ATTACHMENT D

DECISION

Attachment D

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Disability Retirement of: JAMES ROBERSON, Respondent, and DEPARTMENT OF GENERAL SERVICES, Respondent.	CASE NO. 2012-0288 OAH NO. 2012051062 DECISION

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own Decision the Proposed Decision dated September 6, 2013, concerning the application of James Roberson; RESOLVED FURTHER that this Board Decision shall be effective 30 days following mailing of the Decision.

* * * * *

I hereby certify that on October 16, 2013, the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the Administrative Law Judge's Proposed Decision is a true copy of the Decision adopted by said Board of Administration in said matter.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
ANNE STAUSBOLL
CHIEF EXECUTIVE OFFICER

Dated: 10/21/2013

BY Gina N. Ratto (for)
DONNA RAMEL LUM
Deputy Executive Officer
Customer Services and Support

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

In the Matter of the Application for Disability Retirement of: JAMES ROBERSON, Respondent, and DEPARTMENT OF GENERAL SERVICES, Respondent.	Case No. 2012-0288 OAH No. 2012051062

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on July 25 and August 29, 2013, in Sacramento, California.

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

Daniel S. Glass, Attorney at Law, represented James Roberson (respondent), who was present at the hearing.

There was no appearance by or on behalf of the Department of General Services (DGS).

Evidence was received, the record was closed, and the matter was submitted for decision on August 29, 2013.

ISSUE

On the basis of orthopedic (lower back and pelvis) and psychological conditions, is respondent permanently incapacitated for the performance of his duties as a Custodian for DGS?

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 9/10/2013
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FACTUAL FINDINGS

Respondent's Disability Retirement Application

1. Respondent was born in 1955. Respondent worked as a Custodian for DGS from about 2003 until March 2007. Respondent filed a Disability Retirement Election Application (Application) dated June 19, 2008. On the Application, respondent checked the box that stated that the Application Type was "Service Pending Disability Retirement." Respondent described his disability as follows:

> Lower back, 12-6-06
> I fell backward out of a chair and landed in an axial loading manner on a concrete floor.

Respondent described his "limitations/preclusions" as follows:

> I can't do my normal activities that I use[d] to do; can't walk long, running, standing for long periods of time lifting heavy objects.

In response to the question asking how his injury had affected his ability to perform his job, respondent stated:

> It prevents me from doing my job. I can't stand for a long period of time or walk because I'm in constant pain.

In the space provided for "other information," the following information was included:

> This injury affects his mind as far as his mood swings; taking so much medication; can't play with grandchildren like he would like to.

2. On October 15, 2009, CalPERS notified respondent in writing that his Application for disability retirement had been denied, and informed him of his right to appeal.[1]

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[1] On April 5, 2010, respondent's then counsel notified CalPERS in writing that respondent did not receive CalPERS's October 15, 2009 denial letter. On May 3, 2010, CalPERS received a second Disability Retirement Election Application from respondent. This second Application contained the same information set forth in the first Application described above, except that the response in the space for "other information" stated:

Duties of a Custodian

3. As a DGS Custodian, respondent worked the night shift from midnight to 8:30 a.m. The Duty Statement for a Custodian states that: (1) 30 percent of the job involved general office cleaning, including sweeping, vacuuming or mopping, emptying trash, cleaning modular systems, and removing stains from carpets and floors; (2) 30 percent of the job involved cleaning bathrooms, including wiping down and scrubbing toilets and sinks, restocking all paper products and liquid soap dispensers, wiping shower doors and stall walls, and mopping floors; (3) 10 percent of the job involved maintaining assigned equipment and tools for cleanliness and functionality; (4) 10 percent of the job involved doing periodic detail cleaning; (5) 10 percent of the job involved reporting any unsafe conditions and attending safety training; (6) 5 percent of the job involved notifying supervisors of broken fixtures or burned-out lighting; and (7) 5 percent of the job involved other marginal functions.

4. On July 11, 2008, CalPERS received a completed "Physical Requirements of Position/Occupational Title" (Physical Requirements), signed by a representative of respondent's employer and respondent. According to the Physical Requirements, when working as a Custodian, respondent: (1) constantly (over six hours a day) walked; (2) frequently (three to six hours a day) stood, squatted, bent and twisted at his neck and waist, reached below the shoulder, pushed and pulled, engaged in simple grasping and repetitive use of his hands, and lifted and carried up to 10 pounds; (3) occasionally (up to three hours) sat, crawled, kneeled, climbed, reached above his shoulder, engaged in fine manipulation and power grasping, lifted from 11 to 50 pounds, walked on uneven ground, drove, worked with heavy equipment, was exposed to extreme temperatures, humidity, wetness, dust, gas, fumes or chemicals, worked at heights, and operated foot controls or engaged repetitive movement; and (4) never ran, used a keyboard, used a mouse, or lifted over 51 pounds. At the hearing, although respondent agreed that he had signed the Physical Requirements, he stated that, contrary to the information set forth in that document, he was required to lift between 51 and 75 pounds occasionally.

Respondent's Employment History and Work Injuries/Incidents

5. Respondent began working when he was nine years old. In 1975, he worked in a shipyard in Alabama. He thereafter moved to Sacramento and worked odd jobs until approximately 1978 when he began working as a Custodian for the City of Sacramento. He

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> He had surgery on his back on Jan 26, 2010. This injury affects his psychological mind as well as he has stress. He's taking so much medication; can't play with grandchildren like he use[d] to. Also the injury his right knee and shoulder was strain [*sic*].

At hearing, both parties agreed that the June 19, 2008 Application was the operative application in this matter.

worked for the City for approximately 10 years, until he was injured on the job when a table he was pushing fell on him, injuring his head and back. According to respondent, in about 1989, he took a lumpsum retirement from the City when his doctors determined that he could not go back to work. He was off work from 1989 to 1997. In 1997, he went back to work, doing odd jobs. He began working for DGS as a Custodian in 2003.

6. On December 6, 2006, while respondent was in the breakroom at work, he fell off a swivel chair he was sitting on. His knee hit the table and he fell to the concrete floor. Although he felt pain in his back and shoulders, he went back to work at the end of his break, and pushed trash bins onto the loading dock. Respondent told his supervisor about his fall. His supervisor allowed him to leave work at about 6:00 a.m., before his shift ended, so that he could see a doctor.

7. Respondent's doctor put him on light duty work for about three months following his fall off the chair. Respondent testified that his light duty work consisted of doing the same tasks he had done prior to his injury, but he was given more time to rest during breaks. According to respondent, he would work for one hour and 15 minutes, and then rest for 45 minutes. Respondent stated that he could perform the tasks that were assigned to him when he was working light duty, but he was "in a lot of pain." In March 2007, he was informed that light duty work was no longer available, and he was let go. Respondent has not worked since March 2007. He is currently on service retirement.

8. In January 26, 2010, respondent underwent a right L2-3, L3-4 and L4-5 hemilaminectomy[2] and partial facetectomy,[3] and a left L3-4 L4-5 hemilaminotomy and partial facetectomy.

9. At hearing, respondent provided the following list of the medications that he is currently taking: Abilify, Cymbalta, Fentanyl patch, Promolaxin, Tizanidine, Omeprazole, Hydrocodone, Levitra, and Zolpidem. He is also using Aspercreme for joint and muscle pain relief. He testified that he could not perform his usual duties as a Custodian because doing those duties would cause him too much pain.

Expert Opinions on Respondent's Orthopedic Condition

10. Respondent called Carl H. Shin, M.D., as his expert with regard to his orthopedic condition. CalPERS called Robert K. Henrichsen, M.D., as its expert with regard to respondent's orthopedic condition.

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[2] The Merriam-Webster Medline Plus online medical dictionary defines a "laminectomy" to be the "surgical removal of the posterior arch of a vertebra."

[3] The Merriam-Webster Medline Plus online medical dictionary defines a "facetectomy" to be the "excision of a facet especially of a vertebra."

11. Carl H. Shin, M.D., is board-certified in Physical Medicine and Rehabilitation. He has a private practice focused on chronic pain management. Dr. Shin began treating respondent on June 12, 2008, and has seen him approximately once a month since then. Dr. Shin completed a Physician's Report on Disability dated September 4, 2008. In that report, Dr. Shin described respondent's chief complaint as "low back pain" and his diagnosis as "lumbar discogenic pain." Dr. Shin opined that respondent was substantially and permanently incapacitated for the performance of his usual duties as a Custodian, and described the specific work activities that respondent was unable to perform as: "unable to lift > 30 lbs, unable to tolerate frequent walking > 6 hr, frequent bending, twisting, squatting, climbing."

12. At hearing, Dr. Shin testified that respondent presented in June 2008 complaining of chronic back pain, and that he "did not disbelieve" respondent's complaints. One of Dr. Shin's goals was to try to get respondent back to work. According to Dr. Shin, respondent's pain makes it "difficult" for him to do his job. Dr. Shin testified that patients who take the types of medications respondent is taking could possibly perform the duties of respondent's position. But Dr. Shin believes that it is "unreasonable" to ask respondent to go back to his job in light of his "limitations." Dr. Shin opined that respondent should be restricted from lifting more than 10 to 20 pounds, and from frequent bending and stooping, which he understood to be essential functions of respondent's job as a Custodian. Dr. Shin could not state whether working as a Custodian would cause further deterioration to respondent's spine. Dr. Shin explained that one of the goals of his practice was to "minimize human suffering," and that requiring respondent to return to his job as a Custodian would cause him pain.

13. Dr. Shin could not identify precisely the cause of respondent's pain. He testified that a bone scan indicated that, when respondent fell off the chair in 2006, respondent sustained a "subtle sacral fracture," which Dr. Shin described as a "small" fracture. Dr. Shin believed that this subtle fracture may have "set off" respondent's pain. In addition, respondent's pain may have been caused by "post-laminectomy syndrome" following his 2010 surgery, and his use of narcotic medications, which may have "sensitized" respondent's brain to pain. Dr. Shin accepted respondent's claims as to his level of pain, which respondent often described as between 8 and 9 on a scale of 10. At hearing, Dr. Shin conceded that studies regarding chronic pain have found that approximately 20 percent of patients have claims that are "not legitimate." But Dr. Shin does not believe that he has the ability to detect if a patient is "faking it" and did not question respondent's claims. Dr. Shin discounted the "Waddell's signs" that other doctors have found upon examining respondent, which Dr. Shin described as attempts to glean whether there is a physiologic basis for pain. Although Dr. Shin has advised respondent to exercise more and lessen his use of narcotic medications, Dr. Shin believes that respondent should not be required to return to work as a full-time Custodian in order to minimize respondent's "human suffering."

14. Dr. Shin's medical records regarding respondent were admitted into evidence. Dr. Shin's first medical record for respondent on June 12, 2008, set forth his entire musculoskeletal examination as follows:

> LUMBAR SPINE: Examination was fairly useless. I was not able to get much range of motion, perhaps 30 degrees of flexion, 0 degrees of extension, and 20 degrees of bilateral bending. Pelvic rock and sustained flexions were difficult to perform due to his pain. Inspection demonstrated no evidence of abnormalities. Straight leg tests were negative but he was complaining of severe increase in his low back pain.

Dr. Shin diagnosed respondent with "chronic low back pain, bilateral lower extremity radicular symptoms." In one of his discussion and treatment plan notes, Dr. Shin stated:

> I need to get a better sense of this patient. I am a bit concerned. I do not really have a good explanation as to why Dr. Levin has stopped seeing this patient. I am not sure why he is going to the ER for his medications. Examination was difficult as he was simply not putting up any effort citing pain. He has failed to bring in MRI films even though it is routine practice in my office to have the patients bring in the films.

Another note stated, "the goal is to use the least amount of narcotics and utilize other adjunctive pain medications to manage his pain."

Included in Dr. Shin's records was a "Three Phase Bone Scan with SPECT," which was performed on July 23, 2008, and which found that there were "[v]ery subtle findings in the sacrum, which in this setting, would be consistent with a mild and/or nearly resolved skeletal injury, including non-displaced fracture. Otherwise, unremarkable."

