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BEFORE AN ADMINISTRATIVE LAW JUDGE
PUBLIC EMPLOYEES' RETIREMENT FUND

FEB 07 2011

PUBLIC EMPLOYEES
RETIREMENT FUND

IN THE MATTER OF)	1977 POLICE OFFICERS' AND
PAUL BRYSON, Member, and)	FIREFIGHTERS' PENSION AND
CHIEF ORAN TRUE, Brownsburg)	DISABILITY FUND
Fire Territory,)	
)	
Petitioners.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

This case was assigned to me for determination of the appeal of Paul Bryson and the Chief of the Brownsburg Fire Territory from the initial determination of the Director of the 1977 Fund finding Bryson to be disabled, granting him disability benefits, finding his disability to fall within Class 2, and finding the degree of impairment to be 8%. Bryson and Chief True jointly objected and requested a hearing.

A hearing was held on November 23, 2010. Bryson was represented by attorney Matthew Langenbacher. The Brownsburg Fire Territory was represented by attorney Jeffrey Logston. The PERF Board as administrator of the 1977 Fund was represented by attorneys Kathryn Cimera and Jaclyn Brinks. The parties filed post-hearing briefs on January 10, 2011.

At the outset of the appeal, Bryson's counsel indicated that he was challenging only the class of disability. At the hearing, his counsel reserved the possibility that he might also challenge the degree of impairment. However, no evidence on that issue was presented and his post-hearing brief does not address degree of impairment. Therefore, the sole issue for resolution is the class of disability under Ind. Code § 36-8-8-12.5.

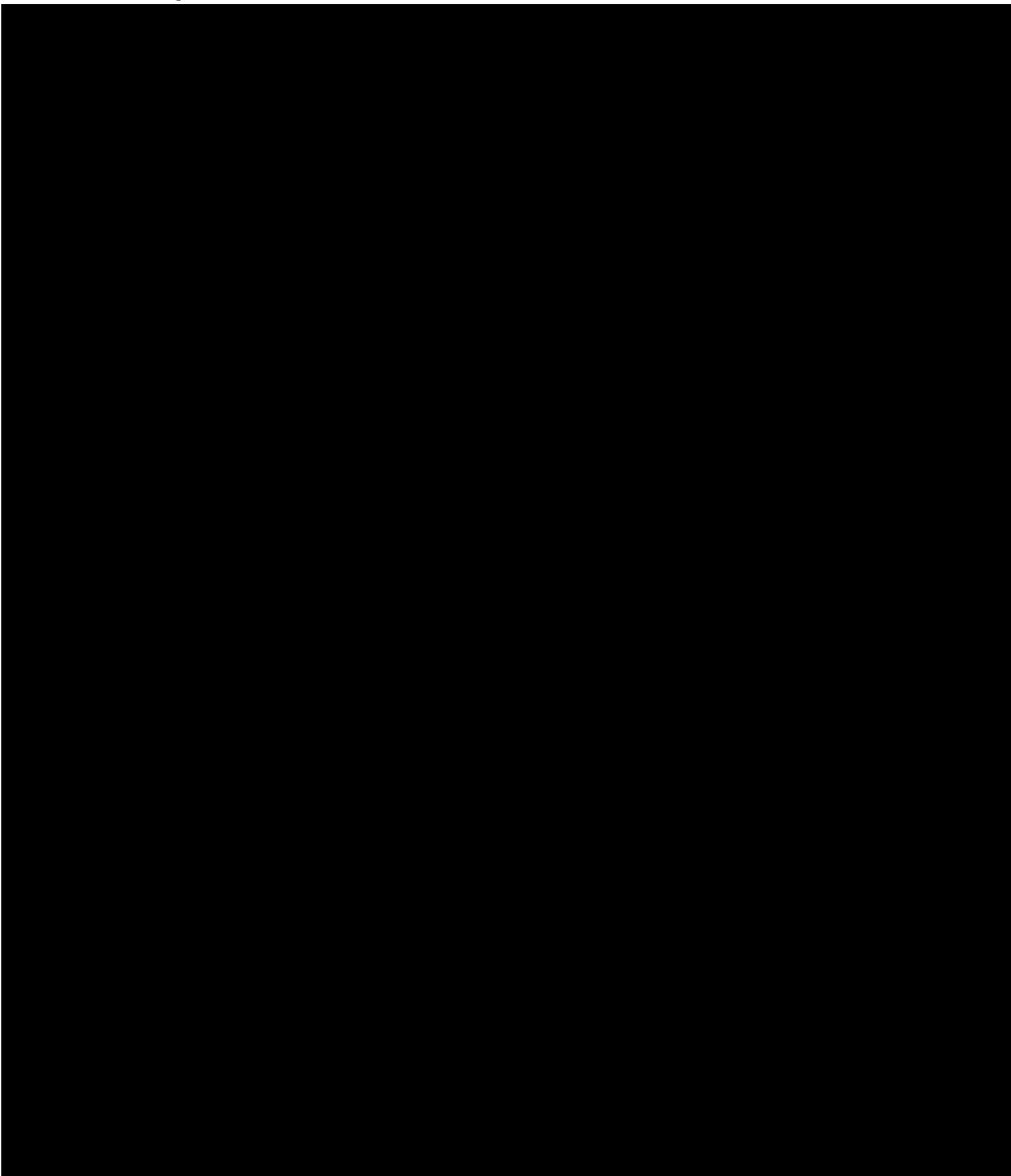
The parties stipulated to the authenticity and admissibility of Exhibits 1 through 19. Petitioners called Thaddeus Dolzall and Paul Bryson. Respondent called Bryson and Dr. Omkar Markand.

