

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Application for Industrial Disability
Retirement of:**

**STEPHEN B. MEADOWS and CALIFORNIA DEPARTMENT OF
FORESTRY AND FIRE PROTECTION, Respondents**

Agency Case No. 2022-0188

OAH No. 2022050886

PROPOSED DECISION

Matthew S. Block, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on September 1, 2022, by videoconference from Sacramento, California.

Cristina Andrade, Senior Counsel, represented the California Public Employees' Retirement System (CalPERS).

Stephen B. Meadows (respondent) appeared and represented himself.

There was no appearance by or on behalf of the California Department of Forestry and Fire Protection (CalFire). A Notice of Hearing was properly served on

CalFire. Consequently, this matter proceeded as a default against CalFire under Government Code section 11520, subdivision (a).

Oral and documentary evidence was received, the record was closed, and the matter submitted for decision on September 1, 2022.

ISSUE

Was respondent substantially incapacitated from the performance of his usual and customary duties as a Fire Captain (B) for CalFire at the time of his application for Industrial Disability Retirement (IDR)?

FACTUAL FINDINGS

Jurisdictional Matters

1. CalPERS is the state agency responsible for administering retirement benefits to eligible employees. (Gov. Code, § 20000 et seq.) Respondent was employed by CalFire as a Fire Captain (B). By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151, subdivision (a).

2. On June 7, 2021, respondent signed and thereafter filed an application for IDR. The application claimed disability on the basis of an orthopedic (low back) condition. On the same day, respondent signed and thereafter filed an application for service retirement. He retired from service effective June 9, 2021.

3. In a letter dated August 27, 2021, CalPERS denied respondent's application for IDR. The letter stated that after a review of the medical evidence

submitted, CalPERS found that respondent's lower back injury did not render him substantially incapacitated from performing his usual duties as a Fire Captain (B).

4. In a letter dated September 21, 2021, respondent appealed CalPERS's denial of his IDR application. Consequently, on May 19, 2022, Keith Riddle, in his official capacity as Chief of CalPERS's Disability and Survivor Benefits Division, signed and thereafter filed a Statement of Issues for purposes of the appeal. The matter was set for an evidentiary hearing, pursuant to Government Code section 11500 et seq.

Duties of a Fire Captain (B)

5. CalPERS submitted three documents explaining respondent's job duties: a "Physical Requirements of Position/Occupational Title" (Physical Requirements); a "Position Essential Functions Duties Statement" (Duties Statement) for the position of Fire Captain (B); and a "Cal Fire Physical/Mental Stress Job Description" (Job Description) for the position of Fire Captain (B). The Physical Requirements describe the frequency of a Fire Captain (B)'s tasks. A Fire Captain (B) is physically required to complete activities of movement, including: walking on uneven ground, using a computer, and interacting with inmates, patients, and co-workers (frequently); lifting up to 10 pounds, bending at the neck, twisting at the neck, sitting, standing, driving, and being exposed to extreme temperature (occasionally); power grasping, running, bending and twisting at the waist, reaching above the shoulder, and working at heights (infrequently); and lifting over 50 pounds, crawling, kneeling, climbing and squatting (never/rarely).

6. The Duties Statement lists the percentage of time spent on tasks relevant to the Fire Captain (B) position. There are three categories of time required: supervising and working with crews of firefighters and conservation camp inmates on

fire protection and suppression, emergency response, and day-to-day projects (50 percent); supervision of in-camp products of manufacture and maintenance repair, pest control, and tool and equipment maintenance (25 percent); and driving a bus transporting a work crew over rough, narrow, mountainous terrain, operating a two-way radio, and preparing reports on personnel conduct and productivity (25 percent).

7. The Job Description described a Fire Captain (B)'s job as physically and mentally stressful. Specifically,

A Fire Captain (B) is expected to have the endurance to perform arduous physical tasks while assigned to emergency incidents such as wildland fires, floods, rescues, etc.

While responding to an emergency incident, the Fire Captain (B) may be required to drive up to 10 hours and then immediately be assigned to a fireline for an 11-to-14-hour shift. Should he/she be assigned the night shift, the Fire Captain (B) would be required to sleep during the day to be ready for the following night shift. Day sleeping, combined with high temperatures (100+), smoke, insects, and noise, makes rest quite difficult to obtain. Normal regularity of meals becomes impossible in these situations also due to the times of shifts, etc.

Supervising 11-17 inmates and/or wards on a daily basis can be very stressful, but when an emergency requires

his/her response, the Fire Captain (B) must be able to meet demanding stressful situations.

[¶] . . . [¶]

He/she has to handle the psychological stress of constantly being mentally ahead of and alert to his/her inmates while they are under his/her charge. A Fire Captain (B) will have to carry tools, and is usually required to carry a backpack with a fire shelter. He/she must also be prepared to handle rescue and flood control emergencies during weather extremes and lead his/her crew on maintenance and construction projects in the rural wildland areas of the state. Most of the normal day-to-day assignments are located in steep, mountainous terrain and are performed in all types of weather from hot and dry to snow and freezing temperatures.

Respondent's Work History and Injury

8. Respondent worked as a wildland fire fighter for approximately 30 years, the last 12 of which were as a Fire Captain (B) at the CalFire Mount Bullion Conservation Camp in Mariposa, California. On February 18, 2019, he slipped on an icy surface and fell to the ground, fracturing multiple ribs and injuring his lower back. He never returned to work.

Medical Evidence

DIAGNOSIS AND TREATMENT

9. On a date not established at hearing, respondent had an MRI which revealed Spondylolisthesis of respondent's spine at the L5 and S1 vertebrae. Spondylolisthesis is a condition that occurs when vertebrae in the spine slip apart, pinching nerves and causing pain and numbness. On August 29, 2019, respondent underwent surgery, performed by Robert Simons, M.D., to decompress the nerve and fuse the L5 and S1 vertebrae back together. Dr. Simons' post-operative report indicated that the surgery was a success without complications.

10. Respondent's primary treating physician is Michael Castillo, M.D. Following the surgery, Dr. Castillo told respondent that he was placing him on permanent modified work restrictions. One of the restrictions was that he lift no more than 35 pounds. Respondent sought a second opinion from Dr. Simons, who agreed that respondent should not lift more than 35 pounds.

AME

11. Glynn Garland, M.D., performed an Agreed Medical Evaluation (AME) of respondent and detailed his findings in a report dated August 27, 2020. Dr. Garland wrote, in pertinent part:

The patient is able to return to pre injury [sic] job without restrictions. He would not have had work restrictions other than for heavy lifting, not more than on an occasional basis in the open labor market.

12. In a supplemental report dated November 14, 2020, Dr. Garland recommended that respondent undergo a Functional Capacity Evaluation (FCE) "to confirm [Dr. Garland's] opinion about [respondent's] return to his preinjury job without restrictions." He also noted that when he drafted the AME report, he had yet to receive and review respondent's medical records.

13. Respondent underwent a FCE on September 29, 2021. He was evaluated by Lindsey Pimentel at Hand to Shoulder Rehabilitation. Ms. Pimentel concluded that respondent "demonstrated the ability to perform physical demand of light-to-medium work, occasional for lifting, pushing, pulling and carrying." Following the FCE, Dr. Garland drafted another supplemental report, dated November 5, 2021. In that report, Dr. Garland wrote that respondent should be precluded from lifting more than 40 pounds from floor to waist height and from carrying more than 20 pounds more than 20 feet for four out of every eight hours. He explained:

The conclusions that were drawn from the formal functional capacity analysis should take precedence over what I previously written [*sic*] in my AME report of August 27, 2020 with the risk of erroring [*sic*] on the side of safety.

IME

14. CalPERS retained Don Williams, M.D., to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Williams earned a bachelor's degree in engineering science from Trinity University before receiving his medical degree from Case Western Reserve Medical School. He then completed a residency at St. Vincent Hospital in New York City before serving as a doctor in the United States Army for five years. He is certified by the American Board of Orthopedic Surgery, and has practiced as an

orthopedic surgeon in California for 30 years. Dr. Williams physically examined respondent on July 30, 2021, took his medical history, and reviewed his medical records. He thereafter prepared an IME report and testified at hearing about the findings therein.

15. Respondent's fractured ribs had healed by the date of the physical examination. The pain in his lower back was much better that it had been prior to surgery, though he still experienced occasional pain with prolonged standing and lifting. Respondent was able to easily lift 35 to 40 pounds but had not attempted more due to Dr. Castillo's restrictions. He was able to walk up to five miles, though he experienced some discomfort when doing so. Dr. Williams determined that respondent had good range of motion in his cervical spine, and full motion in his lower extremities. He acknowledged that respondent probably still experiences occasional pain in his lower back but does not believe that the pain renders respondent substantially incapacitated. He then reasoned as follows:

[Respondent] did have some significant instability, which was successfully surgically treated. It did take a couple of years for the fusion to become solid, but he now has a solid fusion. He retired in [sic] June 9, 2021. He maintains normal reflexes, patellar and Achilles, and good range of motion, flexion 90 degrees and extension 30 degrees. CT scan shows a solid fusion and since the fusion is solid, the chance of re injury at this level is negligible.