15. When all of Dr. Shin's medical records regarding respondent are considered, other than respondent's subjective complaints of pain, there is little additional support for either Dr. Shin's opinion that respondent is substantially incapacitated or the work restrictions Dr. Shin imposed.

16. Robert K. Henrichsen, M.D., is a board-certified orthopedic surgeon. He examined respondent on April 8, 2009, reviewed respondent's medical records, and issued a report dated April 8, 2009.

Dr. Henrichsen's review of respondent's medical records noted repeated comments by other physicians that respondent's complaints of pain were out of proportion to his December 2006 injury, the imaging studies, and the objective findings upon physical examination.

Dr. Henrichsen conducted a thorough examination of respondent's orthopedic complaints and diagnosed respondent as follows:

1. History of lumbosacral contusion.
2. Persistent back pain.
3. Non-physiologic post-injury behavior.
4. Waddell's signs.
5. MRI evidence of right medial meniscal tear.
6. History of right shoulder and right knee sprain.
7. Unfavorable power to weight ratio.
8. History of drug addiction.
9. Poor recovery from lumbosacral contusional injury.

In his April 8, 2009 report, Dr. Henrichsen stated that his examination was "somewhat similar to that accomplished by other physicians," and that most of the physicians, including himself, "identified areas where there are non-physical responses to examination." Dr. Henrichsen "did not find a musculoskeletal neurologic reason for [respondent's] use of a walking cane." Respondent exhibited "abnormal Waddell's signs for give away muscle weakness." Respondent also exhibited an "amplified amount of sensory response to palpatory examination" and "non-anatomical pain distribution without objective imaging or evaluation support to explain the persistent symptoms." Dr. Henrichsen believed that respondent "never had a sacral fracture." Instead, respondent had a "sacral contusion" given both the imaging studies and his "post-injury function and evaluation," which was "not consistent with a fracture of the sacrum."

According to Dr. Henrichsen, the "entire evaluation and record review demonstrate that symptoms and pain are the reason for his continued off work." He found that respondent's previous work restrictions appeared to be "based upon the symptoms presented and the imaging studies," not "examination evidence." Dr. Henrichsen opined that there were no specific job duties that respondent was not able to perform, and that respondent was not substantially incapacitated for the performance of his work. Dr. Henrichsen found further that while respondent was "congenial during the evaluation," he did not "put forth full effort and his subjective complaints are exaggerated a serious amount." While Dr. Henrichsen believed that respondent had "some pain in his back," the pain did not "incapacitate him from his occupational position as a custodian as described, and he has inconsistencies during the examination today just the same as seen from previous physician evaluations."

17. Dr. Henrichsen issued a supplemental report on July 28, 2010, after reviewing additional medical records, including those relating to respondent's surgery in January 2010. After reviewing these records, Dr. Henrichsen concluded that the "records suggest that the amount of improvement from his surgery is not ideal," and that respondent was "making slow progress." Based upon respondent's surgery, Dr. Henrichsen considered him to be "temporarily disabled from his occupation as a custodian." Dr. Henrichsen anticipated that respondent could return to work as a Custodian by October 1, 2010, "if he puts forth good effort and did well with therapy." According to Dr. Henrichsen, the "final result of this type

of surgery depends a large amount on [respondent's] self-motivation and personal commitment to excellence."

18. Dr. Henrichsen conducted another independent medical examination of respondent on March 30, 2011, reviewed additional medical records, and issued a third report.

After conducting a thorough physical examination of respondent's orthopedic complaints, Dr. Henrichsen diagnosed respondent as follows:

1. Failed low back surgery.
2. History lumbosacral contusion.
3. Positive Waddell signs.
4. Nonphysiologic pain behavior.
5. Degenerative arthritis, right and left knee.
6. History of drug addiction.
7. Physical deconditioning.
8. Right shoulder pain.

In his March 30, 2011 report, Dr. Henrichsen stated that, "as seen by a variety of physicians prior to his surgery, there were some positive Waddell signs seen intermittently. Those are greater today." Although respondent was using a cane, Dr. Henrichsen found that there was "no true medical indication for use of a cane." From a review of respondent's records, Dr. Henrichsen found that respondent had "what appeared to be reasonable indications for surgery," and after the surgery, he "looked very good for a few months and then gradually dropped into a chronic pain pattern, and did poorly." But when Dr. Henrichsen looked at respondent's imaging films, he found that respondent had "excellent lordosis."[4] Dr. Henrichsen found that respondent did not have "any significant postoperative scoliosis or instability," and that the "decompression done by Dr. Nelson was accomplished in an expert fashion, but yet the subjective result was horrible." According to Dr. Henrichsen, there continued to be a "large disconnect between symptoms and findings," and the symptoms presented were not "supported by the examination findings."

Dr. Henrichsen concluded that respondent had the ability to lift 50 pounds. He also concluded that, due to respondent's deconditioning, he would "need to get on his knees rather than squat." In all, Dr. Henrichsen opined that respondent was "able to accomplish the essential functions of his occupation," and that he was not "substantially incapacitated." Dr. Henrichsen noted that respondent did not "put forth his best effort." Respondent "exaggerate[d] his symptoms," and "demonstrate[d] give-away muscle weakness, which is a non-physiologic and nonpathologic finding."

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[4] The Merriam-Webster Medline Plus online dictionary defines "lordosis" as "exaggerated forward curvature of the lumbar and cervical regions of the spinal column."

19. At hearing, Dr. Henrichsen testified that, in December 2006, respondent fell off a chair and "bruised his tailbone." According to Dr. Henrichsen, there was no "medical reason" for respondent's prolonged recovery from his December 2006 injury. Respondent had some arthritis of the spine. But respondent also had other symptoms, such as give-away muscle weakness, that were "non-physiologic findings" which could not be explained by anatomy or physiology. In addition, respondent had complaints of pain that could not be explained medically. Dr. Henrichsen testified that respondent's January 2010 surgery accomplished what it was supposed to accomplish – it mechanically removed the irritation to respondent's nerve, but respondent still complained of back pain. In sum, Dr. Henrichsen opined that, although respondent complained of pain, there was not enough medically wrong with him to support that he was incapacitated for the performance of his usual duties as a Custodian.

Expert Opinions on Respondent's Psychological Condition

20. CalPERS retained Benjamin Kaufman, M.D., as its expert with regard to respondent's psychological condition. Respondent did not call an expert to opine with regard to his psychological condition.

21. Benjamin Kaufman, M.D., is a board-certified psychiatrist. He evaluated respondent's psychological condition, reviewed respondent's medical records, and wrote a report dated June 4, 2009. As reflected in his June 4, 2009 report, during the mental status evaluation, Dr. Kaufman found that respondent's mood and affect were "appropriate" in their content. He did not appear to be "inappropriately anxious." He acknowledged "depression and suicidal ideation," but had "no history of a specific plan." He described his mood as being "fairly steady, depressed," but was "not given to rage outbursts or crying spells." His thought processes, cognitive examination for memory and alertness, "state of arousal," attention and concentration were all "normal." His judgment and insight seemed "unimpaired." He did not seem "unusually anxious." Dr. Kaufman assessed respondent's capacity for suicide or violent offensive action as being "nonexistent."

Dr. Kaufman diagnosed respondent as follows:

Axis I	Pain disorder associated with general medical condition and psychological factors. Major Affective Disorder with depression. Substance abuse, now in remission, except for pain medication.
Axis II	Personality disorder.
Axis III	Orthopedic problems related to injuries to his coccyx and his back and obesity.
Axis IV	Severe

Axis V GAF 60

Dr. Kaufman opined that respondent was permanently and substantially incapacitated for the performance of his usual duties as a Custodian, finding that respondent was:

> Unable to perform any of the physical duties associated with his job description as a custodian. He cannot sweep, clean, walk, bend over, lift or perform physically to fulfill the job duties of a custodian. He cannot mop, sweep, pick up or empty trash receptacles.

22. Dr. Kaufman issued a second report on August 20, 2009. In his August 20, 2009 report, Dr. Kaufman stated that, after reviewing the independent medical examination report of Dr. Henrichsen dated April 8, 2009, and his own June 4, 2009 report, he was amending his June 4, 2009 report to find as follows:

> Based on my interview in which I found no cognitive or mood disorder factors in mental functioning, [respondent] can perform all the duties described in his job duty statement. There are no psychological impairments on mental status exam to a degree that would prevent him from performing the essential functions of his job. He will continue to have psychological discomfort and he will claim physical symptoms that he feels are due to injury but no diagnosable physical condition will be found.