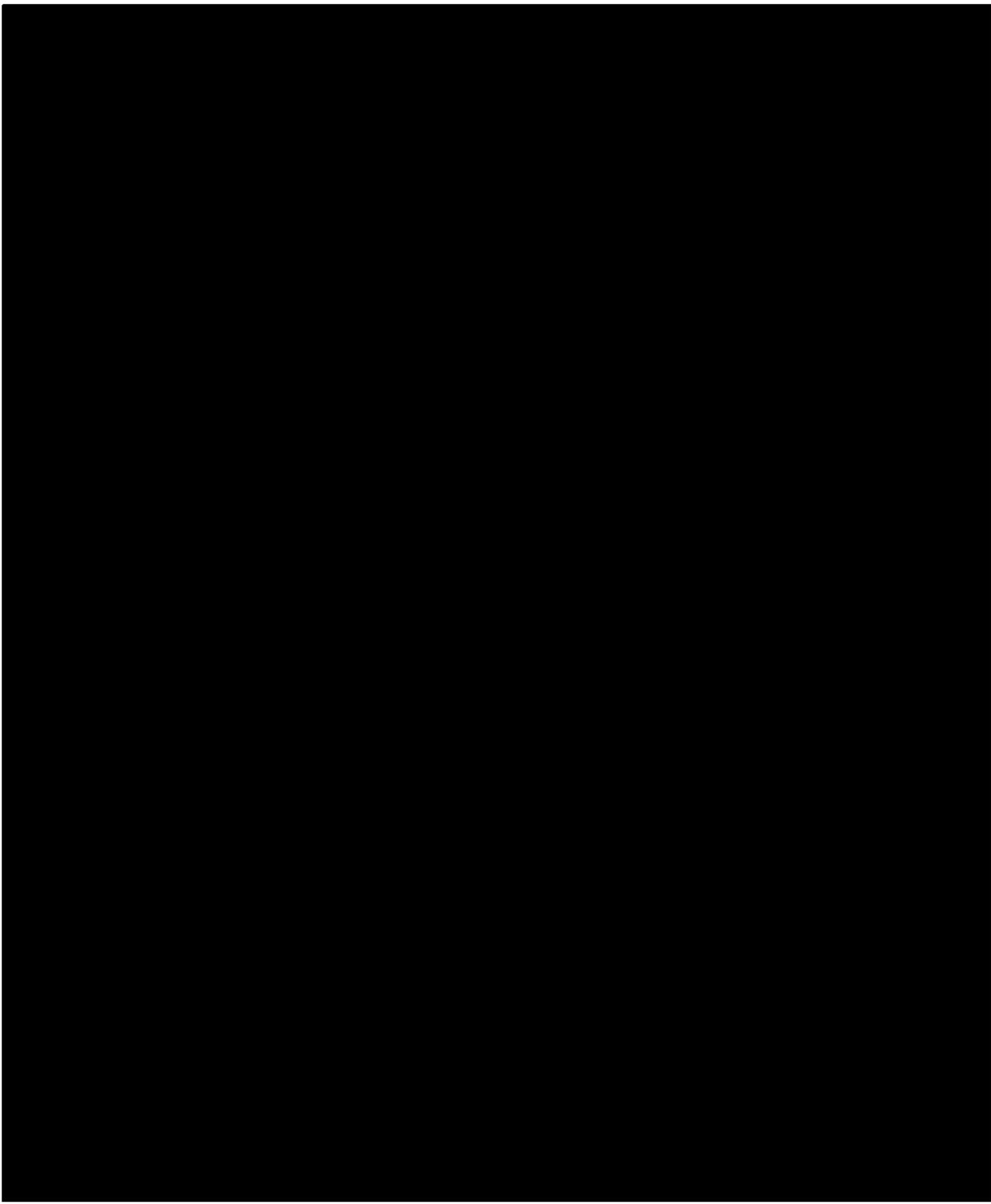
Findings of Fact

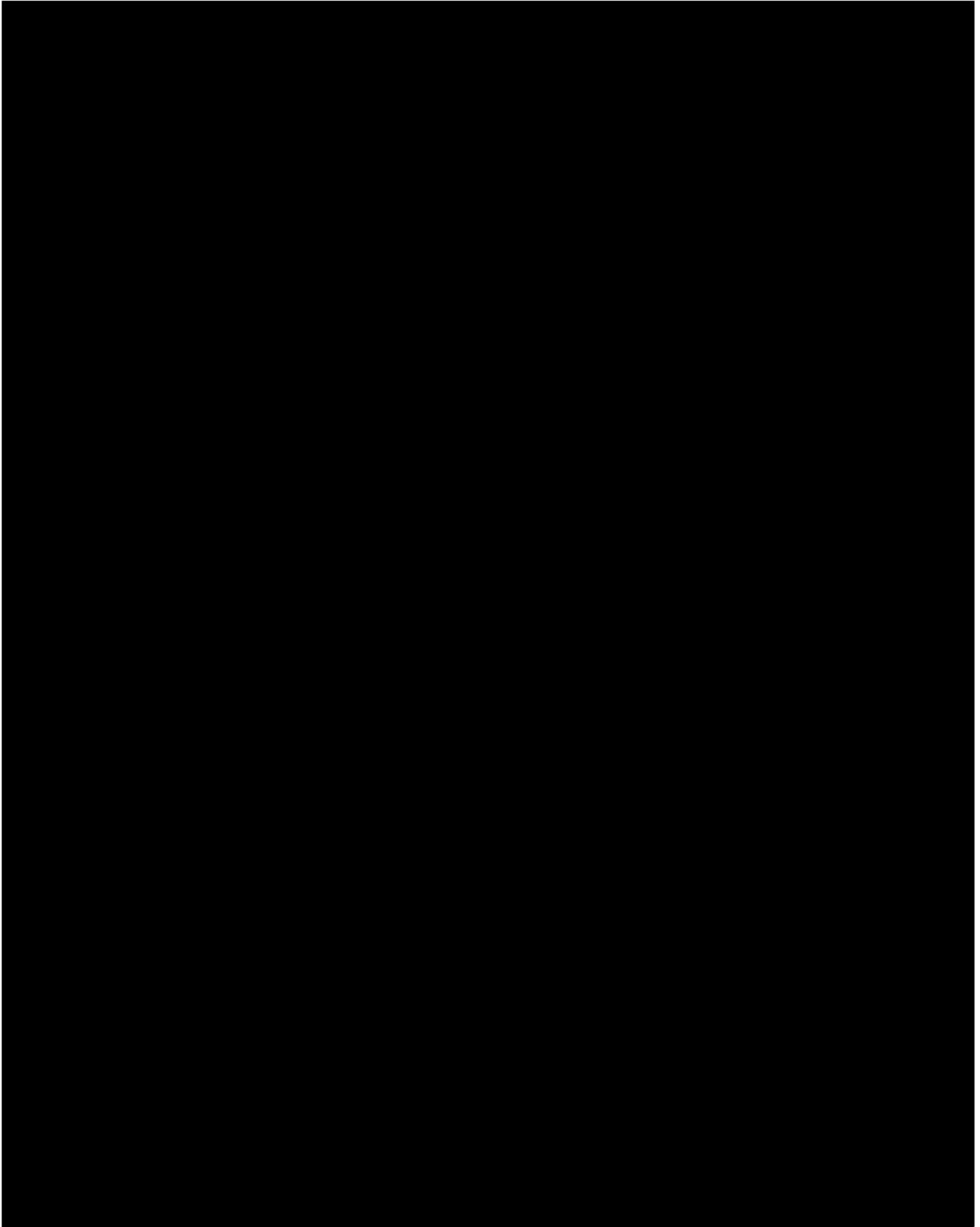
1. Paul Bryson was hired as a firefighter by the Brownsburg Fire Territory on February 12, 2001. He held the rank of private throughout his tenure. He is a member of the 1977 Fund.

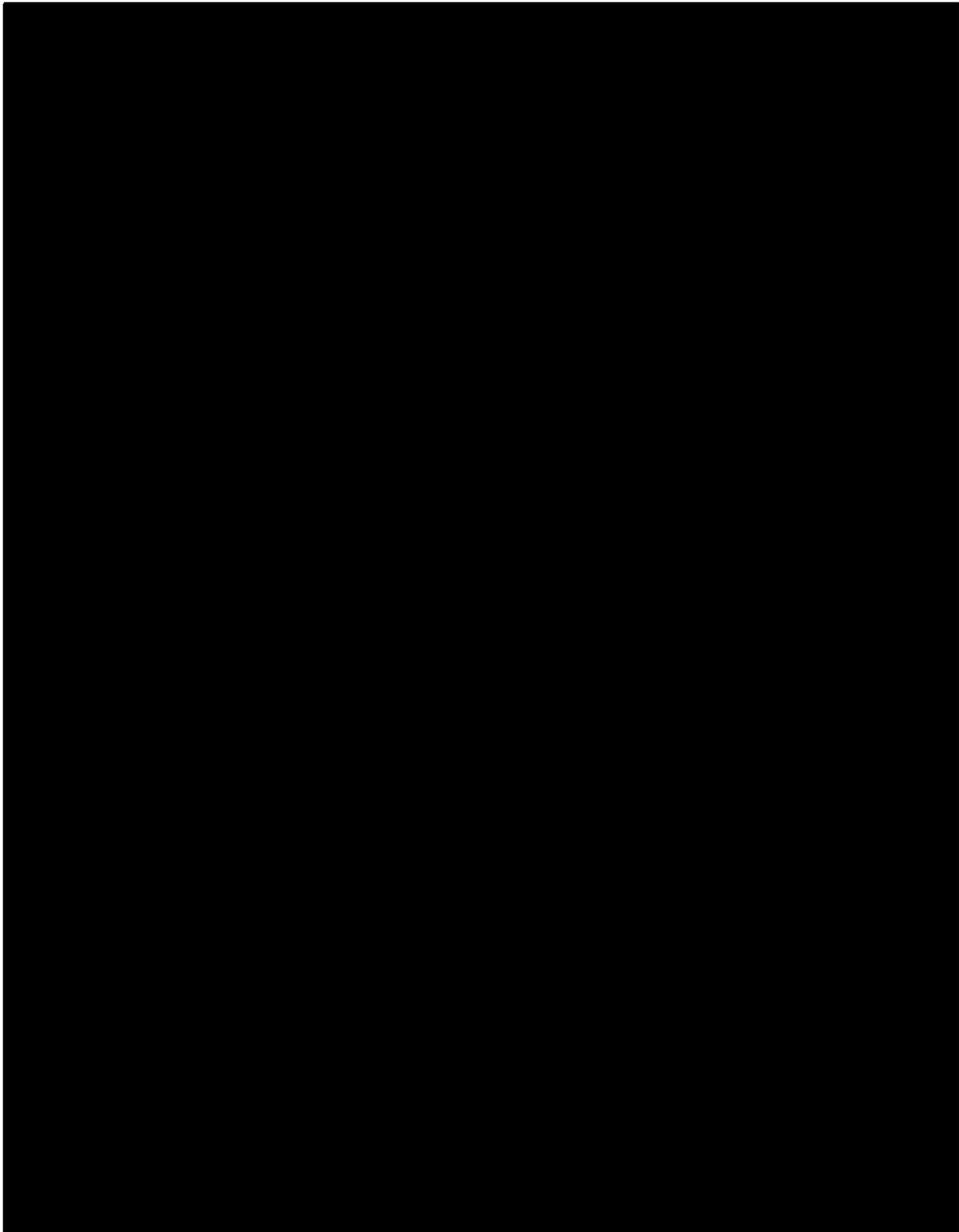
2. Before working for Brownsburg Fire Territory, Bryson was a firefighter for the Mooresville Fire Department. He started there in March 1992, worked as a volunteer for two years, and then was switched to "paid stand-by." Before and during his experience with

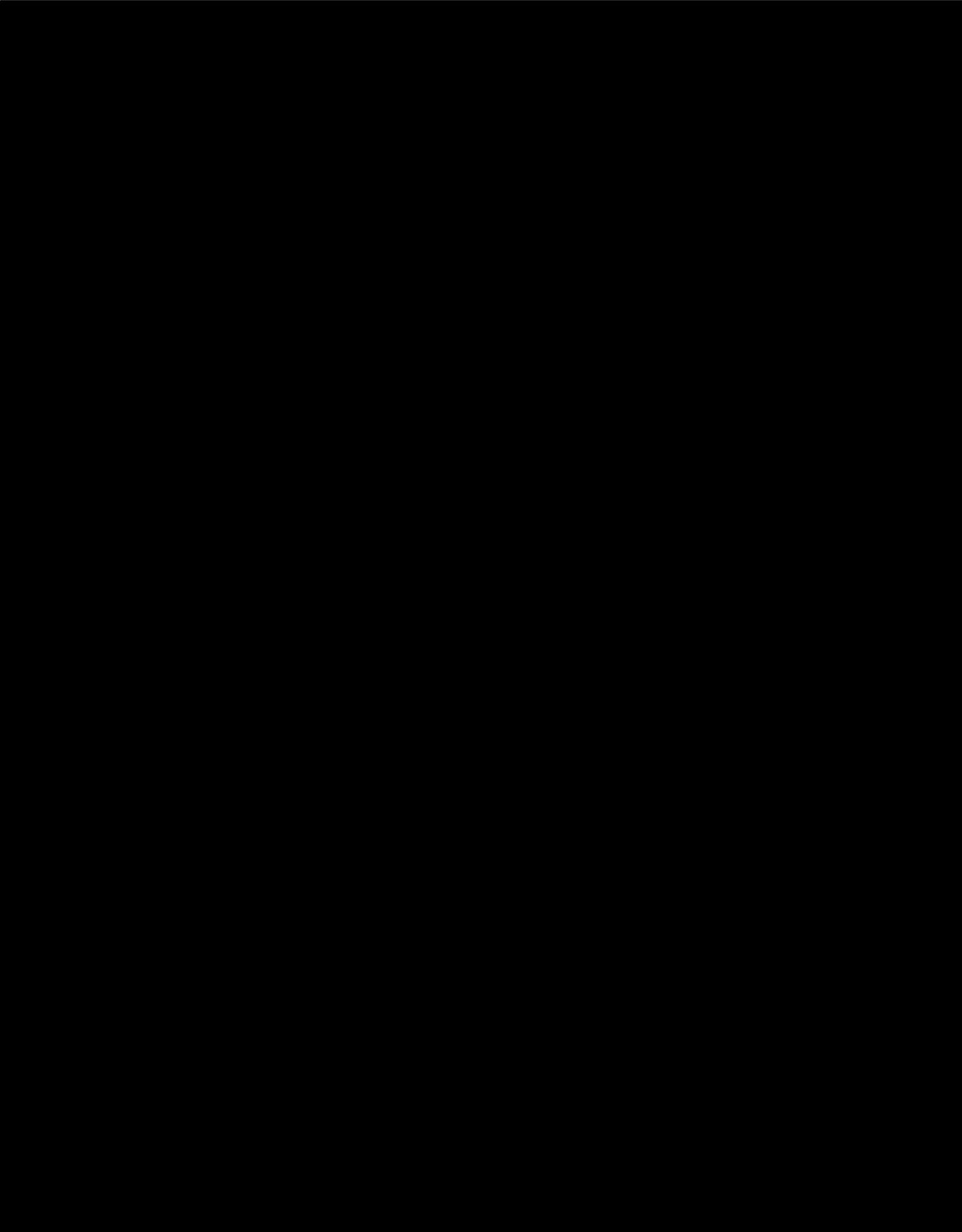
Mooresville, he did construction work including hard physical labor. He has not worked at a hard labor job since about 1998.

