

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

In the Matter of the Statement of Issues Against:

ROBERT L. BROOKSHIRE, III, and CITY OF MODESTO,

Respondents

Agency Case No. 2020-0735

OAH No. 2020110102

PROPOSED DECISION

Heather M. Rowan, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter via telephone and video conference on March 18, 2021, from Sacramento, California.

Austa Wakily, Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Robert L. Brookshire, III, represented himself.

There was no appearance by or on behalf of the City of Modesto (City). CalPERS established that it served the City with a Notice of Hearing. Consequently, this matter proceeded as a default hearing against the City pursuant to Government Code section 11520, subdivision (a).

Oral and documentary evidence was received on March 18, 2021. The record was held open to allow CalPERS to submit an additional document, which was marked for identification as Exhibit A. The record closed and the matter was submitted on March 26, 2021.

ISSUE

On the basis of orthopedic (lumbar spine, lumbar radiculopathy – bilateral lower extremities) conditions, is respondent permanently and substantially incapacitated from performing his usual and customary duties as a Utilities Service Worker III for the City?

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent was employed with the City as Utilities Service Worker III. On November 19, 2019, respondent signed and thereafter filed with CalPERS a Disability Retirement Election Application (application). By letter dated May 7, 2020, CalPERS denied respondent's application. Respondent submitted a timely appeal. This hearing followed.

Respondent's Application

2. Respondent's application does not specify when he last worked for the City, though he cited an injury date of December 26, 2018. He described his disability as: "Low back pain, lumbosacral strain with intervertebral disc syndrome, left lower extremity radiculopathy, left and right lower extremities." He listed his date of injury as

"1993 and 12/26/18," explaining the injury originally occurred when he was "jumping out of an airplane in the Army," and in 2018 he was "sitting in [his] car and twisted causing severe muscle spasms." He described his work limitations as: "Total[ly] disabled. Not able to lift, squat, crouch, stand, sit." He also wrote that due to work restrictions, he is unable to "work and do my job duties."

3. In its May 7, 2020 denial letter, CalPERS stated its review included "the reports prepared by Amrit Ohanota, M.D., Chan Park, M.D., David Moller, M.D. and Robert Henrichsen, M.D." Based on these reports, CalPERS determined respondent was not substantially incapacitated from performing the usual job duties of a Utilities Service Worker III on the basis of his orthopedic conditions.

4. The letter notified respondent he had 30 days to file a written appeal from the denial. By letter dated June 3, 2020, respondent appealed CalPERS's findings.

Job Duties of a Utilities Services Worker

5. CalPERS submitted two documents to list and explain respondent's job duties. The first is a job description that appears to apply to a Utilities Service Worker II, though the document is redacted in a way that makes it difficult to discern. The form describes the position as a "journey level position," that is "filled by advancement from the I level." Respondent's application states he was a Utilities Service Worker III. It is unclear whether this job description applies to respondent. The document is given little weight, but because respondent explained the manual labor required, the tasks are described here in part:

Operate light to heavy construction equipment such as backhoes, motor graders, large front-end loaders, medium to large trucks, heavy duty rodding machines, hydra flush

and vacuum combination trucks, cranes . . . pavement saws, cutting torches, and welders for a variety of construction and maintenance operations involving potable water lines, wastewater mains and lines, and related systems. Expose and excavate water mains and distribution lines, valves, and other water and wastewater mainlines [document cuts off and is illegible until page two]. . .

[¶] . . . [¶]

Break and load asphalt and concrete into dump trucks.

[¶] . . . [¶]

Respond to emergencies including flood, line breaks, overflows, storm water and wastewater overflows and stoppages, repair and restore systems and service as required.

Operate jackhammer and other construction tools. Lay and fit pipelines.

[¶] . . . [¶]

Mobility: frequent performance of heavy manual labor, frequent standing for long period of time, frequent bending and squatting Lifting: frequent lifting up to 100 pounds, occasional lifting up to 100 pounds, depending on assignment . . .

6. The second document is a form titled "Physical Requirements of Position" that respondent completed and signed, as did the City's Human Resources Manager. A Utilities Services Worker III is required to perform the following physical duties with the following frequencies:

Frequently (3-6 hours): Standing, squatting, bending (waist), bending (neck), reaching (above shoulder), reaching (below shoulder), pushing and pulling, power grasping, simple grasping, bending at the waist and neck, and lifting/carrying from 76 to over 100 pounds.

