ATTACHMENT A

THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Disability Retirement Benefits of: BRENT T. MCLEAN, Applicant and Respondent. and COUNTY OF YUBA, Respondent.	OAH No. 2013031098 Agency Case No. 2010-0700

PROPOSED DECISION

Administrative Law Judge Ann Elizabeth Sarli, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on November 5, 2013.

California Public Employees' Retirement System (CalPERS) was represented by Jeanlaurie Ainsworth, Senor Staff Counsel.

Brent McLean (applicant) was properly served with the Notice of Hearing but did not appear at hearing, nor did anyone appear on his behalf. Accordingly a default was entered against applicant pursuant to Government Code section 11520.

The County of Yuba was properly served with the Notice of Hearing but did not appear at hearing. Accordingly a default was entered against this respondent pursuant to Government Code section 11520.

Evidence was received and the record remained open to permit CalPERS to submit evidence that applicant was employed subsequent to his application. On November 19, 2013, applicant filed a document showing that applicant had worked in CalPERS covered employment subsequent to his application. The document was admitted in evidence as Exhibit 15. The matter was submitted and the record was closed on November 19, 2013.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
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PROCEDURAL FINDINGS

1. Applicant was hired by the County of Yuba as an Assistant Chief Building Official in 2003. Applicant was a member of CalPERS by virtue of his employment with the County.

2. Applicant signed an application for a disability retirement (application) with CalPERS on February 10, 2010. At the time of his application, he occupied the position of Assistant Chief Building Official.

3. In his application, applicant wrote that he was permanently incapacitated by a psychiatric condition and by cardiovascular problems following a heart attack in 2007.

4. Applicant's medical and employment records were submitted to CalPERS for review and he was evaluated by independent medical examiners. On the basis of this information, CalPERS denied the application and notified applicant in writing of the denial. Applicant timely filed a request for an evidentiary hearing on the denial of his application.

ISSUES

The issues for determination are:

(a) Is applicant suffering a substantial incapacity from performing the normal and usual duties of his position as an Assistant Chief Building Official for the County?

(b) If yes, as a reasonable medical probability, is the incapacity likely to be permanent in nature?

SUMMARY OF EVIDENCE AND FACTUAL FINDINGS

Medical Opinions

1. Mark Eaton, M.D., evaluated applicant on July 16, 2010, at the request of CalPERS. Dr. Eaton holds diplomates in internal medicine, cardiovascular disease, adult comprehensive echocardiography and nuclear cardiology. He is a fellow of the American College of Cardiology and has a private practice in heart and vascular medicine.

2. Dr. Eaton conducted a medical record review and examined applicant. His July 16, 2010 report was entered in evidence and he testified at hearing. Dr. Eaton testified that applicant was diagnosed with coronary artery disease in 2007. He underwent urgent percutaneous revascularization of the left anterior descending artery including bare metal stenting of the left anterior descending artery. Applicant had excellent results with no

procedural or post- procedural complications. Dr. Eaton did not find records consistent with recurrent angina pectoris, decompensating congestive heart failure or clinically significant cardiac dysrhythmia. There was no documentation to suggest clinically significant cerebrovascular or peripheral vascular disease. Dr. Eaton also noted that applicant had undergone a stress test in 2010, which was unremarkable for exercise-induced ischemia.

3. On examination, Dr. Eaton noted that applicant was 49 years old, overweight, with a history of tobacco use ending in 2007, and with a family history of premature coronary disease. Applicant told Dr. Eaton that he continued to experience intermittent chest discomfort. On examination, applicant's vital signs were stable and his cardiac examination was normal. Although he complained of recurrent chest discomfort, he had not required repeat coronary angiography and stress testing was normal.

4. Dr. Eaton reviewed applicant's job duties and determined that there were no specific job duties applicant was unable to perform

5. Denis Alan Clegg, M.D. is certified by the American Board of Psychiatry and Neurology. He has a private practice in psychiatry. He performed a psychiatric independent medical evaluation of applicant on July 6, 2010. Dr. Clegg also reviewed applicant's medical records and prepared a report. His report was entered into evidence and he testified at hearing.

6. Applicant told Dr. Clegg that he experienced chest pain as a result of work stress. The chest pain occurred once to twice per week and lasted usually less than 15 minutes. Applicant had developed relaxation techniques to help him cope with the chest pain. Applicant denied any past history of significant depressions, manic episodes, excessive anxiety, obsessions, compulsions or psychological traumas. Dr. Clegg asked applicant to relate examples of work stress. Applicant explained that he experienced stress at work from the time he started in 2003, because of the workload and poor management. When he returned to work after his heart surgery, his supervisor had shown favoritism to others. Applicant resented changes that had occurred at the work place while he was on disability leave. Applicant also explained that he was frightened about having another heart attack when he has severe episodes of chest pain.

