

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Appeal of Accepting the Application for:

ROBERT B. CRAIG,

Respondent,

and

**DEPARTMENT OF TRANSPORTATION, HEADQUARTERS
OPERATIONS,**

Respondent.

Agency Case No. 2021-0487 (Statement of Issues)

OAH No. 2021100705

PROPOSED DECISION

Thomas Heller, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference/telephone on September 13, 2022.

Charles H. Glauberman, Senior Staff Attorney, represented complainant California Public Employees' Retirement System (CalPERS).

Respondent Robert B. Craig represented himself.

Respondent Department of Transportation, Headquarters Operations (Caltrans), did not appear at the hearing. CalPERS proved it properly served Caltrans with a notice of hearing. Therefore, this matter proceeded as a default hearing against Caltrans pursuant to Government Code section 11520, subdivision (a).

Oral and documentary evidence was received, and Craig also requested permission to submit additional proposed exhibits after the hearing. The administrative law judge granted the request and held the record open until October 4, 2022. Craig did not submit any additional proposed exhibits. The matter was therefore deemed submitted for decision on October 4, 2022.

FACTUAL FINDINGS

Background and Procedural History

1. In 2004, Craig began working for Caltrans as an Equipment Material Specialist. By virtue of this employment, Craig became a "state miscellaneous member" of CalPERS. "'State miscellaneous member' includes all members employed by the state and university, except National Guard, industrial, patrol, state peace officer/firefighter, and state safety members." (Gov. Code, § 20380.)

2. In July 2019, Craig began an approved leave of absence from work due to a pulmonary condition. Caltrans approved his absence from work for an extended period, but Craig's absence eventually became unexcused. On December 24, 2020,

Caltrans served Craig with a "Notice of AWOL Separation" stating that Craig had been absent without leave (AWOL) for the last five consecutive business days. Therefore, Caltrans intended to invoke the statute regarding a state employee's AWOL separation from service on January 11, 2021. (Gov. Code, § 19996.2 (AWOL statute) [undesigned statutory references are to this code].) On that date, Caltrans would consider Craig to have resigned as of his last day of approved leave on March 20, 2020. Caltrans later amended the notice to change the resignation effective date and the last day of approved leave to August 10, 2020.

3. Craig requested an informal hearing on Caltrans' decision as authorized by *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102 (*Coleman*). On January 5, 2021, the informal hearing officer upheld Caltrans' decision. Three days later, CalPERS received a disability retirement application from Craig that he signed on December 3, 2020. Craig claimed he was disabled due to chronic obstructive pulmonary disease.

4. Craig appealed Caltrans' decision to the California Department of Human Resources (CalHR). On April 7, 2021, CalHR adopted a proposed decision of an administrative law judge dismissing the appeal because Craig failed to appear at a prehearing conference.

5. CalPERS reviewed Craig's retirement application and determined he was ineligible for a disability retirement because his employment at Caltrans ended for reasons that were not related to a disabling medical condition. On April 15, 2021, CalPERS notified Craig of the determination, explaining, "We have determined that your employment ended for reasons which were not related to a disabling medical condition. When an employee is separated from employment as a result of disciplinary action or the employee enters into a settlement agreement where the employee

chooses to voluntarily resign in lieu of termination, and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination and/or a mutual understanding of separation from employment due to a pending adverse action renders the employee ineligible to apply for disability retirement.” (Exhibit 5.) In support of the determination, CalPERS cited three court cases (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*); *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*); and *Martinez v. Public Employees Retirement System* (2019) 33 Cal.App.5th 1156 (*Martinez*)), and two precedential Board decisions (*In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Dec. No. 13-01 (*Vandergoot*); and *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip MacFarland* (2016) CalPERS Precedential Dec. No. 16-01 (*MacFarland*)). CalPERS informed Craig of his right to appeal the determination by submitting a written appeal within 30 days. CalPERS copied Caltrans on the letter.

6. On May 6, 2021, Craig appealed CalPERS’s determination. Caltrans did not appeal. On October 20, 2021, CalPERS filed a Statement of Issues “limited to the issue of whether respondent Craig is eligible to apply for disability retirement under Government Code section 21154, or whether his eligibility is precluded by operation of *Haywood, Smith, and Vandergoot.*” (Exhibit 1.)

Hearing

7. CalPERS introduced the Notice of AWOL Separation, Caltrans’ amendment to the notice, CalHR’s decision dismissing Craig’s appeal, and a declaration from Bud Olafsson, a Staff Services Manager III for Caltrans, in support of its determination that Craig was ineligible for a disability retirement. Olafsson’s

declaration was given the same effect as if he had testified orally under Government Code section 11514. Olafsson declared that Caltrans' decision to separate Craig from service was based entirely on Craig's unexcused absences as stated in the Notice of AWOL Separation. According to Olafsson, Caltrans did not dismiss Craig due to any alleged disabling medical condition or to prevent or preempt Craig from filing a claim for disability retirement.

8. Craig testified he was already disabled when Caltrans invoked the AWOL statute and separated him from service. He wanted to return to work but could not return due to his pulmonary condition, which is still disabling. Before receiving the Notice of AWOL Separation, Caltrans told him to come in and pick up a computer for modified duty. Craig asked Caltrans for a list of modified duty tasks to give to his treating physician, but Caltrans did not reply before sending the Notice of AWOL Separation. Craig filed a workers' compensation case regarding his pulmonary condition in 2019, and that case is still pending. He testified the State Compensation Insurance Fund "has accepted liability" in that case regarding his condition. Craig questions how he could have been considered absent without leave from Caltrans given that acceptance of liability.

9. Overall, the evidence supports a finding that Craig's separation from service at Caltrans was the result of his absence without leave, not a disabling medical condition. Craig failed to report to work without leave on five consecutive business days, and Olafsson declared that Craig's separation from service was based entirely on the unexcused absences, not on Craig's alleged disability. Craig attributes the absences to his pulmonary condition, but his testimony does not explain why he had to be absent without leave.

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10. There is no evidence in the record from any medical professional about Craig's condition, and no evidence as to whether Craig asked Caltrans to approve the unexcused absences beforehand. The evidence also does not show that Craig was unable to come to Caltrans to pick up a computer for modified duty, as Craig testified Caltrans told him to do. Craig also did not pursue his appeal to CalHR of the separation from service, which led to the dismissal of that appeal.

11. This evidence weighs against a finding that Craig's unexcused absences were the result of his alleged disability. Furthermore, Craig's argument that he could not have been considered absent without leave given the status of his workers' compensation case is misplaced in this appeal. Craig's appeal to CalHR was the appropriate forum for that argument, but Craig did not pursue that appeal.

LEGAL CONCLUSIONS

Legal Standards

1. "A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age," unless the person has elected to receive a service retirement allowance under section 21076, 21076.5, or 21077. (§ 21150, subd. (a).) "The application shall be made only (a) while the member is in state service, or (b) while the member . . . is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion." (§ 21154.) "Disability" and "incapacity for performance of duty" 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 . . . on the basis of competent medical opinion.” (§ 20026; see also § 21156, subd. (a)(2).)

2. “Government Code section 21156 . . . has always equated disability with a state employee being ‘incapacitated physically or mentally for the performance of his or her duties.’ And ordinarily, a governmental employee loses the right to claim disability benefits if terminated for cause.” (*Martinez, supra*, 33 Cal.App.5th at p. 1161.)

3. “A pair of decisions from the Third Appellate District carved out three exceptions to this general rule. First, under [*Haywood*], a terminated-for-cause employee can still qualify for disability retirement when the conduct which prompted the termination was the result of the employee’s disability. Second, under [*Smith*], a terminated employee may qualify for disability retirement if he or she had a ‘matured right’ to a disability retirement prior to the conduct which prompted the termination. Third, *Smith* further recognized that there might be instances where ‘a court, applying principles of equity, will deem an employee’s right to a disability retirement to be matured and thus survive a dismissal for cause.’ [Citation.]” (*Martinez, supra*, 33 Cal.App.5th at p. 1161.)

4. “Applying *Haywood* and *Smith*, the [Board] adopted a precedential decision that, when an employee settles a pending termination for cause and agrees not to seek reemployment, this is ‘tantamount to a dismissal,’ thus precluding a disability retirement. [*Vandergoot, supra*, CalPERS Precedential Dec. No. 13-01.]” (*Martinez, supra*, 33 Cal.App.5th at p. 1161.) In *Martinez*, the court held that “‘*Vandergoot* is a reasonable extension of *Haywood* and *Smith*,’ and, moreover, [is] entitled to ‘substantial weight’ due to ‘the agency’s area of expertise.’” (*Martinez, supra*, 33 Cal.App.5th at pp. 1161-1162.) Like *Vandergoot*, *Martinez* involved CalPERS’s

denial of a disability retirement application of an employee who settled a termination for cause action against her and agreed never to return to her former job. The court rejected the employee's challenges to *Vandergoot's* logic and applicability, stating, "[t]he Legislature and the Board have decided that resignation effects a 'permanent separation' from state service. [Citations.] Which is exactly what Martinez did when she agreed to leave state service and 'never again apply for or accept any employment' with [the Department of Social Services]. Notwithstanding the theoretical possibility of reinstatement [at another state agency], Martinez was not going to return to her former job. From this perspective, *Vandergoot* is eminently logical: resignation in these circumstances does indeed appear to be 'tantamount to a dismissal for purposes of applying the *Haywood* criteria.'" (*Martinez, supra*, 33 Cal.App.5th at p. 1176.) Therefore, *Vandergoot's* extension of *Haywood* and *Smith* applied to the employee's disability retirement application. (See *id.*)

5. The Board has also adopted another precedential decision that, when an employee retires just before a termination for cause becomes effective to avoid the termination, the employee is ineligible for a disability retirement unless the employee qualifies for one of the exceptions carved out in *Haywood* and *Smith*. (*MacFarland, supra*, CalPERS Precedential Bd. Dec. No. 16-01.)

Burden of Proof

6. In an administrative matter involving an application for a disability retirement, the applicant has the burden of proving eligibility for a disability retirement by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332; *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691.) A preponderance of the evidence means "'evidence that has more convincing force

than that opposed to it.' [Citation.]" (*People ex rel. Brown v. Tri- Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Analysis

7. Caltrans ended Craig's employment pursuant to the AWOL statute, under which an "[a]bsence without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from state service, as of the last date on which the employee worked." (§ 19996.2, subd. (a).) While that automatic resignation differs from a discharge for cause (*Coleman, supra*, 52 Cal.3d at pp. 1120-1121), it is similar for disability retirement purposes in that it "constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement – the potential reinstatement of [Craig's] employment relationship." (*Haywood, supra*, 67 Cal.App.4th at p. 1297; see § 19996.2, subd. (a).) Craig could have petitioned for reinstatement within 15 days of the service of notice of separation (§ 19996.2, subd. (a)), but no evidence suggests he did, and any potential for reinstatement has long since lapsed.

8. Given this similarity, it is logical to apply *Haywood, Smith, and Martinez* to Craig's automatic resignation under the AWOL statute. Under those authorities, Craig is ineligible for a disability retirement unless he qualifies for one of the three exceptions carved out in *Haywood* and *Smith*. (*Martinez, supra*, 33 Cal.App.5th at p. 1161.)

9. Craig does not qualify for any of the except]ions. First, Craig's separation from service was not the ultimate result of his alleged disability. (*Haywood, supra*, 67 Cal.App.4th at p. 1307; *Martinez, supra*, 33 Cal.App.5th at p. 1161.) The evidence supports a finding that Craig's separation from service was the result of his absences

without leave, not a disabling medical condition. Craig failed to report to work without leave on five consecutive business days, and Olafsson declared that Craig's separation from service was based entirely on this fact, not on Craig's alleged disability. Craig attributes the absences to his pulmonary condition, but his testimony does not explain why he had to be absent without leave.

10. Second, Craig did not have a "matured right" to a disability retirement prior to the unexcused absences that led to his separation from service. (*Martinez, supra*, 33 Cal.App.5th at p. 1161.) Therefore, the separation was not preemptive of an otherwise valid claim for disability retirement. (*Smith, supra*, 120 Cal.App.4th at pp. 205-206; *Haywood, supra*, 67 Cal.App.4th at p. 1307.)

11. When Caltrans notified Craig it was invoking the AWOL statute, Craig had not even applied for a disability retirement, much less received a determination from CalPERS that he was eligible for one. CalPERS did not receive his disability retirement application until about two weeks after the Notice of AWOL Separation. "Nor, for that matter, is there undisputed evidence that [Craig] was eligible. . . , such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb)." (*Smith, supra*, 120 Cal.App.4th at pp. 207.) As in *Smith*, the record at best contains some evidence of a disability for purposes of Craig's workers' compensation case. "But a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties is different. [Citations.]" (*Ibid.*) CalPERS would have a basis for litigating whether Craig's evidence "demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient. [Citations.]" (*Ibid.*) Therefore, Craig's alleged right to a disability retirement had not matured prior to the conduct that led to his separation from service.

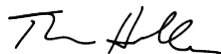
12. Third, Craig has not identified any principle of equity that supports deeming his right to a disability retirement to be matured and surviving his separation from state service. (*Martinez, supra*, 33 Cal.App.5th at p. 1161; *Smith, supra*, 120 Cal.App.4th at pp. 206-207.) No equitable considerations support that result on these facts.

13. Based on the above, Craig is not eligible for a disability retirement.

ORDER

Respondent Robert B. Craig's appeal is denied.

DATE: 11/01/2022


[Thomas Heller \(Nov 1, 2022 11:43 PDT\)](#)

THOMAS HELLER
Administrative Law Judge
Office of Administrative Hearings