

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:

ERIC L. REASON,

Respondent,

and

MARIN COUNTY SCHOOLS,

Respondent.

Case No. 2011-0598

OAH No. 2012060375

PROPOSED DECISION

Administrative Law Judge Hannah H. Rose, State of California, Office of Administrative Hearings, heard this matter on October 11, 2012, and December 13, 2012, in Oakland, California.

Patricia B. Miles, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Eric L. Reason (respondent) was present and represented himself.

There was no appearance by or on behalf of the Marin County Schools.¹

The matter was submitted for decision on December 13, 2012.

¹ No appearance by or on behalf of the Marin County Schools was made at the hearing, despite the fact that the personnel officer for the schools was served with the Notice of Hearing and Notice of Continued Hearing. Therefore the matter proceeded as a default against the Marin County Schools, pursuant to Government Code section 11520.

ISSUE

Whether respondent is permanently disabled or incapacitated from performance of his usual and customary duties as a Custodian II with the Marin County Schools (Novato Unified School District) on the basis of orthopedic (neck, back, and shoulder) conditions.

FACTUAL FINDINGS

Respondent's Employment History

1. Respondent has worked as a school custodian for the Marin County Schools (MCS), in the Novato Unified School District, for 24 years. He is currently 52 years old.
2. Respondent also owned a private custodial services business starting in 1999 or 2000, and through which he contracted with private and charter schools to provide custodial services. He employed and supervised others in this business. Respondent terminated the business after his injury in October 2009 (Factual Finding 8).

Respondent's Disability Retirement Application

3. On July 9, 2010, CalPERS received a Disability Retirement Election Application from respondent. On his application, in response to the questions, "What is your specific disability; when and how did it occur," respondent answered: "Back, neck, and shoulder, right side, muscle spasms in back, upper. Pain, shoulder area, numbness from upper right arm to fingers, excessive lifting, repetitive motion. 10/13/09 – 10/14/08." Respondent described his limitations and preclusions as follows: "Limitations on weight I am able to lift safely. Cannot sustain repetitive motion, i.e., mopping, sweeping, weakened grasping, reaching, wiping, some movement." In response to the question about how his injury affected his ability to perform his job, respondent stated that he could not lift the required weight, that he was unable to use adequate mopping technique, that he was unable to clean according to required standards, and that he had numbness in his arm and hand.

4. By letter dated March 16, 2011, the Benefit Services Division of CalPERS notified respondent that, based upon the medical reports it had received, it had determined that respondent was not substantially incapacitated from performing his duties as a Custodian II with MCS. Respondent appealed from this determination.

Duties of a Custodian II

5. A Custodian II is responsible for maintaining and cleaning school facilities, and delivering and providing equipment and furniture arrangements for meetings, classroom activities and events. The daily maintenance of the school facility required respondent to

collect and carry trash in bags weighing over 50 pounds to a dumpster, where he lifted the bags over his head to deposit them into the dumpster.

6. During an ordinary workday, a Custodian II may be required to: (a) stand continuously for up to six hours; (b) run, kneel, squat, bend, twist, and push and pull light and heavy objects frequently and walk from three to six hours; (c) lift from 11 to 25 pounds occasionally for up to three hours; (d) lift from 25 to 50 pounds frequently for between three hour and six hours; (e) lift from 50 to 100 pounds occasionally for up to three hours; (f) reach overhead occasionally up to three hours; and (g) work with heavy equipment occasionally up to three hours.

7. In 2009, in addition to his general maintenance and cleaning responsibilities, respondent, on a daily basis, set up and broke down heavy wooden tables for the student lunch period, and collected and removed the lunchtime trash. He worked alone in these tasks. He was assigned to one site, at which there were two schools. Although respondent was able to roll the lunch tables into place, he had to lift them over curbs and into position by himself. Respondent found the lunch waste particularly heavy because of the liquid it contained, and in 2009 he devised a system for the students to dump their leftover milk into five gallon buckets that he carried and disposed of separately, in order to reduce the weight of the trash bags and cans. The lunchtime trash was still heavy, and respondent cut his own lunch short in order to be able to empty trash more frequently so that the loads were not so heavy. Respondent estimated that they weighed up to 100 pounds. He carried and lifted the bags over his head to dispose into the dumpster. Respondent also regularly lifted and carried deliveries and supplies in boxes weighing more than 50 pounds.

Respondent's Injuries

8. In October 2008², respondent strained his upper back while lifting a waste can weighing 100 pounds or more above shoulder height. He was off work for between two weeks and one month, and thereafter returned to work full duty sometime in November 2008.

On October 13, 2009, respondent again injured his upper back when he threw a heavy trash bag into a high dumpster. Following this injury, he began a course of conservative treatment that included a diagnostic medical workup, MRIs of his neck and right shoulder, chiropractic treatment, physical therapy, and medication. Respondent did not return to work after the 2009 injury. He testified that he is in constant pain on his right side, involving his arm, hand, shoulder, neck and back, and that he cannot do the job of a school custodian. He manages his pain with prescribed pain medications and epidural injections. His pain is significantly reduced for a period of months after an epidural injection. Before he began to get epidural injections, respondent was depressed and suicidal, as oral pain

² The various medical reports reflect the date of this injury as either October 13, 2008, October 14, 2008, or October 17, 2008. It is undisputed that the incident described occurred in October 2008, and it will therefore be referred to without specific date.

medication alone was not effective. Although there is a possibility that future surgery on respondent's shoulder and/or neck might be medically indicated, at the present time, his doctor recommends that he continue to manage pain with medication and injections.

9. Respondent also had three different motor vehicle accidents in 2004, 2005, and 2006, which also caused neck, and upper and lower back difficulties. The work injury of October 13, 2009 aggravated respondent's existing neck condition.

10. Respondent's last day on the payroll for the Novato Unified School District, after having exhausted available paid leave, was March 16, 2010. He has not returned to work since that time.

Respondent's Doctors' Reports³

11. On March 5, 2009, respondent was evaluated by board certified orthopedic surgeon John Santaniello, M.D., as a Qualified Medical Evaluator (QME), for respondent's workers' compensation claim relating to his shoulder, neck, and back injury of October 2008. Dr. Santaniello prepared a QME report. Dr. Santaniello's report described the October 2008 incident and respondent's follow-up x-rays, MRI, EMG, nerve conduction study, and physical therapy. Respondent had already returned to work full time at the time of Dr. Santaniello's examination. In his report, Dr. Santaniello diagnosed respondent with trapezius and rhomboid muscle strain on the right, degenerative disc disease, degenerative arthritis of the cervical spine, and cubital tunnel syndrome of the right elbow. Although he had not reviewed respondent's job description, Dr. Santaniello opined that, from an ergonomic standpoint, "it does not make any sense" that anyone would have to lift 100 pounds to shoulder level and above. He concluded, however, that respondent "can continue to do his work without formal restriction."

12. On April 10, 2009, respondent was notified by the Novato School District that, upon consideration of Dr. Santaniello's report and ergonomic opinion, there was no modified work available for him with the district. However, respondent had already returned to work full time, and he continued working as a school custodian without accommodation by the district until he was injured again on October 13, 2009.

13. Following his October 13, 2009 injury, respondent was initially treated at Kaiser Permanente Occupational Medicine Department, by Susan Lambert, M.D. On April 6, 2010, Dr. Lambert prepared a two-page form entitled CalPERS Physician's Report on

³ Respondent did not call any doctors or experts as witnesses. He did, however, offer into evidence several doctors' reports (Factual Findings 11 through 17). These reports were admitted as administrative hearsay pursuant to Government Code section 11513, subdivision (d). To the extent these reports corroborated respondent's testimony or were relied upon by Joseph McCoy, M.D., CalPERS's expert, they are used to supplement or explain other evidence.

Disability, in which she diagnosed respondent with thoracic outlet syndrome, and dysfunction of the cervico thoracic region. She imposed the following work restrictions: no pushing/pulling or lifting/carrying anything over 25 pounds; no ladder climbing; no scaffolding; no reaching above shoulder with right arm. Dr. Lambert checked the box indicating that respondent's incapacity was permanent. The report did not contain any details of either an examination of respondent, or review of other medical reports or diagnostic studies.

14. Perry J. Carpenter, D.C., conducted a QME examination of respondent on April 6, 2010. Then, following additional diagnostic studies, he conducted another examination on August 17, 2020. He issued a report on September 7, 2010, regarding respondent's workers' compensation claim relating to the October 13, 2009 incident. Dr. Carpenter is a Fellow of the Academy of Chiropractic Orthopedics. Dr. Carpenter noted that even though respondent described most of his arm and radiating pain on his right side, and insisted that his right forearm had shrunk, at the time of his examination, there was no apparent atrophy of respondent's right forearm. Moreover, respondent's right upper arm circumference was even greater than the left arm. Dr. Carpenter concluded that the October 13, 2009 injury was a permanent aggravation of pre-existing conditions, and that it was therefore a new injury for workers' compensation purposes. He diagnosed respondent with cervical spine sprain/strain and peripheral nerve injury that would require future medical care for medication and chiropractic or physical therapy for treatment. He concluded that respondent was temporarily totally disabled and could not return to his pre-injury occupation.

15. Respondent submitted a number of treatment reports from Gary Martinovsky, M.D., a pain management specialist. Respondent considered Dr. Martinovsky his primary care physician. In his monthly treatment summary reports from December 2010 through August 2012, Dr. Martinovsky described respondent's complaints of severe pain in his neck and right shoulder, and associated weakness of the right upper extremity. Dr. Martinovsky diagnosed respondent with: 1. Displacement of cervical intervertebral disc without myelopathy; 2. Rotator cuff syndrome of shoulder and allied disorders; and 3. Cervicalgia. Respondent was treated with prescription pain, anti-inflammatory, stomach, and sleep medications between December 2010 and June 2011. In May 2011, respondent had an MRI, which showed the following:

1. C7-T1: On top of a broad-based 2mm disc osteophyte complex is a 4-5mm right paracentral disc protrusion which is obliterating the right lateral recess and deforming the right side of the cord. There is also moderate to significant right-sided uncovertebral joint hypertrophy causing severe right-sided foraminal narrowing and nerve root impingement. There is also moderate left-sided foraminal narrowing due to prominence of the uncovertebral joint.

2. C6-C7; There is minimal broad based disc osteophyte complex as well as prominence of the uncovertebral joints bilaterally causing mild right-sided and moderate left-sided foraminal narrowing.

3. C5-C6: There is minimal broad based disc osteophyte complex flattening the ventral surface of the cord with no significant spinal canal stenosis. There is also mild prominence of the right uncovertebral joint causing mild right-sided foraminal narrowing.

4. C3-C4: There is a 1 to 2 mm broad-based disc osteophyte complex with a more central focal component which is flattening the ventral surface of the cord. There is no spinal canal stenosis or foraminal narrowing.

Based on these MRI findings, Dr. Martinovsky requested authorization for respondent to receive a cervical epidural steroid injection at the C7-T1 level. Sometime in July or August 2011, respondent received the injection. In his monthly reports, Dr. Martinovsky stated that respondent reported a 50 percent reduction in pain, improved overall function, reduced reliance on pain medications and improved quality of sleep for almost 10 months after the injection. Respondent received another epidural injection on June 26, 2012. In his report of August 30, 2012, Dr. Martinovsky reported that as a result of the June 2012 injection, respondent experienced a 75 percent reduction in pain, improved overall function, reduced reliance on pain medications and improved quality of sleep.

In a one-paragraph letter to Mary Fisher, Benefits Services Division of CalPERS, dated May 4, 2011, Dr. Martinovsky opined that respondent has a "disability condition affecting his right shoulder, neck, and low back"⁴ and that he does not believe that respondent is capable of returning to his work as a custodian with MCS. On December 12, 2012, Dr. Martinovsky wrote a two-sentence letter addressed to "To Whom It May Concern" in which he stated: "The patient listed above [respondent] had an appointment on December 11, 2012, in my opinion Mr. Reason is permanently totally disabled." Dr. Martinovsky's reports are very short and do not include sufficient objective information to explain or support his conclusions.

16. Orthopedic surgeon James P. O'Hara, M.D., conducted two examinations as an Agreed Medical Evaluator (AME) of respondent on January 13, 2011, and on April 26, 2012, in relation to respondent's workers' compensation claim. After the first examination, Dr. O'Hara diagnosed respondent with the following: 1. Right brachial plexopathy consistent with thoracic outlet syndrome; 2. Degenerative cervical disc disease; 3. Possible right rotator cuff impingement syndrome; 4. Emotional distress compatible with chronic depression. He concluded that respondent was, at the time, temporarily totally disabled, but that his condition was not permanent and stationary. He requested a chest x-ray, an MRI, and a psychiatric evaluation for respondent's depression.

⁴ This is the first reference in any of his reports or letters to respondent's *low back* condition. This is not listed as one of the orthopedic conditions on which respondent based his application for disability retirement.

At the time of Dr. O'Hara's second AME evaluation in April 2012, respondent had received steroid injections in his neck, which he reported had helped "to a considerable degree." Respondent also reported that he had seen a psychologist, had an MRI, and also had been advised to have surgery to his right shoulder. In his examination of respondent's shoulders, Dr. O'Hara reported that it was impossible to tell whether respondent's passive range of motion is better than his active range because respondent had "guarding" in his movements. Dr. O'Hara also reported, noting that respondent is right-handed, that despite his limited range of motion and guarding, respondent's biceps and forearm circumference measurements were both larger for his right arm.

Following his second examination, Dr. O'Hara diagnosed respondent with the following: 1. Aggravation of degenerative cervical disc disease, with right cervical radiculopathy; 2. Right rotator cuff impingement syndrome; 3. Chronic depression, improved, per comments; 4. Past history of low back pain as well as pain in the thoracic and cervical spine compatible with aggravation of cervical disc disease. . ." He concluded that respondent was permanent and stationary, and gave him a 26 percent whole-person impairment for workers' compensation purposes, based on respondent's cervical spine, upper extremity, pain and sleep disorders. He imposed work restrictions that precluded respondent's repetitive use of his right arm at shoulder height, repetitive turning and twisting of his neck, lifting more than 30 pounds, and lifting objects above shoulder height on his right side. Dr. O'Hara recommended that respondent continue to have medications for pain, and future steroid injections in both his neck and right shoulder, and noted that, in the future, respondent might also need neck surgery. However, Dr. O'Hara also noted that he had not been given the most recent x-rays, MRI, or electrodiagnostic studies, and that "therefore, to a certain extent my opinions concerning impairment and apportionment are provisional pending review of these records."

17. In relation to his workers' compensation claim, respondent was also examined by orthopedic surgeon Michael D. Ciepiela, M.D., on February 6, 2012, for a Primary Treating Physician-selected Permanent and Stationary Examination. At the time of this examination, respondent reported that he had injections both in his right shoulder and his neck. He complained of constant moderate pain in his shoulder that extended up to the right side of his neck and down to his arm. Dr. Ciepiela reviewed past medical reports and diagnostic evaluations and conducted a physical examination of respondent. He diagnosed respondent with exacerbation of degenerative disc disease of the cervical spine and right shoulder impingement. He found respondent permanent and stationary, and rated respondent's whole-person impairment for workers' compensation purposes as follows: zero percent for cervical spine, six percent for right shoulder, and three percent for continued right shoulder pain. Dr. Ciepiela imposed work restrictions precluding pushing and pulling with the right arm, reaching over the right shoulder, frequent carrying and lifting no more than 10 pounds, and occasional maximal lift and carry up to 20 pounds.

18. Respondent's claim for workers' compensation benefits was resolved in his favor on April 1, 2011, and he began receiving benefits the following month. His benefits were increased on June 15, 2012, based on Dr. O'Hara's April 2012 report.

19. Respondent testified that on an unknown date in 2012 it was determined that he was also eligible to receive disability benefits under Social Security. The basis for the disability was not established by the evidence.

20. On May 21, 2010, respondent was informed by Pam Conklin, Human Resources Director for the Novato Unified School District, that since he had exhausted available paid leave, he would be placed on the district's 39-month reemployment list if he were not medically able to return to work as of May 24, 2010. Respondent did not return to work, and he is still on that list. His status giving him preferential re-employment does not expire until August 2013.

CalPERS's Expert Opinion

21. CalPERS retained Joseph McCoy, M.D., to conduct an evaluation of respondent as an Independent Medical Evaluator (IME). Dr. McCoy is board-certified in orthopedic surgery. He testified at the hearing. On January 14, 2011, Dr. McCoy obtained a history and conducted an orthopedic examination of respondent. He also reviewed extensive medical treatment records, medical evaluations, a 2008 MRI report, 2010 x-ray reports, and respondent's job description. Dr. McCoy issued his IME report on January 17, 2011.

During the examination, respondent informed Dr. McCoy that, on October 13, 2009, he sustained an injury when lifting and tossing heavy bags of waste material into a high dumpster. He stated that while tossing the trash, he lost his footing, and felt an initial sensation of a pulled muscle in his neck and right shoulder. This evolved first into severe spasm in respondent's upper back, which lasted approximately 30 days, and then he experienced the gradual onset of numbness and tingling extending into his right arm and the pinky and ring fingers of his right hand.

At the time of his examination, respondent complained of "excruciating pain 24 hours a day, seven days a week," involving his lower neck, trapezius area, right shoulder blade, and extending down the medial aspect of his arm toward the small and ring fingers of his right hand. Dr. McCoy noted that throughout the course of his physical examination, respondent demonstrated what appeared to be "exaggerated pain behavior, holding his head tilted to the right, and elevating his right shoulder and rubbing his right arm." Dr. McCoy found no asymmetry or atrophy in respondent's arms bilaterally, and found respondent's right forearm circumference 0.25 centimeters larger than the left arm. He also measured respondent's biceps and found his two arms to be equal, noting that "this appears compatible with him utilizing his right upper extremity in a near normal fashion, and more aggressively than the uninvolved left side." Respondent also displayed "grimacing and rather exaggerated pain behavior," and "withdrew in a very exaggerated manner," when he was asked to perform cervical spine and right upper extremity ranges of motion. Dr. McCoy could not identify any specific spasm in respondent's shoulder girdle to explain the exaggerated pain behavior.

Dr. McCoy diagnosed the following: 1. Degenerative disc disease of the cervical spine; 2. Right upper extremity lancinating pain without obvious source, previously

identified as a possible brachial plexus stretch injury, however without obvious objective diagnostic abnormality.

Dr. McCoy wrote the following in his IME report:

There are subjective inconsistencies found in the course of this review. His qualified medical evaluator describes substantial atrophy of the right upper extremity. I have been unable to duplicate or verify this diagnostic finding. I have reviewed his case history and am unable to document any diagnostic abnormalities that would prevent him from continuing to work in his usual capacity.

In his January 17, 2011 report, Dr. McCoy concluded that respondent was not substantially incapacitated from performing the usual and customary duties of a Custodian II for the Novato Unified School District.

22. Dr. McCoy issued a supplemental report on February 28, 2011, after reviewing an additional medical record from Dr. Martinovsky regarding respondent's January 27, 2011 appointment with Dr. Martinovsky. In his supplemental report, Dr. McCoy stated that the additional records, "although interesting, have no impact on my original conclusions" that respondent was not substantially incapacitated from performing his usual duties.

23. At the hearing, Dr. McCoy testified that in the week before the October 11, 2012 hearing, he had received additional medical reports that included Dr. Santaniello's March 5, 2009 report (Factual Finding 11), Dr. Lambert's April 16, 2010 report (Factual Finding 13), a May 2011 MRI report, Dr. O'Hara's two reports (Factual Finding 16), and Dr. Ciepiela's report (Factual Finding 17). He considered these reports in his opinion given at the hearing, and testified that these reports did not change his original conclusion that respondent was not substantially incapacitated from performing his usual duties as a custodian. Dr. McCoy explained that Dr. Santaniello's report was made while respondent was working full duty, and that it did not consider the October 13, 2009 injury. Dr. Lambert's report was of little value to Dr. McCoy because it did not contain any details or explain the basis for her opinion. He also disagreed with her diagnosis of thoracic outlet syndrome, as no other examining physician made the same diagnosis. He also disagreed with Dr. O'Hara's diagnosis because there was no objective evidence of plexopathy or radiculopathy, and that while there was evidence of increased rotator cuff tendinitis, this is "very treatable," and not permanently disabling. Dr. McCoy also disagreed with Dr. Ciepiela's conclusions. Dr. McCoy's opinion that there was no evidence of respondent's substantial incapacity to perform his usual and customary work was not changed after review of these additional reports.

24. Further, Dr. McCoy noted that Dr. Carpenter, Dr. O'Hara and Dr. Ciepiela's conclusions of disability were based on an evaluation of respondent for a workers' compensation claim, and not for a CalPERS disability retirement application. Dr. McCoy

explained that he has performed many of each kind of evaluation, and that a workers' compensation examination was very different from the examination he conducted for CalPERS because it did not concern the question of permanent disability or inability to substantially perform the customary duties of the job as defined by CalPERS. Dr. McCoy also felt that the diagnoses of the doctors whose additional reports he reviewed were "all over the map" and therefore did not influence his own evaluation, or change his opinion after he had reviewed them.

25. Dr. McCoy further explained that with regard to his testimony and the statement in his report that he believed that respondent displayed exaggerated pain behavior, he would not consider making such a statement if there were any ambiguity or if the behavior were borderline. He has included that statement only in a "very small minority" of the thousands of reports he has made as a board-certified evaluator. He was certain at the time of his examination that respondent's reactions were inconsistent with his objective diagnoses. Dr. McCoy opined that respondent's May 2011 MRI gave no reason to cause the substantially limited range of motion that respondent demonstrated, and that it was much the same as the 2008 MRI that he had reviewed at the time of his examination. Dr. McCoy explained that a C7-T1 bulge shown in the 2011 MRI could not anatomically cause a C5-C6 radiculopathy that respondent demonstrated in the examination. Respondent's demonstrated less than 50 percent ability to move his right arm at the time of the examination is blatantly inconsistent with the increased muscle mass evident in the right arm at the time.

26. Dr. McCoy's testimony was continued at the hearing on December 13, 2012. Before beginning his testimony on that date, he reviewed a compact disc with MRI results and an electrodiagnostic study report offered into evidence by respondent (Exhibits G and I). In his testimony, Dr. McCoy noted the inconsistency between the two reports. The electrodiagnostic study showed that respondent's problem was more severe in the C7-T1 area, and the 2011 MRI shows that the problem is in the C5-C6 area. He explained that a bulge in the C7-T1 area could not cause the radiculopathy that originates from the C5-C6 area, and that electrodiagnostic studies are very operator-dependent, and therefore unreliable by themselves. Both studies, however, show that all of the discs in respondent's neck have evidence of age-related degenerative disc disease. Although there is evidence that respondent's cervical discs are "quite abnormal," there was no evidence of radiculopathy at the time of Dr. McCoy's exam, and the further review of the electrodiagnostic study and the MRI compact disc did not provide objective reason to change his opinion that respondent was not substantially incapacitated from the performance of his usual duties as a school custodian.

Discussion

27. Respondent argued that, while Dr. McCoy may not have found there to be significant objective findings to support his complaints of pain, he was agitated and depressed at the time he was examined, and his complaints were real. He further argued that it was only because he was found disabled and eligible for treatment by the workers' compensation system, that he has been able to get epidural injections that have significantly

reduced his pain, and that he has been found disabled by Social Security. Respondent's arguments were not persuasive. He failed to present sufficient medical evidence to support that he is substantially incapacitated from performing the usual duties of a Custodian II. Dr. Santaniello's examination and report concluded that respondent was not permanent and stationary, and that respondent could continue to work without restriction after his October 8, 2008 injury. Dr. Lambert gave no analysis or objective criteria to support her conclusion that respondent was disabled. Additional medical evaluations related to respondent's workers' compensation claims did not apply the CalPERS standard for disability. Similarly, Dr. Martinovsky, respondent's primary treating physician, was a pain management specialist. He did not conduct an orthopedic evaluation of respondent, and he did not use the CalPERS standard for disability when he opined in two brief letters that respondent was disabled. The fact that Dr. Martinovsky may be administering epidural injections and prescribing pain medications to respondent does not constitute competent medical evidence that he is substantially incapacitated from performing his job. There was no independent evidence regarding the nature of respondent's disability for Social Security purposes.

28. In contrast to the hearsay reports of the several workers' compensation examiners and respondent's treating physician, Dr. McCoy's testimony was persuasive. He was the only physician who testified as a witness in this case. He is a board-certified orthopedist, his medical opinion is reasonable and is supported by the evidence, and his opinion is not refuted. Dr. McCoy's testimony established that respondent was exaggerating his symptomatology. His opinion is based on inconsistencies that he found on his physical examination, findings of other physicians in medical records, and MRI and electrodiagnostic studies that he reviewed. After his examination and review, Dr. McCoy found that there was not sufficient substantiating medical evidence to support respondent's claims of substantial incapacity. Given the paucity of competent medical evidence to support his disability retirement application, respondent's application must be denied.

LEGAL CONCLUSIONS

1. By reason of his employment, respondent is a local miscellaneous member of CalPERS and eligible to apply for disability retirement under Government Code section 21150.

2. To qualify for disability retirement, respondent must prove that, at the time he applied for disability retirement, he was "incapacitated physically or mentally for the performance of ... his duties in the state service." (Gov. Code, § 21156.) As defined in Government Code section 20026,

"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, or in the case of a local safety member by the governing body of the

contracting agency employing the member, on the basis of competent medical opinion.

3. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.)

4. The *Mansperger* court found that Mansperger was not disabled because, although he suffered some physical impairment, he could still substantially perform most of his usual job duties. Thus, it is clear from the *Mansperger* case that there is a significant distinction between a person who suffers from some impairment and one who suffers substantial impairment sufficient to be eligible for disability retirement. To be eligible for disability retirement, respondent must be "substantially unable" to perform his usual duties.

Since *Mansperger* was issued, courts have followed its reasoning in subsequent disability retirement cases. (See, e.g., *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855 [finding that prophylactic restrictions imposed to prevent the risk of future injury or harm were not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature] and *Harmon v. Board 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"].)

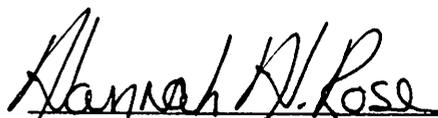
5. *Mansperger*, *Hosford* and *Harmon* are controlling in this case. The burden is on respondent to present competent medical evidence to show that, as of the date he applied for disability retirement, he was substantially unable to perform the usual duties of a Custodian II. Although respondent was injured at work and complained of pain, he did not present sufficient medical evidence to establish that he is substantially incapacitated from performing the usual duties of a Custodian II for the reasons set forth in Factual Findings 21 through 28. The preponderance of the medical evidence presented in this case shows that respondent's subjective complaints are out of proportion to the objective medical findings. (Factual Findings 21 through 26.) The fact that respondent may be taking pain medication and has had steroid injections to reduce his pain does not establish that he is substantially incapacitated from performing the usual duties of a Custodian II.

6. In sum, respondent failed to submit competent medical evidence to show that he is permanently and substantially incapacitated from performing the usual duties of a Custodian II for the Marin County Schools (Novato Unified School District). His application for disability retirement must, therefore, be denied.

ORDER

The application of respondent Eric L. Reason for disability retirement is DENIED.

DATED: January 9, 2013



HANNAH H. ROSE
Administrative Law Judge
Office of Administrative Hearings