Occasionally (up to 3 hours): Sitting, walking, crawling, kneeling, climbing, twisting (neck), twisting (waist), repetitive use of hand(s), keyboard use, mouse use, lifting 76 to 100 pounds, walking on uneven ground, operation of foot controls or repetitive movements, driving, and working with heavy equipment.

Expert Opinion, Robert Henrichsen, M.D.

7. CalPERS retained Robert Henrichsen, M.D., to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Henrichsen issued a report regarding his IME and testified at hearing. He is a board-certified orthopedic surgeon and is also a certified Fellow of the American Academy of Orthopaedic Surgeons. Dr. Henrichsen received his medical degree from Loma Linda University in 1967. He has been in private practice since 1973. He has contracted with CalPERS to conduct IMEs since 2003.

8. Dr. Henrichsen conducted respondent's IME on January 28, 2020. He began by gathering an oral history from respondent, including injuries, medical background, physical issues, and treatment. Dr. Henrichsen learned that respondent suffered an injury during a paratrooper jump while he was in the army in 1993. The Department of Veteran's Administration (VA) issued a service-connected disability determination based on respondent's "intervertebral disc syndrome and history of a lumbosacral strain" as well as lower extremity radiculopathy. Respondent left the army following his injury and was a truck driver until the City hired him as a temporary employee in 2001, and made him permanent in 2002.

9. In December 2018, respondent experienced extreme back pain while driving to work. He was prescribed physical therapy with some stretching and was off work until February 2019. Respondent returned and worked for a month, but his mobility was limited and his pain was increasing. His doctor restricted him from returning.

10. Respondent explained to Dr. Henrichsen that he is in pain daily. He experiences pain while driving. If respondent stands too long, his left leg becomes numb from his lower back to his toes. If he walks too long, he has to stop and sit; if he sits too long, he has to get up and move around. On average, his pain was a five on a 10-point scale, but increased to 10 at times.

11. After the oral history, Dr. Henrichsen conducted a physical examination. He described respondent as standing five feet, eight inches tall and weighing 350 pounds. Dr. Henrichsen watched respondent walk and asked him to stand on his toes, then his heels. Respondent had a normal heel to toe gait. Dr. Henrichsen did not observe any abnormal indicators.

12. Dr. Henrichsen explained that respondent's "significant low back trouble" causes decreased hip strength. He tested respondent's hip strength and found it was normal, though the test caused some back pain. Dr. Henrichsen determined respondent did not have femoral nerve pain or a related issue. When he performed a "nerve stress examination," respondent held his leg at 30 degrees whereas 60 degrees is normal.

13. Further testing showed respondent's back and trunk mobility was within normal limits, though on the lower end of the spectrum. His low back motion was reduced as was the range of motion in his hips. Respondent cannot squat.

14. Dr. Henrichsen did not identify objective support for respondent's claimed leg numbness or radiating pain. Respondent's symptoms were "significantly greater" than Dr. Henrichsen's findings. Dr. Henrichsen also opined respondent has more treatment options he has not yet explored. While Dr. Henrichsen found respondent had limited mobility in his back and "radicular-like symptoms" without "radicular-like findings," meaning Dr. Henrichsen did not find nerve-related numbness or pain. He also concluded respondent was morbidly obese, which was a primary factor in his symptomology.

15. Based on his findings, Dr. Henrichsen opined respondent was substantially incapacitated from performing his job duties, but the incapacity was temporary because if respondent were to lose weight, his symptoms would decrease. He stated that unless he were able to view the x-ray film and MRI scans, he could not be more precise.

SUPPLEMENTAL REPORTS

16. On February 6, 2020, CalPERS provided Dr. Henrichsen with respondent's chest x-ray film, a CAT Scan of respondent's sinuses and upper cervical spines, and an x-ray film of respondent's lumbar back. On March 12, 2020, Dr. Henrichsen wrote a supplemental report. The chest x-ray was normal and the CAT Scan was outside Dr. Henrichsen's area of expertise.

17. Regarding the lumbar spine x-ray, Dr. Henrichsen did not see orthopedic issues to support respondent's complaints. His opinion was unchanged. He stated:

It does remain my opinion that he has more symptoms than findings of a significant amount and he has morbid obesity. I am not able to determine thus far whether his objective imaging study results to his low back are sufficient to provide permanent disability greater than 1 year. The reason I cannot determine that is because the radiology summary is not satisfactory of the MRI scan, and I do not have the scan to visually review.

