

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of Accepting the Application
for Disability Retirement of:

WILLIAM F. WELCH,

Respondent,

and

CALIFORNIA DEPARTMENT OF
FORESTRY AND FIRE PROTECTION,

Respondent.

Case No. 8494

OAH No. 2012040323

PROPOSED DECISION

Administrative Law Judge Hannah H. Rose, Office of Administrative Hearings, State of California, heard this matter on June 11, 2013, in Sacramento, California.

Rory J. Coffey, Senior Staff Counsel, California Public Employees' Retirement System, appeared on behalf of petitioner.

Ryan M. Daugherty, Attorney at Law, appeared on behalf of William F. Welch, who was present.

There was no appearance on behalf of the California Department of Forestry and Fire Protection.

The matter was submitted for decision on June 11, 2013.

FACTUAL FINDINGS

1. Anthony Suine, Chief, Benefits Services Division, California Employees' Retirement System (CalPERS), made and filed the Statement of Issues in his official capacity.

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2. William F. Welch (respondent) was employed by respondent California Department of Forestry and Fire Protection (Department) as a Fire Engine Operator. By virtue of his employment, respondent became a state safety member of CalPERS subject to Government Code sections 21151 and 21154.

3. On or about November 20, 2006, respondent signed an application for industrial disability retirement, which was received by CalPERS on December 12, 2006. In filing the application, disability was claimed on the basis of moderate left ventricular systolic dysfunction with concentric left ventricular hypertrophy and a dilated left atrium.

4. At hearing, there were two stipulations. First, it was stipulated that on an unknown date in 1995, respondent was terminated from his employment with the Department for cause. It was also stipulated that respondent's termination was not the ultimate result of a disabling medical condition. As a result of these stipulations, there was no testimony of witnesses for the Department.

5. CalPERS determined that respondent was barred from any entitlement to disability retirement because he was terminated for cause and the discharge was neither the ultimate result of a disabling medical condition nor preemptive of any otherwise valid claim for disability retirement. CalPERS notified respondent of its determination by letter dated September 18, 2007, which included notice that respondent could appeal.

6. Respondent filed an appeal by letter dated October 7, 2007, and requested a hearing. As noted in the Statement of Issues, the appeal is limited to the issue of whether respondent may file an application for industrial disability retirement, or whether his application and eligibility for disability retirement are precluded by operation of law. (See *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*).)

Employment Background and Medical Evidence

7. Respondent testified by telephone from his home in South Carolina. He had before him copies of complainant's Exhibits 1 through 5 and respondent's Exhibits A and B. Respondent was hired by the Department in 1977. He passed a full physical examination at the time of his hire. Respondent thereafter worked seasonally as a Fire Engine Operator, mainly performing wild land fire control, until his termination in 1995. His work included fighting woodland, structure, airplane and car fires. Respondent's job was to get equipment to fires. There were usually four firefighters on an engine, and respondent supervised those firefighters. He received assignments from and reported to either his captain or the battalion chief.

8. Respondent testified that he first became aware of his heart condition when he participated in Emergency Medical Technician (EMT) training in 1988 or 1989. There were five firefighters in his training group and, as part of their training, they listened to one another's hearts using a stethoscope. Respondent stated that his heartbeat sounded different

than any of the others. This was not reported to his employer, and respondent did not seek medical treatment for this perceived anomaly. This did not constitute competent medical evidence of a heart condition. Respondent testified that at an unknown time while working as a firefighter for the Department, he inhaled hazardous chemicals, and he received second and third degree burns over 10 percent of his body.

9. Prior to his termination, respondent sometimes experienced shortness of breath and stress from his job. He took breaks more often when he felt short of breath. Respondent saw his primary care physician at an unknown time sometime during the last few years of his employment with the Department, and while they discussed these symptoms, he did not want his doctor to "write a letter" because he wanted to go back to work. Although respondent felt that he could not perform "at 110 percent" and that he "was not the person he had been 15 years before," he continued to work full duty until he was terminated. Respondent testified that his termination for cause had nothing to do with his heart. If his challenge to the termination for cause had been successful, respondent testified that he would have asked to be transferred to another supervisor, and would have gone back to work in his former job.

10. While working for the Department between 1977 and 1995, respondent was aware of co-workers who could not work because they were injured or developed medical conditions, and who consequently applied for disability retirement. In 1995, respondent knew that he could apply for disability retirement if he were disabled from performing his job.

11. After leaving the Department, respondent worked as a water truck driver, for a large construction company in Nevada. During his 1997 annual physical for that job, respondent was transported by ambulance from the doctor's office to the hospital, where a nurse told him to contact workers' compensation because of his heart condition. Respondent testified that he sometime thereafter contacted his former commander, and "paperwork was started." There was no further testimony with regard to the nature of the paperwork or the outcome at the time. It is presumed that this paperwork was related to a workers' compensation claim as there was evidence that several years later respondent was examined for a workers' compensation claim relating to his heart, and that he subsequently received workers' compensation. (Factual Finding 13.)

12. Early in 1999, respondent moved to South Carolina, where he has resided since. Soon after, respondent came under the care of cardiologist John E. Cebe, M.D. Dr. Cebe wrote a letter to respondent's primary care physician thanking her for the referral and describing his intended treatment of respondent. Respondent described his heart condition as one in which the bottom right side of his heart "quivers and doesn't beat right." He has had blood clots that required hospital emergency room treatment, which clots were resolved by medication. He reports that he has "tachycardia and a mild myocardial infarction." Respondent takes medications for these conditions, he has had "electric shock treatment" to his heart on three occasions, and a heart pacemaker was implanted in 2006. Respondent submitted a 1999 letter from Dr. Cebe that was admitted into evidence as administrative

hearsay, which corroborates that respondent was referred for evaluation and treatment to Dr. Cebe in 1999, and that Dr. Cebe undertook to treat him at that time.

13. Sometime in 2006 or 2007, respondent was examined by R. M. Luros, M.D., M.P.H., as a Qualified Medical Examiner (QME), pursuant to a workers' compensation claim for his heart problems as a firefighter. Respondent testified that he was found disabled, and that he received \$800 per month workers' compensation from 2007 until 2012. Dr. Luros' report of respondent's medical history was based on respondent's self-report of that history and medical records that are not in evidence in this case. Respondent submitted a QME report from Dr. Luros that was admitted into evidence as administrative hearsay. It corroborates respondent's testimony that Dr. Luros evaluated him for a workers' compensation claim and found him to be disabled by a heart condition under workers' compensation standards.

14. Respondent argues that, pursuant to Government Code section 31720.5, his heart condition was presumptively caused by employment, and that his termination otherwise pre-empted a valid claim for disability as a result of the heart condition. However, Government Code section 31720.5 falls under Title 3 of the Government Code, Government of Counties, and it is part of the County Employees Retirement Law of 1937. Title 2 of the Government Code governs state employee retirement, including state employee disability retirement. Respondent has not presented competent medical evidence either that he had a disabling heart condition or that it existed before he was terminated. His own testimony that in 1988 or 1989 his heartbeat sounded different from other EMT trainees, and that he was sometimes short of breath is not competent medical evidence of a disabling heart condition. Neither does the 1999 letter from Dr. Cebe, or the 2006 QME from Dr. Luros, which were admitted as administrative hearsay, amount to competent medical opinion that respondent had a heart condition during the time he worked for the Department and at the time of his termination.

15. Respondent further argues that because his heart condition existed at the time of his termination, as evidenced by his irregular heartbeat while at EMT training, the Department, as his employer, had a burden to file for disability retirement at the time, pursuant to Government Code section 21153.¹ However there is no competent medical evidence that, at the time of his termination, respondent, was either disabled by a heart condition, or eligible to retire for disability, or the Department knew or reasonably should have known that he had a disabling heart condition. Respondent continued to work full duty for approximately six years after the EMT training.

¹ Government Code section 21153 states, in pertinent part, that "an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled."

Application of Haywood

16. The sole issue in this hearing is whether respondent may file an application for industrial disability retirement, or whether his application and eligibility for disability retirement are precluded by operation of *Haywood*. In *Haywood*, the employee “was terminated for cause following a series of increasingly serious disciplinary actions against him. After his discharge, the employee applied for disability retirement, claiming that stress from the disciplinary actions caused him to suffer a major depression, which rendered him incapable of performing his usual duties with the [employer].” (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at p. 1295. The Court of Appeals concluded that the employee was not entitled to disability retirement, stating as follows:

As we shall explain, there is an obvious distinction in public employment retirement laws between an employee who has become medically *unable* to perform his usual duties and one who has become *unwilling* to do so. Disability retirement laws address only the former. They are not intended to require an employer to pension-off an unwilling employee in order to maintain the standards of public service. Nor are they intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. In addition, while termination of an unwilling employee for cause completely severs the employer-employee relationship, disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled.

In this case, Haywood challenged his employer’s authority and lost when, after a series of disciplinary actions, he was terminated for cause. The behavior which resulted in Haywood’s firing--his unwillingness to faithfully perform his duties--was not caused by a physical or mental condition, and Haywood had no valid claim for disability retirement which could have been presented before he was fired.

Haywood’s firing for cause constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement--the potential reinstatement of his employment relationship with the District if it ultimately is determined that he no longer is disabled. Moreover, to award Haywood a disability pension would interfere with the District’s authority to discipline recalcitrant employees. Such an award in effect would compel the District to pension-off an employee who has demonstrated unwillingness to faithfully perform his duties, and would reward

Haywood with early retirement for his recalcitrance. In other words, granting Haywood disability retirement would override Haywood's termination for cause despite his inability to set aside the termination through the grievance process.

It follows that where, as here, an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination of the employment relationship renders the employee ineligible for disability retirement.

(*Id.* at pp. 1296-1297, footnote omitted. Italics in original.)

17. Respondent contends that because he was continuously disabled from before his termination for cause, his application was therefore timely. (Gov. Code, § 21154, subd. (d).) He also contends that the Department's action in terminating him was preemptive of his otherwise valid claim for disability retirement.

18. It was stipulated that respondent was properly terminated for cause on an unknown date in 1995, and that respondent's termination was not the ultimate result of a disabling medical condition. It is undisputed that respondent filed his application for industrial disability retirement after being "terminated." Respondent's employment relationship with the Department was severed in 1995, more than 10 years before he filed for industrial disability retirement.

19. *Haywood* makes it clear that a necessary requisite for disability retirement is the potential reinstatement of the employment relationship with the District if it ultimately is determined that respondent is no longer disabled. (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at pp. 1296 - 1297.) Such is not possible here. Pursuant to respondent's termination for cause, he cannot be reinstated. Such a circumstance must be viewed as wholly inconsistent with the policy behind and rationale for disability retirement:

[D]isability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. Until an employee on disability retirement reaches an age of voluntary retirement, an employer may require the employee to undergo a medical examination to determine whether the disability continues. (§ 21192.) And an employee on disability retirement may apply for reinstatement on the ground of recovery. (*Ibid.*) If an employee on disability retirement is found not to be disabled any longer, the employer may reinstate the employee, and his disability allowance terminates. (§ 21193.)

(*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at p. 1305.)

20. Were respondent to receive a disability retirement allowance, he would have no employer who could require him to undergo a medical examination under Government Code section 21192. And it is no longer possible for him to be reinstated under Government Code section 21193. These necessary prerequisites for receiving a disability retirement allowance are not present.

Preemptive of Valid Claim

21. Respondent contends in the alternative that the Department's termination for cause was preemptive of an otherwise valid claim for disability retirement. Thus, even if an agency dismisses an employee solely for a cause unrelated to a disabling medical condition, this will not result in the forfeiture of a matured right to a pension allowance. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 206.) "Thus, if a plaintiff were able to prove that the right to a disability retirement matured before the date of the event giving cause to dismiss, the dismissal cannot preempt the right to receive a disability pension for the duration of the disability. [Citations omitted.] Conversely, 'the right may be lost upon occurrence of a condition subsequent such as a lawful termination of employment before it matures...'" (*Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749, ...) (*Ibid.*)

22. While respondent may have had a vested right to apply for industrial disability retirement prior to his termination, he would not have been entitled to receive any retirement benefits until all the conditions prescribed therefor were met. (*Dickey v. Retirement Board of the City and County of San Francisco* (1976) 16 Cal.3d 745.) There is a marked difference between the vesting of a pension right and the accrual of a cause of action to enforce a vested right. "The right to a pension is a vested right; the amount of the pension may not always be ascertained until the last contingency has occurred." (*Id.* at p. 750; *Brooks v. Pension Board* (1938) 30 Cal.App.2d 118, 123.) The vested right to the pension benefit may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures, or because of the nonoccurrence of one or more conditions precedent. (*Id.* at p. 749.) Thus, the issue here is whether respondent's vested interest in disability retirement "matured" prior to his separation from employment.

23. A vested right matures when there is an unconditional right to immediate payment. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at p. 206.) Typically, this arises at the time a pension board determines that the employee was no longer capable of performing his/her duties. (*Ibid.*; *Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671-672.) Here, a CalPERS determination of eligibility does not antedate respondent's separation from employment. His right to industrial disability retirement has thus not matured.

24. *Smith* recognized that even where there has not yet been a determination of eligibility, there may be facts which a court, applying principles of equity, will deem an employee's right to a disability retirement. (*Id.* at pp. 206-207.) *Smith* then went through a number of situations where equitable principles might apply. They are also considered here.

As in *Smith*, this is not a case where respondent had an impending ruling on a claim for a CalPERS disability pension that was delayed through no fault of his own. (*Id.* at p. 207.) Here, he did not even initiate the process for receiving an industrial disability retirement allowance until more than 10 years after his termination for cause. Nor was there “undisputed evidence” that respondent was eligible for a CalPERS disability retirement, “such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb).” (*Ibid.*) Even if the medical evidence offered by respondent were competent medical evidence, as was the case in *Smith*, for purposes of the standard for disability retirement, the medical evidence here is not unequivocal. CalPERS would have a basis for litigating whether the evidence demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient. (*Ibid.*) Here, respondent testified that he was willing and able to resume his duties as a firefighter if his termination had been reversed. CalPERS has argued that the mere fact that respondent has a heart condition is by no means a “foregone conclusion,” leading to certain approval of his application.

25. When the above matters are considered as a whole, respondent has not presented competent or unequivocal medical evidence of such nature that approval of his application for disability retirement was a “foregone conclusion.” Any right to an industrial disability retirement allowance cannot be deemed to have matured in this case. For all these reasons, his application for disability retirement should be precluded by operation of *Haywood*.

LEGAL CONCLUSIONS

1. Government Code section 21152 states, in pertinent part:

Application to the board for retirement of a member for disability may be made by...

(d) The member or any person in his or her behalf.

2. Government Code section 21154 states, in pertinent part:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of any application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or on its own motion it may, order a medical examination

of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

3. Where an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination of the employment relationship renders the employee ineligible for disability retirement. (*Haywood v. American River Fire Protection District* (1998) 67 Cal. App.4th 1292, 1297.) The Third District Court of Appeal explained that the dismissal “constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement—the potential reinstatement of his employment relationship with the District if it ultimately is determined that he is no longer disabled.” (*Ibid.*)

4. It was stipulated that respondent’s separation from employment was a dismissal for cause for purposes of applying the *Haywood* criteria. (Finding 4.) It was also stipulated that respondent’s separation from employment was not the ultimate result of a disabling medical condition. (Finding 4.)

5. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, the same court reiterated the principles of the *Haywood* decision. The court further explained that a disability claim must have “matured” in order to find that a disciplinary action preempts the right to receive a disability retirement pension, and this maturation did not occur at the time of the injury, but rather when the pension board determined that the employee was no longer capable of performing his duties. (*Id.* at p.206.) The *Smith* court further allowed consideration of equitable principles to “deem an employee’s right to a disability retirement to be matured and thus survive a dismissal for cause.” (*Id.* at p. 207.)

As noted in Findings 19 through 23, even where principles of equity are applied, this was not a case where there was undisputed evidence that respondent was eligible for a CalPERS industrial disability retirement allowance, such that a favorable decision on his claim would have been a “foregone conclusion.” Respondent’s vested interest in an industrial disability retirement allowance never “matured” prior to his separation from employment.

6. For all the above reasons cause exists to uphold CalPERS’ determination that respondent is not entitled to file an application for an industrial disability retirement allowance.

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ORDER

The appeal of William F. Welch to be granted the right to file an application for industrial disability retirement is DENIED.

Dated: July 8, 2013



HANNAH H. ROSE
Administrative Law Judge
Office of Administrative Hearings