

**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:

ROBERT CUMMINGS,

and

GLENDALE COMMUNITY COLLEGE  
DISTRICT,

Respondents.

Case No. 2011-1248

OAH No. 2012061052

PROPOSED DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on September 27, 2012, in Glendale, California. The California Public Employees' Retirement System (CalPERS) was represented by Rory J. Coffey, Senior Staff Counsel. No appearance was made on behalf of Respondent Robert Cummings (Respondent).

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on September 27, 2012.

FACTUAL FINDINGS

1. Mary Lynn Fisher, Chief of the Benefits Services Division of CalPERS, filed the Statement of Issues while acting in her official capacity.
2. On August 21, 2012, a Notice of Hearing, setting forth the date, time and place of hearing, was served by mail on Respondent at his address of record.
4. Service of the Notice of Hearing conformed to the requirements of Government Code sections 11505 and 11509.
5. Respondent did not appear at the September 27, 2012 hearing. At Complainant's request, the matter proceeded as a default, pursuant to Government Code section 11520.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

October 17 20 12  
*Debra R. Kuris*

6. At the time he filed his application for retirement, Respondent was employed as a Senior Computer Lab Technician with the Glendale Community College District (District). By virtue of his employment, Respondent is a local "miscellaneous" member of CalPERS, subject to Government Code section 21150.

7. On February 22, 2011, Respondent signed and subsequently filed an application for "service pending disability retirement" (application), claiming disability on the basis of the following conditions: "job stress resulting in psychological and physiological problems," which included "abdominal pain, depression, diabetes problems exacerbated by the stress." (Exhibit 1.)

8. Effective in 2010, on a date undisclosed by the evidence, Respondent retired for service.

9(a). After review of medical reports, CalPERS determined that Respondent was not substantially incapacitated for performance of his duties as a Senior Computer Lab Technician at the time the application was filed. Therefore, Respondent's application was denied.

9(b). In a letter dated August 15, 2011, CalPERS notified Respondent of its determination. In the letter, CalPERS noted that Respondent would continue to receive his service retirement benefits.

10. In a letter dated September 21, 2011, Respondent timely appealed the denial and requested a hearing.

11. The issue on appeal is whether, on the basis of psychological, internal and orthopedic conditions, Respondent is substantially incapacitated for performance of his duties as a Senior Computer Lab Technician with the District.

12(a). The evidence presented at the hearing included two reports from Alexander Raskin, M.D., Q.M.E. (orthopedics), a report from Jane Y. Chung, M.D. (psychiatry), and a report from and testimony by Anitha Mitchell, M.D. (internal medicine).

12(b). At a June 30, 2011 examination by Dr. Raskin, Respondent, then 66 years old, complained of left elbow pain and intermittent bilateral knee pain, with diffuse numbness and tingling in his upper and lower extremities. Dr. Raskin diagnosed Respondent with: status post bilateral knee replacement surgery; diabetic neuropathy; left elbow contusion; venous insufficiency; gout; and psoriasis. Having reviewed Respondent's job description, Dr. Raskin opined that, "[f]rom an orthopedic point of view, [Respondent] can perform his regular work duties," and that he was "not substantially incapacitated for the performance of the usual duties as a senior computer lab technician for [the District]." (Exhibit 5.)

12(c). On July 15, 2011, Dr. Raskin issued a supplemental report after reviewing additional medical records. He found "no reason to alter the opinions expressed in [his] previous report." (Exhibit 6.)

12(d). On June 23, 2011, Dr. Chung examined Respondent and reviewed his medical records and job description. Dr. Chung diagnoses for Respondent included: Axis I – History of adjustment disorder with depressed mood, currently stable without diagnosis; and Axis II – Paranoid personality traits. Dr. Chung did not find any specific job duties which Respondent would be unable to perform. Dr. Chung also did not find that Respondent was substantially incapacitated for the performance of the usual duties of his position.

12(e). On June 27, 2011, Respondent was examined by Dr. Mitchell. On that date, he complained of hearing impairment, abdominal pain with mucus in his stools, constant fatigue, depression and waking up feeling bloated. He informed Dr. Mitchell that he suffered from diabetes. After examining Respondent and reviewing his medical records and job description, Dr. Mitchell diagnosed Respondent with: Type 2 diabetes mellitus; hypertension, controlled; exogenous obesity; history of obstructive sleep apnea; history of degenerative joint disease status post total knee arthroplasties x 2; coronary artery disease status post percutaneous transluminal coronary angioplasty; depression, by history; mild psoriasis; and probable irritable bowel syndrome. In her report, Dr. Mitchell opined that "there are no specific job duties that [Respondent] is unable to perform from an internal medicine perspective," and that none of his diagnoses render him unable to perform the duties of his job. Dr. Mitchell further opined that Respondent was "not presently substantially incapacitated for the performance of the usual duties" of a senior computer lab technician for [the District]." (Exhibit 7.)

12(f). Dr. Mitchell testified credibly at the administrative hearing and reiterated the opinions she stated in her June 27, 2011 report.

12(g). The collective opinions of Drs. Raskin, Chung and Mitchell established that Respondent is not substantially incapacitated for performance of his duties as a Senior Computer Lab Technician for the District based on any of his asserted conditions.

### **LEGAL CONCLUSIONS**

1. Respondent has not established that he is entitled to retirement for disability, as set forth in Factual Findings 6 through 12, and Legal Conclusions 2 through 5.

2. Government Code section 21150 provides, in pertinent part:

Any 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 . . .

///

3. Government Code section 20026, states, in pertinent part:

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

4. “Incapacitated for the performance of duty,” means the “substantial inability of the applicant to perform his usual duties,” as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) The increased risk of further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future injury are insufficient to support a finding of disability. (*Hosford, supra*, 77 Cal.App.3d 854, 862 - 863.)

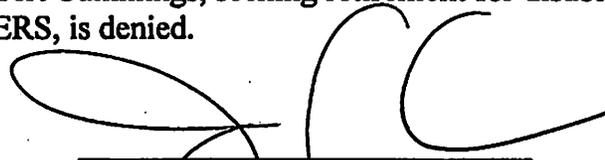
5. In this case, Respondent asserted in his application that he suffered from psychological, orthopedic and internal conditions which were the basis for his seeking disability retirement. However, the evidence did not establish that any of Respondent’s conditions rendered him substantially incapacitated for the performance of his usual duties as a Senior Computer Lab Technician for the District.

**ORDER**

**WHEREFORE, THE FOLLOWING ORDER is hereby made:**

The appeal of Respondent Robert Cummings, seeking retirement for disability as a local miscellaneous member of CalPERS, is denied.

DATED: October 15, 2012

  
\_\_\_\_\_  
JULIE CABOS-OWEN  
Administrative Law Judge  
Office of Administrative Hearings