condition; the rule also uses different terms in subsections (1)(b) and (1)(d), where it states that an applicant's *condition* must have met the duration requirement ((1)(d)), but he must have separated from LEOFF eligible employment "due to [his] *disability*" ((1)(b)). (Emphasis added.)

23. "Condition" is not defined or further described for a catastrophic disability benefit, and the LEOFF provisions have not adopted terms or definitions from the SSD program. For this decision a "condition" will designate a "health condition" generically, similar to use of the term in WAC 415-104-510 *et seq.*, listing health conditions that formerly affected membership in LEOFF.
24. In both RCW 41.26.470(9) and WAC 415-104-482(1)(d) the disability must be due to a condition of a certain duration or seriousness; as described in the rule, "[the] condition has lasted or is expected to last at least twelve months, or . . . is expected to result in death".
25. Under WAC 415-104-482(1)(b), the disability must have been the reason that the applicant ended his LEOFF eligible employment.

³⁶ This use of "impairment", in the common sense of a decrease in strength or quality, differs from the defined term in SSD. See also the note following.

Finally, "your [the applicant's] disability" in subsection (1)(c), read together with subsection (1)(a), would be the same disability incurred in the line of duty under subsection (1)(a). Where an applicant has been retired for duty disability in LEOFF, the disability being assessed under subsection (1)(c) would be the same disability accepted by the Department as incurred in the line of duty for duty disability retirement.

26. *Black's Law Dictionary* defines "disability" as follows:

1. The inability to perform some function; esp. the inability of one person to alter a given relationship with another person. 2. An objectively measurable condition of impairment, physical or mental, esp. one that prevents a person from engaging in meaningful work <his disability entitled him to workers' compensation benefits>. Also termed *incapacity or handicap*.³⁷

Similarly, for SSD benefits, a medically determinable condition may cause an applicant to be disabled where it significantly limits the ability to function in certain ways, such as performing basic work activities.

27. A working definition must serve where LEOFF has not provided a system definition, or expressly adopted defined terms from another program, such as SSD. Designating disability as the functional impairment(s) caused by an individual applicant's qualifying health condition is consistent with the sources above and the specific terms in RCW 41.26.470(9) and WAC 415-104-482(1).

2. Severity

28. Once the disability is identified, its severity is measured by the applicant's ability to do his previous LEOFF eligible work, then by his ability to engage in any other kind of substantial gainful activity in the labor market. Where an applicant has already retired for duty disability, his inability to perform the duties of his previous LEOFF eligible work is likely established, so the severity of disability will be measured in relation to other types of activity.

29. In this step certain factors personal to the individual applicant ("individual factors") are compiled and placed in the context of the larger economic environment. Individual factors would be the applicant's particular disability, the location of his residence or last employment, and his educational background, work experience and transferable skills. An external factor, the applicant's labor market, will help describe the extent of available opportunity for employment. For this step WAC 415-104-482(13) defines "substantial gainful activity" (and "earnings", for "substantial gainful activity"), "labor market" and "transferable skills".

³⁷ *Black's Law Dictionary* 559 (10th ed. 2014). The definition goes on to quote a secondary source clarifying that "[In the field of Social Security,] 'impairment only refers to the type of medical problems a person has', not necessarily the resulting disability.

II. Mr. Vorhies' Eligibility for LEOFF Catastrophic Disability Benefit

A. Rule Elements – Disability, Severity

30. An applicant for the catastrophic disability benefit authorized in RCW 41.26.470(9) must show that he meets all the eligibility terms set out in subsection (1) of WAC 415-104-482. Only the first four are relevant in this case.

(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 subsection (13) of this section;
- (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; . . .

1. Mr. Vorhies' Disability

a. Mental Conditions

31. In RCW 41.26.470(9), a disability must be "due to a physical or mental condition". For this assessment of Mr. Vorhies' disability under WAC 415-104-482(1)(c), consideration is limited to the effects of physical conditions, disregarding any possible mental conditions.

First, Mr. Vorhies himself has not asserted disability based on a mental condition. Neither he nor Dr. Crim mentioned effects of any mental condition in his application for disability retirement, and the Department approved his retirement for duty disability based on physical, not mental, conditions. In this appeal Mr. Vorhies neither referred to a mental condition in his Notice of Appeal, nor identified a mental condition as a basis for his claim in the course of the proceeding.^{38,39}

³⁸ Mr. Vorhies' post-hearing brief makes passing mention of Dr. Crim's testimony about anxiety, without claiming that it is a disabling condition, which would call for addressing how it affects Mr. Vorhies' functioning, including the effect of medication.

³⁹ Ms. Berndt's vocational report recites that Mr. Vorhies applied for "full disability under LEOFF2" based on "cervical, lumbar and psychiatric conditions". Exhibit D-3, p.1, "Background". This statement appears to be simply erroneous, at least with respect to Mr. Vorhies' application for LEOFF disability retirement.

Second, the record contains no reliable indication that Mr. Vorhies' functioning is detrimentally affected by a mental condition, even in combination with physical conditions. (1) In October 2010, Mr. Vorhies consulted Dr. Tomski, a psychiatric physician, for a second opinion regarding his physical ability to return to police work. Observing symptoms of depression in the course of his examination, Dr. Tomski recommended counseling for pain management and antidepressant medication (through Dr. Crim), but also noted Mr. Vorhies' reluctance to accept any referral. There is nothing in the record to indicate that Mr. Vorhies or Dr. Crim ever followed those recommendations. (2) In April 2011, Psychologist John T. Lloyd examined Mr. Vorhies, reporting his diagnosis of pain disorder related to Mr. Vorhies' medical condition, and his observation that Mr. Vorhies had mild psychological difficulties with social and occupational functioning; but he also recorded that Mr. Vorhies "denied depression", and rated his functioning satisfactory overall. (3) In Mr. Vorhies' appeal of his claim for SSD, the administrative law judge (ALJ) determined that he had depression and somatoform disorder.⁴⁰ Those determinations are disregarded here because the origin of the evidence supporting those conditions has been neither identified nor offered to the record of this appeal. (4) Mr. Vorhies expressed concerns about his ability to remember and concentrate when his blood pressure is high, and Dr. Crim observed that chronic pain and high blood pressure ("secondary hypertension") increase Mr. Vorhies' anxiety. However, Mr. Vorhies has taken medication prescribed by Dr. Crim for both anxiety and control of blood pressure; at the time of his testimony, Mr. Vorhies was taking a single non-narcotic medication prescribed for nerve pain and anxiety, two medications specifically for control of blood pressure, and a medication for sleep that also helps control blood pressure. There is no indication that the medications are ineffective, and Dr. Crim observed that Mr. Vorhies' blood pressure was under good control since he had stopped smoking.⁴¹ (5) In the addendum to her 2011 PCE report Ms. Casady expressed concern about Mr. Vorhies' employability in part because he was then taking narcotic medications for pain every day, but Mr. Vorhies has not asserted that narcotic pain medications affect his mental functioning; at the time of the hearing, he was not taking any narcotic pain medications, and wanted to continue to do without them.

Critically, none of the medical professionals whose opinions of record state or suggest that Mr. Vorhies is affected by mental conditions have described how those conditions, or medications to treat them, affect either Mr. Vorhies' daily functioning or his ability to engage in activities. Where there is no objective medical evidence of *any* measurable impairment in Mr. Vorhies' mental functioning, the appeal record appears consistent with Dr. Crim's 2011 observations that "A formal psychological

The report itself mentions Dr. Lloyd's report only briefly, and does not further describe or discuss the effects of any psychiatric conditions.

⁴⁰ Exhibit D-5, p.7.

⁴¹ TR 299. There are differing indications in the record about when Mr. Vorhies most recently stopped smoking, which could have been as early as 2009 or as late as early 2013. It is not important to resolve the inconsistency since Dr. Crim's testimony about the beneficial effect on Mr. Vorhies' blood pressure was offered at the end of 2013. TR 77, 296.

evaluation confirmed absence of any untoward psychopathology . . . There are no psychological problems complicating [his] neck injury."⁴²

b. Physical Conditions

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

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

33. Mr. Vorhies does base his claim for a catastrophic benefit partly on the condition of his lumbar spine, in both his application for LEOFF disability⁴³ and his appeal presentation. The effects of the lumbar spine condition(s), however, are not material.

In WAC 415-104-482, "your disability" in subsections (1)(b) and (c) must be the same as the "physical or mental disability" incurred in the line of duty in subsection (1)(a). Where an applicant has been retired for duty disability, the Department will have identified some disability traceable to LEOFF eligible employment. WAC 415-104-480(1). Thus the disability to be considered for subsections (1)(b) and (1)(c) will have been fixed at retirement.

⁴² Exhibit D-8.

⁴³ Mr. Vorhies' narrative addendum to his application includes reference to his lower back injury. Dr. Crim's medical report, Part 3 of Mr. Vorhies' application, does not name lumbar conditions in the sections for history, complaints or findings on examination; however, in the "diagnosis" section, Dr. Crim's report added "degenerative disk [disease with] "an[n]ular disk bulge/protr[usion]" (724.9, 724.5); the "annular disk bulge" matches Dr. Tomski's description of results of the September 7, 2010, MRI scan, and as far as this record shows, that phrase is associated only with the lumbar injury. Further, the application medical report identified the date on which Mr. Vorhies became disabled as September 8, 2010, the first day he was absent from work after being examined at the hospital emergency room for lumbar pain.

Here, the Department retired Mr. Vorhies for duty disability on the basis of the origin and effects of his cervical spinal condition(s). The medical report portion of Mr. Vorhies' application for LEOFF disability retirement listed only neck pain under "present complaints". In his "Progress Note" of the same time period, on which the Department relied, Dr. Crim opined that Mr. Vorhies "should be declared 100% disabled from his current job" (apparently meaning his former City law enforcement position); based solely on cervical pain and risk of further damage to the neck area, without mentioning the effects of a lumbar injury.

The Department did not accept lumbar spine injury, conditions or symptoms as a basis for Mr. Vorhies' duty disability retirement.⁴⁴ He has not disputed, or asked to reopen, the Department's decision. The terms of WAC 415-104-482(1), including the severity of disability under subsection (1)(c), are therefore applied to the effects of Mr. Vorhies' cervical spine condition(s), which the Department deemed sufficiently duty-related and sufficiently debilitating to disable him from further employment as a law enforcement officer.

The optional plural "condition(s)" is used because Mr. Vorhies' neck pain symptoms may be due to more than one condition.⁴⁵ The record does not provide a single consistent diagnosis, but a variety of diagnostic descriptions.⁴⁶ The resulting physical effects appear similar, that is, nerve pain from inflammation of, or pressure on, the nerves connected to the spinal cord in the cervical segment of the spine, because of compression or narrowing (stenosis) of the areas of the spine where the nerves connect, or pass through the spinal column, and compression of the disk spaces between the vertebrae.⁴⁷

2. WAC 415-104-482(1)(a),(b),(d)

34. The terms of WAC 415-104-482(1)(c) are the focus of this appeal, but before close examination of that subsection, some attention should be given to its context. (1)(c) is one of five subsections, of which only the first four are relevant in this case. The rule directs that the Department determine that the requirements of all the subsections are met. Where an application for a catastrophic disability benefit is

⁴⁴ In addition to the reports reviewed in the Department's Action Sheet (2011), Mr. Vorhies' testimony and medical reports in this record confirm that he experienced recurring low back pain well before he entered LEOFF covered employment.

⁴⁵ The provisions governing the catastrophic disability benefit use only the singular terms "condition" and "disability". This may aid clarity, but it is not logically necessary that only one condition cause only one disability; it is possible that multiple conditions could cause a single identifiable disability, and that a single condition could cause more than one identifiable disability.

⁴⁶ Examples include "Left C6 radiculopathy secondary to disk osteophyte complex", Exhibit A-2; "left C5 radiculitis secondary to foraminal stenosis", Exhibit A-5; "cervical degenerative disk disease", Exhibit A-8; "cervicalgia", Exhibit A-11-B; "neck sprain", Exhibit A-15-B; osteoarthritis and post-operative arthritis (arthritic bone spurring), and disk disease in the neck, testimony of Crim, TR 281 (11), 298 (7-12), 313 (22-25) through 316 (10).

⁴⁷ Testimony of Crim, TR 282-283, 290, 298, 302, 316.

denied, the applicant who appeals the denial under chapter 415-08 WAC retains the burden of proof, and must prove that he meets all the relevant eligibility requirements set out in WAC 415-104-482(1).

35. Previous retirement for duty disability under WAC 415-104-480 does not by itself prove that any of the elements of WAC 415-104-482(1) are met, but the record here does indicate that three of the subsections are sufficiently covered. The surgical reports and the testimony and written opinions of Dr. Crim regarding the likely origin of Mr. Vorhies' cervical spine injuries and post-surgical cervical status, combined with the results of the PCE's and the Department's documentation of its duty disability retirement decisions, provide sufficient evidence to meet the terms of subsection (1)(a) with respect to the cervical spine condition(s).

For subsection (1)(d), the duration requirement, there is acceptable uncontested evidence that Mr. Vorhies has had a cervical spine condition forcing some limitation of work activity since at least the 2009 surgery.

For subsection (1)(b), the separation requirement, it is not clear that Mr. Vorhies resigned his City employment only because of his neck condition(s). An injury to his lumbar spine triggered his absence from work beginning in September 2010, but when he resigned in December 2010 the lumbar pain had been treated with some success by epidural steroid injection. In the interim, both Dr. Crim and Dr. Tomski reported reservations about the overall condition of Mr. Vorhies' spine, but in November 2010 Dr. Crim's opinion letter to the City focused clearly and specifically on his concern about Mr. Vorhies' cervical spine condition(s), because of both the history of injury there and unacceptable risk of future injury. Thus there is evidence to support a conclusion that Mr. Vorhies separated from his LEOFF employment because of disability resulting from his cervical spine condition(s).

36. The next step, then, is to assess the severity of disability from Mr. Vorhies' cervical spine condition(s) under WAC 415-104-482(1)(c). When an applicant for a catastrophic disability benefit has retired for duty disability, it may be taken as established that he cannot return to LEOFF eligible employment (in this case, law enforcement). The record here generally supports the Department's determination that Mr. Vorhies was unable to return to work in law enforcement, though it does not make clear what law enforcement duties Mr. Vorhies was prevented from performing as a result of his cervical spine conditions. But for a catastrophic disability benefit, the applicant must then prove that he cannot do other activity from which he could earn a minimum amount of income. It becomes necessary to discern the extent of what he still can do.

B. WAC 415-104-482(1)(c)

1. Scope of Evidence

37. Mr. Vorhies first applied for LEOFF disability retirement in February 2011, using a Department-provided form, the record copy of which did not ask him to specify a

particular type of disability benefit. The Department treated his application as including a claim for a catastrophic disability benefit as well as a line-of-duty disability retirement benefit. His retirement for duty disability was later approved retroactive to January 1, 2011. The hearing in this matter was held in late 2013. In appeals before this agency it is established practice to determine an applicant's eligibility for a retirement benefit by considering his or her circumstances at the time of application, or, in some cases, at the date of retirement.⁴⁸ WAC 415-104-482, the Department's rule governing the catastrophic benefit at issue here, does not direct that eligibility be determined as of a particular point in time.

38. In the absence of specific direction, and for application of subsection (1)(c) only, the undersigned has admitted and considered evidence relating to Mr. Vorhies' situation as of the time of the appeal hearing, including evidence developed in 2013 in preparation for the hearing. Much of this evidence addressed his condition or circumstances in 2013 rather than at some point in the past.
39. This approach appears best in light of WAC 415-104-482(7)(b),⁴⁹ which expressly recognizes that a duty disability retiree whose disability was not severe enough to

⁴⁸ Some claims for disability retirement must be determined with reference to the date that the applicant separated from retirement-system-covered employment. An example is found in WAC 415-104-485(4) (emphasis added):

(4) **Is there a time limit for filing an application for nonduty disability benefits?** No . . . However, if you have separated from employment, your application must be based on your condition *at the time of separation*.

⁴⁹ (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. . . . 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.

(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.

qualify as "catastrophic" when he retired might later become entitled to a catastrophic disability benefit if he became more severely disabled by the same condition. Subsection (7)(b) seems to assume a separate, later application for the catastrophic benefit, but this should not be required here. Where the initial application was treated as including a claim for a catastrophic benefit, and there is a possibility of measurable change in condition after application or retirement but before a final agency determination, this *de novo* proceeding may extend to receiving and considering all legally relevant evidence. Therefore for this order Mr. Vorhies' ability to engage in any other kind of substantial gainful activity in the labor market under WAC 415-104-482(1)(c) has been evaluated as of the time of the hearing, rather than only when he separated from his City employment or when he applied for disability retirement.

2. Extent of Mr. Vorhies' Physical Disability

40. Mr. Vorhies experiences constant neck pain. According to Dr. Crim, Mr. Vorhies' pain intensity is not static, but will "wax and wane depending on a variety of factors", with "good days and bad days"; overall, the general condition of his cervical spine is likely to deteriorate; and it is not reasonable to expect that Mr. Vorhies will be pain free, but it is a reasonable goal to have pain that is manageable. Dr. Crim accepts Mr. Vorhies' descriptions of the intensity of his pain because they are consistent with his own observations of Mr. Vorhies, both in clinic and in other settings in the Sequim area.
41. 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. Mr. Vorhies and his wife and son have testified to what he does and does not do in general and in a typical day. This testimony gives a picture of the changes that have occurred in Mr. Vorhies' daily life since he first saw Dr. Crim for shoulder pain in 2006. But is only minimally useful for the application of subsection (1)(c) because it describes only what he *does* and *does not* do, instead of what he *can* and *cannot* do. A disability benefit applicant, and close family members, are generally not in a good position to objectively measure the applicant's capabilities; what he *can* and *cannot* do must be assessed more objectively.
42. Dr. Crim's written opinions and testimony also provide little information about what Mr. Vorhies can and cannot physically do for purposes of WAC 415-104-482(1)(c). As Mr. Vorhies' longtime primary care physician, he shows an understandable interest in treating and protecting his patient. When he advised the City in November 2010 that Mr. Vorhies should not return to law enforcement duties, Dr. Crim did not describe any law enforcement duties, or even activities, that Mr. Vorhies could not perform because of his neck condition; rather, he expressed his

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.

concern that returning to that type of work presented an unacceptable risk of future neurological harm. In his statement for Mr. Vorhies' disability application, and in his testimony in this proceeding, he provided partial diagnoses, and some recommended limitations on activity, but no description of Mr. Vorhies' capabilities.

43. Where opinions given by Dr. Crim before his testimony varied from his testimony regarding Mr. Vorhies' physical capacities, capability for employment, and the possibility of treatment for his cervical spine condition(s) and chronic pain associated with them, Dr. Crim's hearing testimony has been accepted here over any prior inconsistent opinions.
44. As far as this record shows, the only objective measurements of what Mr. Vorhies can and cannot physically do comes from the PCE's of 2011 and 2013. Dr. Crim endorsed the results of the 2013 report, which did not differ greatly from the 2011 report, as a well-validated measure of Mr. Vorhies' physical capacities, consistent with his own recommended limits on activity. He also believed that other specialists who have examined Mr. Vorhies would agree with the results of the 2013 report. The vocational experts who testified in this matter both accepted the results of the 2013 report (Ms. Berndt compared the two against each other). Because these reports are the only objective measurements available, and because the experts all accepted the results and conclusions, the undersigned places greatest reliance on these reports to measure Mr. Vorhies' physical capacities.
45. In addition, the undersigned places somewhat greater reliance on the 2011 report than on the 2013 report. Again, for catastrophic disability only the disability stemming from the conditions accepted for duty disability retirement (here, the cervical spine conditions) can be considered. For this analysis, the 2011 report gives a slightly better idea of Mr. Vorhies' capacities in relation to the neck condition(s). Ms. Casady's 2013 report does not show that she was aware of any specific diagnoses, and her testing and commentary gave noticeably more attention to Mr. Vorhies' lumbar complaints than did the 2011 report, but without any consistent distinction between the effects of the lumbar and cervical spine injuries or conditions. The 2013 PCE report thus reveals less than it could about the effects of only the cervical spine conditions. The effect is not marked because despite the differences the conclusions in the two reports do not differ greatly.
46. The limits of Mr. Vorhies' permitted physical activities in an eight-hour workday, then, are as follows: he can alternately sit, stand and walk a maximum of 6.5 to 7.5 hours in an eight-hour day; he can walk 20 minutes at a time, up to 1.33 hours intermittently in an eight-hour day; he can stand 15 minutes at a time, up to 1.5 hours intermittently in an eight-hour day; he can alternately stand and walk 30 minutes at a time, up to 2.5 hours in an eight-hour day; and can sit for up to 1.5 hours at a time, up to five hours intermittently in an eight-hour day. He is able to kneel and crouch frequently, bend or stoop, climb stairs and twist or turn the low back occasionally, and only seldom to occasionally climb ladders, or twist or turn or

bend his neck. He can lift and carry 10 to 25 pounds occasionally and up to 12.5 pounds frequently, tolerances within the sedentary to light weight-handling categories. Because the 2013 PCE report specifies that these results are based on high-effort performance, that weight handling capacities are on a less-than-reasonably continuous basis, and that Mr. Vorhies would be precluded from the full range of light duties, it would be reasonable to expect that Mr. Vorhies would not be able to perform all these activities at their maximum limits through every work day, but could sustain them at somewhat reduced levels. These limits on physical activities describe Mr. Vorhies' disability for WAC 415-104-482(1)(c).

47. Mr. Vorhies expressed his belief that he cannot work, or engage in substantial gainful activity because pain so limits his physical activity. In other words, he views his disability as more severe than the PCE's would indicate. The Department points out that aside from taking some prescribed medications he has not implemented suggestions by health care professionals that could reduce the effect of his pain. The undersigned gives no determinative weight to this consideration because the Department's catastrophic disability rule does not address an applicant's efforts to reduce the effects of his physical disability. However, for a catastrophic disability claim based on a physical disability, it is highly desirable to have a complete picture of an applicant's physical capacities. Here the central complaint is pain, and examining or treating health professionals have made suggestions or recommendations for steps beyond surgery and medications that could mitigate its effects. Where these have not been tried the concern does arise that the record has not provided a complete picture of Mr. Vorhies' physical capacities.

3. Severity

a. Personal Factors

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

Transferable skills WAC 415-104-482(1) defines "transferable skills" as "any combination of learned or demonstrated behavior, education, training, work traits, and skills that you can readily apply. . . . skills that are interchangeable among different jobs and workplaces."

The vocational experts who testified in this case identified skills that Mr. Vorhies could transfer to potential employment. He has skills in customer service, negotiation, working on a team or collaboratively with others, mechanical, troubleshooting and problem-solving, estimating and bidding painting jobs (structures), performing basic mathematical calculations, billing, collecting payment and money transactions, record keeping, observation, investigation and interviewing, abiding by and enforcing rules and regulations, and knowledge of Clallam and Jefferson counties and of tools and construction equipment and methods.

Additional behaviors or work traits that Mr. Vorhies has demonstrated in work and hobby activities are creativity, a strong work ethic and the ability to learn quickly.

b. External Factor: Labor Market

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

c. Conclusion

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

d. Discussion

51. Where an applicant for a catastrophic disability benefit is already retired from LEOFF for duty disability, it is no longer necessary to consider whether he can return to LEOFF eligible employment, in this case to law enforcement duties. WAC 415-104-482(1)(c) then requires the applicant to prove that his disability is so severe that he cannot engage in any (other) kind of substantial gainful activity in the labor market. In subsection (13), the rule defines "labor market" only in terms of distance, that is, the geographic area within reasonable commuting distance of the applicant's home or last paid employment. It is not disputed that Mr. Vorhies lives in Sequim, which is also where he was last employed, as a law enforcement officer for the City of Sequim, so the pertinent labor market is reasonable commuting distance from Sequim.⁵⁰ "Substantial gainful activity" is "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". The parties have agreed that the amount of earnings applicable in this case to determine substantial gainful activity is \$1040 per month.

⁵⁰ Only the eastern portion of Jefferson County would likely be within Mr. Vorhies' labor market for this purpose.

"Earnings are any income or wages received, which are reportable as wages or self-employment income on IRS form 1040."

52. Mr. Vorhies is not employed and there is only slight evidence that he has income reportable as wages or self-employment income for federal income tax purposes. Thus he must prove that he *cannot engage in* substantial gainful activity, or activity that *would produce* average earnings of at least \$1040 per month, considering his education, transferable skills and work experience.
53. Mr. Vorhies has not proven that he cannot so engage. It would take just over 100 hours of work per month, or just under 24 hours per week, at the lowest wage appearing in Ms. Berndt's job classification list, \$10.18 per hour, to reach the \$1040 per month threshold. Alternately walking, standing and sitting, he has the physical capacity to engage in income-producing activity for less than five hours a day in a standard five-day work week, the most that would be required at the lowest wage.

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

54. Ms. Larson's qualifications and experience suggest that she is an effective vocational rehabilitation counselor. However, the undersigned has not found her testimony in this matter to be effective in proving that Mr. Vorhies is not able to engage in substantial gainful activity in his labor market.

First, the applicant's burden of proof was not well served by her testimony. It is not the Department's burden to prove that a catastrophic disability applicant *can* engage in substantial gainful activity; it is the applicant's burden to prove that he *cannot*. The Department's rule does not provide for burden shifting as the SSA decision indicates occurs in the Social Security Disability program.⁵¹ The bulk of Ms. Larson's testimony was merely a critique of Ms. Berndt's report and conclusions, producing very little useful evidence that Mr. Vorhies' labor market affords no realistic employment opportunities for someone with his physical capacities and transferable skills.

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

⁵¹ Exhibit D-5, p. 6.

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

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

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

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

⁵² In WAC 415-104-482, the term "gainful employment" does appear, but only in subsection (13)(f), the definition of "labor market"; the pertinent labor market was generally not disputed here. "Substantial gainful activity" is separately defined without use of the term "gainful employment".

⁵³ Exhibit D-5, p.6.

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

57. Fourth, Ms. Larson offered meager support for her opinions with respect to the pertinent labor market. She testified that she performed labor market surveys for this appeal, but the only specifics supplied were three contacts with employers of security guards in the Sequim-Port Angeles area. She identified only one out-of-area school district that she contacted with respect to crossing guard positions. In discussing security and parking lot attendant classifications, she identified her source of information as surveys or investigations done for other clients. Beyond this, her testimony consisted largely of surmise regarding what individual positions within job classifications might require, making it difficult to rely on her experience with labor market surveys and knowledge of the labor market in the northern Olympic Peninsula.
58. Ms. Berndt's report and testimony are given greater credit as the undersigned finds them more appropriate to the catastrophic disability rule and more reliable. Ms. Berndt maintains qualifications to act as a vocational expert as distinct from a vocational rehabilitation counselor; acting as a vocational expert in this matter, she produced a report with the type of information that is appropriate to the particular benefit at issue, in the appropriate system. She detailed her use of a consistent method for producing a vocational assessment, and identified the source of the information on which she relied. She developed her list of employment options with reference to the entire content of the PCE results and publicly available information in state agency databases on which she commonly relies. She recognized that labor market surveys as prescribed for vocational rehabilitation services in the workers' compensation program were not prescribed or needed in an appeal of a LEOFF catastrophic disability application. In her inventory of Mr. Vorhies' transferable skills she included skills acquired through activities other than paid employment, in line with the broad definition of "transferable skills" in WAC 415-104-482(13), whereas Ms. Larson recognized only skills acquired through previous paid employment, a restriction not apparent in that definition.

III. Other Issues

A. Consideration of SSA Decision

59. In his reply brief Mr. Vorhies raised a concern about the effect in this decision of the January 2012 SSA appeal decision denying Mr. Vorhies' claim for SSD benefits.

It has already been noted that WAC 415-104-482(5) advises applicants for the catastrophic disability benefit that the LEOFF plan administrator will "rely substantially" on determinations of the SSA. In an appeal of a benefit decision by the Department, the presiding officer exercises the same authority that the agency has, so it would seem that the second sentence of WAC 415-104-482(5) would also authorize the Department's presiding officer, in an administrative appeal of a denial of a catastrophic benefit application, to rely on an SSA determination granting or denying SSD benefits.

In Mr. Vorhies' case, the SSA appeal decision was entered after the Department issued its petition decision, so the Department had no opportunity to consider the SSA decision in its earlier denials. The Department itself has not argued that the SSA decision should be relied upon on this proceeding. The undersigned does not rely on the SSA appeal decision here, for the following reasons.

First, reliance on an SSA determination of SSD benefits would not generally align with the goals or requirements of the Department's administrative appeal process. This adjudicative process under the WAPA is intended to provide an appellant with a *de novo* review of a Department determination, including the opportunity to create a new factual record specific to the result sought, such as the requirements for LEOFF disability benefits here. The WAPA requires a presiding officer to enter written findings of fact drawn only from evidence placed in the record of the appeal proceeding.⁵⁴ Absent a stipulation by the parties, a final order for the Department would not be based on facts found by another agency in a different proceeding.

In addition, with respect to required conclusions of law, a presiding officer in Department administrative appeals can apply only provisions of Washington state law. In an appeal of a denial of an application for a LEOFF catastrophic disability benefit, the pertinent law comprises the provisions already reviewed and applied in this order. Though these state law provisions contain some terms that also appear in the federal law governing SSD benefits, the state provisions have not directly adopted provisions of the federal law, or approved reference to that law for determinations of LEOFF benefits. It can easily be seen from the SSA appeal decision that the federal law being applied there still differs significantly from the provisions that must be applied here; as one example, the LEOFF catastrophic disability provisions have nothing comparable to the SSD sequential determination process or its accompanying schedule of impairments. WAC 415-104-482(5)

⁵⁴ RCW 34.05.461(4).

serves primarily as information for applicants, and does not create a mandate in Department's administrative appeals.

Second, WAC 415-104-482(5) specifies that the Department's medical advisor will rely on an SSA determination, but it also qualifies any reliance, stating, "The LEOFF 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*". This provision advises catastrophic disability applicants that an SSA determination may, but need not, control the Department's initial determination. The same possibility is always open in an administrative appeal where a new factual record may be created. In the undersigned's view, in this appeal it would not be appropriate to rely on the decision of the SSA, where the ALJ considered a good deal of evidence never offered to the record here, and expressly discounted or never considered the results of the 2011 and 2013 PCE's, evidence that is important here.

In an appropriate case, then, the Department's presiding officer could choose to rely on an SSA determination in an appeal of a denial of a LEOFF catastrophic disability benefit application. But in this case, the undersigned finds no reason to rely on the January 2013 SSA determination; both the evidence considered and the law applied by the SSA ALJ are too far removed from the record produced and the law applicable in this proceeding to provide any useful guidance.

B. Consideration of DLI Decisions

60. Similarly, though this question was not raised in Mr. Vorhies' legal arguments, decisions by the DLI played no role in this decision. As far as may be seen from this record, DLI approved Mr. Vorhies' claim for benefits for the effects of a lumbar strain, accepting that activities on September 7, 2010, resulted in an injury that was covered by the workers' compensation program; DLI later closed his claim without finding any permanent impairment. These decisions were not explained, and they were addressed to an injury or condition other than the injury or condition accepted by the Department for Mr. Vorhies' duty disability retirement. They have no relevance to application of the catastrophic disability benefit provisions here.

C. Consideration of IME

61. In his Notice of Appeal Mr. Vorhies expressly disagreed with "several statements made by the IME", which he states he attended in July 2011. The reference is taken to be to an IME performed in April 2011, which the Department reviewed when it reconsidered Mr. Vorhies' catastrophic retirement benefit claim in September 2011, and which was reviewed in some detail in the Department's petition decision. The vocational expert witnesses also reported having reviewed a 2011 IME report. However, neither party proposed including the report of the April 2011 IME in the record of this appeal proceeding, and neither included reference to

it in their legal arguments. Thus that report has not been reviewed or considered in reaching this decision, and Mr. Vorhies' disagreement with it cannot be addressed.

ORDER

Mr. Vorhies' application for LEOFF Plan 2 catastrophic duty disability retirement is denied.

Done this 5th day of February, 2015.



ELLEN G. ANDERSON
Presiding Officer
Department of Retirement Systems

Notice of Further Appeal Rights

Reconsideration: Any party to this appeal may ask the DRS Presiding Officer to reconsider this Final Order, but must do so promptly. The party must file a petition for reconsideration within ten days of the mailing date in the certification at the top of this Order. The ten-day time limit is strictly observed; DRS must **receive** the petition within that time. RCW 34.05.470, 34.05.010(6).

A petition for reconsideration must state specific reasons why the Final Order should be changed, and must be addressed to the Presiding Officer at the Department of Retirement Systems, PO Box 48380, Olympia, WA 98504-8380.

Judicial Review: A party may request judicial (Superior Court) review of this Final Order. A petition for judicial review must be filed within 30 days of the Final Order mailing date. ***Any party seeking Superior Court review should carefully read and comply with the requirements for judicial review in the state Administrative Procedure Act (chapter 34.05 RCW).*** Petitions for judicial review go directly to the Superior Court; it is not necessary to request DRS reconsideration. RCW 34.05.470(5), 34.05.542.

WASHINGTON STATE ATTORNEY GENERAL

September 27, 2016 - 4:37 PM

Transmittal Letter

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