

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:

MARIO R. VELASQUEZ,

Applicant,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
SUBSTANCE ABUSE TREATMENT
FACILITY,

Respondent.

Case No. 2013-0262

OAH No. 2013050362

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California heard this matter in Fresno, California, on May 22, 2014.

JeanLaurie Ainsworth, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Applicant Mario R. Velasquez appeared in pro per.

Respondent California Department of Corrections and Rehabilitation, Substance Abuse Treatment Facility, did not appear.

The record was closed and the matter was submitted on May 22, 2014.

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PROCEDURAL AND JURISDICTIONAL FINDINGS

1. Mario R. Velasquez (applicant) was employed by the California Department of Corrections and Rehabilitation (CDCR), assigned to the Substance Abuse Treatment Facility, at all times relevant to this Decision.

2. Through his employment with CDCR, applicant has been and remains a state safety member of CalPERS. At the time of his applications (below), applicant had the minimum service credits to qualify for a service retirement.

3. Applicant applied for a service retirement pending industrial disability retirement from CalPERS on approximately April 5, 2007. Applicant's effective retirement date for service was March 1, 2007, and he received a service retirement benefit until August 6, 2008, at which time he returned to work full-time for CDCR. Applicant retired again for service effective February 1, 2011, pending his refiled application for disability retirement (below) and has been receiving a service retirement benefit since.

4. Applicant applied to CalPERS for industrial disability retirement (the first application) on July 18, 2007. Applicant claimed disability because of an injury to his lower back and neck, and headaches.

5. The first application for disability retirement was denied by CalPERS, primarily, but not totally, because applicant returned to work. Applicant appealed. An evidentiary hearing on the first application for disability retirement was scheduled before the Administrative Law Judge (ALJ) on December 1, 2011. Applicant withdrew his appeal during the hearing after the presentation of considerable evidence that showed his return to work was likely to defeat his claim.

6. Applicant reapplied to CalPERS for industrial disability retirement (the second application) on December 13, 2011. Applicant claimed in the second application to be permanently disabled from performing his duties as a Stationary Engineer with CDCR due to an orthopedic condition; an injury to his back.

7. Applicant described his disability in his application:

Back injury (upper) 8-10-06, ladder fell from under me while I had placed both feet on it, it left me hanging in crawl space opening and had to physically haul myself back up.

8. Applicant described his limitations/preclusions because of his claimed disabling conditions:

Back pain, severe headaches, leg pain, tingling feeling in small finger and one next to it. Pain between shoulder blades. Able to squat, but unable to get back up easily, headaches, unable to

continuously work without stopping, unable to work in awkward positions and carry 40 lbs.

9. Applicant submitted medical records and other documentation to support his claims to CalPERS. These medical records were largely from his primary care physician and from health care practitioners treating or evaluating him with his Workers Compensation claims. Prominent among these were reports by Ronald N. Kent, M.D., Ph.D., a Board certified neurologist who conducted a Worker's Compensation Agreed Medical Evaluation (AME) following an examination on October 21, 2008, and Bruce Fishman, M.D., an orthopedic surgeon, who conducted a records review only Worker's Compensation AME on October 24, 2008, evaluating applicant's claims of neurological and orthopedic disability.

10. Applicant's medical records were evaluated by the staff of CalPERS' Benefits Services Division. Those records were submitted to Ernest Miller, M.D., a Board certified orthopedic surgeon, and Steven McIntire, M.D., a Board certified neurologist, both retained by CalPERS to perform Independent Medical Evaluations (IME). Dr. Miller performed his orthopedic IME of applicant on June 15, 2012, and wrote two reports, dated June 15, 2012 and July 9, 2012, and a supplemental report dated August 7, 2012. Dr. McIntire performed his neurological IME on April 9, 2008.

11. CalPERS' Benefit Services staff re-reviewed the medical and other reports submitted by applicant. CalPERS Benefit Services staff did not conclude the medical information submitted by applicant supported granting the application.

12. CalPERS notified applicant in writing on January 3, 2013, that he had failed to produce sufficient persuasive medical evidence to demonstrate that he was substantially incapacitated from his duties as a Stationary Engineer with the CDCR, and that his application for a disability retirement was denied. Applicant's service retirement benefit continued unimpaired.

13. Applicant timely appealed the CalPERS determination and denial of his application.

14. Anthony Suine, Chief, Benefits Services Division of CalPERS, made the allegations in the Statement of Issues in his official capacity and caused it to be filed. The Statement of Issues was made on April 16, 2013. Applicant timely filed a Request for Hearing on the Statement of Issues. The matter was set for an evidentiary hearing before the same ALJ.

15. Notice of the date, time and place of the evidentiary hearing was duly given to the respondent CDCR. CDCR failed to appear. The matter proceeded as a default as to the CDCR, pursuant to the provisions of Government Code section 11520.

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FACTUAL FINDINGS

USUAL AND CUSTOMARY DUTIES

1. Applicant's official CDCR Job Description and Duty Statement (job description) as a Stationary Engineer, in the portion entitled "Summary," contains the following general job requirements:

Under the general supervision of the Chief Engineer I, the Stationary Engineer will supervise and work with a crew of at least two inmates and is responsible for the maintenance, repair, installation and preventative maintenance to the heating, ventilation, air conditioning, refrigeration and mechanical/electrical systems throughout the prison. In addition, the Stationary Engineer operates, maintains and repairs single and multi-phase electrical circuitry up to 550 V, compressed air systems, natural gas distribution piping, water lines, plumbing systems and fixtures, high pressure steam boilers and appurtenances, laundry equipment, lighting systems, security locking devices, food service equipment, and orders necessary parts and materials.

2. Applicant's job description states that a Stationary Engineer working at CDCR moves from one location to another during the workday, and performs a wide range of duties comprising the operation, maintenance, repair, and installation of equipment throughout the inmate housing units, support services facilities, and administrative holdings. The majority of the equipment is in the facility pantries or in mechanical rooms, but some of the air conditioning systems are on the rooftops of the buildings. The position is also responsible for performing repairs to the steam distribution piping, which typically involves working in confined space location, such as underground utility vaults. The Stationary Engineer is also responsible for maintaining accountability of tools, keys, and power equipment used in performing required duties, including performing tool checks, inventory checklist, and maintaining accountability of hazardous materials. The Stationary Engineer may be required to provide coverage in the boiler plant, either on a temporary or long-term basis. Duty in the boiler plant includes continuously monitoring the high pressure steam boilers, securing or bringing additional boilers online as necessary, checking gauges, operating pumps, completing written logs, performing chemical tests, dispersing chemical agents, isolating individual boilers, or the entire steam plant if an emergency occurs. This includes opening and closing boiler valves, typically with a large pipe wrench. The Stationary Engineer can also be required to perform repairs to the boilers and auxiliary equipment as needed, including maintenance during the summer that includes tube cleaning, patching of firebrick, and servicing of blower motors.

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3. **“Other Skills and Abilities,” required of the Stationary Engineer are:**

Ability to operate, maintain and repair boilers, heaters, pumps, valves, appurtenances, and lines used in distributing steam and heated or processed water;

Ability to operate, repair and maintain refrigerant compressors, condensers, evaporators, traps, transfer pumps, expansion valves, stop valves, and float valves, with all refrigerant lines and devices used to control temperatures;

Ability to operate, maintain and repair air compressors, with distribution lines and all valves and devices for air control;

Ability to operate, maintain and repair water filters, softeners, piping and pumps used with water distribution, including all sinks and toilet bowls, supply lines and water lines;

Ability to operate, repair and maintain many motors and engines used to power pumps, compressors and fans;

Ability to repair and maintain single phase and multiphase electrical circuits up to 550 V, to repair and maintain electrical transformers, motors, controls, machinery, fixtures, appliances and elevators;

Ability to repair and maintain electronic systems such as clocks, closed-circuit television, automatic alarm systems, security systems, energy management systems, equal potential grounding in automatic power transfers;

Ability to calibrate control systems for air conditioning, refrigeration, heating and ventilation systems, including air balance, humidity stats and solid-state refrigeration, heating and ventilation systems, including air balance;

Ability to operate, maintain and repair water and sewage systems, electronic motor control amplifiers, laundry, baking and culinary equipment, inspect and troubleshoot electrical and mechanical systems and equipment to identify repairs needed, and to perform minor building maintenance and repair.

4. **The job description also requires the Stationary Engineer have “Special Physical Characteristics”:**

Must be reasonably expected to have and maintain sufficient strength, agility and endurance to perform during stressful (physical, mental, and emotional) situations encountered on the job without compromising their health and well-being or that of their fellow employees or that of inmates.

5. The job description describes those physical demands as:

Frequent standing while making repairs to various types of equipment, but not over 30 minutes in one place;

Frequent walking throughout prison grounds and back and forth various worksites to make repairs;

Sitting occasionally to frequently during breaks, to complete paperwork, while monitoring boiler operations or completing log entries;

Occasional to frequent lifting, including lifting and carrying tool bags weighing approximately 20 pounds, although the tool bag may be placed on a hand truck and pushed from one location to another. Lifting also includes lifting tools, equipment, parts and materials throughout the workday. Items lifted can weigh from a few pounds each up to overhead doors that can weigh up to 50 pounds each. Occasionally the Stationary Engineer may be required to move the move or lift mortar mix other bag items weighing up to 90 pounds each, but not without assistance.

Occasionally carry tools, materials and equipment to perform repair jobs, often with assistance of inmates are additional staff;

Frequent bending and stooping to inspect and repair equipment and can sometimes be required to perform in tight quarters;

Frequent reaching in front of the body when performing repairs, preventative maintenance, inspections and equipment installations;

Occasional reaching overhead is required as most overhead work is done while working on ladders;

Occasional climbing using ladders or stairs to access a rooftop, work on doors, gates and other equipment. In each of the prison living units, administration and support services buildings and the boiler room, certain stairs must be accessed to required completed tasks, and certain repair tasks such as accessing the roof to repair air conditioning units requires climbing up ladders;

Occasional balancing, must work on roofs, stairs or ladders;

Occasional pulling and pushing, must assist in the installation activities repairs and other miscellaneous tasks;

Occasional kneeling and crawling when repairing equipment working in small and/or confined spaces, such as attics, pipe chases or utility vaults;

Occasional crouching to work on culinary equipment, air conditioners or other equipment near the ground;

Frequent fine finger dexterity, must work on intricate mechanical and electrical device repair and maintenance;

Constant to frequent hand and wrist movement, must manipulate hand tools and parts during the majority the day while performing repairs and preventative maintenance on equipment;

Good hearing, speech and sight, to perform the job successfully and to maintain institutional security; and

Frequent operation of vehicles and heavy equipment must be operated frequently such as, cars, trucks, golf carts, forklifts, tractors or other motorized conveyance.

6. The physical demands of the Stationary Engineer position set forth in the job description are coincident with the Physical Requirements of Position/Occupational Title form. This form was completed and submitted to CalPERS jointly by a CDCR representative and applicant as part of the application process in order to accurately describe the physical requirements of applicant's Stationary Engineer position.

7. Dr. Miller and Dr. McIntire (below) each read and considered applicant's official CDCR job description and the Physical Requirements of Position/Occupational Title document as part of performing their IMEs and in writing their reports.

ON THE JOB INJURY

8. Applicant was working at his Stationary Engineer job for the CDCR on August 16, 2006, in an attic crawl space he entered by using a ladder. The ladder broke, causing him to start to fall. He broke his downward progress by grabbing the supporting beams of the crawlspace, and as he dangled, he called for help. Coworkers responded immediately and helped him get down from the crawlspace by putting up another ladder. Applicant reported that as he fell and grabbed the crawlspace support members to break his fall, he felt a "popping" in his back between his shoulder blades. He also reported pain in his low back. He sought medical attention through his primary treating physician, Dr. Sidhu.

9. Applicant filed Workers Compensation claims for injuries claimed to have been sustained because of the August 16, 2006, incident. In resolving these claims, he was evaluated numerous times, which resulted in the production of several MRI imaging studies of his cervical and lumbar/sacral spine, several neurological studies, and the AME reports of Dr. Fishman and Dr. Kent. Applicant relied upon the medical reports and diagnostic imaging produced through his Workers Compensation claims to support his application here.

NEUROLOGICAL CLAIMS

DR. MCINTIRE

10. Dr. McIntire did not testify. His opinions and conclusions, expressed in his IME report dated June 3, 2008, are hearsay.¹

11. Dr. McIntire conducted an IME of applicant on April 9, 2008, restricted to evaluating applicant's claim of neurological disability regarding his reported current complaints of burning in his feet, headaches and low back pain, and to determine whether applicant was substantially incapacitated from performing his duties due to his claimed neurological disabilities.

12. Dr. McIntire conducted a physical and neurological examination, reviewed applicant's history and summary of present complaints, and reviewed applicant's voluminous medical records, including medical reports and opinions from physicians who treated and evaluated applicant for his Workers Compensation claims.

13. Dr. McIntire's impression following his IME is that applicant has a history of work injuries. He noted that applicant described cervical and thoracolumbar pain, paresthesias of his feet and headaches that spread from the cervical region and are holocephalic. He concluded there was not a description of significant associated symptoms with the headaches, and that the headaches responded to medication, Tramadol, when they occurred.

¹ Government Code section 11513, subdivision (c).

14. Dr. McIntire wrote that objectively, there were no findings of any cervical radiculopathy or myelopathy on examination. Applicant was found to have a slight asymmetry of Achilles reflexes, but there were no findings of an active lumbar radiculopathy². He also found on examination that applicant demonstrated a full range of motion in his cervical and thoracolumbar spine. Dr. McIntyre opined, "From a neurological perspective, there are no findings to suggest functional limitations."

DR. MCINTIRE'S IME FINDINGS AND CONCLUSIONS

15. Dr. McIntire opined that applicant is not precluded from any job duties as a Stationary Engineer due to any neurological condition. From a neurological perspective, Dr. McIntire concluded applicant is not substantially incapacitated from performing his duties. Dr. McIntyre wrote that although there were no findings of exaggeration, there were also no substantial objective findings to support many of applicant's reported symptoms. He observed that applicant has a history of cervical and thoracolumbar strains caused by employment, but there are no ongoing neurological conditions of significance. "The current examination does not suggest a disability."

DR. MILLER

16. Dr. Miller, a Board certified orthopedic surgeon, performed an IME on applicant on June 15, 2012, regarding applicant's claims of orthopedic disability due to injuries to his low back, mid back and shoulders. Dr. Miller's IME is the most recent of the medical evaluations and diagnostic studies information in this record.

17. Dr. Miller noted that applicant's most important symptom and/or current complaint is "four herniated discs in his lower back." He also noted that applicant complained that he "cannot function properly," was experiencing "extreme pain," in his waist and legs, having frequent headaches, inflammation and swelling in his low back, and that he "lives in pain." Applicant told Dr. Miller he had not been taking any pain medication during the months leading up to the time of the evaluation.

18. Dr. Miller had applicant fill out a questionnaire regarding his employment history, work and history of injuries. Applicant told Dr. Miller he was hired as a Stationary Engineer by CDCR in June 2000 and was terminated in January 2011. He told Dr. Miller that being a stationary engineer for the CDCR was "an excellent job," and he would love to return to the job.

19. Dr. Miller performed a physical and neurological examination, and although he had received voluminous medical records, he had not reviewed those records at the time of his evaluation. Dr. Miller diagnosed applicant as having chronic low back pain dating from an industrial injury applicant suffered in 2002.

² Radiculopathy is radiating pain, numbness and/or tingling into an extremity caused by harm sustained to a nerve.

20. Dr. Miller concluded that his physical examination of applicant was normal. Dr. Miller noted that applicant reported chronic lower back pain, but he could not find evidence of orthopedic, physical or neurological abnormalities, either upon his physical and neurological examination, or evident in the several MRI studies that were obtained of applicant's cervical spine, thoracic spine and lumbar spine as part of his Worker's Compensation treatment and evaluations. He did note that applicant has an inexplicable one inch muscle atrophy of his right calf. He concluded that there is no objective evidence of a lower back injury on physical examination, of a cervical or lumbar spine disability, or of any herniated disc in applicant's back. While offering to read and review the medical records of Dr. Sidhu and Dr. Silver before committing himself to a final opinion, he opined that, based on the evidence gathered in his physical and orthopedic examination, there was no evidence that applicant was substantially incapacitated from performing his usual and customary duties as a Stationary Engineer with CDCR.

21. Dr. Miller received and reviewed the medical reports of Dr. Sidhu and Dr. Silver, as requested, as well as the AME reports of Dr. Fishman and Dr. Kent. Dr. Miller wrote a supplemental evaluation on July 9, 2012, based upon his records review, comparing those physician's opinions and conclusions to his IME report.

22. Dr. Miller concluded that his review of the provided medical records and imaging studies confirmed the results and conclusions of his prior IME. He noted that the initial MRI study of applicant's lumbar sacral spine, performed May 29, 2002, is normal, except for mild degenerative disc disease and a mild posterior disc bulge at L-5/S-1. The December 21, 2007, MRI of applicant's lumbar spine was unchanged from the 2002 MRI study, with no evidence of pathology, other than confirming the existence of multilevel degenerative disc disease.

23. Dr. Miller noted that Dr. Kent performed a neurological examination following applicant's 2006 injury and found applicant to be neurologically normal. Dr. Miller noted that Dr. Fishman did not perform an orthopedic examination on October 24, 2005, when he wrote his AME report. Dr. Miller noted that Dr. Fishman diagnosed "mechanical lower back pain with disc bulges and protrusions," and "lumbar radiculopathy," conclusions not supported or confirmed on his own physical examination.

24. EMG studies conducted April 10, 2009, by Dr. Kent, indicated normal nerve conduction, but also showed the potential cause for the slight muscle atrophy of the calf, which Dr. Miller noted in his physical examination. Dr. Miller noted that the cause of the neuropraxia that resulted in the slight atrophy in applicant's calf is not discussed anywhere else in the entire medical record.

25. Dr. Miller concluded there is nothing in the lengthy medical records he reviewed that constituted cause for him to alter the results, opinions and conclusions of his previous IME orthopedic examination. He noted that the medical records contain considerable diagnostic imaging of applicant's back, including multiple x-rays and MRI studies of the lumbar and sacral spine that identify no significant pathology, precluding any

objective finding of upper or lower back disability from applicant's industrial injury. Dr. Miller reiterated his opinion first expressed in his IME report following physical examination that applicant is not disabled, is not substantially incapacitated and activity restriction is not warranted or indicated. Dr. Miller stated that applicant may, "Certainly resume his preinjury occupation."

THE AME REPORTS FROM DR. KENT AND DR. FISHMAN

26. The findings and conclusions of Dr. Kent and Dr. Fishman in their AME reports were reviewed and assessed in writing by Dr. Miller in his supplemental report referenced above, and in his testimony, and are not repeated here.

DR. MILLER'S TESTIMONY

27. Dr. Miller was the only medical expert who testified at the evidentiary hearing.

28. Dr. Miller testified that applicant told him at the beginning of his evaluative visit that he had "four herniated discs," and as a result, could only work 10 minutes without extreme waist and leg pain, that he had swelling in his low back and headaches due to his pain. He observed that during his IME evaluation of applicant, applicant did not mention any pain in his shoulders or upper back.

29. Dr. Miller testified that his opinions and conclusions were based not only on his physical examination of applicant, but also upon his review of several MRIs and other radiological studies of applicant's back he was provided that were obtained by other physicians in the course of treating applicant.

30. Dr. Miller noted that he found an unexplained one inch difference in calf circumference in his physical examination, which he attributed to atrophy from an injury that occurred to applicant's peroneal nerve that is undocumented in any of the medical records except Dr. Kent's 2012 EMG study. When asked, Dr. Miller opined that the injury to the peroneal nerve must have occurred after 2008 and before 2012, because it first showed up in the 2012 EMG. He also clarified that this injury to the peroneal nerve is not disabling, is not explanatory of any of applicant's complaints, nor is it related to applicant's claims in the application for disability retirement.

31. Dr. Miller noted that his physical examination, assessment of applicant's complaints, review of the records and the MRI studies show that applicant's upper back is "unremarkable," so unremarkable that he saw no medical indication even to obtain the 2007 MRI studies of applicant's upper back. He commented there is arthritis present in applicant's rotator cuff and some tendinitis in his acromioclavicular space, but that is true of most 50 to 55-year-old males, regardless of their occupations or injuries. Regarding his analysis of applicant's lumbar/low back complaints, Dr. Miller opined that the MRI studies and his physical examination findings show a "totally normal" low back for a man of his age,

and that applicant is no more incapacitated due to the condition of his low back than any other 50 to 55-year-old man.

32. Dr. Miller explained during applicant's questioning that there is a substantial difference between herniation of discs and bulging discs. He explained that almost all 50 to 55-year-old men have degenerative changes in their cervical, lumbar and sacral spines and some amount of disc bulging, often at several discs, as reflected in the MRI's of applicants back taken in 2002 and 2007. He rather bluntly stated in response to one question asked by applicant, "You do not have herniated discs, you have bulging discs, and everybody has these at age 50 or so, and so do I."

33. Dr. Miller was pointedly critical of the conclusions made by Dr. Silver, Dr. Kent, and particularly Dr. Fishman, in their reports he reviewed.

34. Dr. Miller testified that he especially disagreed with Dr. Silver's conclusions, observing that, "Dr. Silver could not have looked at multiple MRIs and other physical examinations that show no radiculopathy," and conclude that applicant has a low back-based disability. Dr. Miller forcefully stated that a physician cannot find disability commensurate with the AMA standards when the physical exams and radiological studies do not support the diagnosis and conclusion.

35. Dr. Miller testified that Dr. Kent's clinical findings on examination of applicant were "correct," and were entirely consistent with his own. Dr. Miller particularly noted that Dr. Kent's EMG examination showed no evidence of upper or lower radiculopathy, refuting Dr. Silver's conclusion that radiculopathy existed. But although he agreed with Dr. Kent's clinical findings, he "totally disagrees" with Dr. Kent's medical opinions and conclusions stemming from those clinical findings. He pointed out rhetorically, "How can a normal physical exam plus a normal EMG study support a conclusion of disability?"

36. Dr. Miller reserved his harshest criticism for Dr. Fishman's report dated February 9, 2010. Although congratulating Dr. Fishman for finding in his EMG report the peroneal nerve damage, and noting that Dr. Fishman noted in the records he reviewed the same mild disc bulging and mild multilevel degenerative disc disease he found, he noted there was no orthopedic clinical examination performed, and that Dr. Fishman's orthopedic and neurological opinions and conclusions in this AME report were entirely based upon reviews of records and "prognostications and pronouncements," based upon his review of those records. He noted that Dr. Fishman's conclusion that applicant has four herniated discs in his lumbar spine, and imposing work restrictions, without having conducted a physical examination, without his own or any other clinical findings in the medical records of radiculopathy, with no EMG findings of nerve conduction impairment and with no findings of reflex diminution on his own or any other physician's physical examination violates both Workers Compensation and AMA guidelines for diagnosing and rendering medical opinions in an agreed or independent medical examination. Dr. Miller stated that Dr. Fishman's

opinions and conclusions expressed in the February 9, 2010 AME report are medically invalid.

WORK RESTRICTIONS AND SUBSTANTIAL INCAPACITY

37. Applicant points to work restrictions imposed, particularly by Dr. Silver and Dr. Kent, as evidence he is permanently incapacitated and unable to return to work as a Stationary Engineer for CDCR.

38. Dr. Silver imposed permanent preclusions against heavy lifting (over 30 pounds) and repetitive bending or stooping. Dr. Kent imposed physical restrictions on applicant's work, "Based on the patient's subjective complaints and objective findings³," that applicant should be precluded from heavy lifting and repeated bending and stooping "with regard to his lumbar spine and legs." Dr. Kent precluded applicant from heavy work and protracted flexion and extension at the neck regarding his cervical spine. Dr. Kent concluded his AME report by stating that, "Applicant is probably unable to return to his duties as a Stationary Engineer for California Substance Abuse Treatment Facility within the work restrictions set forth above."

39. The remarkable part of Dr. Kent's AME report is the sentence immediately following the above, where he states, "I would, of course be pleased to review a detailed job analysis to provide a supplemental report regarding the issue." If Dr. Miller's credible and persuasive discrediting of Dr. Kent's opinions and conclusions set forth above were not sufficient, that Dr. Kent was willing to impose work restrictions and opined that applicant cannot return to work at his usual occupation without ever having reviewed a job description, completed the process of fully discrediting Dr. Kent's opinions and conclusions.

APPLICANT'S TESTIMONY

40. Applicant expressed exasperation and frustration with his condition and his inability to obtain the benefit he seeks in this action. He testified, "I am in a lot of pain." He acknowledged that after the injury he suffered that is the precipitating event of this application in 2006, he returned to work in 2008, and continued to work full time until April 27, 2010. It was not entirely clear whether he worked under restrictions, but considering the reports of Dr. Silver and Dr. Kent from the Worker's Compensation case imposing such restrictions, it must be assumed that he did. He testified he loved his job and that he tried hard to return to work and continue, including taking a lot of medications he really did not want to take, to help him manage the pain. He testified that he is an honest person with good credit and that, "I am entitled to the benefit being denied and I am not looking for a handout."

³ As Dr. Miller bluntly pointed out, there were no such objective findings of a disabling condition by Dr. Kent, as he did not conduct a clinical examination in which he could make such findings, leaving the entire basis of the opinions and conclusions applicant's subjective complaints.

41. It was not disputed that applicant's experience of pain and discomfort from the multilevel degenerative disc disease in his spine and the bulging discs identified in the MRI studies and commented on by every medical report in evidence is genuine, even if a bit exaggerated. Nevertheless, the medical evidence does not support his claims of substantial incapacity. The medical evidence supports only a conclusion of a period of temporary total disability immediately following his 2006 injury, from which he recovered in due course and with the assistance of medical treatment and physical therapy. Applicant recovered sufficiently such that he could return to work for almost two years. A period of temporary total disability does not equate to substantial incapacity, which requires evidence of a permanent and sustained substantially incapacitating disability that does not exist in this record.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. "As in ordinary civil actions, the party asserting the affirmative in an administrative hearing has the burden of proof going forward and the burden of persuasion by a preponderance of the evidence."⁴ It has been repeatedly held that the applicant for a disability retirement must prove eligibility for the benefit, including presenting satisfactory evidence of substantial incapacity to perform the usual and customary duties of his or her position.⁵ An applicant for a CalPERS disability retirement bears the burden of proof and the burden of going forward with the evidence.⁶ *Mansperger* requires the applicant for disability retirement to prove that he or she is "substantially incapacitated" from the performance of his or her usual and customary duties.⁷

STANDARDS FOR REVIEW

2. "'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."⁸

⁴ *McCoy v. Board of Retirement* (1986) 183 Cal.App. 3d 1044, 1051.

⁵ *Id.*, *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332, *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App. 3d 873, 876.

⁶ *Id.*, *Harmon v. Board of Retirement* (1976) 62 Cal.App. 3d 689, 691, *In Re: Theresa V. Hasan*, Board of Administration of the California Public Employees' Retirement System Precedential Decision No. 00-01.

⁷ *Mansperger, supra.*

⁸ Government Code section 20026, in pertinent part.

3. "If the medical examination and other available information show to the satisfaction of the board ... that the member is incapacitated physically or mentally for the performance of his or her duties in the state service and is eligible to retire for disability, the board shall immediately retire him or her for disability...."⁹

4. "We hold that to be 'incapacitated for the performance of duty' within section 21022 means the substantial inability of the applicant to perform his usual duties."¹⁰ *Mansperger* continues to be the definitive statement of California courts to date regarding the meaning of the language of section 21156, "incapacitated for the performance of duty," in the context of an application for a disability retirement.

5. In applying the *Mansperger* standard, it has been held that the fact that a person has a limiting and painful physical condition, or an emotionally troubling psychological condition that limits, but does not preclude, the person's ability to perform his or her usual duties; or makes performing the usual and customary duties of one's occupation more difficult or unpleasant physically or mentally does not necessarily constitute a substantial incapacity for the purposes of a disability retirement.¹¹ The fact that the physical or psychological condition may preclude the applicant from performing some but not all usual and customary job duties does not necessarily mean the applicant is substantially incapacitated within the meaning of *Mansperger* and section 21156.¹²

THE EFFECT OF WORKERS COMPENSATION IMPOSED WORK LIMITATIONS/RESTRICTIONS

6. The existence of physician-imposed workplace limitations and restrictions do not equate to substantial incapacity to perform the ordinary and customary requirements of one's employment. Workplace restrictions and limitations imposed through a physician or other healthcare provider through Workers Compensation can address a potentially wide variety of situations, and may relate to either temporary, partial or total incapacity, or longer lasting conditions, up to and including permanent disability. Workers Compensation work restrictions can reflect conditions or pathology that may or may not be substantially incapacitating. Worker's Compensation remedies and the system that provides them focuses on and addresses an entirely different set of concerns than does disability retirement, and applies different standards and a different analytical evaluative process in determining what constitutes compensable conditions.

⁹ Government Code section 21156, in pertinent part.

¹⁰ *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App. 3d 873, 876.

¹¹ *Hosford v. Board of Administration* (1978) 77 Cal.App. 3d 854, 861-863.

¹² *Id.*

7. The quantum of credible medical evidence required to prove a compensable injury in the Workers Compensation system is considerably less than that required to meet the substantial incapacity threshold for a disability retirement. Applicant's receipt of an award in his Workers Compensation case has no material impact on the determination that must be made here, and is not material to the determination of whether his claims of substantial incapacity have credible and persuasive medical evidentiary support. Even a finding of permanent total disability under the Worker's Compensation standards does not equate to and require a finding of substantial incapacity in the disability retirement system. The nomenclature and the rating system of the Workers Compensation system for disability finds no parallel and has no meaning in evaluating whether that same applicant is substantially incapacitated from the ability to perform their usual and customary job duties.

8. Applicant failed to carry his burden of proof; requiring him to prove by a preponderance of the evidence of competent medical evidence he is substantially incapacitated for performing his usual and customary duties as a stationary engineer with the CDCR Substance Abuse Treatment Facility. The medical evidence does not support a claim of substantial incapacity on the basis of orthopedic conditions in applicant's low back or cervical spine area, and there was no evidence of disability in his shoulders. The medical evidence upon which applicant relied in support of his application was credibly and persuasively discredited by Dr. Miller. The legal standards for proof of substantial incapacity require more than what applicant presented. The medical evidence upon which this Decision may rely to make Factual Findings and Legal Conclusions, do not support applicant's claim.

9. Since applicant failed to meet his burden to prove by competent medical opinion that he is substantially incapacitated within the *Mansperger* standard, the application must be denied.

ORDER

The application of Mario Ricardo Velasquez for a disability retirement is DENIED. The determination of the CalPERS Benefits Division that applicant is not substantially incapacitated from performing his duties as a Stationary Engineer for the CDCR, Substance Abuse Treatment Facility, is AFFIRMED.

DATED: August 7, 2014


STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings