

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for
Disability Retirement of:

ANTHONY MEADOWS,

Respondent,

and

SACRAMENTO MUNICIPAL
UTILITY DISTRICT,

Respondent.

Case No. 2011-0954

OAH No. 2012050455

PROPOSED DECISION

Administrative Law Judge Catherine B. Frink, State of California, Office of Administrative Hearings, heard this matter in Sacramento, California on October 25, 2012.

Elizabeth Yelland, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Anthony Meadows (respondent) appeared by telephone and represented himself.

Debbie Griggs, Senior Human Resource Analyst, represented the Sacramento Municipal Utility District (SMUD).

The record was closed and the matter was submitted for decision on October 25, 2012.

ISSUE

Whether respondent is permanently disabled or incapacitated from performance of his duties as a Meter Reader with SMUD on the basis of a neurological (neck) condition.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED November 15, 2012
Risa Okanun

FACTUAL FINDINGS

Procedural History

1. CalPERS, by Anthony Suine, Chief, Benefit Services Division, filed the Statement of Issues in its official capacity on October 9, 2012.
2. At the time respondent filed his application for disability retirement, he was employed by SMUD as a Meter Reader. By virtue of his employment, respondent is a local miscellaneous member of CalPERS subject to Government Code sections 21150.¹ Respondent has the minimum service credit necessary to qualify for retirement.
3. On December 16, 2009, Gary King, Chief Workforce Officer for SMUD, signed a Disability Retirement Election Application (Application) on behalf of respondent, and submitted the Application to CalPERS. Section 4 of the Application, "Disability Information," requests information from the applicant for disability retirement, including the following: "What is your specific disability, when and how did it occur?" "What are your limitations/preclusions due to your injury or disease?" "How has your injury or illness affected your ability to perform your job?" This portion of the Application was left blank. Respondent did not sign the Application.
4. CalPERS obtained or received medical reports from competent medical professionals. After review of those documents, CalPERS determined that respondent was

¹ Government Code section 21150, subdivision (a), provides in pertinent part that a member incapacitated for the performance of duty shall be retired for disability if he or she is credited with five years of state service, regardless of age. Government Code section 20048 states:

"Industrial," with respect to state industrial members, means death or disability resulting from an injury that is a direct consequence of a violent act perpetrated on his or her person by an inmate of a state prison, correctional school or facility of the Department of Corrections or the Department of the Youth Authority, or a parolee therefrom, if:

(a) The member was performing his or her duties within the prison, correctional school or facility of the Department of Corrections or the Department of the Youth Authority.

(b) The member was not within the prison, correctional school or facility of the Department of Corrections or the Department of the Youth Authority, but was acting within the scope of his or her employment and is regularly and substantially as part of his or her duties in contact with those inmates or parolees.

not permanently disabled or incapacitated from performance of his duties as a Meter Reader at the time the application for disability retirement was filed.

5. Respondent was notified of CalPERS' determination and advised of his appeal rights by a letter dated December 30, 2010 (denial letter). The denial letter stated, in pertinent part:

This letter is in response to your employer's application for disability retirement.

All medical evidence submitted was reviewed before a final decision was rendered. Our review included the reports prepared by Steven McIntire, M.D., Vinay M. Reddy, M.D., and Floyd D. Fortuin, M.D. Based on the evidence in those reports it is our determination that your neurological (neck) condition is not disabling. As a result, we have concluded that you are not substantially incapacitated from the performance of your job duties as a Meter Reader with the Sacramento Municipal Utility District. Therefore, the application for disability retirement is denied.

6. Respondent responded to the denial letter by submitting a timeline and chronology of events which is undated, but was received by CalPERS on January 31, 2011 (chronology). Respondent requested that CalPERS re-evaluate his case. Thereafter, respondent submitted a letter which was received by CalPERS on March 18, 2011 and was accepted as a timely appeal of the denial of his disability retirement Application. The letter stated, in part: "My having been in an explosion in an inclosure [*sic*] where I fell on to my back and injured a disk, and have had a loss of hearing due to a constant ringing in my ears should be sufficient to qualify for payment [of] benefits."

7. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

SMUD Employment and Job Duties

8. The Job Specification for Meter Reader (Job Specification) states that, "[u]nder general supervision, [the employee] reads electric meters, records electricity consumption, using a hand-held computer, and detects and reports unusual conditions....Incumbents are assigned to a different route each workday and travel the route either on foot or in a District vehicle." The essential functions of the position include the following:

- 1) Reads an electric meter for a variety of accounts, including those for residential and commercial customers.