18. On April 14, 2020, CalPERS requested Dr. Henrichsen review supplemental information and opine on respondent's substantial incapacity. On April 23, 2020, Dr. Henrichsen issued a supplemental report after reviewing respondent's June 29, 2019 MRI. Dr. Henrichsen found some degenerative disc disease and foraminal narrowing on the left side, but no nerve root displacement. In a more extreme form, foraminal narrowing can cause nerve pain or nerve impingement. On viewing the MRI, Dr. Henrichsen opined:

1. Respondent does not have permanent substantial incapacity from his occupation as a utility service worker. He does have pain greater than supported by his examination and imaging findings.

2. I do not find him substantially incapacitated, and with the new scan demonstrating most of the lumbar discs are healthy, it is my assessment he does not have temporary impairment or incapacity.

3. I do not medically identify any specific job duties that he is unable to accomplish based upon his examination and imaging review.

19. On June 8, 2020, CalPERS again requested Dr. Henrichsen update his findings after reviewing a May 6, 2020 Fitness for Duty/Independent Medical Evaluation Report by Harry Khasigian, M.D., the VA report on disability, and support letters describing respondent's pain and its impact on his daily life. Dr. Henrichsen reviewed the materials and answered CalPERS's specific questions regarding respondent's substantial incapacity to perform his job duties:

As I indicated in my summary of April 23, 2020, Mr. Brookshire does not have substantial permanent incapacity for his occupational duty as a utility services worker based upon the current medical information available.

[¶] . . . [¶]

The lack of medical objective findings on his imaging is that his lumbar spine imaging demonstrates a healthy lumbar spine for a person in the fifth decade of life. He does have some degenerative change at L2-3 which is very common. He does not have significant arthritic facet joint changes. His lordosis remains intact on the scan. Imaging evidence of significant multilevel degenerative disc disease was absent. As indicated in my summary of March 12, 2020, the lumbar spine xrays show that normal lordosis remains, disc space height is satisfactory, and significant osteophytes are absent. Additionally, there was no imaging that identified that demonstrated lumbar spine instability. At the time of my examination of January 28, 2020, I identified reduced motion in the low back and no additional significant abnormal findings to examination were present separate from his unfavorable power to weight ratio.

[¶] . . . [¶]

As I re-review the physical requirements for his occupation, I find that he has no specific job duties he is unable to perform.

[¶] . . . [¶]

As I indicated above, once I received the x-rays and the MRI scan that I could visually review to improve the medical accuracy of my summary, then the lack of objective findings

listed above is the reason he does not have substantial incapacity.

20. At hearing, Dr. Henrichsen explained that while respondent does have physical limitations, those limitations are based on his "weight to power" ratio, meaning respondent's weight is too great for his frame strength. He also stated that, while there may be a nexus between back pain and weight gain, gaining weight due to back pain is not a foregone conclusion. Dr. Henrichsen opined that if respondent were to lose 115 to 120 pounds, his ability would not be as restricted. He further opined that if respondent were "persistent and cooperative," he could lose that amount of weight within 12 months.

Respondent's Evidence

FITNESS FOR DUTY EVALUATION/INDEPENDENT MEDICAL EVALUATION

21. The City requested Dr. Khasigian evaluate respondent for his fitness to continue working as a Utilities Service Worker III, which he did on May 6, 2020. Dr. Khasigian authored a "Fit for Duty/Independent Medical Evaluation" report, which was submitted at hearing. He did not testify, and his report is considered as administrative hearsay under Government Code section 11513, subdivision (d).¹

22. Dr. Khasigian took an oral history, performed a physical evaluation, and reviewed respondent's available medical records. His evaluation was similar to Dr.

¹ "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

Henrichsen's with similar results. Dr. Khasigian found respondent had back pain, degenerative disc disease, and limited mobility in his low back. He wrote: "his unfavorable power to weight ratio makes the situation severely worse."

23. Like Dr. Henrichsen, Dr. Khasigian found respondent's x-rays and MRI showed degenerative changes, but no "extraordinary findings which would be consistent with his level of pain and complaints." Dr. Khasigian found respondent was "not able to perform heavy manual labor, work in confined spaces, bend and squat frequently, or lift 100 pounds, and he cannot operate backhoes, heavy-duty machines, or a jackhammer currently." Were respondent to undergo bariatric weight loss surgery, however, within one year he would be able to return to perform the essential functions of his job.

RESPONDENT'S TESTIMONY

24. Respondent was in the army for a year and a half. A paratrooper training drill caused a back injury, which led to his separation from the military. He now has an 80 percent disability rating from the VA based on his "degenerative discs and radiculopathy." This back injury was exacerbated over years of heavy manual labor with the City, which culminated on December 26, 2018, when he experienced excruciating pain. He attempted to return to work, but given the amount of heavy labor in unsafe conditions, he became a liability to his coworkers and stopped working. Respondent enjoyed his job with the City for nearly 20 years. He tried to keep working, despite his pain.

25. Respondent has "always been in shape," as it was important to maintain his strength to keep his back strong. Over the years, the pain decreased the amount of exercise he was able to do and he began to gain weight. He stated, "if there were

something [he] could do, [he] would do it." He is ashamed and embarrassed when doctors talk to him about his weight because he feels he is unable to lose weight given the pain he is in. He has been told there is "no way to lose the amount of weight" necessary "without a life-altering surgery." Respondent is unsure whether he is willing to submit to such a procedure.

26. In the past, respondent did some physical therapy, which "helped somewhat." He does the prescribed stretching "periodically." Currently, however, respondent is depressed, he "cannot work," is not active, and he feels defeated.

PRINCIPLES OF LAW

27. By virtue of respondent's employment as a Utilities Service Worker III, he is a local miscellaneous member of CalPERS subject to Government Code section 21150.

28. Respondent has the burden of proving his eligibility for disability retirement benefits by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) To be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

29. To qualify for disability retirement, respondent had to prove by competent medical opinion that, at the time he applied for disability retirement, he was "incapacitated physically or mentally for the performance of his or her duties." (Gov. Code, § 21156.) As defined in Government Code section 20026,

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

30. In *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term “incapacity for performance of duty” as used in Government Code section 20026 (formerly section 21022) to mean “the *substantial* inability of the applicant to perform his usual duties.” (Italics in original.) It is not necessary that the person be able to perform any and all duties since public policy supports employment and utilization of the disabled. (*Schrier v. San Mateo County Employees’ Retirement Association* (1983) 142 Cal.App.3d 957, 961.) Instead, the frequency with which the duties he cannot perform are usually performed, as well as the general composition of duties he can perform, must be considered. (*Mansperger v. Public Employees’ Retirement System, supra*, 6 Cal.App.3d at pp. 876-877 [while applicant was unable to lift or carry heavy objects due to his disability, “the necessity that a fish and game warden carry a heavy object alone is a remote occurrence”].)

ANALYSIS

31. Dr. Henrichsen, Dr. Khasigian, and respondent all agree respondent is unable to perform several of the duties of a Utilities Service Worker III. As explained above, however, respondent must prove substantial incapacity from performing his job

duties and that the incapacity is "expected to last at least 12 consecutive months." Both Dr. Henrichsen and Dr. Khasigian opined that with will and determination, and likely a dramatic surgery, within 12 months or less respondent could reduce his weight such that he could perform his job duties.

32. Whether a member is substantially incapacitated from performing his job duties must be determined by "competent medical opinion." Both doctors agreed respondent has many limitations that prevent him from substantially performing his job duties. Dr. Khasigian opined respondent's weight significantly impacted his lower back. Respondent has limited mobility in his low back and on initial examination, Dr. Henrichsen noted respondent "cannot squat." On viewing the MRI, Dr. Henrichsen opined respondent's disability was not permanent because he can lose weight and change the circumstances. No evidence was presented regarding Dr. Henrichsen's or Dr. Khasigian's expertise allowing either to opine on the time it would take for respondent to lose over 100 pounds.

33. Respondent is in pain and has been for years and that pain has contributed to his current state. Mobility limitations and depression compound his ability and will to commit to losing the large amount of weight Dr. Henrichsen recommended. Respondent is unsure whether he will undertake what he described as a "life-altering surgery." Dr. Henrichsen's opinion that respondent's disability is not "permanent" because it will not last "12 consecutive" months as required under the statute is conditional on respondent losing 115 to 120 pounds. The defining statutes do not provide for a "conditional disability." At the time of his application, respondent was substantially incapacitated from performing the heavy manual labor required of a Utilities Service Worker III, and the incapacity is of an unknown duration.

LEGAL CONCLUSION

Respondent established by a preponderance of the evidence that he is substantially incapacitated from performing the usual duties of a Utilities Service Worker III.

ORDER

The application of Robert L. Brookshire, III, for disability retirement is GRANTED.

DATE: April 6, 2021

Heather M. Rowan

Heather M. Rowan (Apr 6, 2021 09:33 PDT)

HEATHER M. ROWAN

Administrative Law Judge

Office of Administrative Hearings