16. Dr. Williams believes that respondent can lift 50 pounds. When asked if respondent could lift 70 pounds, Dr. Williams stated that respondent could probably do so if he was able to "do it before" and if he worked out. However, Dr. Williams

admitted that the chances of pain increase when lifting more weight. Dr. Williams also believes that respondent can sit and stand for long periods of time, twist, and walk for a long distance over unstable terrain. He believes that respondent could run, but only for a short distance.

Respondent's Evidence

17. Respondent submitted documentary evidence in support of his application for IDR and testified at hearing. On the morning of February 18, 2019, respondent was preparing to transport a crew of inmates by bus to a project. While walking to the bus garage and carrying approximately 50 pounds of equipment, he slipped on an icy surface and fell to the ground. He immediately experienced severe pain in his lower back and had to go to the emergency room. Respondent had experienced back pain in the past associated with his duties as a firefighter, but nothing as debilitating as the pain he experienced from the fall.

18. Respondent called the occasional 10-pound lifting requirement in the Physical Requirements an "insult." He routinely carried a 40-pound pack on his back containing water and safety equipment. Respondent had to be ready to fight a wildfire at a moment's notice. He described the perilous circumstances he faced at Mount Bullion Conservation Camp. In the fire season prior to his injury, he worked approximately 660 hours fighting 13 different fires. He has also battled floods, extreme weather, falling trees, and tumbling rocks on unstable and mountainous terrain. He would frequently walk for multiple miles per day and estimated that he walked an average of 11,000 steps per day while supervising inmate project work.

19. Respondent wanted to return to work. However, CalFire was unable to accommodate the 35-pound lifting restriction placed on him by Dr. Castillo. He retired

after exhausting his sick and vacation leave balances. He still experiences residual pain when performing physical activity. He has attempted to resume playing golf for leisure and exercise but has experienced pain while swinging a golf club. He presently works for Sierra Forestry Consulting.

Analysis

20. CalPERS argues that respondent is not substantially incapacitated from performing the duties of a Fire Captain (B) because the position only requires him to occasionally lift up to 10 pounds, which his back injury does not preclude. Respondent argues that he routinely lifted 40 pounds or more and had to be prepared, at a moment's notice, to engage in the far more arduous and physically demanding tasks of firefighting, which the pain in his back and restrictions placed on him by his doctors preclude.

USUAL AND CUSTOMARY DUTIES

21. The Duties Statement indicates that a Fire Captain (B) works with crews of firefighters and conservation camp inmates on fire protection and suppression and emergency responses. The Job Description states that "[a] Fire Captain (B) is expected to have the endurance to perform arduous physical tasks while assigned to emergency incidents such as wildland fires, floods, rescues, etc." The Physical Requirements indicate that a Fire Captain (B) will rarely have to lift more than 10 pounds but will occasionally be exposed to extreme temperature and required to engage in physical activity such as pushing, pulling, and power grasping.

22. Respondent did not have to perform strenuous work on every shift as a Fire Captain (B). However, respondent credibly testified and introduced documentary evidence to show that in addition to his supervisory duties, he was frequently required

to engage in far more arduous physical activity than occasionally lifting 10 pounds. Moreover, his testimony supports his argument that a Fire Captain (B) must be able to perform physically demanding firefighting duties when covering a fire incident. As such, the need to perform arduous physical tasks while assigned to emergency incidents was a usual and customary duty of respondent's position. (*Thelander v. City of El Monte* (1983) 147 Cal.App.3d 736, 742 ["If every officer must be capable of and prepared for the worst everyday, then that is a 'usual' duty of the job."].)

SUBSTANTIAL INCAPACITY

23. Although Drs. Castillo, Garland, Simons, and Williams have espoused different opinions as to the threshold of how much weight respondent could or should be lifting, they agree that his back injury has limited the physical tasks he can perform. Drs. Castillo and Simons believe respondent should lift no more than 35 pounds. Dr. Williams believes that respondent can lift 50 pounds and might be able to work his way up to lifting 70 pounds but concedes that the risk of pain increases when a person lifts more weight. He believes that respondent could run, but for a short distance. While those limitations would not render one substantially incapacitated for the performance of most jobs, the duties of a Fire Captain (B) include responding to various emergencies and being capable of arduous physical activity at a moment's notice.

24. However, it is respondent who bears the burden of proving, by competent medical evidence, that he was substantially incapacitated from performing his usual and customary duties as a Fire Captain (B) at the time of his application for IDR. Respondent has not met his burden.

25. Respondent relies heavily on the lifting restrictions placed on him by his primary treating physician. However, the restrictions were a prophylactic measure aimed at preventing future injury, not a medical determination of respondent's physical capabilities. Moreover, by July 2021, respondent was already able to easily lift 40 pounds, and admitted he had not attempted more because of Dr. Castillo's advice. While respondent is not to be faulted for following the advice of his primary treating physician, he nonetheless failed to introduce competent medical evidence that when he filed his application for IDR in June 2021, he was physically unable to perform the more arduous tasks of the Fire Captain (B) position. Instead, respondent's evidence showed that performing the more arduous tasks of the Fire Captain (B) position could potentially result in a prospective future injury. Consequently, respondent's appeal must be denied.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant seeking service-connected disability retirement has the burden of proving his eligibility for such benefits. (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn. 5.) Although pension legislation must be liberally construed in favor of the applicant, this liberal construction "does not relieve a party of meeting the burden of proof by a preponderance of the evidence." (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) A preponderance of the evidence means "the evidence on one side outweighs, preponderates over, or is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed." (*People v. Miller* (1916) 171 Cal. 649, 652.)

Applicable Laws and Statutes

2. Any state safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability. (Gov. Code, § 21151, subd. (a).) Disability as a basis of retirements means "disability of permanent or extended uncertain 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." (Gov. Code, § 20026.) According to Government Code section 21156, subdivision (a)(1), "[i]f the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability."

USUAL AND CUSTOMARY DUTIES

3. An applicant must show a substantial inability to perform their usual duties based on competent medical evidence. (Gov. Code, § 20026; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) "Usual duties" are based on duties of the last job classification held and applicable law. (*Beckley v. Board of Administration* (2013) 222 Cal.App.4th 691, 699-700 [California Highway Patrol (CHP) officer assigned to public affairs role had to be capable of carrying out complete range of tasks required of CHP officers under Vehicle Code section 2268].)

4. The inability to perform a rarely performed, albeit necessary duty of a position does not automatically render an applicant disabled. (*Mansperger v. Public Employees' Retirement System, supra*, 6 Cal.App.3d at pp. 876-877 [fish and game

warden was not incapacitated where he was able to do all normal activities except lift and carry heavy objects, tasks which rarely occurred]; *Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854 [CHP sergeant with physical limitations was not incapacitated where the physically demanding activities of his job were performed much less often by someone in his supervisory role].) However, in certain public safety positions, an uncommon activity can be a "usual duty" if the employee "must be capable of and prepared for the worst every day." (*Thelander v. City of El Monte, supra*, 147 Cal.App.3d at p. 742, *Beckley v. Bd. of Administration, supra*, 222 Cal.App.4th at pp. 699-700.)

SUBSTANTIAL INCAPACITY

5. An applicant's disability must be presently existing and cause an inability to perform, rather than an increased risk of future injury or aggravation. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (Precedential Decision 99-03); *Wolfman v. Bd. of Trustees* (1983) 148 Cal.App.3d 787, 791 [applicant's disability "was not merely a prospective probability, but a medical certainty"].) Additionally, mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Bd. of Administration, supra*, 77 Cal.App.3d at p. 863; *Mansperger v. Public Employees' Retirement System, supra*, 6 Cal.App.3d at pp. 876-877.) And discomfort, which may make it difficult to perform one's duties, is insufficient to show permanent incapacity from performance of one's position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Bd. of Administration, supra*, 77 Cal.App.3d at p. 862.)

Determination

6. Based on the Factual Findings and Legal Conclusions as a whole, and in particular Factual Findings 20 through 25, respondent failed to prove by a preponderance of the medical evidence that when he filed his application for IDR, he was substantially incapacitated for the performance of his duties as a Fire Captain (B) with CalFire.

ORDER

The appeal of respondent Stephen B. Meadows is DENIED.

DATE: September 29, 2022

Matthew Block

MATTHEW S. BLOCK

Administrative Law Judge

Office of Administrative Hearings