- 2) Arranges and organizes meter reading work with other meter readers.
- 3) Identifies and resolves meter access problems.
- 4) Completes daily route assignments accurately and in a timely manner, operates District vehicles.
- 5) Contacts customers in person to request permission to read meters, open gates, and/or enter facility/property and request that animals be restrained.
- 6) Refers customer questions and complaints to Customer Services.
- 7) Follows all pertinent District and department rules, policies, and procedures related to meter reading, meter access, customer contact, route completion, and safety.
- 8) Verifies account data for completeness and accuracy, observes and reports hazardous conditions related to meter connections, meter housings, exterior writing, etc.
- 9) Checks service connections, notes and reports to supervisor(s) any deviations or problems with service connections and metering, including tampering, theft mechanisms, etc.
- 10) Updates and revises routes, assists with the re-routing and/or re-timing of various routes, updates and revises route maps.

9. On December 17, 2009, SMUD Human Resources Analyst Debbie Griggs prepared a list of the physical requirements of the position of Meter Reader (Physical Requirements), which was submitted to CalPERS. Respondent subsequently signed a copy of the Physical Requirements on June 21, 2010. The daily physical requirements include the following:

Never: running; using a mouse; working with heavy equipment; working with bio-hazards.

Occasionally (up to three hours): sitting; standing; crawling; climbing; bending (waist); reaching (above shoulder); power grasping; lifting/carrying (100+ lbs); driving; exposure to excessive noise; exposure to dust, gas, fumes, or chemicals; working at heights; operation of foot controls or repetitive movement.

Frequently (three to six hours): walking; kneeling; squatting; bending (neck); twisting (neck); twisting (waist); reaching (above shoulder); reaching (below shoulder); reaching (below shoulder); pushing and pulling; fine manipulation; simple grasping; repetitive use of hands; keyboard use; exposure to

extreme temperature, humidity, wetness; use of special visual or auditory protective equipment.

Constantly (over six hours): walking on uneven ground.

10. Carl Whitley is a SMUD safety and loss prevention specialist. At all times relevant to this matter, he was a meter reader supervisor, and was respondent's immediate supervisor. According to Mr. Whitley, respondent's typical work hours were from 7:00 a.m. to 3:30 p.m., Monday through Friday. Respondent typically drove to the start of his route, and then would walk or ride a bicycle from house to house or business to business. On other occasions, respondent drove to each location. Respondent plugged each meter into a hand-held device which Mr. Whitley described as being the size of a brick, and weighing about three pounds. The device stored the data for each meter. After completing his assigned route, respondent returned to the office and plugged the hand-held device into the main computer to upload the data. Respondent then completed related paperwork until the end of his shift.

Respondent's Injury

11. On March 5, 2008, respondent underwent a cervical fusion because of a nonwork-related automobile accident. He was released and returned to full duty with no restrictions around the end of April 2008. On June 11, 2008, respondent noted a vandalized meter cabinet at a business that was on his inspection route. He was verifying the meter number when a gust of wind blew a panel on the meter cabinet closed and the panel exploded. Respondent was thrown back and fell on his "backside." Respondent stood up and felt an immediate tingling in his right hand. Respondent called his supervisor. Mr. Whitley arrived at the scene approximately 20 minutes after the incident. After discussing the incident with respondent, Mr. Whitley understood that there was an electricity "arc" which startled respondent, but did not make contact with him. Mr. Whitley sent respondent to SMUD medical services, located at SMUD's 59th Street facility, for evaluation.

12. Respondent was released to full duty later in the day on June 11, 2008. However, Mr. Whitley testified that respondent did not resume his duties as a meter reader after that date.

Neurological Evaluation

13. Respondent was evaluated by Floyd David Fortuin, M.D. on November 19, 2010. Dr. Fortuin is a neurologist. He received his medical degree from Cornell University Medical School in 1963. He completed a residency in neurology and medicine from the University of Washington in 1967, and is a Diplomate of the American Board of Psychiatry and Neurology. He has a solo practice in San Francisco, in which he engages in forensic evaluations half-time and treats patients half-time. Dr. Fortuin prepared an independent medical examination report dated November 18, 2010, in which he summarized his neurological findings. Dr. Fortuin testified at the administrative hearing.

14. Dr. Fortuin obtained respondent's medical history and conducted a physical examination. He also reviewed respondent's medical records and his job duty statement. Respondent's complaints at the time of the examination were a constant tingling in the fingers of both hands, aggravated by hand use, with right grip weaker than left; ringing in both ears, high and mid-pitched, with impaired hearing; and dizziness/lightheadedness with activity. Respondent reported feeling disconnected, and falling on occasion. He stated that he has been close to unconsciousness on several occasions but had not actually lost consciousness. Sleep-walking had been a problem, but had stopped as of the date of this examination after a reduction in his medication.

Respondent also reported constant neck stiffness, "usually 10/10,"² which was aggravated by sitting, but improved when he moved his neck. He complained of "a little mid back pain that is localized," and constant low back pain that is aggravated by activity. Respondent described the pain as "fire-like" in the midline and on the right side, with a 10/10 intensity level. He also complained of numbness and tingling in both feet, particularly on the top. Respondent reported that his sleep was poor due to pain, and that he felt depressed.

At the time of the examination, respondent was taking Amiodipine (for high blood pressure and angina), Methocarbamol (a muscle relaxant), Omeprazole (to treat heartburn), Simvastatin (to treat high cholesterol), Amitriptyline (an antidepressant), Gabapentin (anti-seizure medication, also used to treat neuralgia), Temazepam (anti-insomnia medication), and Oxycodone (narcotic pain medication) (5 mg. four times daily).

15. In describing his past medical history, respondent reported that he had been in three major traffic accidents: a "T-bone" accident on April 10, 2006, resulting in neck and back pain; a rear-end motorcycle accident on June 19, 2006, which aggravated his pain; and an incident on November 11, 2007, in which respondent rear-ended a truck, which further increased his pain. He underwent an anterior cervical fusion on March 8, 2008, to address his chronic neck pain. Respondent reported excellent results from this operation, which resolved numbness, tingling and severe pain radiating down his right arm. He also underwent a right forearm osteotomy in 2006 for arm pain; right carpal tunnel surgery on November 9, 2007; and trigger thumb repair in 2007.

16. Respondent described the incident on June 11, 2008, while working as a meter reader for SMUD. He stated that the meter unexpectedly exploded. He recalled a "flash," and reported that he was thrown backwards. The incident resulted in tingling hands, and neck and low back pain. A cervical MRI performed thereafter showed no NRE (nerve root enhancement) defects subsequent to respondent's neck surgery (i.e., no problem attributable to the incident of June 11, 2008).

17. Dr. Fortuin performed a physical examination, and described respondent as "muscular and well built." Examination of the neck and back showed posterior muscular

² "10/10" means a pain level of 10 on a 1 to 10 scale, with 10 being the most severe.

tenderness, without trigger points, and with no spasm. There was moderate cervical restriction of ability, and normal range of motion (ROM) of the shoulders. The head was nontender, with full cervical and shoulder ROM. The low back had intact forward flexion and 90 degrees straight leg raising.

The cranial nerve examination was normal, except that there was “decreased hearing in both ears to finger rubbing.”

Dr. Fortuin noted a positive Tinel’s sign at both wrists.

Respondent’s lumbar mobility was “excellent, with palms touching the floor and intact lateral hyperextension.” His gait was normal, and Romberg was negative. Respondent’s coordination was also normal. Motor testing showed intact strength without pronator drift and no atrophy or fasciculations. Reflexes were “1-2/4 symmetrically,” without thenar weakness or atrophy. Sensation was intact to sharp touch, vibration, temperature and position sense.

18. Dr. Fortuin examined respondent’s medical records, and summarized relevant records in his report. On March 8, 2008, Dr. Gary Schneiderman performed an anterior cervical fusion at C-5-6-7, to relieve chronic neck pain, with arm radiation, numbness, and tingling. Dr. Schneiderman noted that, preoperatively, there was severe degenerative disease at those levels.

A Doctor’s First Report of Injury, dated June 14, 2008, stated that an examination was performed after respondent “was involved in an incident when a meter popped and he pulled away suddenly. He then felt some tingling in his right hand. He denied any feeling of electrical current pass through his body.” An EKG was normal.

A cervical MRI performed on July 21, 2008, showed postoperative changes at C5-6 and C6-7, mild canal stenosis at these levels, and mild right foraminal narrowing of C2-3 and C-4-5. These findings were unchanged from a previous MRI taken on March 5, 2008.

Dr. Mann evaluated respondent in connection with his Workers’ Compensation claim. In a report dated September 24, 2008, Dr Mann noted that respondent had sustained a work injury on June 11, 2008. The report mentioned neck pain, but did not refer to any low back pain. The examination by Dr. Mann showed cervical tenderness and mild loss of ROM. An EMB of both upper extremities by Dr. Kindal was normal. Nerve conduction studies showed mild prolongation of the right median sensory latency.

Records from Kaiser Spine and Nerve Center show treatment by Dr. Reddy in 2009 and 2010 for chronic neck pain with findings of tenderness and decreased ROM of 20 to 40 percent. There were no low back complaints or abnormal findings, but there were reports of intermittent upper extremity parasthesia (tingling).

A cervical CT scan performed on January 6, 2009, showed the interbody fusions at C5-6 and C6-7, and some bilateral neural foraminal narrowing.

Dr. Reddy performed a cervical epidural injection on April 19, 2009. He examined respondent for neck pain and bilateral arm numbness on June 8, 2009. Respondent reported that the pain was "6/10 and aching." Dr. Reddy's note indicated that cervical fusion surgery had been performed by Dr. Schneiderman on March 8, 2008. The exam showed neck tenderness, and Dr. Reddy's assessment was "exacerbation of chronic neck pain."

A lumbar MRI was performed on October 3, 2010, which showed multilevel disc bulging at L3-4, L4-5, and L5-S1. There was facet arthropathy, with osteophytes producing severe bilateral foraminal narrowing at L4-5 and L5-S1. There was minimal spinal stenosis at L3-4 and L4-5.

Dr. Fortuin reviewed medical records of Steven McIntire, M.D., a neurologist, dated June 17, 2009, and September 15, 2009. Respondent reported to Dr. McIntire that he approached a meter that exploded, causing him to jump backward. "His rapid withdrawal resulted in some tingling in the right hand and forearm." Neurological testing was normal. The examination showed no spasm and only slight tenderness in the right upper cervical muscles. There was mild loss of ROM. Dr. McIntire reviewed the medical file and noted a carpal tunnel surgery and right Guyon's canal release on November 9, 2007.

19. Dr. Fortuin made the following diagnoses:

1. 6/11/2008 work injury producing a cervical strain.
2. Cervical spondylosis, status post anterior cervical fusion, C5-6-7 on 3/2008
3. Chronic low back pain secondary to lumbar spondylosis with facet arthropathy.
4. Bilateral hand tingling secondary to bilateral carpal tunnel syndrome, status post right carpal tunnel release in 2007.

20. Dr. Fortuin described respondent as "a chronic pain person with neck and low back pain." MRI findings confirm cervical and lumbar spondylosis (degenerative osteoarthritis). Dr. Fortuin opined that respondent's complaints of bilateral hand tingling were most likely related to carpal tunnel syndrome, because he found "no hard signs of radiculopathy" to indicate that the tingling was a manifestation of respondent's cervical spondylosis.

Dr. Fortuin found that, after the incident on June 11, 2008, respondent "developed neck pain consistent with a cervical strain. There was no injury to his fusion and there was

no increase in his pre-existing cervical spondylosis. The cervical strain would be a reversible self-healing injury with an excellent prognosis.” Dr. Fortuin concluded that respondent had long-standing chronic neck pain which he did not feel was attributable to the June 11, 2008 work incident. Dr. Fortuin also concluded that the incident did not result in any acute low back pain, and that respondent’s current complaints of low back pain were unrelated to the work incident. Nor was there any evidence of injury to respondent’s hands or aggravation of his carpal tunnel as a result of the June 11, 2008 work incident.

21. Dr. Fortuin concluded that there were no specific job duties that respondent was unable to perform because of a physical or mental condition. His report stated, in part:

He is a chronic pain patient and requires some medication. He, himself, indicates he is able to work if he is able to take low-dose Norco. There are no objective findings of any disability and he shows no neurological impairment.

22. In Dr. Fortuin’s opinion, respondent is not substantially incapacitated for the performance of his usual duties as a meter reader.

23. During the hearing, Dr. Fortuin reiterated the opinions contained in his report. He noted that, while he confirmed respondent’s claimed loss of hearing, it was a “subjective test,” and the amount of hearing loss was not disabling for respondent’s work. He also noted that respondent’s gait and coordination were “perfect,” and that his motor testing demonstrated that respondent’s muscles were “big, strong, [and] normal.” He found respondent’s hand strength to be normal, and there was no evidence to indicate a pinched spinal cord or pinched nerve, except possibly in the hands (i.e., carpal tunnel).

With respect to respondent’s use of narcotic medication to control pain, Dr. Fortuin characterized Norco as a “first level, weak narcotic.” He stated that, when initially prescribed, Norco can produce sleepiness, but that when taken regularly, there are no significant side effects. He also noted that respondent was taking Neurontin, which he characterized as a weak nerve stabilizer, usually without side effects.

Dr. Fortuin did not believe that the medications prescribed to respondent would preclude his ability to drive a SMUD vehicle. However, if SMUD were to disallow respondent to drive while taking a narcotic medication, Dr. Fortuin concluded that respondent still was not disabled for the performance of his duties as a meter reader. He stated that, while Norco makes respondent more comfortable, it was not established that his pain level would be disabling if he were to stop taking narcotic medication. He noted that respondent had taken Norco on the day that Dr. Fortuin evaluated him, he reported his pain on that date as “10/10,” which is the highest level of pain possible, and yet he was able to perform all of the physical tests administered by Dr. Fortuin in a manner that showed he was capable of performing the duties of a meter reader. He reiterated his belief that respondent’s reported sleepwalking and blackouts had been resolved by adjustments to his medications.

He stated that, if these conditions continued, he would consider them as temporarily disabling, so long as the cause was treatable.

SMUD's Evidence

24. Ms. Griggs reviewed documents from respondent's Workers' Compensation file in preparation for hearing, as it pertained to respondent's June 2008 work-related injury. According to Ms. Griggs, respondent was placed on light duty, with restrictions, on an exact date not established by the evidence. SMUD has a 90-day "light duty program," during which SMUD seeks to identify an alternate work assignment that an employee can perform with restrictions. Respondent did work for 90 days, but did not return to his meter reader position. The nature of his alternate assignment was not established by the evidence.

Respondent's light duty assignment "expired" on September 28, 2008. At that time, respondent was "sent home" until he obtained a release to return to work. Respondent obtained a work release that returned him to full duty, with a restriction of no lifting over 40 pounds. Ms. Griggs testified that lifting in excess of 40 pounds was not one of the job requirements for a meter reader, so respondent should have been able to return to full duty. However, the Physical Requirements which Ms. Griggs prepared and submitted to CalPERS in connection with the Application stated that lifting more than 100 pounds was "occasionally (up to 3 hours)" required for the position of meter reader (Finding 9). Mr. Whitley's testimony confirmed that respondent did not return to his meter reader job after June 11, 2008 (Finding 12).

25. According to SMUD's records, as reviewed by Ms. Griggs, respondent was taken off work on April 8, 2009, due to issues pertaining to his ability to drive, which was an essential function of his job. Respondent was reportedly experiencing blackouts, and SMUD attempted to determine whether this problem was related to his earlier workers' compensation injury and medications respondent was taking.

26. Ms. Griggs testified that, when an employee is unable to return to work after six months, it is SMUD's practice to have its Human Resources Department apply for disability retirement on the employee's behalf. Hence, SMUD filed the Application on December 16, 2009.

27. Neither Ms. Griggs nor Mr. Whitley was able to state whether or not SMUD would preclude respondent from returning to his usual duties as a meter reader if he needed to take Norco or another narcotic medication for pain. According to Mr. Whitley, an employee is required to disclose if he or she is on medication, and if there is a concern about the employee's ability to drive, the employee is referred for evaluation to SMUD's medical staff. A meter reader is required to possess a valid driver's license in order to operate a SMUD vehicle and drive to assigned routes.

Respondent's Evidence

28. According to respondent's January 2011 statement, after the accident on June 11, 2008, he was evaluated by his surgeon to determine whether his cervical fusion was still intact. The surgeon advised him that the spinal cord was "compressed, but not pinched." Further surgery was not deemed to be required. His pain level increased, and he experienced what felt like a "leg cramp," which respondent claimed was later diagnosed as sciatica. Respondent also developed tinnitus, a constant ringing of the ears, which has not dissipated. Respondent wrote that most of the medical care he has received has focused on his neck, which is "stiff and achy at best."

29. After the June 11, 2008 incident, respondent was prescribed Norco for pain. According to respondent, "[t]he prescribed medication began to have some adverse reactions." On a date not established by the evidence, respondent lost control while riding a motorcycle and ran off the road. Days later, he was walking around his home and "could not stop myself from walking into a wall." He began to sleepwalk, and claimed that he has "driven while asleep, and cooked and caught fire to the kitchen while totally unaware." The California Department of Motor Vehicles suspended respondent's driver's license (CDL) from November 2009 to April 2010.

30. After respondent's wife lost her job, and his family lost their health benefits, they moved to Hawaii. He continued to experience episodes of sleepwalking, and the stress of his condition has put a strain on his marriage. He is continuing to experience pain in his hands, shoulders, and neck. As of January 2011, his medications had been changed, and he was taking Oxycodone and Amitriptyline instead of Norco. His physician in Hawaii advised him that "it is illegal to drive while taking Oxycodone, [and he] may be asked to surrender [his] driver's license, again."

31. At hearing, respondent claimed that he was not able to return to meter reading because of his use of narcotics and possible blackouts, and that SMUD "did not want him driving." He did not feel his blackouts could be eliminated by simply adjusting his medications.

32. Respondent provided no medical records or reports to corroborate his testimony, nor did he provide any evidence to support his claim that SMUD would not allow him to return to work because of safety concerns about his driving. While respondent's CDL was suspended at the time the Application was filed, his driving privileges were restored in April 2010 (Finding 29).

Discussion

33. Respondent has the burden of proving entitlement to disability retirement. It was incumbent upon him to present competent medical evidence and opinion that he is disabled and incapacitated from performance of his duties as a Meter Reader.

The medical opinion of Dr. Fortuin is the only evidence in the record relating to respondent's claimed disability. Dr. Fortuin's medical examination and report does not support respondent's application for disability retirement, opining that he is not substantially incapacitated for the performance of his usual duties. Respondent has not otherwise presented persuasive medical evidence to establish that he has a neurological disability that incapacitated him from performing his usual duties at the time the application for disability retirement was filed in 2009.

LEGAL CONCLUSIONS

Applicable Statutes

1. Government Code section 20026 provides in pertinent part that:

"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.
2. Government Code section 21156 provided in pertinent part that:

If the medical examination and other available information show to the satisfaction of the board ... that the member is incapacitated physically or mentally for the performance of his or her duties in the state service and is eligible to retire for disability, the board shall immediately retire him or her for disability....

Burden of Proof and Legal Standards for Determining Disability

3. Respondent has the burden of proof to establish by a preponderance of evidence that he is "incapacitated for the performance of duty,"³ which courts have

³ Although no court construing CalPERS law has ruled on this issue, courts applying the County Employees' Retirement Law have held that the applicant has the burden of proof. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691.) CalPERS may rely on decisions affecting other pension plans when the laws are similar. (*Bowman v. Board of Pension Commissioners for the City of Los Angeles* (1984) 155 Cal.App.3d 937, 947.) In this case, Government Code section 31724 (County Employees' Retirement Law) is similar to Government Code section 21151 (California Public Employees' Retirement Law), and the rule concerning the burden of proof is therefore applicable. Furthermore, Evidence Code section 664 creates the general presumption that a public agency has performed its official duty. Here, CalPERS has fulfilled its duty to determine respondent's eligibility for disability retirement, and the burden falls on

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 ones 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. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability retirement. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

Conclusion Re: Eligibility for Disability Retirement

4. As set forth in Findings 13-23 and 33, the evidence established that respondent is not permanently disabled or incapacitated from performance of his duties as a Meter Reader with SMUD on the basis of a neurological (neck) condition. Respondent failed to sustain his burden of providing competent medical evidence to establish that he is permanently incapacitated for the performance of duty.

ORDER

The application of Anthony Meadows for disability retirement benefits is **DENIED**.

Dated: November 13, 2012



CATHERINE B. FRINK
Administrative Law Judge
Office of Administrative Hearings

respondent to rebut the presumption of Evidence Code section 664 by proving incapacitating disability.