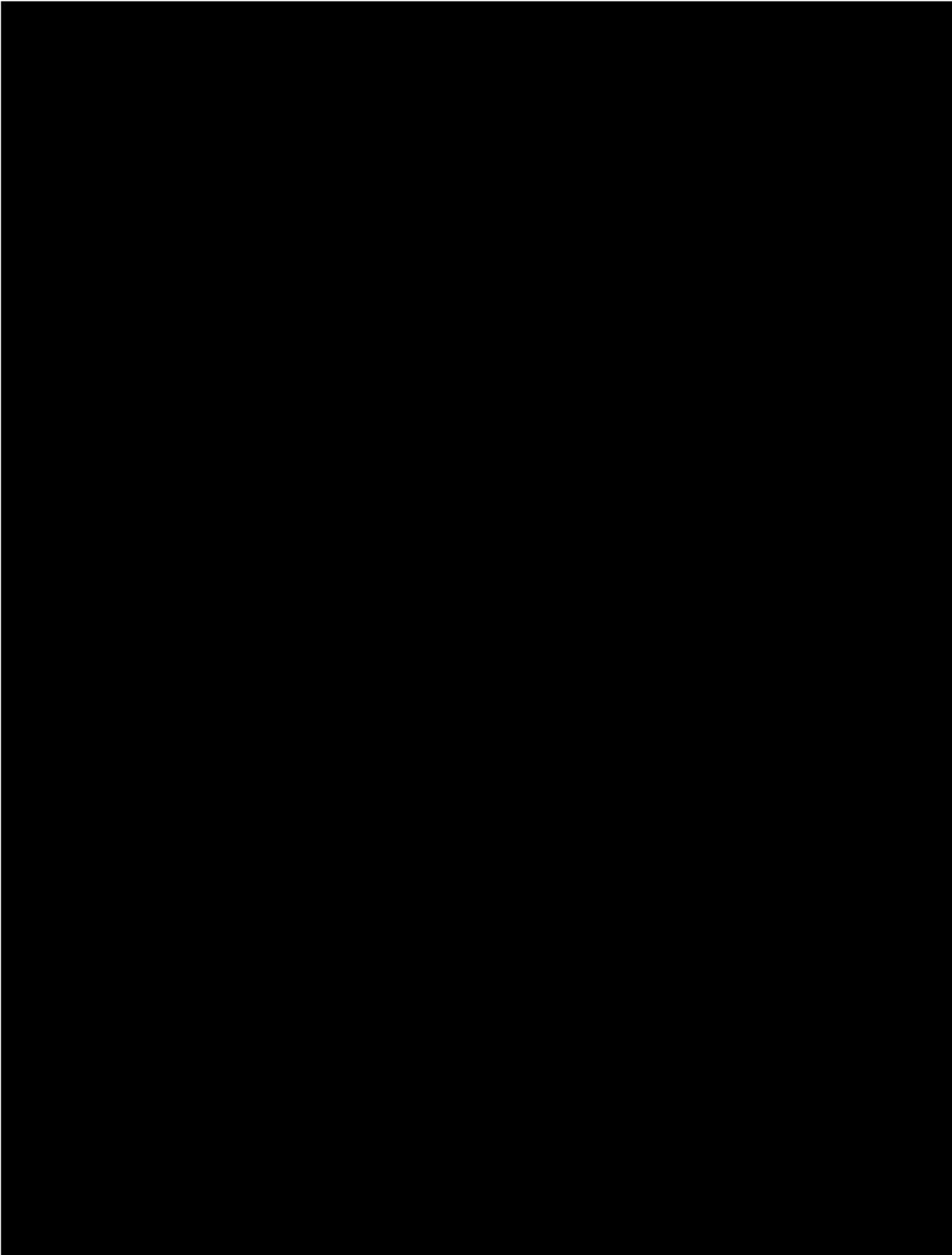


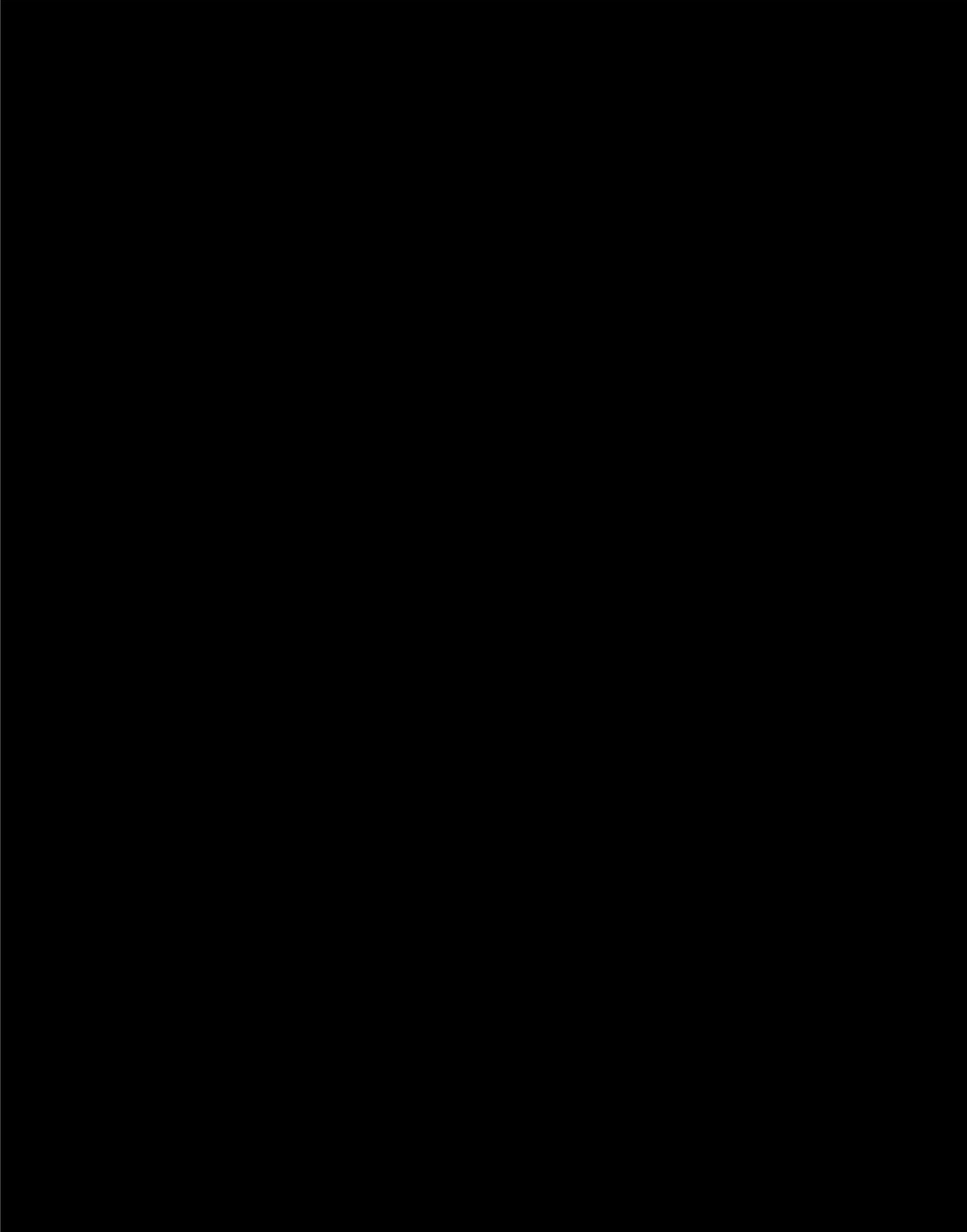


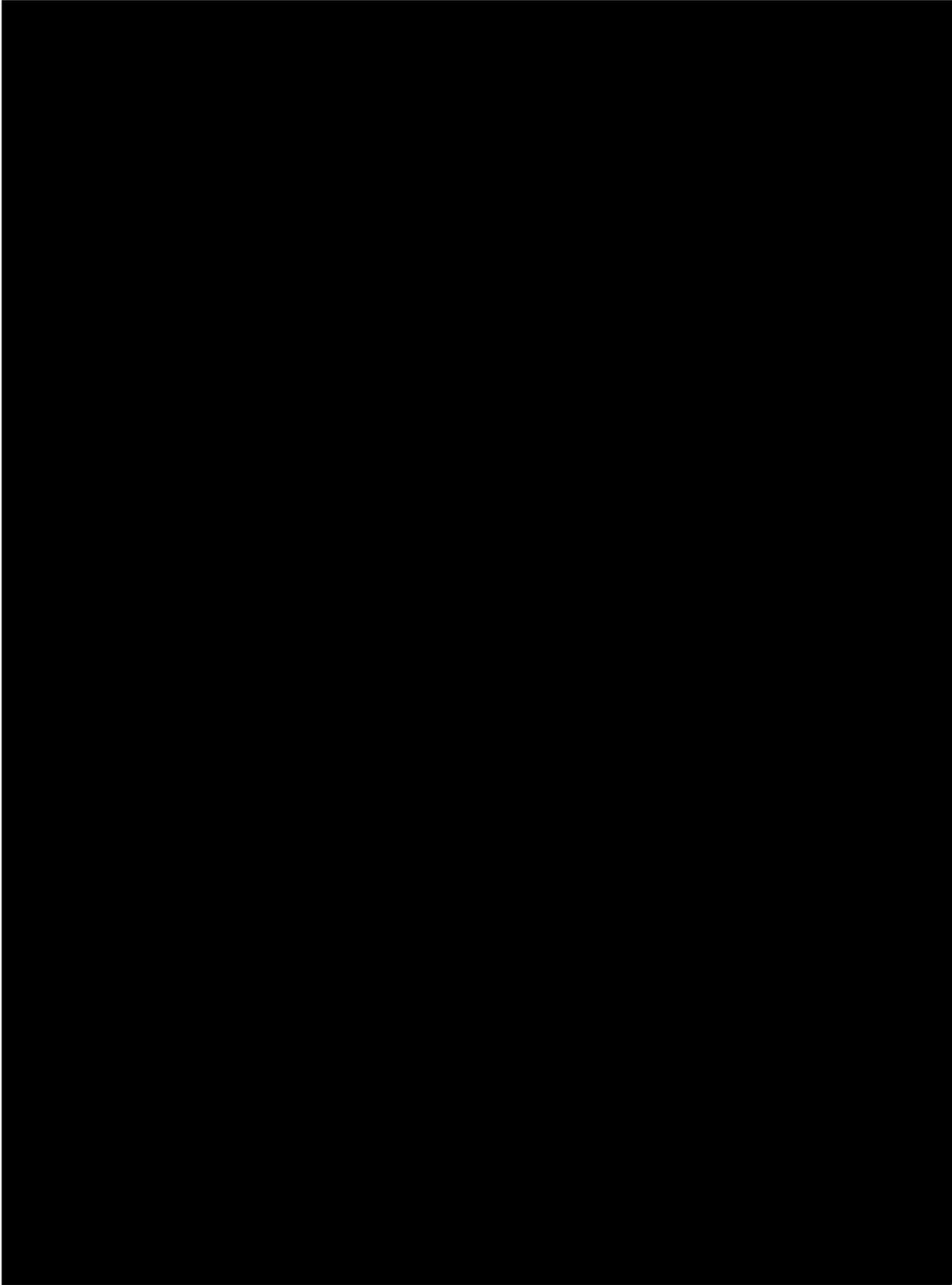


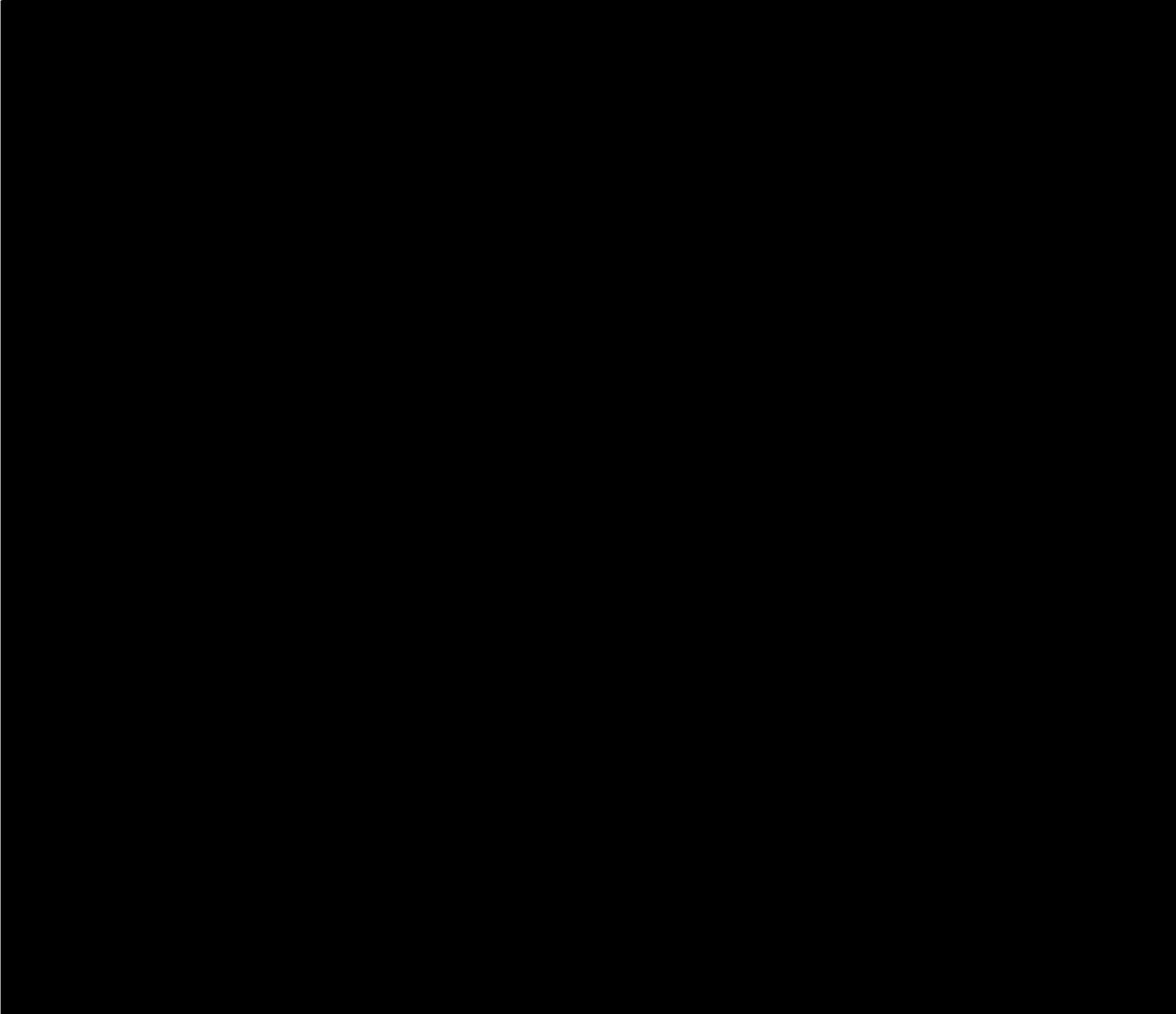












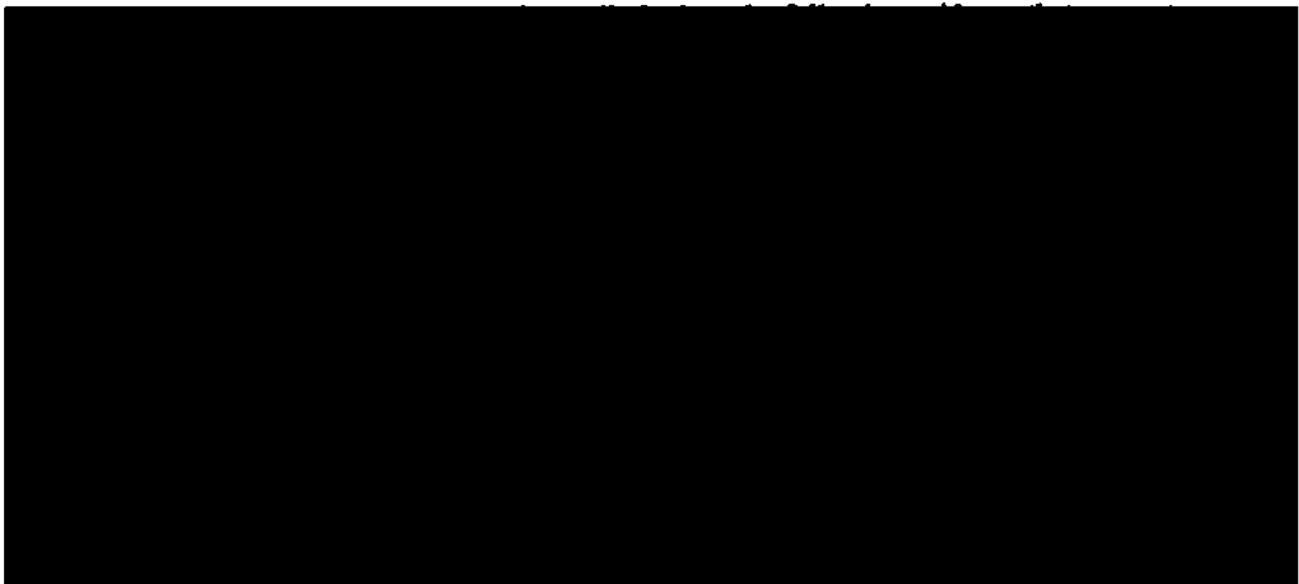
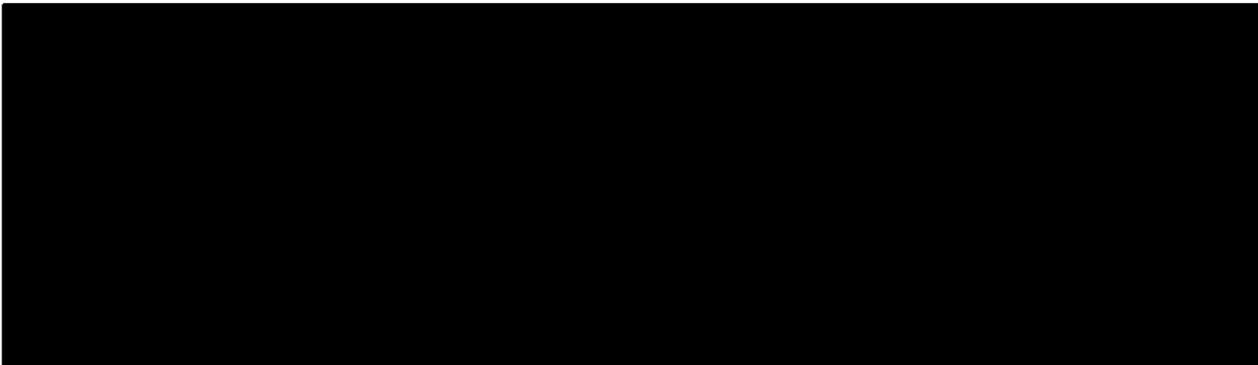
67. Petitioners did not present any expert testimony to contradict Dr. Markand's opinion.



69. Based on all of the evidence and Dr. Markand's opinion, the ALJ finds as a matter of fact that Bryson's impairment—[redacted]—was caused by progressive and chronic changes [redacted] before any of the painful episodes experienced by Bryson, and was not caused by an acute injury [redacted].

70. The ALJ accredits Dr. Markand's expert opinion, which is un rebutted. *See Foddrill v. Crane*, 894 N.E.2d 1070, 1077 (Ind. Ct. App. 2008) (ordinarily the question of the causal connection between a permanent condition, an injury and a pre-existing affliction or

condition is a complicated medical question and testimony of an expert witness on the issue is necessary), citing *Daub v. Daub*, 629 N.E.2d 873, 877-78 (Ind. Ct. App. 1994).



73. On May 27, 2010, the Director of the 1977 Fund issued an initial determination, consistent with Dr. Markand's determination, that Bryson was eligible for disability benefits, his degree of impairment is 8%, and the applicable class of disability is Class 2. (Ex. 11.)

74. On June 4, 2010, the Chief of the Brownsburg Fire Territory and Bryson jointly submitted their objection to the initial determination. (Ex. 12.) The parties have stipulated that the objection was timely. (Ex. 1.)

75. Any finding of fact included in the conclusions of law below is incorporated herein by reference.

Conclusions of Law

A. Legal standard

The factual questions presented by this case are reviewed under the preponderance of the evidence standard. *Pendleton v. McCarty*, 747 N.E.2d 56, 64-65 (Ind. Ct. App. 2001). The ALJ, even where not the ultimate authority, performs a role similar to that of a trial judge sitting without a jury, and reviews the evidence *de novo* without deference to the agency's initial determination. *Indiana Department of Natural Resources v. United Refuse Company, Inc.*, 615 N.E.2d 100, 103-04 (Ind. 1993); *Branson v. Public Employees' Retirement Fund*, 538 N.E.2d 11, 13 (Ind. Ct. App. 1989).

The burden of proof lies with Bryson and Chief True, as the parties requesting agency benefits. I.C. § 4-21.5-3-14(c); see *Indiana Department of Natural Resources v. Krantz Brothers Construction Corp.*, 581 N.E.2d 935, 938 (Ind. Ct. App. 1991) (party seeking exemption from general rule has burden of proof, both under I.C. § 4-21.4-3-14(c) and at common law). Traditionally, an applicant for an administratively granted privilege bears the burden of demonstrating eligibility. *Leventis v. South Carolina Dept. of Health and Environmental Control*, 530 S.E.2d 643, 651 (S.C. Ct. App. 2000), citing 73A C.J.S. *Public Administrative Law and Procedure* § 128 at 35 (1983) ("In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof, and the burden of proof rests upon one who files a claim with an administrative agency to establish that required conditions of eligibility have been met. It is also a fundamental principle of administrative proceedings that the burden of proof is on the proponent of a rule or order, or on the party asserting the affirmative of an issue."); *Division of Motor Vehicles v. Granziel*, 565 A.2d 404, 411 (N.J. Super. 1989).

Administrative decisions must be supported by "the kind of evidence that is substantial and reliable." I.C. § 4-21.5-3-27(d). In other words, the quality of evidence must be substantial and reliable. If both sides present evidence that is substantial and reliable, the petitioners can prevail only if their evidence preponderates over the evidence submitted by the PERF Board.

Hearsay evidence may be admitted and, if not objected to, may form the basis for an order. I.C. § 4-21.5-3-26(a). However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence. *Id.*

B. Discussion

At the time he applied for disability benefits, Bryson was an employee of the Brownsburg Fire Territory and a member of the 1977 Fund. I.C. § 36-8-8-7(a). His entitlement to disability benefits is governed by I.C. §§ 36-8-8-12, -12.3, and -12.5. A fund

member's entitlement is determined by (1) the existence of a covered impairment, (2) the class of impairment, and (3) the degree of impairment.

It is undisputed that Bryson has a covered impairment under I.C. § 36-8-8-12.3(b). It is also undisputed that his degree of impairment is 8% of the whole person. See I.C. § 36-8-8-13.1(c). The only dispute is the class of impairment under I.C. § 36-8-8-12.5(b), which provides in pertinent part:

(1) . . . A Class 1 impairment is a covered impairment that is *the direct result* of one (1) or more of the following:

(A) A personal injury that occurs while the fund member is on duty.

(B) A personal injury that occurs while the fund member is off duty and is responding to:

(i) an offense or a reported offense, in the case of a police officer; or

(ii) an emergency or reported emergency for which the fund member is trained, in the case of a firefighter.

(C) An occupational disease (as defined in IC 22-3-7-10). A covered impairment that is included within this clause and subdivision (2) shall be considered a Class 1 impairment.

(D) A health condition caused by an exposure risk disease that results in a presumption of disability or death incurred in the line of duty under IC 5-10-13.

(2) . . . A Class 2 impairment is a covered impairment that is a *duty related disease*. A duty related disease means a disease *arising out of* the fund member's employment. A disease shall be considered to arise out of the fund member's employment if it is apparent to the rational mind, upon consideration of all of the circumstances, that:

(A) there is a connection between the conditions under which the fund member's duties are performed and the disease;

(B) the disease can be seen to have followed as a natural incident of the fund member's duties as a result of the exposure occasioned by the nature of the fund member's duties; and

(C) the disease can be traced to the fund member's employment as the proximate cause.

(3) . . . A Class 3 impairment is a covered impairment that is not a Class 1 impairment or a Class 2 impairment.

(Emphasis added.) Thus, both Class 1 and Class 2 require that the disability be caused by or related to the performance of the member's duties, with Class 1 being "the direct result" and Class 2 being "duty related" and "arising out of" the member's employment. A Class 3 impairment is everything else, including conditions caused by factors unrelated to duty.

The legal question here is the distinction between a Class 1 and Class 2 impairment. When reviewing a statute, effect and meaning must be given to every word, and a part of a statute will not be construed to be meaningless if it can be reconciled with the rest of the statute. *Allied Signal, Inc. v. Ott*, 785 N.E.2d 1068, 1071 (Ind. 2003); *Brown v. State*, 774 N.E.2d 1001, 1004 (Ind. Ct. App. 2002). Disability and pension statutes are liberally construed in favor of those intended to benefit from them. *Bobson v. City of Mishawaka*, 383 N.E.2d 484, 487 (Ind. Ct. App. 1978), citing *Schock v. Chappel*, 231 Ind. 480, 109 N.E.2d 423 (1952), and *State ex rel. Clemens v. Kern*, 215 Ind. 515, 20 N.E.2d 514 (1939).

In defining a Class 1 impairment ("the direct result"), the statute's use of the word *direct* implies a strict requirement of causation between the on-duty injury and the impairment, and the definite article *the* implies exclusivity. By contrast, in defining a Class 2 impairment ("a duty related disease"), the legislature used less strict language such as *arising out of*, *connection between*, *natural incident of* and *proximate cause*. Thus, a Class 1 impairment requires a showing that an injury in the line of duty was the sole and independent cause of the impairment, while a Class 2 impairment requires a showing that an on-duty injury contributed to but was not the sole and independent cause of the impairment.

Bryson disputes this interpretation, arguing that an injury that aggravates a pre-existing condition should fall within Class 1. He draws an analogy to the worker's compensation law, under which aggravation or triggering of a latent or pre-existing condition is compensable, if the injury is shown to arise out of and in the course of employment. *Smith v. Henry C. Smithers Roofing Co.*, 771 N.E.2d 1164, 1168-69 (Ind. Ct. App. 2002), citing *Hansen v. Von Duprin, Inc.*, 507 N.E.2d 573, 577 (Ind. 1987). But the analogy is inapposite, because the worker's compensation law requires a benefit for any injury "arising out of and in the course of the employment." I.C. § 22-3-2-2. The 1977 Fund law uses similar language to describe a Class 2 impairment ("a disease arising out of the fund member's employment"), but draws an additional distinction between compensable disabilities that are "the direct result" of an on-duty injury. The mere fact that Bryson's injury would be compensable under the worker's compensation law, which is not disputed here, does not resolve the question of class of impairment.

Causation is generally a question of fact. *Peters v. Forster*, 804 N.E.2d 736, 743 (Ind. 2004). The ALJ has found as a matter of fact that Bryson's back condition was a progressive, pre-existing disease that may have been exacerbated by firefighting duties. This places Bryson's impairment into Class 2, because it was duty related, but was not the "direct result" of personal injury while on duty. Class 2 is appropriate even though the underlying disease did not arise out of Bryson's employment, because his duties as a firefighter may have accelerated the progression of the disease.¹

[REDACTED]

he was involved in strenuous activity on each of the three occasions. The ALJ does not discount the hard labor of a firefighter's duties. But the circumstances of the episodes do not negate or preponderate over the other evidence [REDACTED]

[REDACTED]

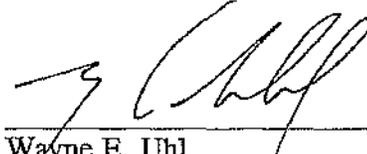
The community owes firefighter Bryson its gratitude for his years of dedicated service. His desire to continue working as a firefighter notwithstanding his back condition is admirable. It is unfortunate that Brownsburg has lost his services. This decision should not be taken to reflect negatively on firefighter Bryson in any way, but simply to apply the statute to the particular facts of his case.

¹ Bryson does not argue, and the evidence does not show, that [REDACTED] is an [REDACTED]. The [REDACTED] his [REDACTED]

RECOMMENDED ORDER

Based on the foregoing findings of fact and conclusions of law, the initial determination is confirmed. Bryson suffers from a covered impairment, his impairment is a Class 2 disability, and his degree of impairment is 8%.

DATED: February 3, 2011.



Wayne E. Uhl
Administrative Law Judge
8710 North Meridian Street, Suite 200
Indianapolis, Indiana 46260-5388
(317) 844-3830

STATEMENT OF AVAILABLE PROCEDURES FOR REVIEW

The undersigned administrative law judge is not the ultimate authority, but was designated by the PERF Board to hear this matter pursuant to I.C. § 4-21.5-3-9(a). Under I.C. § 4-21.5-3-27(a), this order becomes a final order when affirmed under I.C. § 4-21.5-3-29, which provides, in pertinent part:

(b) After an administrative law judge issues an order under section 27 of this chapter, the ultimate authority or its designee shall issue a final order:

- (1) affirming;
- (2) modifying; or
- (3) dissolving;

the administrative law judge's order. The ultimate authority or its designee may remand the matter, with or without instructions, to an administrative law judge for further proceedings.

(c) In the absence of an objection or notice under subsection (d) or (e), the ultimate authority or its designee shall affirm the order.

(d) To preserve an objection to an order of an administrative law judge for judicial review, a party must not be in default under this chapter and must object to the order in a writing that:

- (1) identifies the basis of the objection with reasonable particularity; and

(2) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days (or any longer period set by statute) after the order is served on the petitioner.

(e) Without an objection under subsection (d), the ultimate authority or its designee may serve written notice of its intent to review any issue related to the order. The notice shall be served on all parties and all other persons described by section 5(d) of this chapter. The notice must identify the issues that the ultimate authority or its designee intends to review.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this document on the following persons, by U.S. Postal Service first-class mail, certified mail, return receipt requested, postage prepaid, on February 3, 2011:

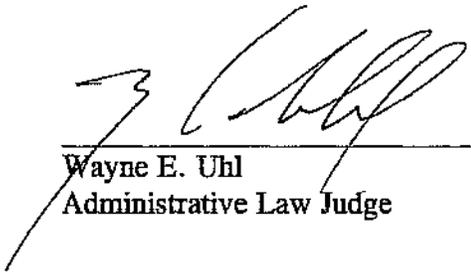
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Matthew Langenbacher


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Wayne E. Uhl
Administrative Law Judge

**BEFORE THE EXECUTIVE DIRECTOR
OF THE PUBLIC EMPLOYEES' RETIREMENT FUND**

IN THE MATTER OF)	1977 POLICE OFFICERS' AND
PAUL BRYSON, Member, and)	FIREFIGHTERS' PENSION AND
CHIEF ORAN TRUE, Brownsburg)	DISABILITY FUND
Fire Territory,)	
)	
Petitioners.)	

FINAL ORDER

The Board of Trustees ("Board") of the Indiana Public Employees' Retirement Fund (PERF) is the ultimate authority in administrative appeals brought by 1977 Fund members under IC 4-21.5-3-28 and 35 IAC 2-5-5(a)(7). In Appendix I of the PERF and TRF Board Governance Manual, the Board delegates to the Executive Director the authority to conduct a final authority proceeding, or a review of decision points by the administrative law judge (ALJ), to issue a final order in this matter.

1. The Administrative Law Judge (ALJ) issued a Findings of Fact, Conclusions of Law and Recommended Order (the "Recommended Order") in this matter on February 3, 2011 confirming PERF's initial determination that Petitioner suffers from a covered impairment, his impairment is a Class 2 disability, and his degree of impairment is 8%.
2. Copies of the Recommended Order have been delivered to the parties.
3. On February 14, 2011, Petitioner filed with the final authority Petitioner's Objections to the Administrative Law Judges' [sic] Findings of Fact, Conclusions of Law and Recommended Order, setting forth four (4) objections to the Recommended Order.
4. As to Objection #1, the ALJ's finding is affirmed.
5. As to Objection #2, the ALJ's finding is affirmed.
6. As to Objection #3, the ALJ's finding is affirmed.
7. As to Objection #4, the ALJ's finding is affirmed.
8. It has been more than fifteen (15) days since having received the ALJ's Recommended Order.

NOW THEREFORE the Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge is affirmed.

DATED February 23, 2011



Steve Russo, Executive Director
Public Employees' Retirement Fund
One North Capitol, Suite 001
Indianapolis, IN 46204

CERTIFICATE OF SERVICE

I certify that on the 23rd day of February, 2011, service of a true and complete copy of the foregoing was made upon each party or attorney of record herein by depositing same in the United States mail in envelopes properly addressed to each of them and with sufficient first class postage affixed.

Distribution:

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