Dr. Kaufman opined that respondent "suffers from a form of conversion and somatoform disorders, in which symptoms are unsupported by medical findings," but he found that respondent was "not incapacitated for the performance of the usual duties of his current position" based upon his psychological condition. In Dr. Kaufman's opinion, respondent "would have developed complaints of this nature had he had some minor injuries with transient minor disability on any job." According to Dr. Kaufman, respondent's "personality makeup predisposes him to overreacting to physical injury."

23. Dr. Kaufman issued a third report on August 3, 2010. In his August 3, 2010 report, Dr. Kaufman reviewed additional medical records provided to him. He diagnosed respondent as follows:

> Having reviewed the above documents, my diagnosis and impression remain the same as my earlier report of August 20, 2009. [Respondent] suffers from a personality disorder, depression and anxiety which are related to a continued pain syndrome that is described in my earlier report.

24. At hearing, Dr. Kaufman explained that he initially supported respondent's disability retirement application in his June 4, 2009 report because he felt empathic toward respondent. But when he read Dr. Henrichsen's report, he realized that there were no physical findings to support the level of pain that respondent claimed. According to Dr. Kaufman, his June 4, 2009 opinion was based upon respondent's physical complaints, not on a psychological condition. Although respondent suffers from a personality disorder and may be depressed about his perceived physical condition, Dr. Kaufman does not believe that respondent can no longer work due to a psychological condition. According to Dr. Kaufman, respondent's psychological condition does not rise to the level of psychological dysfunction. Although respondent may have exaggerated complaints of pain, his psychological issues do not cause him to be incapacitated for the performance of his usual duties as a Custodian.

25. Although respondent did not call a psychiatrist to testify on his behalf, he submitted, among other reports, Agreed Medical Evaluation reports dated July 25, 2008, and April 17, 2009, from Ethan G. Harris, M.D., a psychiatrist, who conducted psychiatric examinations of respondent in his workers' compensation case. These reports have been considered to the extent permitted under Government Code section 11513, subdivision (d).[5] In his July 25, 2008 report, Dr. Harris opined that:

> [Respondent] has intermittently been disabled by psychological factors, but not continually or extensively. His credibility is marginal. His disability is chiefly physical in origin. Levels of disability are discussed below. Strictly speaking, his emotional condition is not permanent and stationary in the absence of a trial of systematic psychiatric care to consist of counseling and medications.

In his April 17, 2009 report, Dr. Harris found that:

> [Respondent] presents with a history of having injured himself in an orthopedic accident at work. He fell and developed pain. He now takes pain medications and sedatives. He has been found to be poorly credible and his injury not substantial by medical examiners. He gives an amplified report of marginal credibility, with extreme responses to many questions.

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[5] Government Code section 11513, subdivision (d), in relevant part, provides:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Other Medical Reports

26. At the hearing, respondent submitted additional medical records, which were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d). Respondent also submitted documents showing that he received awards in the workers' compensation and social security cases he filed, which were also admitted as administrative hearsay under Government Code section 11513, subdivision (d).

Discussion

27. Respondent's Orthopedic Condition. When all the evidence is considered, Dr. Henrichsen's opinion that respondent is not substantially incapacitated for the performance of his usual duties as a Custodian based upon his orthopedic condition was persuasive. Dr. Shin's contrary opinion was supported almost exclusively by respondent's subjective complaints of pain. The medical records and other documents respondent submitted were not contrary to Dr. Henrichsen's opinion. There is not sufficient competent medical opinion included in these records and documents to substantiate respondent's assertion that he is substantially incapacitated for the performance of his usual duties as a Custodian based upon the legal criteria applicable in this matter. Consequently, respondent failed to establish that his disability retirement application should be granted based upon his orthopedic condition.

28. Respondent's Psychological Condition. While Dr. Kaufman's June 4, 2009 report found that respondent was substantially incapacitated for the performance of his usual duties as a Custodian based upon his physical condition, at no time did Dr. Kaufman opine that respondent was substantially incapacitated based upon his psychological condition. Because Dr. Kaufman is a psychiatrist, he is not competent to render a medical opinion regarding respondent's physical condition. Consequently, his June 4, 2009 report can be given no weight in reaching a determination on whether respondent's physical condition causes him to be substantially disabled for the performance of his work. While respondent may suffer from some psychological impairments, there was not sufficient competent medical evidence to establish that he is substantially incapacitated for the performance of his usual duties as a Custodian based upon his psychological condition. Consequently, respondent failed to establish that his disability retirement application should be granted based upon his psychological condition.

LEGAL CONCLUSIONS

1. By virtue of his employment as a Custodian for DGS, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150.[6]

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[6] In pertinent part, Government Code section 21150 provides:

2. To qualify for disability retirement, respondent must prove that, at the time he applied, 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 ... **on the basis of competent medical opinion.** (Bolding added.)

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.)

The employee in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations and apprehend violators, issuing warnings and serving citations, and serving warrants and making arrests. He suffered an injury to his right arm while arresting a suspect. He could shoot a gun, drive a car, swim, row a boat (with some difficulty), pick up a bucket of clams, pilot a boat, and apprehend a prisoner (with some difficulty). He could not lift heavy weights or carry a prisoner away. The court noted that "although the need for physical arrests do occur in petitioner's job, they are not a common occurrence for a fish and game warden." (*Mansperger, supra,* 6 Cal.App.3d at p. 877.) Similarly, the need for him to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding that the game warden was not incapacitated for the performance of his duties, the *Mansperger* court noted that the activities he was unable to perform were not common occurrences and that he could otherwise "substantially carry out the normal duties of a fish and game warden." (*Id.* at p. 876.)

4. The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, reached a similar conclusion with respect to a state traffic sergeant employed by the CHP. The applicant in *Hosford* had suffered injuries to his left ankle and knee, and had strained his back. The court noted that the sergeant "could sit for long periods of time but it would 'probably bother his back;' that he could run but not very adequately and that he would probably limp if he had to run because he had a bad ankle; that he could apprehend persons escaping on foot over rough terrain or around and over obstacles but he would have difficulty and he might hurt his back; and that he could make physical effort from the sedentary state but he would have to limber up a bit." (*Id.* at p. 862.) Following *Mansperger*, the court in *Hosford* found that the sergeant:

> (a) A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076 or 21077.

> is not disabled unless he is substantially unable to perform the usual duties of the job. The fact that sitting for long periods of time in a patrol car would "probably hurt his back," does not mean that in fact he cannot so sit; ...[¶] As for the more strenuous activities, [a doctor] testified that Hosford could run, and could apprehend a person escaping over rough terrain. Physical abilities differ, even for officers without previous injuries. The rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the function, renders [the doctor's conclusion that Hosford was not disabled] well within reason. (*Ibid.*)

In *Hosford*, the sergeant argued that his condition increased his chances for further injury. The court rejected this argument, explaining that "this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently existing." (*Hosford, supra*, 77 Cal.App.3d at p. 863.) As the court explained, prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (*Ibid.*)

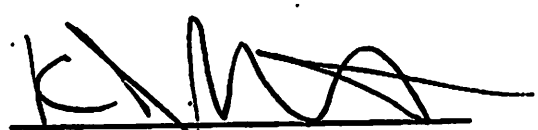
5. In *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff was not permanently incapacitated for the performance of his duties, finding, "A review of the physician's reports reflects that aside for a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the appellant's condition are dependent on his subjective symptoms."

6. When all the evidence in this matter is considered in light of the courts' holdings in *Mansperger, Hosford*, and *Harmon*, respondent did not establish that his disability retirement application should be granted. While respondent may complain that working as a Custodian would cause him too much pain, there was not sufficient evidence based upon competent medical opinion that he is permanently and substantially incapacitated for the performance of the usual duties of his job, based on either his orthopedic or psychological condition. Consequently, his disability retirement application must be denied.

ORDER

The application of James Roberson for disability retirement is DENIED.

DATED: September 6, 2013



KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings