

Case: *Ricky Merritt v. State of Alaska, Department of Transportation, Alaska Workers' Comp. App. Comm'n Dec. No. 196 (May 16, 2014)*

Facts: Ricky Merritt (Merritt), who worked for the State of Alaska (the State) as an airport safety officer for the Fairbanks airport, suffered a heart attack during a disaster drill at the airport in June 2002. Merritt returned to work a couple of months later. More than three years later, on December 11, 2006, a physician's assistant declined to approve Merritt's fitness to return to duty during a routine biannual evaluation. As a result of Merritt's intermittent chest pains and elevated triglyceride levels, she required Merritt to pass cardiac testing and referred him to Dr. Triplehorn. From December 20, 2006, through January 15, 2007, the State would not allow Merritt to work. Merritt was ultimately awarded temporary total disability (TTD) benefits for this period in a board decision that is not at issue in this appeal.

After an evaluation on January 15, 2007, Dr. Triplehorn noted Merritt would likely be cleared to return to work. On January 22, 2007, the State permitted him to resume work. A day later, Merritt was warned during a meeting about his inappropriate behavior and work performance issues. As a result of this meeting, Merritt was suspended for two work shifts. A letter describing the meeting noted that this was Merritt's fifth disciplinary suspension for improper employee conduct. Two more meetings were held in March 2007 regarding additional instances of what the State viewed as unacceptable conduct, culminating in Merritt's termination on March 16, 2007. The State asserted he was fired for insubordination; Merritt asserted his termination occurred because he was no longer able to work due to his angina.

In November 2008, Merritt moved to Sparta, Wisconsin. He began treating at the Veterans Administration's facility and saw Dr. Eric M. Rotert on March 10, 2009. Merritt reported three episodes of angina since his heart attack. He stated one of them resulted in a catheterization that was "apparently normal." Merritt reported he had had no recent changes in his exercise tolerance and did not have angina, shortness of breath, diaphoresis, palpitations, or other symptoms. Dr. Rotert signed a medical release-from-work form. The report lists Merritt as "retired," and ordered continued restrictions from September 2008. (However, the record does not contain a medical report from September 2008.)

Merritt filed a claim on March 30, 2010, requesting permanent total disability (PTD) benefits ongoing from March 15, 2007, and other benefits that were later withdrawn. On April 9, 2010, the State controverted the claim, contending Merritt had voluntarily left the labor market, no physician had offered an opinion that he lacked the physical capacity to work at the time he was terminated, and no physician had concluded that he was permanently and totally disabled.

On April 29, 2010, Dr. Winter stated that Merritt's psychiatric condition was work-related as a result of mood deterioration following his heart attack. Dr. Rotert completed a physician's report on May 12, 2010, in which he stated that Merritt was medically stable, but his injury permanently precluded him from returning to his job at the time of injury.

He also thought Merritt had suffered a permanent impairment based on "exertional angina," fatigue, and mood disorder.

On July 19, 2010, the State voluntarily initiated the payment of PTD benefits starting May 12, 2010, based on Dr. Rotert's report, leaving at issue PTD benefits only for the period from March 2007, when Merritt was fired, to May 2010. In November 2010, Dr. Breall conducted a cardiologic employer's medical evaluation (EME) and Dr. Lipscomb performed a psychiatric EME. Based on their opinions that Merritt was capable of working in some capacity, on April 19, 2011, the State filed a controversion of PTD benefits after December 22, 2010, and further treatment for his cardiac condition.

The board found that Merritt had attached the presumption through his and his wife's testimony that his angina, triggered by physical exertion, made it impossible for him to work. It also found that the State had rebutted the presumption with the evidence provided by Dr. Triplehorn in his January 15, 2007, report and release of Merritt to return to work. In terms of the third step of the presumption analysis, the board concluded that Merritt failed to prove he was PTD during the relevant time period by a preponderance of the evidence. "There is no evidence in the record of a physician ordering [Merritt] off work or imposing restrictions of any kind on [Merritt's] employment subsequent to the January 15, 2007[,] return to work form until Dr. Winter's and Dr. Rotert's physician report forms in the spring of 2010." Moreover, the board found that even though the Merritts were credible, "their testimony is at odds with contemporaneous medical evidence from three different doctors: Drs. Judkins, Zuckerman, and Triplehorn." Specifically, the board ruled their evidence "has less probative value and is afforded less weight than the physicians' opinions in this case." (Drs. Judkins' and Zuckerman's reports were not discussed in the commission's summary of the facts.) The board also found that Merritt was not entitled to PTD benefits in this period because he was terminated for cause.

Also at issue was whether the board should apply a cost of living adjustment (COLA) to Merritt's compensation rate. Merritt argued the COLA should not apply because he moved out of state for cardiac services not reasonably available in Alaska. The board concluded that the COLA applied because Merritt failed to attach the presumption of compensability. "[Merritt] did not even adduce minimal evidence cardiac services were not reasonably available to him in the state *at the time of his move*[" The board applied the COLA, thereby lowering Merritt's compensation rate. The board also denied attorney fees. Merritt appeals.

Applicable law: AS 23.30.180 on permanent total disability provides:

(a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. . . . In making this determination the market for the employee's services shall be

- (1) area of residence;
- (2) area of last employment;

- (3) the state of residence; and
- (4) the State of Alaska.

AS 23.30.120(a)(1) and related case law applying the three-step presumption of compensability analysis.

AS 23.30.121 provides a presumption for firefighters with certain diseases who “at a minimum, hold[] a certificate as a Firefighter I by the Department of Public Safety[.]”

AS 23.30.122 provides that findings by the board concerning the weight to be accorded testimony, including medical testimony and reports, are conclusive. AS 23.30.128(b) provides that the commission should uphold the board’s findings when they are supported by substantial evidence in light of the whole record and that the board’s credibility findings are binding on the commission.

AS 23.30.175(b)(2) states that the compensation rate provided for in §.175(b)(1) “does not apply if the recipient is absent from the state for medical or rehabilitation services not reasonably available in the state.”

AS 23.30.145 on attorney fees.

Issues: Did the board err in not applying AS 23.30.121, the firefighter presumption, to Merritt’s claim? Did the board err in concluding that Merritt had not proved he was permanently and totally disabled from March 15, 2007, to May 14, 2010? Did the board err in applying a COLA to Merritt’s compensation rate? Did the board abuse its discretion in denying attorney fees?

Holding/analysis: The commission concluded that the board did not err in not applying the firefighter presumption. Merritt waived the issue by raising it for the first time on appeal, but the presumption would not apply anyway because he suffered his heart attack six years before the effective date of the statute and because the presumption applies only to those with Firefighter I certification, which Merritt acknowledged he did not have.

The commission deferred to the board’s findings concerning the Merritts’ credibility and weight accorded to their testimony. The commission concluded that substantial evidence, described in the above facts, supported the board’s holding that Merritt did not prove his entitlement to PTD benefits during the relevant time period. The commission also concluded that substantial evidence supported that Merritt voluntarily removed himself from the workforce when he was terminated for reasons unrelated to his heart attack, workers’ compensation claim, or fitness for duty. “Setting aside any medical considerations, there was substantial evidence Merritt had disciplinary problems over a considerable period of time, having been suspended at least four times before he was terminated in March 2007. Even though Merritt attributed the suspensions, etc., to Supkis unfairly singling him out for such discipline, we note that the EEOC and the Human Rights Commission upheld the disciplinary action taken by the State against Merritt.” Dec. No. 196 at 28.

Merritt argued the board erroneously applied a COLA because he moved to Wisconsin to obtain cardiac treatment that was not available in Alaska. The commission agreed with the board's findings that Merritt had not attached the presumption to his claim that an exception to the COLA applied. The commission observed that

[T]he Merritts moved to Wisconsin in November 2008, approximately six years after his heart attack in June 2002. In that timeframe, Merritt was apparently satisfied with the cardiac treatment he was receiving in Alaska, and from the record, that treatment was not extensive following the catheterization procedure in Anchorage in June 2002. Therefore, it was reasonable for the board to conclude that . . . Merritt did not relocate for purposes of appropriate cardiac treatment. Consequently, the board's imposition of a COLA was supported by the evidence. *Id.* at 29-30.

On the issue of attorney fees, the commission agreed no fees were due because the State accepted Merritt was PTD in May 2010, which was before Merritt's attorney was retained, and because Merritt was not successful on the issues, PTD benefits from March 2007 to May 2010 and the COLA, that were before the board. However, the commission remanded the issue of fees for one specific period:

[O]n April 19, 2011, long after Mr. Beconovich had been retained, the State controverted "PTD Benefits After 12/22/10" and "Further Medical Treatment and Medications for Cardiac Condition[.]" In the commission's view, this controversion might serve as a basis for an award of attorney fees under AS 23.30.145(a), for PTD, §.041(k), and medical benefits that were paid to Merritt after December 22, 2010. *Id.* at 30-31.