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 Disability Retirement of:

ENRIQUE A. RIOS, Respondent

and

CALIFORNIA CONSERVATION CORPS, Respondent

Agency Case No. 2022-0520

OAH No. 2022090030

PROPOSED DECISION

Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by video and telephone on January 24 and March 16, 2023, from Sacramento, California.

Nhung Dao, Attorney, represented complainant Keith Riddle, Chief, Disability and Survivor Benefits Division, California Public Employees' Retirement System (CalPERS).

Enrique A. Rios (respondent), appeared by video and represented himself.

No appearance was made by or on behalf of respondent California Conservation Corps (respondent CCC). The matter proceeded as a default against respondent CCC, pursuant to Government Code section 11520.

Evidence was received, the record closed, and the matter submitted for decision on March 16, 2023.

ISSUE

Whether, at the time of his disability retirement application, respondent was substantially incapacitated from the performance of his usual and customary duties as a Conservationist Supervisor for respondent CCC based on a rheumatological (joints) condition.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent has been employed by respondent CCC for the past 32 years. At the time he filed his application for disability retirement, he held the position of Conservationist Supervisor. By virtue of his employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150.

2. On January 6, 2022, respondent signed and thereafter filed his Disability Retirement Election Application for service pending disability retirement with CalPERS. He claimed disability based on a rheumatological (joints) condition.

3. On April 26, 2022, after reviewing all the medical evidence submitted by respondent, CalPERS notified respondent that his application for disability retirement was denied. CalPERS reviewed reports prepared by Monica Gonzales, F.N.P. (FNP Gonzalez), Mario Celaya, P.A. (PA Celaya), and Scott T. Anderson, M.D. CalPERS determined that respondent's rheumatological joints condition was not disabling, and that he was not substantially incapacitated from the performance of his job duties as a Conservationist Supervisor with CCC.

4. On May 16, 2022, respondent appealed CalPERS's denial of his application for disability retirement. The matter was set for an evidentiary hearing pursuant to Government Code section 11500 et seq. This hearing followed.

Respondent's Disability Retirement Election Application

5. In his Disability Retirement Election Application (disability application), respondent described his specific disabilities as "severe pain on all my body articulations (joints)." His disability began on June 10, 2021, because of "post Covid 19 complications." Respondent's limitation or preclusion due to his rheumatological (joints) condition is that he is "not able to walk for more than [five] minutes."

Respondent's Job Duties

6. CCC's Position Duty Statement states the Conservationist Supervisor is "responsible for the supervision of conservationist staff." Essential duties and responsibilities include: (1) supervising and directing staff and corps members assigned to the Tahoe Center on proper implementation of policies and procedures and ensuring their safety; (2) developing, monitoring, and managing public service conservation work; (3) evaluating staff performance; (4) participating in staff and

community meetings; (5) overseeing recruitment of staff and ensuring CCC labor relations policies are met; and (6) coordinating emergency response.

7. A CalPERS form entitled "Physical Requirements of Position/Occupational Title" (form) sets forth the physical requirements for a Conservationist Supervisor. The physical requirements of the job include: infrequently (five to 30 minutes) lifting and carrying from 11 to 25 pounds, kneeling, squatting, and twisting at the neck and waist, pinching and picking, operating hazardous machinery, and being exposed to dust, gas, fumes, or chemicals; and occasionally (31 minutes to two and a half hours) communicating with the public, lifting and carrying up to 10 pounds, bending at the neck and waist, reaching above and below shoulders, pushing, pulling, handling, walking on uneven ground, and being exposed to excessive noise and extreme temperature. The job also requires frequent (two and a half to five hours) sitting, standing, walking, and driving; and constant (over five hours) communicating with coworkers, and using the computer.

8. On November 17, 2021, respondent signed and dated the form. On December 2, 2021, CCC's District Director signed and dated the form.

Independent Medical Examination (IME) by Scott T. Anderson, M.D., Ph.D., FACP,[1] FACR[2]

9. On March 23, 2022, Scott T. Anderson, M.D., performed an IME of respondent at CalPERS's request. The purpose of the IME was to conduct a

[1] Fellow of the American College of Physicians.

[2] Fellow of the American College of Radiology.

"polyarthralgia[3] and joint pain" examination. Dr. Anderson is board-certified in Internal Medicine and Rheumatology. He received his medical degree from the University of Texas Southwestern Medical School, and his Ph.D. in Medical Anthropology from the University of California at San Francisco-Berkeley. He completed his residency in Internal Medicine at New York Medical College, Cabrini Medical Center, and was a Rheumatology Fellow at Georgetown University/VA Medical Center. He is currently a Clinical Professor of Medicine at the University of California at Davis, Division of Rheumatology, Allergy, and Clinical Immunology, serves as a Qualified Medical Evaluator, is a consultant for Newton Medical Group/Exam Works IME Services, and is President of Anderson Arthritis Associates, Inc.

10. Dr. Anderson's IME consisted of interviewing respondent, conducting a physical examination, and reviewing respondent's medical records, occupational history, intake rheumatology questionnaire, disability application, physical requirements form, and job duties. He thereafter wrote an IME Report, dated March 23, 2022, and testified at hearing consistent with his IME Report.

11. Dr. Anderson noted respondent's chief complaint as "Joint pain." His most painful joints are his knees, hands, and wrists. Respondent's joint pain began after getting sick in January 2021 and being diagnosed with COVID-19. Respondent was not hospitalized and went back to work after one month. He experienced "muscle issues" and described his pain as muscle cramping. He reported to Dr. Anderson that he filed insurance claims for rheumatoid disease but was denied. At the time of his

[3] Polyarthralgia is when pain occurs in several joints of the body.

IME, he was waiting to see a rheumatologist in April 2022. Respondent's joints "feel swollen," and he has not received any specific treatment.

12. Dr. Anderson opined that respondent fully recovered from his COVID-19 infection, and has no history of rheumatoid disease, other inflammatory arthritic process, meningitis, congestive heart failure, "long-term sequelae," or systemic lupus. Respondent's treatment has "largely been supportive," and he has "not received any disease modifying medication."

13. Respondent completed an intake questionnaire, checking approximately 20 symptoms which Dr. Anderson listed in his IME report:

> Neck pain, muscle tics and twitches, muscle cramps, muscle pain, muscle weakness, muscle shrinkage, poor balance, numbness and tingling, joint pain and stiffness, joint swelling, shortness of breath, chest pain, difficulty chewing, difficulty speaking, difficulty swallowing, chronic fatigue, [and] feeling depressed and stressed.

REVIEW OF RESPONDENT'S MEDICAL RECORDS

14. Dr. Anderson reviewed and summarized approximately 36 medical records, dated from July 16, 2020 through February 15, 2022. From July 16, 2020, to approximately November 16, 2020, respondent was primarily seen for left shoulder pain due to a ladder fall. A magnetic resonance image (MRI) on August 11, 2020, revealed tendonitis of the left shoulder and "superior labrum anterior to posterior (SLAP) tear of left shoulder." FNP Gonzalez referred respondent to physical therapy and an "ortho" specialist. Respondent's left shoulder pain continued, and on October 27, 2020, requested a second opinion regarding surgery on his left shoulder.

15. On January 11, 2021, respondent tested positive for COVID-19. He had a telephone visit on January 13, 2021, with PA Celaya. Respondent was told to drink plenty of water, take Tylenol as needed, and maintain a healthy diet. One month later, respondent continued to experience fatigue and shortness of breath. On March 16, 2021, he saw FNP Gonzalez for body aches. Her assessment was: "1) Myalgia. 2) History of Covid-19. 3) Spasticity. 4) Fatigue, unspecified type. 5) Essential hypertension." Treatment included increasing water intake, maintaining a healthy diet, reducing sodium, increasing exercise, and journaling three times per week.