7. Applicant explained to Dr. Clegg that his work management was abusive and this aggravated his chest pain. When Dr. Clegg asked for examples of abusive management, applicant told him about an incident where applicant raised his voice with another employee and slammed a door. He was formally reprimanded for this outburst and was told that he would be demoted if it ever happened again. His employer sent him for a fitness for duty evaluation and he saw a psychologist for about three sessions after the evaluation. Applicant also told Dr. Clegg that in January 2010, he was told that management was top heavy and he could either be demoted to Assistant Chief Building Official (from Chief Building Official), with a 25% pay decrease, or be terminated. Applicant told Dr. Clegg that these incidents increased his stress. He told Dr. Clegg that he had been seeing a psychotherapist for several months.

8. Dr. Clegg conducted a mental status examination and noted that applicant was alert and oriented to time, date and place. Applicant's speech was clear and coherent, not pressured, and there was no loosening of associations and no tangentiality. He was not retarded in psychomotor activity and he had no difficulty understanding Dr. Clegg's questions and responding with appropriate answers. His eye contact was good and his facial expression was not sad, anxious or tearful, although he described his mood as depressed and anxious. His ability to abstract was good and his concentration was good during the interview. His attention span and working memory were good. There was no history of auditory hallucinations and no evidence of delusional ideation of a persecutory or grandiose nature. His thinking was logical and goal directed. His impulse control and judgment were good and his insight was fair.

9. Dr. Clegg diagnosed applicant with a mood disorder due to history of myocardial infarction with mixed features of depression and anxiety and occupational problem. Dr. Clegg also found applicant had narcissistic and paranoid personality traits such that he has general hostility and a sense of entitlement. He has episodes of anxiety but they are not greater than two per week lasting usually less than 15 minutes and he has learned skills to cope with his fear when he has chest pain. Dr. Clegg concluded that applicant was not substantially incapacitated from the performance of the job duties of Building Inspector (Assistant Chief Building Official).

Discussion of Evidence

10. Applicant produced no medical evidence and did not appear at hearing. Additionally, after he filed his application for disability retirement, between December 12, 2011 and July 22, 2012, applicant worked for the City of Grass Valley in CalPERS covered employment. The evidence submitted by CalPERS established that applicant is not substantially incapacitated from the performance of any of the job duties of an Assistant Chief Building Official.

LEGAL CONCLUSIONS

1. "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."[1] The burden of proof is on the County employee seeking a disability retirement.[2] Thus, applicant has the burden of proving by a preponderance of the evidence each affirmative issue on which the application depends. Here, applicant has the burden of

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[1] Evidence Code section 500.

[2] *Harmon. v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 696.

proving that he was permanently and substantially incapacitated from the performance of the duties of an Assistant Chief Building Official.

2. Government Code section 31720 provides, in pertinent part, as follows:

> Any member permanently incapacitated for the performance of duty shall be retired for disability regardless of age if, and only if:
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> (a) The member's incapacity is a result of injury or disease arising out of and in the course of the member's employment, and such employment contributes substantially to such incapacity, or
>
> (b) The member has completed five years of service, and
>
> (c) The member has not waived retirement in respect to the particular incapacity or aggravation thereof as provided by Section 31009.
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> [¶] . . . [¶]

3. Section 31724 provides that the board shall retire the member "if the proof received, including any medical examination, shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his duties in the service..."

4. *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal. App. 3d 873, 876, remains the definitive statement of California courts regarding the meaning of "incapacity" and "disability" in the context of an application for a disability retirement. "Incapacitated for the performance of duty" within Government Code section 21022 means the substantial inability of the Applicant to perform his usual duties." *(Mansperger v. Public Employees' Retirement System*, supra at 876.) The County Retirement Act of 1937 employs the term "Incapacitated for the performance of duty." The definition of the term as used in County retirement systems is the same as that used in the Government Code.[3]

5. In order to qualify for a disability retirement, applicant must prove he is "substantially and permanently incapacitated" within the meaning set forth in *Mansperger*. The disabling condition must render him substantially unable to perform his usual and

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[3] *Curtis v. Board of Retirement of Los Angeles County Employees Retirement Association* (1986) 177 Cal. App. 3d 293, 298, *McCoy v. Board of Retirement* (1986) 183 Cal. App. 3d 1044, 1051, *Rau v. Sacramento County Retirement* Board (1966) 247 Cal.App.2d 234, 238, *Lindsay v. County of San Diego Retirement* Board (1964) 231 Cal. App. 2d 156, 160-162.

customary work duties. As the *Mansperger* court explains, pain and difficulty performing tasks does not necessarily constitute a substantial incapacity for duty. The disabling condition must be permanent; in that it is reasonably medically certain the disabling condition or injury will continue to be disabling for the indefinite future.

6. Pursuant to the Findings, applicant has not met his burden of proving by a preponderance of the evidence that he is permanently incapacitated from performing the normal and usual duties of the position of Assistant Chief Building Official.

ORDER

The application of Brent McLean for disability retirement is DENIED.

DATED: November 25, 2013

ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative