

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:

JOHN A. MACIAS,

Respondent,

and

CITY OF WALNUT CREEK,

Respondent.

Case No. 2013-0118

OAH No. 2013050433

PROPOSED DECISION

Administrative Law Judge Jill Schlichtmann, Office of Administrative Hearings, State of California, heard this matter on August 20, 2013, in Walnut Creek, California.

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

Respondent John A. Macias represented himself and was present throughout the hearing.

No appearance was made by or on behalf of respondent City of Walnut Creek.

The matter was submitted for decision on August 20, 2013.

FACTUAL FINDINGS

Introduction

1. John A. Macias (respondent) was employed by the City of Walnut Creek as a street maintenance worker. By virtue of his employment, respondent is a local miscellaneous member of the California Public Employees' Retirement System (CalPERS), and subject to

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Sept 10 2013

[Signature]

Government Code section 21151.

2. On November 17, 2011, respondent signed an application for disability retirement, identifying orthopedic (neck, shoulder) conditions as the basis for the disability. On the application, respondent stated that his job was very physically demanding and repetitive and he was no longer able to perform many of the requirements of the job without experiencing significant pain and exceeding his physician's work restrictions. Respondent stated further that he was unable to lift without assistance, dig holes or do anything strenuous without feeling significant pain. On November 17, 2011, respondent also signed a service retirement application. Respondent retired for service effective December 9, 2011.

3. CalPERS obtained respondent's medical records concerning his neck and shoulder conditions from competent medical professionals. After a review of the reports, CalPERS determined that respondent was not permanently disabled or incapacitated for the performance of his duties at the time he filed his application. CalPERS denied the application on November 27, 2012. Respondent filed a timely appeal by letter dated December 11, 2012.

Respondent's Job Duties and Work History

4. A street maintenance worker for the City of Walnut Creek performs skilled and semi-skilled work in the construction, maintenance, repair, sweeping, and cleaning of city streets, curbs, gutters, storm drains, rights-of-way, and similar facilities. Street maintenance employees operate and maintain a wide variety of light and heavy equipment, including hand and power tools, and are responsible for set-up and take-down of traffic control. Representative duties of the position include repairs to street surfaces, identifying, cleaning and repairing holes in streets, dumping, applying, spreading, shoveling, raking, tamping and rolling asphalt and patching materials for street surfacing and repairing, sealing cracks, grading, driving a truck, operating a dump truck, spreading gravel and asphalt, and operating a road roller to compact asphalt and to smooth surfaces.

5. The CalPERS "Physical Requirements of Position/Occupational Title" form reflects the frequency with which respondent was required to perform certain physical activities in connection with his employment as a street maintenance worker.

Respondent was required to perform the following activities on an "occasional basis" (up to three hours per day): sitting, running, crawling, kneeling, climbing, fine manipulation, keyboard use, mouse use, lifting and carrying more than 75 pounds, walking on uneven pavement, working at heights, and working with biohazards.

Respondent was required to perform the following activities on a frequent basis (between three and six hours per day): walking, squatting, reaching above the shoulder, simple grasping, operating foot controls, and using special visual or auditory protective equipment.

Respondent was required to perform the following activities on a constant basis (over six hours per day): standing, bending at the neck and waist, twisting at the neck and waist, reaching below shoulder height, pushing and pulling, power grasping, repetitive use of the hands, lifting and carrying up to 75 pounds, driving, working with heavy equipment, and being exposed to excessive noise, extreme temperature, dust, gas and chemicals.

6. Respondent added that he spent a fair amount of time operating a jackhammer and lifting and finishing concrete. He also set up barricades and safety cones, and distributed sandbags during storm season.

7. Respondent worked for the City of Walnut Creek as a street maintenance worker from 1988 to 2011.

Neck and Shoulder Condition

8. Respondent experienced neck and shoulder pain over time during the course of his employment. On March 1, 2010, while at work lifting a stack of safety cones out of the back of a truck, he felt severe pain radiating from his neck to his left shoulder and numbness and tingling to the fingers on both hands.

9. An MRI report dated June 24, 2010, revealed at level C4-C5, left paracentral disc protrusion causing deformity of the spinal cord, moderate to severe central stenosis and severe bilateral foraminal narrowing. There was subtle cord edema consistent with cord impingement. The MRI also revealed severe right and moderate to severe left foraminal narrowing with impingement of both exiting nerve roots and right dorsal root ganglion at C5-C6, which was related to the protuberant uncovertebral joint spur. At C6-C7, there was a left paracentral disc herniation causing severe lateral recess stenosis without cord compromise and moderate to severe left foraminal narrowing.

10. Respondent was evaluated by orthopedist Jason A. Smith, M.D., on August 26, 2010. Respondent had tried physical therapy but his condition had not improved. He had also undergone 12 visits of acupuncture that provided only temporary relief. Respondent was taking ibuprofen and Vicodin as needed to control the pain. Dr. Smith diagnosed respondent with cervicalgia, cervical disc degeneration, cervical disc displacement without myelopathy and cervical spinal stenosis.

Dr. Smith opined that respondent "clearly has pathology at C4-C7 with the most significant being at C4-5 and C6-7; disc herniations causing stenosis and foraminal narrowing." Dr. Smith recommended a left-sided transforaminal cervical epidural injection at both C4-C5 and C6-C7, and that if symptoms persisted, surgical management would be indicated.

11. On February 16, 2011, respondent was examined by Wesley P. Chan, M.D., who is board certified in occupational medicine. Respondent had undergone two epidurals which had helped to relieve the radicular symptoms; however, respondent was still

experiencing pain at the neck, pain with heavy lifting and pain while standing. Dr. Chan diagnosed him with cervical degenerative disc disease with radiculopathy, and felt he had reached maximum medical improvement. Dr. Chan also imposed restrictions following a functional capacity evaluation on March 22, 2011. The work restrictions, as reported to the City of Walnut Creek, were: limited occasional standing, 10 minutes at a time; limited lifting to 50 pounds from ground to chest level; occasional lifting up to 25 pounds from ground to shoulder level; no repetitive lifting; limited carrying up to 50 pounds rarely and 25 pounds occasionally; limited to pushing and pulling rarely up to 50 pounds and occasionally up to 25 pounds; limited to occasional reaching; no climbing of ladders.

12. On May 9, 2011, Dr. Chan found that respondent was totally disabled from his regular occupation and that his condition was permanent and stationary.

13. Respondent worked in a modified duty position for seven months, directing traffic around road repair work, but standing at length and holding up the signs was too painful for him.

14. On November 3, 2011, Sally Rice, the assistant director of administrative services for the City of Walnut Creek wrote a letter to respondent concerning reasonable accommodations proposed by respondent that would enable him to continue working. Rice explained that his proposals, while appreciated, were not feasible, and "do not address the fact that it is evident that you are unable to perform most of the essential tasks of a Street Maintenance Worker, with or without reasonable accommodation."

15. On July 30, 2012, orthopedist J. Hearst Welborn, Jr., M.D., examined respondent at the request of CalPERS. Dr. Welborn interviewed respondent, examined him, reviewed his medical records and wrote a report dated August 20, 2012.

Respondent told Dr. Welborn that at the time he examined him, his pain level was a 4 to 5 regularly, but it would increase to an 8 or 9 of 10, about three times per month. He reported that he experienced increased neck pain when lifting more than 50 pounds. He also reported that surgery was recommended by two physicians, but he was reluctant to undergo surgery on his neck. The medical reports reviewed by Dr. Welborn confirm that when respondent was seen by Dr. Lee on February 7, 2011, he was diagnosed with three-level disc herniation and Dr. Lee recommended a three-level fusion if the symptoms progressed. Respondent also advised Dr. Welborn that he was unable to perform his job duties, which included shoveling, working with concrete, heavy lifting, using a pick, tying down trucks and using a jackhammer.

In the response to the question, "Are there specific job duties that you feel the member is unable to perform because of a physical or mental condition? If so, please detail," Dr. Welborn states:

Yes, there are job duties he cannot perform such as lifting more than 50 pounds. He can drive a truck and shovel and tie down

heavy equipment. Lifting more than 50 pounds may aggravate [sic] his cervical degenerative condition. Surgery is not indicated at this point and both of his spine surgeons have recommended that he NOT have surgery at this time.

Dr. Welborn concluded that respondent was not substantially incapacitated for the performance of his usual duties as a street maintenance worker, because he felt respondent could perform most of the duties required.

16. On September 4, 2012, CalPERS sent a supplemental questionnaire to Dr. Welborn. CalPERS stated: “your response to question 1 implies that the member has a prophylactic restriction of not being able to perform lifting over 50 pounds as it may aggravate his cervical degenerative condition and therefore in question 2 you indicate he is not substantially incapacitated. In reviewing the member’s Physical Requirements (attached), it indicates that the member must perform lifting/carrying up to 75 pounds constantly, over 6 hours. Taking this requirement into consideration, is the member presently, substantially incapacitated for the performance of his usual duties in his current position? Dr. Welborn answered “No (prophylactic).”

17. At hearing, respondent testified credibly regarding his neck condition. Initially the pain he endured was so severe he would tear up and his wife had to dress him. The second epidural injection, on January 17, 2011, helped relieve his symptoms; however, he was still unable to perform many of his job duties as a result of the pain. Drs. Chan, Smith and Lee restricted him from many of his job duties after examining him. As of the date of his disability application, respondent was unable to lift more than 35 to 50 pounds; he had difficulty getting in and out of trucks; standing for long periods was “like torture”; he could not operate the jackhammer; and he was unable to lift concrete. He felt he could perform some of his duties and proposed accommodations, but his supervisors disagreed and would not allow him to continue working.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The burden of proving an incapacitating condition is on the applicant for a disability retirement, and the standard of proof is a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051; Evid. Code, § 115.)

2. By virtue of his employment, respondent is a local miscellaneous member of the CalPERS, and subject to Government Code section 21151. A CalPERS member may retire for disability if he becomes “incapacitated for the performance of duty.” (Gov. Code, § 21150.) The term “incapacitated for the performance of duty” and is defined as “disability of permanent or extended and uncertain duration . . . on the basis of competent medical opinion.” (Gov. Code, § 20026.) An applicant is “incapacitated for performance of duty” if

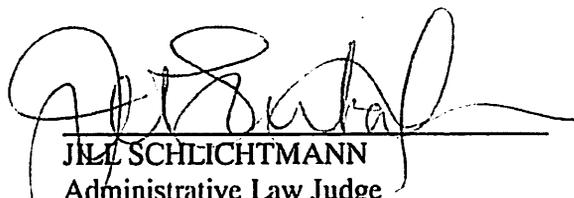
he is substantially unable to perform the usual duties of his position. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876; accord *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.)

3. The issue here is whether respondent was substantially unable to perform the usual and customary duties of a street maintenance worker for the City of Walnut Creek in November 2011. The preponderance of the evidence is that he was. Respondent's usual and customary duties were very physically demanding. He was constantly required to lift and carry up to 75 pounds. He was also required to regularly use a jackhammer, and to constantly stand, bend at the neck, twist at the neck, drive, and work with heavy equipment. Respondent tried to persuade his employer to keep him on and suggested various accommodations. His supervisors did not believe that the accommodations would be feasible or that he was able to perform his usual duties with the work restrictions his physicians put in place. Respondent's MRI revealed objective support of respondent's complaints. Although he obtained some help from the epidural injection, he remained unable to perform his usual duties at the time he applied for disability retirement. Dr. Welborn's finding that respondent was unable to lift more than 50 pounds is consistent with the findings of respondent's treating physicians. The evidence established that respondent was substantially unable to perform the usual and customary duties of his position at the time he applied for disability retirement and retired.

ORDER

The application of John A. Macias for a disability retirement is granted.

DATED: 9/9/13


JLL SCHLICHTMANN
Administrative Law Judge
Office of Administrative Hearings