16. On April 2, 2021, respondent received an x-ray for pain in both knees. He did not have any fractures or dislocations, and his pain was the result of degenerative conditions. On April 7, 2021, FNP Gonzalez saw respondent for a "follow-up of arthralgias." She saw respondent again on April 14, 2021 for bilateral knee pain. PA Celaya saw respondent on April 27, 2021 for knee pain, May 4, 2021 for hyperglycemia, on May 18, 2021 for weakness, and on May 25, 2021, June 10, 2021, September 8, 2021, and on September 16, 2021 for chronic pain of both knees.

17. Dr. Anderson opined that respondent had a "remote history of traumatic injury of the left shoulder." Respondent's bones in his left shoulder healed prior to his diagnosis of polyarthralgia and degenerative arthritis, a condition Dr. Anderson described as a "ubiquitous phenomenon beginning after age 40." Diagnostic studies showed degenerative changes to respondent's knees, and there was no indication of lupus or inflammatory arthritis. Respondent was also diagnosed with "humeral epicondylitis," also known as tendonitis. Respondent's pain originated at the elbow, which creates "pain in dorsiflexion" at the wrist. Dr. Anderson opined that a "good prognosis can be treated with compressive bands and analgesics."

PHYSICAL EXAMINATION, DIAGNOSIS, AND FINDINGS

18. Dr. Anderson's physical examination of respondent revealed high blood pressure and obesity. Respondent had a swollen facial appearance, which can be a side effect of medications such as steroids. This "cushingoid" facial appearance was Dr. Anderson's only "unnormal" observation. Respondent's head, eyes, ears, nose, and throat (HEENT) were normal. Dr. Anderson opined that with rheumatological disease, sometimes the eyes will have abnormalities, and there may be face rash, tightness of the skin, and ulcerations of the mouth and nose. Respondent's facial appearance "was in all likelihood due to obesity." Respondent's normal HEENT presentation did not suggest rheumatological disease or systemic lupus.

19. Dr. Anderson examined respondent's neck and did not find stiffness, which "one might see with neck spasm or meningitis." He did not find any nodules or distended jugular veins, which could be a sign of congestive heart failure.

20. Respondent's heart, lungs, and abdomen examinations were unremarkable. Dr. Anderson opined that with rheumatoid arthritis, a patient may have an enlarged spleen; with lupus, the liver may be enlarged; and with sclerosis, the skin over the abdomen may be taut or thickened. Respondent did not present with any of these abnormalities. There were no findings that pointed Dr. Anderson to rheumatoid issues.

21. Respondent demonstrated a full range of motion in his upper and lower extremities, and he had no instability during his knee examination. He had tenderness of the "lateral epicondyles," commonly known as tennis elbow. His muscle mass was adequate, and he had no muscle asymmetry, ruling out a blood clot. His hand grip, which can show joint damage and effort, was "typical for an office worker."

Respondent's reflexes, overall strength, and sensations were normal. His gait was unremarkable. Dr. Anderson opined that some rheumatological diseases cause neurological problems. His examination of respondent's cranial nerve function showed no deficits.

22. Dr. Anderson provided a diagnosis of "Humeral epicondylitis, bilateral." He opined:

> I think that the humeral epicondylitis can be constructed as a kind of joint related pain although it does not occur in the true elbow joint rather in the tendons lateral to the elbow. He also may have other conditions that are not subject to this evaluation which will not be listed at this time consistent with CalPERS process.

23. Dr. Anderson concluded that respondent is not substantially incapacitated from performing his usual job duties based upon a rheumatological (joints) condition. He recognized that respondent's elbow pain is a concern and could inhibit heaving lifting. However, respondent's tennis elbow can be managed with a tennis elbow band, cortisone injections, analgesics or anti-inflammatory medications, and topical application of ice or other substances. This condition usually resolves with time. It will not result in substantial incapacity necessitating retirement. Dr. Anderson also opined that in a supervisory position, respondent may not "do very much in the way of currently lifting objects greater than 50 pounds repetitively, but rather supports and oversees crews of younger people performing these job duties." Dr. Anderson based his conclusion on his examination. Respondent had tenderness over his lateral elbows, but did "not have rheumatoid nodules, lateral deviation of the digits, warm joints, swollen joints or other objective pathology to suggest he is substantially

incapacitated." Moreover, respondent "does not have a history of inflammatory arthritis that would be consistent with significant polyarthritis."

24. Addressing the performance of respondent's usual job duties, Dr. Anderson opined that respondent can still interact with coworkers, supervise staff, and lift up to 10 pounds "with occasional weights of heavier nature." Respondent "could perform his other major activities including supervising, leading and directing staff, developing and monitoring conservation work, evaluating staff, participating in meetings, overseeing recruitment of staff, and coordinating emergency responses."

25. Dr. Anderson noted that respondent "would have some difficulty with, for example, repetitive lifting of objects greater than 25 pounds." However, such lifting is infrequent, and respondent "checked off" that he never lifts greater than 26 pounds. "Therefore, we are left with no substantial incapacity to perform job duties."

26. Dr. Anderson did not believe respondent exaggerated his complaints and thought respondent "put forward his best effort." On physical examination, Dr. Anderson did not make any findings that would justify disability retirement. Dr. Anderson summarized:

> This member has some pain in his lateral elbow region, which may require some treatment, but he does not arise to the threshold of having a substantial incapacity to perform job duties which would justify CalPERS Disability Retirement.

Respondent's Evidence

27. Respondent testified at hearing but did not submit any documents. Respondent stated that his job "requires a lot of physical work," and that in addition to office work, he ensures crew safety in the field. He asserted that his job is "more demanding" than what is stated on the duty statement. It requires "a lot of hiking," "catching all potential hazards for the crew to do their work," and "lifting." He added that Dr. Anderson "is not in my shoes to do what is required for my job." He believes his health issues are related to COVID-19. He is concerned not only with his health; he is also concerned with his financial situation, which prompted him to file his disability application with CalPERS.

Analysis

28. Respondent did not meet his burden to establish by competent medical evidence that he is substantially incapacitated from the performance of his usual job duties. No medical expert testified on respondent's behalf, answering the following CalPERS's questions regarding disability retirement: (1) whether there are any specific job duties that respondent was unable to perform because of his physical condition; (2) whether he is substantially incapacitated from the performance of his duties; (3) if yes, on what date did his disability begin; (4) if incapacitated, is the incapacity permanent or temporary; and (5) did he cooperate with the examination and put forth his best effort, or was there an exaggeration of complaints.

29. None of respondent's medical reports submitted to CalPERS, specifically those written by FNP Gonzalez and PA Celaya, addressed CalPERS's disability retirement standards listed above. Respondent presented no objective medical

evidence from his medical practitioners to establish substantial incapacity based on a rheumatological (joints) condition.

LEGAL CONCLUSIONS

1. Respondent has the burden of proof to establish by a preponderance of evidence that he is "incapacitated for the performance of duty," which courts have interpreted to mean "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) Discomfort, which may make it difficult to perform one's duties, is insufficient to establish 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* (1978) 77 Cal.App.3d 854, 862.)

2. Pursuant to Government Code section 21150, members incapacitated for the performance of duty shall be retired for disability. Government Code section 20026 provides that " 'Disability' and 'incapacity for performance of duty' as a basis of retirement, means disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion."

3. An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (*Harmon v. Bd. of Retirement* (1976) 62 Cal.App.3d 689, 697 [finding that a deputy sheriff was not permanently incapacitated from the performance of his duties, because "aside from a demonstrable mild degenerative change of the lower lumbar

spine at the L-5 level, the diagnosis and prognosis for the [the sheriff's] condition are dependent on his subjective symptoms"].)

3. *Mansperger*, *Hosford*, and *Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date he applied for disability retirement, he was substantially unable to perform the usual duties of a Conservationist Supervisor due to his rheumatological (joints) condition. Respondent failed to meet this burden. His application for service pending disability retirement must, therefore, be denied.

ORDER

The application for service pending disability retirement filed by respondent Enrique A. Rios is DENIED.

DATE: April 6, 2023

Danette C. Brown

DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings