

**MUNICIPAL FIRE AND POLICE RETIREMENT
SYSTEM OF IOWA
7155 Lake Drive, Suite 201
West Des Moines, IA 50266**

IN THE MATTER OF:

JEREMY M. BURKEN,

Applicant.

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DECISION

Iowa Code § 411.6(3) (2015) and
Iowa Code § 411.6(5) (2015)

STATEMENT OF THE CASE

Jeremy M. Burken ("Burken") filed his application for a disability pension on or about May 21, 2014. On August 26, 2014, the Medical Board of the University of Iowa Hospitals and Clinics reported its findings to the System regarding Burken's disability. An initial decision awarding an accidental disability pension was made by the System on September 22, 2014. The City of Davenport filed a timely appeal challenging the award of an accidental, rather than ordinary, disability pension. A hearing was held before the Disability Appeals Committee of the Board (comprised of Mary Bilden, Frank Guihan, and Duane Pitcher, chair) on April 8, 2015 at the offices of the System. Burken appeared, and was represented by attorneys Charles Gribble and Ben Matchan. Attorney Amanda Richards appeared for the City of Davenport. Daniel Cassady, Deputy Director, appeared on behalf of the System. Alice Helle was present as counsel to the Committee. Testimony was received from Burken, Bruce Eberhart, a Davenport firefighter, and Ricky Lee Garrells, M.D. Both parties waived post-hearing briefs.

FINDINGS OF FACT

The Committee, having reviewed the evidence of record, finds as follows:

1. Burken was born on October 1, 1980 and commenced service as a firefighter for the City of Davenport on June 6, 2005. His service as a firefighter ended in May of 2014. He is presently working in maintenance at a nuclear plant while training to work on machines.
2. Burken filed for an accidental disability pension from the System, citing upper spine injuries resulting in chronic neck pain and muscle atrophy and loss of motor function in the right hand.

3. On August 26, 2014, the System's Medical Board opined that Burken is unable to perform the full duties of a firefighter as a consequence of his neck pain and right hand weakness and muscle incapacity, and that the incapacity is likely to be permanent, in that it is expected to be of at least one year's duration.
4. On September 22, 2014, the System awarded an accidental disability pension due to neck and right hand impairments.
5. The City of Davenport filed an appeal on September 30, 2014, challenging the award of an accidental disability pension.
6. At the April 8, 2015 hearing, Burken testified about the two on-the-job incidents that he believed to be the cause of his impairments. The first was on August 9, 2010, when he was preparing to answer a call and struck his head on the lower part of the cab in the fire truck. He testified that he got a "stinger," chipped a tooth, and had increased neck pain and muscle tightness as the day went on. An injury report was filed with the department that day. The second incident occurred on September 21, 2012. At that time he was driving a city van while in Des Moines for training and hit his head on the van window while making a lane change. He testified that it felt like he "replicated" the 2010 injury. The 2012 injury was not reported to the City of Davenport until 2014. Burken stated that he didn't report it initially because the injury seemed insignificant at the time. He also noted that he is 6' 6" tall, and that his height is "a bit of a problem" in vehicles.
7. Bruce Eberhart, an engineer with the Davenport Fire Department, was called as a witness by Burken. He testified regarding the First Report of Injury filed August 9, 2010 (System's Exhibit 3-3 – 3-5). He testified that he prepared the report based on information from Burken, and that it was submitted to him because he was the acting commanding officer that day. Counsel for the City noted that the response on the form to the item "parts of the body directed affected by the injury" was "neck" and asked whether only one could be specified. He responded, "to the best of my recollection, yes." When asked whether Burken ever mention problems with his arm or hand, he responded that he did not recall.
8. Ricky Lee Garrells, M.D. was called as a witness by the City of Davenport. He testified that he is employed by Genesis Occupational Health and saw Burken as directed by the City of Davenport regarding complaints of numbness and weakness in the right hand and certain fingers. His reports were admitted into evidence as City Exhibit 2. Dr. Garrells testified that those impairments were caused by ulnar nerve damage in the arm near the elbow. He further testified that such damage is typically caused by trauma to the nerve or tightness in the muscle, and that it can't be caused by hitting the head. He noted that there was no reported trauma to the arm. He further testified that results of EMG performed at his direction and admitted as City Exhibit 3 confirmed that Burken's ulnar nerve was damaged and ruled out nerve damage in the neck area.

9. In his Clinical Note, Dr. Joseph Chen of the System's Medical Board referred to Burken's "severe right ulnar neuropathy" and noted that he told Burken that he is not certain what is causing his underlying hand weakness.
10. Following the hearing, the System posed the following question to the Medical Board, at the direction of the Committee: "Is the member disabled on his neck pain alone, without the right hand weakness and muscle atrophy?" In response, Dr. Patrick Hartley of the Medical Board responded in a letter dated May 4, 2015:

Following review of the medical records, including the previous evaluations at UIHC in August 2014, I cannot state with certainty that Mr. Burken would be disabled based on his neck pain alone, absent the right hand weakness and muscle atrophy. He reported daily neck pain and some difficulty performing job-related tasks including putting on his SCBA air pack, or putting a medical bag over his right shoulder, but most of his reported job-related limitations are primarily related to the weakness of his right arm. The relationship of his arm weakness to his neck pain is unclear.

11. In response to the May 4 letter, Burken requested the opportunity to depose Dr. Hartley. The deposition was conducted on June 16, 2015. In response to questions from the attorneys for Burken and the City, Dr. Hartley testified that he cannot causally connect Burken's ulnar neuropathy to the incidents he described (transcript at p. 11) and specifically stated that he "cannot explain an ulnar neuropathy at the elbow based on hitting your head." (Transcript at p. 12.) He further testified that, taking the EMG results into account, he agreed with Dr. Garrells' opinion that Burken's complaints attributable to the ulnar neuropathy cannot be causally connected to the work injury he reported. (Transcript at p. 27.) Dr. Hartley also reaffirmed that he cannot state within a reasonable degree of medical certainty that Burken would be disabled based on neck pain alone. (Transcript at p. 51.)

CONCLUSIONS OF LAW

1. Iowa Code § 411.6(3) states:

3. Ordinary disability retirement benefit. Upon application to the system, of a member in good standing or of the chief of the police or fire departments, respectively, any member shall be retired by the system, not less than thirty and not more than ninety days next following the date of filing the application, on an ordinary disability retirement allowance, if the medical board after a medical examination of the member certifies that the member is mentally or physically incapacitated for further performance of duty, that the incapacity is likely to be permanent, and that the member should be retired. However, if a person's membership in the system first commenced on or after July 1, 1992, the member shall not be eligible for benefits with respect to a disability which would not exist, but for a medical condition that was known to exist on the date that membership

commenced. A member who is denied a benefit under this subsection, by reason of a finding by the medical board that the member is not mentally or physically incapacitated for the further performance of duty, shall be entitled to be restored to active service in the same position held immediately prior to the application for disability benefits. The member-in-good-standing requirement of this subsection may be waived for good cause as determined by the board. The burden of establishing good cause is on the member.

2. Iowa Code section 411.6(5) states (in relevant part) as follows:

5. *Accidental disability benefit.*

a. Upon application to the system, of a member in good standing or of the chief of the police or fire departments, respectively, any member in good standing who has become totally and permanently incapacitated for duty as the natural and proximate result of an injury or disease incurred in or aggravated by the actual performance of duty at some definite time and place, or while acting pursuant to order, outside of the city by which the member is regularly employed, shall be retired by the system if the medical board certifies that the member is mentally or physically incapacitated for further performance of duty, that the incapacity is likely to be permanent, and that the member should be retired. However, if a person's membership in the system first commenced on or after July 1, 1992, the member shall not be eligible for benefits with respect to a disability which would not exist, but for a medical condition that was known to exist on the date that membership commenced. A medical condition shall be deemed to have been known to exist on the date that membership commenced if the medical condition is reflected in any record or document completed or obtained in accordance with the system's medical protocols pursuant to section 400.8, or in any other record or document obtained pursuant to an application for disability benefits from the system, if such record or document existed prior to the date membership commenced. A member who is denied a benefit under this subsection, by reason of a finding by the medical board that the member is not mentally or physically incapacitated for the further performance of duty, shall be entitled to be restored to active service in the same position held immediately prior to the application for disability benefits.

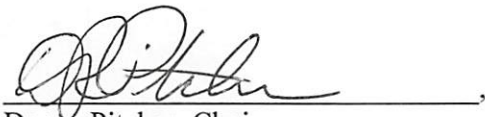
3. It is undisputed that Burken is physically incapacitated for further performance of duty and that the incapacity is likely to be permanent, as "permanent" is defined in the System's Administrative Rules. He is therefore entitled to at least an ordinary disability pension.
4. It is also undisputed that Burken's neck pain is related to the work injuries that he cited, and thus resulted from the performance of duty at some definite time and place.

5. The medical reports and testimony of Dr. Garrells and Dr. Hartley support a conclusion that Burken's hand and arm weakness are not the result of the performance of duty.
6. The reports and testimony of Dr. Hartley support a conclusion that Burken's neck pain alone is not disabling.
7. Since Burken's incapacity for duty is the result of his hand and arm weakness, which he has not proven to be job-related, he is not entitled to an accident disability pension from the System.

DECISION

The City's appeal for an ordinary rather than accidental disability pension for Jeremy M. Burken under chapter 411 is hereby granted.

Dated this 9th day of July, 2015.



Duane Pitcher, Chair
Disability Appeals Committee

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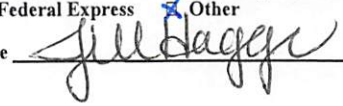
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at such attorney's address as disclosed by the pleadings of record herein on the 13 day of July, 2015.

By: ☒ U.S. Mail ☐ Facsimile
☐ Hand Delivered ☐ Overnight Courier
☐ Federal Express ☒ Other

Signature 

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