ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Appeal of Reinstatement from Industrial Disability Retirement of:

BRIAN A. DALHOVER, Respondent

and

DEPARTMENT OF STATE HOSPITALS-METROPOLITAN, Respondent

Agency Case No. 2020-1258

OAH No. 2021020497

PROPOSED DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference and telephonically on November 4, 2021, due to the ongoing COVID-19 pandemic.

Helen L. Louie, Staff Attorney, represented complainant, Keith Riddle, Chief, Disability and Survivor Benefits Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Brian A. Dalhover, respondent, represented himself.

There was no appearance on behalf of respondent Department of State Hospitals-Metropolitan (Metropolitan).

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on November 4, 2021.

ISSUE

Is respondent[1] still substantially incapacitated from performing the usual and customary duties of a psychiatric technician at Metropolitan due to a urological (groin) condition such that he cannot be reinstated to his former position?

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent worked for Metropolitan as a psychiatric technician. By virtue of his employment, respondent is a state safety member of CalPERS.

2. On July 30, 2010, respondent injured his groin as a result of being attacked by a patient while respondent attempted to give an injection to the patient.

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[1] Respondent refers solely to Brian A. Dalhover throughout this decision, and respondent Department of State Hospitals-Metropolitan will be referred to as Metropolitan.

3. On July 6, 2017, respondent submitted an application for an industrial disability retirement on the basis of urological (groin) condition. On January 12, 2018, CalPERS approved respondent's application for an industrial disability retirement based on his claim of urological (groin) condition. Consequently, respondent retired effective July 1, 2017.

4. On March 19, 2020, CalPERS sent a letter to respondent advising him of its intent, in accordance with applicable law, to conduct a review and reevaluation to ensure that he was still eligible for an industrial disability retirement. CalPERS also requested documentation from respondent, including completion of a Retiree Questionnaire for CalPERS Disability Re-evaluation, and documents from each of respondent's treating physicians. Respondent submitted additional documentation, and CalPERS reviewed his submissions. Thereafter, CalPERS required respondent to undergo a re-evaluation examination from an Independent Medical Examiner (IME).

5. On August 19, 2020, respondent underwent a re-evaluation examination by William Moseley, M.D., an IME retained by CalPERS. Dr. Moseley submitted a report of his re-evaluation examination of respondent to CalPERS.

6. On September 3, 2020, CalPERS notified respondent that it had reviewed all medical reports, including the re-evaluation examination report completed by Dr. Moseley, as well as reports from Richard Leff, M.D., and Samuel Chan, M.D., and determined as follows:

> Based on the evidence in those reports, it is our determination that you are no longer substantially incapacitated from the performance of your job duties as a Psychiatric Technician with Department of State Hospitals

> Metropolitan due to your urological (groin) condition. In accordance with Government Code (G.C.) section 21193, you will be reinstated to your former position.

7. By letter dated October 1, 2020, respondent appealed the denial and this hearing followed. Metropolitan did not appeal CalPERS's determination that respondent should be reinstated to his former position.

8. On December 17, 2020, complainant filed the Accusation in his official capacity, seeking to reinstate respondent to his former position with Metropolitan based on the determination that he is no longer substantially incapacitated from performing the usual and customary duties of a psychiatric technician due to his urological (groin) condition.

Job Duties of a Psychiatric Technician

9. A document entitled, "Physical Requirements of Position/Occupational Title" was submitted as evidence. The document identifies those job duties for a psychiatric technician that are considered occasional (up to 3 hours), frequent (3 to 6 hours), constant (over 6 hours), and never. Both respondent and a representative for his employer signed the document agreeing with its contents in April 2017. The document identifies activities that are occasionally required to be performed as sitting, standing, walking, crawling, kneeling, climbing, squatting, bending at the neck and waist, twisting at the neck and waist, reaching above the shoulder, reaching below the shoulder, fine manipulation, power grasping, simple grasping, repetitive use of hands, pushing & pulling, keyboard use, mouse use, lifting and carrying up to 50 pounds, and working with biohazards. The document identifies frequent activities as standing only. The document identified the following activities as never required to be performed:

running, lifting or carrying 51 pounds to over 100 pounds, walking on uneven ground, driving, working with heavy equipment, exposure to excessive noise, exposure to extreme temperature, humidity, wetness, exposure to dust, gas, fumes or chemicals, working at heights, and operation of foot controls or repetitive movement, and use of special visual or auditory protective equipment.

10. A document entitled "Duty Statement, Department of Mental Health, Metropolitan State Hospital" was also submitted as evidence. That document generally describes the duties of a psychiatric technician, who is responsible for providing a basic level of general behavioral and psychiatric nursing care to facilitate the rehabilitation of individuals. The essential functions of the psychiatric technician include: providing a basic level of general and psychiatric nursing care to mentally ill and emotionally disturbed individuals, providing emergency care to patients, administering medications and treatments, observing and recording signs, symptoms, behavior, and response to medications, and collaborating with members of the treatment team to develop and implement wellness and recovery interventions.

Investigation Conducted by CalPERS

11. Sarah Garcia is employed by CalPERS as an investigator, a job she has held for the past two-and-a-half years. Her duties include conducting investigations regarding disability retirement applicants and individuals who are currently on disability retirement and creating reports and documentation of her investigations. Ms. Garcia's investigations usually include conducting undercover surveillance of the individuals and filming the individuals performing daily activities. Ms. Garcia conducted surveillance of respondent and recorded his activities on video and summarized her findings in an investigative report. Ms. Garcia testified at the hearing

and the following factual findings are based upon her testimony, her report, and video evidence received in the record.

12. Ms. Garcia testified that she verified respondent's identity prior to conducting her surveillance by using his photograph and address obtained from the Department of Motor Vehicles. Ms. Garcia and her partner, Investigator Cooper, conducted surveillance of respondent at his home address for a total of 36 hours over the course of three days in both January and February of 2020.

13. During her surveillance of respondent, Ms. Garcia observed respondent standing continuously, bending over, bending at the waist to fix his shoes and pants, walking and kicking his legs in an outward motion, and riding a bicycle. Ms. Garcia observed respondent riding a bicycle into his driveway and out of view. Ms. Garcia testified that she did not observe respondent to have any difficulty with these physical activities. Ms. Garcia stated that she was unable to capture respondent riding the bicycle on film, but she did observe it. Her report summarized the activities Ms. Garcia observed consistent with her testimony.

14. Video evidence showing the surveillance conducted by Ms. Garcia and Investigator Cook shows respondent standing upright in a line of people for a number of minutes, walking in his neighborhood, walking while kicking his legs in an outward motion, bending at the waist, bending over, walking with his children to school, medical appointments and the grocery store. Respondent appeared to have no difficulty with these tasks and did not appear to be in pain during those tasks.

Independent Medical Re-Evaluation Examination

15. Dr. William Moseley is a board-certified urologist and has been board-certified in urology for the past 50 years. Dr. Moseley has been licensed to practice

medicine in California since 1972. He practices general urology, which encompasses all issues related to the genitourinary system. Dr. Moseley currently works in private practice as the attending urologist San Diego Urological Medical Group, where he has worked since April 2005. Prior to April 2005, he worked in another private practice group and also held the following titles: Chief of Urology at Sharp Memorial Hospital, Chief of Surgery at Harbor View Medical Center, Vice Chief of Staff and Chief of Staff of Harbor View Medical Center, and Medical Director of San Diego Uro-Research. Dr. Moseley also has held academic appointments as a clinical assistant professor and clinical instructor at the Department of Urology at University of California San Diego. Additionally, he worked as the Research Director of Genesis Research, L.L.C. Dr. Moseley has been appointed as a Qualified Medical Evaluator for worker's compensation cases since January 2005 and has performed more than 200 such evaluations. Dr. Moseley was asked by CalPERS to perform an independent medical evaluation (IME) of respondent for this matter, and he has only performed one IME on behalf of CalPERS. Dr. Moseley performed the IME of respondent and summarized his findings in a report, which was received into evidence. The following factual findings are based on his testimony and his report.

16. In a letter dated August 5, 2020, Dr. Moseley was appointed by CalPERS to provide an IME of respondent to evaluate respondent's "tender abdominal [*sic*] with chronic pain groin conditions." Prior to his examination of respondent, Dr. Moseley reviewed the medical qualifications for disability retirement, the job requirements of a psychiatric technician, and 262 pages of medical records regarding respondent, all provided to him by CalPERS. Dr. Moseley examined respondent on August 19, 2020, and drafted a report summarizing his findings based upon his interview of respondent, examination of respondent, and review of records provided. In this matter Dr. Moseley spent one-and-a-half hours interviewing and examining respondent, 2.75 hours

reviewing medical records, one hour reviewing surveillance video of respondent and Ms. Garcia's investigative report, one hour reviewing records related to the job duties and physical requirements of a psychiatric technician and the medical qualifications for disability retirement, and five-and-one-half hours drafting his report summarizing his review and findings.

17. Dr. Moseley testified that his understanding from his interview of respondent and review of records is that respondent sustained an injury on October 15, 2005, from a kick to his genitalia by a patient during the time respondent was caring for this patient. As a consequence, respondent received an injury to his penis and right scrotum, which was diagnosed at that time as traumatic epididymitis and contusion to the penis on the right side. Thereafter, respondent suffered with testicular pain, pain in the groin area, and pain in the right lower quadrant. As a result, respondent was evaluated by Irwin Goldstein, M.D. who determined that respondent had a blood circulation problem to his penis resulting in erectile dysfunction. Respondent then underwent micro-revascularization surgery to redirect blood from the penile artery to help with the blood supply, which relieved respondent's symptoms, and respondent was able to return to work. Thereafter, in July 2010, respondent sustained a second injury as a result of a sharp blow to his right lower quadrant while he was working, which reactivated respondent's previous symptoms in his genitalia. Respondent continued to work until April 2011, when the pain worsened in his genital, inguinal and scrotal areas to the point that he was unable to work.

18. During his examination and interview of respondent on August 19, 2020, Dr. Moseley noted that respondent was complaining of severe right lower quadrant pain and erectile dysfunction, and that he was having "on and off" right testicular pain, but respondent did not have right testicular pain during the August 19, 2020,

examination. Respondent informed Dr. Moseley that he was sexually active, but respondent had to limit his sexual activity to no more than once a month because of the pain in his abdomen while having sex. Respondent also complained of moderate lower urinary tract irritative symptoms and frequency, nocturia, urgency, but no history of urinary incontinence. Respondent had not been to a urologist for treatment of any of his current symptoms.

Dr. Moseley also testified that his review of respondent's medical records showed that respondent's pain medications "were significant." Specifically, Dr. Moseley noted that respondent was taking hydrocodone, a narcotic, four times per day for the past four years for pain, as prescribed to him by Dr. Chan, respondent's primary care physician. Dr. Moseley explained that this is significant because "that is a long period of time to take a narcotic on the basis of pain," and that Dr. Chan had seen respondent approximately 36 times during that four year period and prescribed hydrocodone. However, Dr. Moseley did not see any additional evaluations of respondent during that time on which Dr. Chan based his conclusions that the pain medication was necessary.

Dr. Moseley also stated that his review of the records, as well as his interview with respondent, showed that respondent's traumatic epididymitis had been completely resolved prior to respondent returning to work in 2010. Dr. Moseley explained that traumatic epididymitis was an inflammation of the area of the epididymis, which is a structure behind the testicle that stores sperm. During his examination, respondent showed no pain in the epididymis and there was no evidence that any further treatment of the epididymis was necessary.

Dr. Moseley's physical examination of respondent showed that respondent had a surgical incision below the navel on the right side where he had his micro-revascularization surgery, and he had "marked tenderness to palpation in the right

lower quadrant." Dr. Moseley stated that he felt no masses or foreign bodies or hernias in the right lower quadrant of the abdomen. Dr. Moseley explained that his routine examination of respondent's abdomen revealed that it was normal. Dr. Moseley further explained that respondent complained of significant discomfort in the right lower abdomen when Dr. Moseley provided only the lightest touch, which Dr. Moseley stated was extremely unusual and not something he would expect to see when there are no significant problems in that area, such as a hernia, palpable nodules, or inflammation or trauma to the area. According to Dr. Moseley, there was no logical reason for respondent's response to the light touching in the right lower quadrant. Dr. Moseley also found no objective findings in respondent's medical records or his own examination of respondent to support respondent's subjective complaint of pain in the right lower quadrant.

Dr. Moseley examined respondent's penis and testicles, and both were normal and exhibited no tenderness to palpation. Dr. Moseley performed a rectal examination to assess the rectal area and the prostate, both of which were normal. Dr. Moseley also performed a neuro-urological examination to assess if there are any neurological issues with the genital area and that examination was also normal.

Dr. Moseley testified that he completed a "good physical examination" of respondent and that respondent was cooperative during the examination.

19. Dr. Moseley summarized his diagnoses of respondent in his report as follows:

- (1) Past History of Traumatic Injury to Right Groin, Testicle and Penis 10/15/2005
- (2) History of Traumatic Right Epididymitis – resolved

- (3) History of Erectile Dysfunction 2005 and again since 2010
- (4) Status Post-Op Penile Revascularization with anastomosis of Right Inferior Epigastric Artery and the right dorsal penile artery 7/21/09 secondary to #1.
- (5) Lower Urinary Tract Irritative Symptoms – non-industrial
- (6) History of Chronic Depression/Anxiety

Dr. Moseley explained that at the time of his examination of respondent, Dr. Moseley was unable to diagnose respondent with any urological condition that would cause respondent pain or would otherwise keep respondent from working as a psychiatric technician. While respondent does have a diagnosis of erectile dysfunction, this diagnosis would not cause respondent to be unable to perform his job duties as a psychiatric technician. Dr. Moseley was unable to find any objective findings to substantiate respondent's subjective complaint of extreme pain in the right lower quadrant in response to light touching. Dr. Moseley stated that he found nothing that would require respondent to undergo any urological treatment or that would interfere with respondent's ability to perform his job duties. Dr. Moseley also testified that the lower urinary tract irritative symptoms diagnosis for respondent do not indicate that respondent has any voiding dysfunction at this time and is not incapacitated based on that diagnosis.

20. Dr. Moseley provided answers to specific questions posed by CalPERS in his report, in part, as follows:

1. In your professional opinion, is the member presently, substantially incapacitated for the performance of his duties?

From a Urological perspective, Mr. Dalhover is **NOT** substantially incapacitated for the performance of his duties. There are no work restrictions required for the diagnosis of erectile dysfunction. At the time of my evaluation, he was not complaining of any genital pain nor were any painful responses elicited by my examining his genitals. He relates that he has right lower quadrant pain when I exam [*sic*] his lower abdomen on this side. However, there are no demonstrable physical findings noted on the exam – i.e. hernia or palpable masses or induration of the tissues. Although the patient had a transverse abdominal surgical incision which appears to be above the patient described area of physical impact from his injury, he was completely asymptomatic at the site of this surgical incision following Dr. Goldstein's surgery and at the time of my physical exam. . . .

[¶] . . . [¶]

3. Based on your objective findings, are there specific job duties that you feel the member is unable to perform due to his urology Tender abdominal with chronic pain and groin conditions? . . .

No, there are no specific job duties that I feel Mr. Dalhover is not able to perform due to any specific urological conditions. I do not believe that Mr. Dalhover's complaint of abdomen pain has any urological origin. At the time of my evaluation, Mr. Dalhover was not complaining of any general pain nor were there any physical findings on the basis of my physical examination which would suggest this.

4. Is the member cooperating with the examination and putting forth their best effort, or do you feel there is exaggeration of complaints?

Mr. Dalhover was cooperating with me during my examination. He appeared to me to be very sincere in his complaints of pain, but I was unable to determine with any certainty that there was any exaggeration of his complaints of abdominal pain. However, it is very unusual for me to examine a patient where just the lightest touch of my examining hand on his abdomen would cause the patient to profess such significant discomfort.

21. Dr. Moseley testified that he reviewed the additional two documents provided by respondent at the hearing and neither of those documents changed his opinion in this matter. The first document is a CalPERS form titled "Physician's Report on Disability" signed by Dr. Samuel Chan regarding respondent wherein Dr. Chan wrote "patient is permanently disabled." No further information regarding the basis of that statement was provided by Dr. Chan in the document. Dr. Moseley testified that he disagrees with the statement written by Dr. Chan in that document because Dr.

Moseley's physical examination of respondent and his review of medical records for respondent did not provide him any basis for the conclusion that respondent is permanently disabled.

Dr. Moseley also testified that the second document is a progress note from Dr. Paul David Lui, a urologist, dated July 12, 2021, based on a 30-minute examination of respondent. The document provides that Dr. Lui's physical examination of respondent's genital area revealed no masses, normal testes, no left inguinal pain, right head of the epididymis is tender to exam, and right groin tender to exam. Dr. Lui recommended respondent undergo an ultrasound of the scrotum and penis to determine blood flow. Dr. Moseley stated that this document does not change his opinion in this matter and that based on Dr. Moseley's examination of respondent, his scrotum and penis were normal and had no vascular impairment.

Respondent's Testimony

22. Respondent is 44 years old and not currently employed. He was last employed in April 2011 as a psychiatric technician at Metropolitan, where he worked from 2004 to 2011. Respondent has four children, ages 20, 12, 11 and 7 years. All of these four children are respondent's biological children, and his two youngest children were born during the time respondent has been on industrial disability retirement for his urological conditions. Respondent testified at the hearing and the following factual findings are based on his testimony.

23. Respondent has had abdominal pain since he was punched during his second injury in 2010. In 2010 respondent was punched in his abdomen by a patient while he was attempting to give the patient an injection. After this second injury, respondent continued to work for another week, but the pain would not go away.

Respondent stated that he is still undergoing treatment for his abdominal pain, testicular pain, inguinal pain, erectile dysfunction, and chronic epididymitis from his traumatic injury. Respondent provided the progress note from Dr. Lui, the urologist, which lists as diagnosis the following conditions:

Right testicular pain

Lower urinary tract symptoms

Lower abdominal pain

Erectile dysfunction due to injury, revasc 7/26/2009
Goldstein

Chronic epididymitis Traumatic

24. Respondent also provided the form signed by Dr. Chan, his primary care physician and general practitioner, wherein Dr. Chan wrote that respondent is permanently disabled. Respondent testified that "erectile dysfunction is the least of [his] complaints" because he has all those other diagnoses as listed on Dr. Lui's progress note.

25. On cross-examination respondent admitted that he has ridden a bicycle "maybe once or twice" but he does not do so often or regularly because it hurts too much. He could not recall if he rode a bicycle in 2020. Respondent later testified that he is unable to ride a bicycle because it hurts his epididymis too much, but that he has tried it because his psychiatrist told him to exercise.

26. With regard to his job duties as a psychiatric technician, respondent stated he is unable to perform the following duties: defend himself, run away, think,

concentrate, or sit down. Respondent stated it is very difficult to think or concentrate because he is in a lot of pain and "it is hard to do anything without pain medication." Respondent stated that he is unable to sit longer than seven minutes at a time because his epididymis is so swollen that when he sits it hurts. Respondent also stated that he is able to walk but he can't run and has limitations because of the pain in his abdomen. Respondent admitted on cross-examination that he walks every day and takes his children to school by driving them when he needs to.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. CalPERS had the burden of proving by a preponderance of the evidence that respondent is no longer substantially incapacitated from performing the usual and customary duties of a psychiatric technician based on a urological (groin) condition. (Evid. Code, §§ 115, 500.)

Applicable Statutes

2. Government Code section 20026 provides in part:

> "Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain 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.

3. Government Code section 21060, subdivision (a), provides in part:

> A member shall be retired for service upon his or her written application to the board if he or she has attained age 50 and is credited with five years of state service, except as provided in Sections 7522.20, 21061, 21062, and 21074.

4. Government Code section 21151, subdivision (a), provides in part:

> Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

5. Government Code section 21156, subdivision (a)(1) provides:

> If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, 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, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account

of disability, in which event the board shall retire the member for service.

6. Government Code section 21192 provides in part:

> The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, shall also cause the examination to be made upon application for reinstatement to the position held at retirement or any position in the same class, of a person who was incapacitated for performance of duty in the position at the time of a prior reinstatement to another position. The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or

other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

7. Government Code section 21193 provides in part:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position. However, in that case, acceptance of any other position shall immediately terminate any right to reinstatement. A recipient who is

> found to continue to be incapacitated for duty in his or her former position and class, but not incapacitated for duty in another position for which he or she has applied for reinstatement and who accepts employment in the other position, shall upon subsequent discontinuance of incapacity for service in his or her former position or a position in the same class, as determined by the board under Section 21192, be reinstated at his or her option to that position. . . .

Appellate Authority

8. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his customary duties, even though doing so may be difficult or painful, the employee is not incapacitated and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854.) Further, respondent must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Id.* at 863.)

9. Retirement benefits and reinstatement rights are fundamental vested rights. (*California Department of Justice v. Board of Administration of California Public Employees' Retirement System and Angelita Resendez,* 242 Cal.App.4th 133, 138.) A disability retirement is considered a temporary separation from state service. (Gov. Code § 19143; Cal. Code Regs., tit. 2, section 446.) As a temporary separation from state service, disability retirement does not result in the loss of permanent civil service

status. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes*, December 15, 1999, CalPERS Precedential Decision 99-03, at p. 10.) A state civil service member is therefore entitled to reinstatement once the disability ends. (Gov. Code § 21193; *Resendez, supra*, 242 Cal.App.4th, at p. 142.) An employer is also prohibited from placing any conditions upon the employee's return to work. (*Resendez, supra*, 242 Cal.App.4th, at p. 142.)

Evaluation

10. A public employee has a fundamental vested right to a disability pension if he or she is, in fact, disabled. (*Beckley v. Bd. of Administration* (2013) 222 Cal.App.4th 691, 697, citing *Quintana v. Bd. of Administration* (1976) 54 Cal.App.3d 1018, 1023.) Government Code section 20026 defines disability as "disability of permanent or extended and uncertain duration . . . on the basis of competent medical opinion." The courts have typically relied on medical expert opinion in determining whether a respondent should be granted disability retirement. (See, e.g., *Hosford, supra,* 77Cal.App.3d at p. 864; *Haywood v. American River Fire Protection District* (1998) 61 Cal.App.4th, 1292,1299.) A respondent's opinion of his or her physical condition does not constitute competent medical evidence within the meaning of Government Code section 20026.

In this case, CalPERS had the burden of proving the respondent was no longer substantially incapacitated from performing the usual and customary duties of a psychiatric technician. Dr. Moseley persuasively testified that his physical examination and review of medical records as of August 19, 2020, showed that respondent was not substantially incapacitated to perform his usual duties of a psychiatric technician based on a urological (groin) condition. Dr. Moseley credibly testified that his physical examination of respondent provided no objective evidence of any urological condition

that would require treatment or that would prevent respondent from performing his duties as a psychiatric technician. Dr. Moseley credibly and persuasively testified that respondent no longer has epididymitis and had no swelling of the epididymis and had a normal genital examination. Dr. Moseley admitted that respondent suffers from erectile dysfunction and lower urinary tract irritative symptoms, but that neither of these diagnoses is related to respondent's job duties as a psychiatric technician. Dr. Moseley stated that the lower urinary tract irritative symptoms do not substantially incapacitate respondent and he had no indication of any significant symptoms of voiding dysfunction from that diagnosis. Accordingly, complainant provided competent medical evidence in the form of Dr. Moseley's testimony and expert opinion to demonstrate that respondent is no longer substantially incapacitated from performing the duties of his job as a psychiatric technician based on a urological (groin) condition.

11. Respondent provided no testimony from a physician, and only provided two documents, one of which was a general form signed by Dr. Chan stating that respondent is permanently disabled. However, that form had no substantive information regarding the underlying basis of that conclusion, and Dr. Chan did not testify to provide support for that conclusion. Additionally, the other document provided by respondent from Dr. Lui also listed a number of diagnoses, however, the underlying bases for those diagnoses were not provided and Dr. Lui did not testify at the hearing. Notably, Dr. Moseley credibly testified that based on his physical examination of respondent and review of the records, respondent had no diagnosis of epididymitis at the time of his examination, a normal genital examination, and no urological condition that required treatment.

Accordingly, the competent medical evidence established that respondent is no longer substantially incapacitated from the performance of the usual and customary duties of a psychiatric technician, and respondent is not entitled to continue his industrial disability retirement.

ORDER

Respondent Brian A. Dalhover's appeal of the determination by CalPERS that he is no longer substantially incapacitated from the performance of the usual and customary duties of a psychiatric technician with Metropolitan is denied.

DATE: December 3, 2021

Debra Nye-Perkins
Debra Nye-Perkins (Dec 3, 2021 16:14 PST)
DEBRA D. NYE-PERKINS
Administrative Law Judge
Office of Administrative Hearings