

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Statement of Issues
(Application for Industrial Disability
Retirement) Of:

GLENN K. NAGEL,

Respondent,

and

CALIFORNIA HIGHWAY PATROL,

Respondent.

Case No. 2013-0595

OAH NO. 2013080617

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on October 10, 2014.

Elizabeth Yelland, Senior Staff Attorney, represented complainant Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Christopher C. Dehner Esq., Jones, Clifford, Johnson, Dehner, Wong, Morrison, Sheppard & Bell, LLP, represented respondent Glenn K. Nagel.

Respondent California Highway Patrol was not represented.

Evidence was received and the matter was submitted on October 10, 2014.

ISSUE PRESENTED

Whether respondent Glenn Nagel was permanently and substantially incapacitated for the performance of his usual duties as a California Highway Patrol Traffic Officer at the time that he filed his application for industrial disability retirement?

FACTUAL FINDINGS

1. Complainant Anthony Suine filed the Statement of Issues solely in his official capacity as Chief of the CalPERS Benefits Services Division.
2. Respondent Glenn K. Nagel (respondent Nagel) was employed by respondent California Highway Patrol (CHP) as a Traffic Officer. By virtue of his employment, respondent Nagel is a state safety member of CalPERS subject to government code section 21151.
3. On or about September 7, 2012, respondent Nagel submitted an application for industrial disability retirement. Respondent Nagel claimed disability on the basis of an orthopedic (back) condition.
4. Respondent Nagel retired for service effective December 5, 2012. He has been receiving a retirement allowance since that date.
5. CalPERS obtained medical reports concerning respondent Nagel's orthopedic condition from competent professionals. After review of the reports, CalPERS determined that respondent Nagel was not permanently and substantially incapacitated for the performance of his duties as a CHP Traffic Officer at the time that he filed his application for industrial disability retirement.
6. Respondent Nagel was notified of CalPERS's determination and was advised of his appeal rights by letter dated May 23, 2013.
7. Respondent Nagel filed a timely appeal by letter dated June 4, 2013, and requested a hearing.

Usual Duties of a California Highway Patrol Officer

8. Three documents describing the usual duties required of a CHP Traffic Officer were received in evidence. One document was the California State Personnel Board Specification document for the position reflecting September 6, 1995 revisions. A second document is entitled "CALIFORNIA HIGHWAY PATROL OFFICER 14 CRITICAL PHYSICAL ACTIVITIES," revised in April of 2010. The third document is a CalPERS' document entitled "Physical Requirements of Position/Occupational Title jointly filled out and signed on September 17, 2012, by a CHP supervisor and respondent Nagel.
9. As explained in the Legal Conclusions below, CHP officers must be able to perform all of the 14 critical physical tasks. The required tasks that are relevant to this matter, based on testimony and reports of medical experts, are lifting and carrying moderately heavy to heavy objects, pushing and pulling moderately heavy to heavy objects, and dealing with uncooperative persons. The specific tasks identified by health professionals are discussed below in the description of the competent medical evidence.

Respondent Nagel's Injury Leading to His Claimed Industrial Disability

10. Respondent testified at the administrative hearing and related the incident that he felt led to his current physical condition. He also described the symptoms he experiences and the manner in which his physical problems negatively impact his activities.

11. On December 5, 2011, respondent Nagel was assisting another CHP officer investigate a fatal highway accident. The deceased driver had been ejected from the vehicle and there was a question whether the driver had been wearing a seatbelt. Part of the roof of the vehicle had been torn off, and respondent Nagel lifted the detached portion and held it aloft for the other officer to examine the driver's seat area. Afterward, respondent Nagel felt a sharp pain in his back and he was unable to get into his own truck. He was helped into the passenger's seat of his truck and another officer drove him home. Respondent's wife took him to the emergency room. Respondent Nagel was given an injection and prescribed oral medications.

12. Respondent Nagel continued treatment with a family practice physician in Burney, California, where he resided. He was prescribed pain medication and taken off work. Respondent Nagel never returned to his duties as a CHP Traffic Officer.

13. Respondent described his current condition. He experiences painful episodes five to ten times each day. He likened the sensation to having a ball between his shoulder blades and leaning against a wall. The pain gets progressively worse during the day. He feels constant stiffness and spasms. His left side is worse, and it is painful for him to lie on that side.

14. Respondent Nagel cannot engage in activities he used to enjoy like fishing. He sold his boat. He does not permit his grandchildren to jump or pull on him. He has not been employed in any capacity since the accident. Respondent does home exercises with an elastic band and takes at least a one-half hour walk daily. He is very careful stepping off curbs to avoid sharp pains that he has experienced when he stepped off curbs "too hard."

15. Respondent Nagel feels that he cannot return to his Traffic Officer job. His biggest concern is his inability to back-up other officers in situations involving fights or motor vehicle accidents. He could not carry a service weapon when taking narcotic pain medications for his back. He uses a Flector patch two to three times per week and takes Celebrex and Ultram as needed for pain. He cannot carry the portable scales that he used in his last position inspecting trucks for excessive weight.

Competent Medical Opinion

Shishir A. Dhruva, M.D.

16. Dr. Dhruva is board certified in anesthesiology. He and another physician operate the Therapeutic Pain Management Medical Clinic in Redding, California. They

specialize in chronic pain management. 95 percent of the clinic's patients are injured workers in the workers' compensation system. Many of the injuries treated involve the spine. Dr. Dhruva testified and his reports relating to respondent Nagel were received in evidence.

17. Dr. Dhruva has treated respondent Nagel for his back condition since March 22, 2012. On that day, he performed a one to one and one-half hour clinical examination and had respondent Nagel complete a 13 page questionnaire. Dr. Dhruva took a history and performed a physical examination. He reviewed past treatment medical records, focusing on diagnostic studies. Dr. Dhruva noted that respondent Nagel had not improved significantly with pain medications and a 17-session physical therapy regimen. Respondent Nagel complained of midthoracic pain radiating to the left side of his rib cage as well as low back and groin pain.

18. Dr. Dhruva examined the MRI films of three regions of respondent Nagel's spine. The studies of the thoracic spine showed degenerative changes. The lumbar spine films also showed degenerative changes including facet joint arthropathy. Dr. Dhruva's physical examination of respondent Nagel revealed moderate to significant tenderness over the midthoracic region with paramedian tenderness on both sides with increasing pain when twisting and turning. There was, in Dhruva's view, positive facet "loading" in the lumbar region.

19. Dr. Dhruva's diagnoses included chronic pain syndrome, thoracic sprain and strain, lumbar sprain and strain, lumbosacral spondylosis without myelopathy, and degeneration of lumbar and lumbosacral intervertebral disc. Dr. Dhruva's treatment plan included changing his pain medications and administering trigger point injections in the midthoracic region.

20. In an updated report dated March 1, 2014, Dr. Dhruva's reiterated his clinical findings and evaluation of the MRI studies. He expressed that respondent Nagel could not return to his usual duties as confirmed by a functional capacity evaluation performed by Timothy Thomas, P.T. Dr. Dhruva commented in his report that Mr. Thomas determined that respondent Nagel did not meet seven physical requirements of his job and demonstrated less than 50 percent of the required capacity on five of the seven tasks. Mr. Thomas's report is discussed below.

21. Dr. Dhruva acknowledged in his testimony, that he did not measure respondent Nagel's range of motion in the affected areas of this back because his focus was on pain provoking conditions. Dr. Dhruva remarked that pain caused by problems in the thoracic spine is particularly difficult to treat because of the region's complex structure, including three ribs that touch the spine in this region. Strains and sprains do not heal well because the spine cannot be immobilized and continued movement prolongs the symptoms.

22. Dr. Dhruva relied on Mr. Thomas's functional capacity evaluation to determine respondent Nagel's substantial incapacity. He did not feel it necessary to form his

own opinion. However, he did testify that respondent could “absolutely not” perform four of the five push/pull required job tasks: pulling an incapacitated person weighing up to 200 pounds up to 20 feet; pulling or dragging a person resisting arrest and weighing up to the same amount up to 20 feet; separating uncooperative persons of the same weight and physically restraining an individual; and pulling or dragging heavy objects, e.g., logs, off the roadway and up to 35 feet.

Tim L. Thomas, PT, CWCE.

23. Mr. Thomas did not testify at the administrative hearing, but his “Essential Function Test” dated October 15, 2013, was received in evidence as “administrative hearsay.”¹ According to the list of Mr. Thomas’s credentials beneath his signature line, he is a physical therapist and certified work capacity evaluator (CWCE). Dr. Dhruva referred respondent to Mr. Thomas for the evaluation.

24. In the portion of the report listing the physical demands of respondent Nagel’s job, Mr. Thomas listed occasional lifting demands of “Over 100 lbs.” According to the report, he obtained the demands from the employer’s job description or an insurance adjuster. In the narrative job description, Mr. Thomas described respondent Nagel’s Traffic Officer’s job as entailing prolonged driving, occasional walking, standing and running. Respondent Nagel’s job description required that he be able to lift, carry, push and pull upwards of 50 to 100 pounds. Mr. Thomas had respondent lift weights in the “Material Handling” part of the evaluation. The seven exercises required respondent Nagel to lift a 100 pound weight from the floor to waist, lift a 75 pound weight from waist to shoulder level, lift a 50 pound weight from shoulders to overhead and lift a 75 pound weight from floor to shoulder level. The last three of the material exercises required carrying a 100 pound weight 100 feet, pushing a 150 pound weight with sustained horizontal force 25 feet, and pulling a 150 pound weight with sustained horizontal force 25 feet. Respondent failed each of the tests, demonstrating the ability to handle just 40 pounds in six tests and 25 pounds in the shoulder to overhead lift. The other test category was entitled “Non-Material handling/positional tolerance,” and included 13 tasks. Respondent Nagel failed the static bend and repetitive bend tests, and Mr. Thomas commented that respondent Nagel began experiencing pain within 30 seconds of repetitive bending. Although not tested, respondent Nagel told Mr. Thomas that even slight twisting of his upper/mid back triggered severe pain.

Steven S. Isono, M.D.

25. Dr. Isono, an orthopedic and sports medicine specialist, evaluated respondent Nagel at the request of respondent Nagel’s legal counsel. He prepared a report dated

¹ Government Code section 11513, subdivision (d), allows relevant hearsay to be received in evidence, over objection, to supplement or explain non-hearsay evidence. Unless an exception exists, hearsay evidence cannot, standing alone, support a finding. (*Lake v. Reed* (1997) 16 Cal.4th 448.)

December 13, 2012, that was also received in evidence as administrative hearsay. Dr. Isono did not testify at the administrative hearing.

26. Dr. Isono met with respondent Nagel. He took a history, conducted a physical examination and reviewed medical records. Dr. Isono noted that after the injury on December 5, 2011, and an emergency room visit on the same day, respondent Nagel began treatment with Dr. Weinhold on December 7, 2011. Conservative measures attempted by Dr. Weinhold included medications, physical therapy and temporary total disability. The last of the 17 physical therapy sessions took place on February 12, 2012. Respondent Nagel continued to have problems, and he hired legal counsel. His legal counsel referred respondent Nagel to Dr. Dhruva.

27. Dr. Isono did not have access to the MRI studies, but he did have Dr. Dhruva's description of the lumbar spine films showing L4-5 facet arthrosis and T10-11 perineural cysts. Dr. Dhruva had continued conservative measures with numerous medications and he administered trigger point injections on April 10, 2012. These provided mild temporary relief.

28. Respondent Nagel complained to Dr. Isono of persistent thoracic spine pain, greater than the pain he experienced in his lumbar spine. The pain was constant and more severe with spasms. Respondent Nagel also described lumbar spine pain at the left base radiating through the left buttock, posterior thigh, and calf, and extending to the ankle. Respondent Nagel reported that lifting, carrying, pushing, pulling, and prolonged weight bearing increased his symptoms.

29. The notable findings in Dr. Isono's physical examination of respondent Nagel included lumbar spine flexion of 30 degrees and extension of 10 degrees. The thoracic spine forward flexion was 15 degrees and extension was 0 degrees. Right and left rotations were each 10 degrees. Right and left lateral bending were each 15 degrees. There was "marked pain" at the base of the lumbar and thoracic spines at the extremes of these motions. Sitting and supine straight leg raising tests were negative. There was marked tenderness at the bases of the lumbar and thoracic spines. There were moderate to severe spasms of the thoracic paraspinal musculature.

30. Dr. Isono's diagnoses were lumbar spine: L4-5 degenerative disc disease with facet arthropathy (by MRI) and left L-5 radiculopathy; and thoracic spine: T-10-11 degenerative disc disease with left perineural cysts (by MRI.)

31. Although his report was prepared in accordance with workers' compensation protocols, Dr. Isono also expressed his agreement with Dr. Dhruva that respondent Nagel "would be unable to return to his usual and customary occupation." There was no indication in the report that Dr. Isono had reviewed the documents describing respondent Nagel's usual duties as a CHP Traffic Officer.

Robert Henrichsen, M.D.

32. At the request of CalPERS, respondent Nagel was examined by Dr. Henrichsen, a board-certified orthopedic surgeon. Dr. Henrichsen examined respondent Nagel on March 26, 2013. He prepared a report that was received in evidence. Dr. Henrichsen testified at the administrative hearing.

33. Dr. Henrichsen took a history from respondent Nagel that included reviewing an intake questionnaire completed by respondent Nagel. Dr. Henrichsen reviewed medical records and conducted a physical examination of the areas of complaint. Respondent Nagel was 51 years old at the time and described his last job with respondent CHP as inspecting commercial vehicles. He used a "creeper" to get under trucks and carried portable scales in his pickup truck to determine if the trucks weighed less than 40 tons. He explained to Dr. Henrichsen that the work required frequent reaching, kneeling, twisting, pulling, detailed hand work, bending and stooping. He had to lift up to 200 pounds. He described the incident that led to his physical problems. Respondent Nagel related his treatment at the emergency room and follow-up treatment with Dr. Weinhold. He reported that the treatment, including physical therapy, did not improve his condition very much. In December of 2012, he retired because he was unable to return to full duty. Most of his treatment has been provided by Dr. Dhruva who administered trigger point injections in respondent's thoracic spine on one occasion.

34. Respondent Nagel told Dr. Henrichsen that his physical complaints centered on a pain between his shoulder blades that felt like having a baseball there and leaning against a wall. He had low back pain in the tissue on the left side, with occasional sharp symptoms and intermittent left radicular syndrome. He experienced pain if he laid on his left side at night. He often had difficulty sleeping and sometimes slept in a chair. Before the injury, respondent Nagel enjoyed fishing, motorcycling, golf and music. He had significantly curtailed his recreational activities since the injury. Respondent's medications were Nucynta, a pain relief medication, twice a day; Flector patches, an anti-inflammatory, as needed; Zanaflex, a muscle relaxant, as needed; and Celebrex, another anti-inflammatory, as needed.

35. As part of the physical examination, Dr. Henrichsen conducted range of motion tests. After a brief warm up, respondent Nagel was asked to perform the tests three times in accordance with workers' compensation protocols. The thoracic spine flexion was 20, 25, and 25 degrees. The normal average range is between 40 and 50. Extension was 0, 0, and 0 degrees, which was not, in Dr. Henrichsen's view, unreasonable. Rotation was 10 degrees, both right and left. Lumbar flexion was 50, 60, and 60 degrees, which Dr. Henrichsen regarded as pretty good for a man of respondent Nagel's age. Extension was 20, 25 and 25 degrees, within reasonable limits. Lateral bending was (right over left) 20/20, 15/15, and 15/15 degrees, a bit reduced from average. Rotation was 30 degrees in both directions. Sitting and supine straight leg raises produced no radicular pain, even when the ankle was extended and pushed backward toward respondent Nagel's head. There was no evidence of atrophy in respondent's shoulder level musculature.

36. Dr. Henrichsen viewed a CD containing the MRI films of respondent Nagel's three spinal regions. He noted degenerative disease at L4-5 on the lumbar films with a little disc bulging. There was multi-level facet disease, worse at L4-5. He did not see any disc protrusion irritating a nerve root. Overall, Dr. Henrichsen felt the condition of respondent Nagel's lumbar spine was generally pretty good for a man of his age. The thoracic spine films revealed degenerative disease as well. There was a cyst at about the T10-11 level, but the nerve did not appear to be compressed. There were osteophytes at different levels. All of the findings were age-appropriate. There was also multi-level degenerative disease in the cervical spine, with large spurs at C4-5 and C5-6. There was foraminal narrowing on the left which was severe at C5-6. There was midline disc protrusion, but no true midline stenosis.

37. Dr. Henrichsen's diagnoses were lumbar strain, with degenerative disease and degenerative arthropathy; history of referred pain left lower extremity; thoracic strain with persistent pain and left side neural cyst, T-10-11; degenerative arthritis of the lumbar, thoracic and cervical spine, and multi-level degenerative disc disease, cervical spine. Dr. Henrichsen opined that respondent Nagel experienced a strain and sprain injury when he lifted the top of the damaged vehicle in December of 2011, from which he should have recovered, or at least greatly improved. The objective findings relating to the condition of respondent Nagel's spine do not support the level of pain and disability reported by respondent Nagel. The greatest amount of degenerative disease is in the cervical region, but respondent's symptoms do not correlate with cervical spine nerve impingement. Dr. Henrichsen felt that Dr. Dhruva probably based his conclusions on respondent Nagel's subjective complaints, rather than any objective supporting findings. Dr. Henrichsen also expressed his skepticism of functional evaluations because the findings depend on the effort put forth by the person evaluated. He acknowledged, however, that respondent Nagel was cooperative and seemed credible during his own evaluation of him.

38. Dr. Henrichsen concluded that respondent Nagel is not incapacitated from performing his usual duties. More specifically, he can do all of 14 critical tasks listed for CHP officers. This was confirmed by the diagnostic studies, range of motion testing, and absence of atrophy which might otherwise confirm disuse of muscles for an extended period of time because of chronic pain. Dr. Henrichsen could not find any orthopedic or neurological impairment that prevents respondent Nagel from performing his usual duties as a Traffic Officer.

Resolution of Conflicts among Medical Experts

39. Dr. Henrichsen was the most persuasive expert witness on the question of respondent Nagel's substantial capacity to perform his usual duties. Dr. Dhruva acknowledged that he focused on what he perceived as respondent Nagel's intractable pain as described by respondent Nagel. Dr. Dhruva relied on Mr. Thomas to assess whether respondent Nagel could perform his usual duties. Dr. Henrichsen pointed out that functional assessment tests depend upon the effort put out by the subject, and respondent Nagel was very concerned about any physical activity that might exacerbate his pain symptoms as evidenced by the careful way he stepped off curbs on his walks and his abandonment of

recreational activities. It is also not clear how Mr. Thomas determined the manner in which to test the various lifting, pulling and pushing requirements by his “movement” series. For example, the 14 critical tasks require an officer to be able to lift and carry 50 pound objects, but there is no specified distance. An officer must be able, with assistance, to lift and carry a resisting person up to 35 feet. An officer must be able to pull or drag a 200 pound person up to 200 feet and drag heavy objects off the roadway up to 35 feet. Mr. Thomas asked respondent Nagel to lift heavier weights and to carry, on his own, 100 pounds for 100 feet. He was asked to push, in a sustained manner, a 150 pound weight 25 feet. The critical tasks include no such requirement. Dr. Isono’s hearsay report corroborated the conclusion of Dr. Dr. Dhruva on the ultimate question, but there is no indication that he had reviewed the critical task list. Finally, Dr. Henrichsen’s testimony that there were no objective findings by MRI or clinical examination that would logically support the persistent pain and incapacity reported by respondent Nagel was very persuasive.

LEGAL CONCLUSIONS

1. An applicant for retirement benefits has the burden of proof to establish a right to the entitlement absent a statutory provision to the contrary. (*Greator v. Board of Administration* (1979) 91 Cal. App.3d 57.)
2. Government Code section 20026 reads, in pertinent part:

‘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....
3. Incapacity for performance of duty means the substantial inability to perform usual duties. (*Mansperger v Public Employees’ Retirement System* (1970) 6 Cal. App.3d 873, 876.) The ability to substantially perform the usual job duties, though painful or difficult, does not constitute permanent incapacity. (*Hosford, supra*, 77 Cal. App.3d 854, at p. 862.)
4. Vehicle Code section 2268 reads:

(a) Any member of the Department of the California Highway Patrol, as specified in Sections 2250 and 2250.1, shall be capable of fulfilling the complete range of official duties administered by the commissioner pursuant to Section 2400 and other critical duties that may be necessary for the preservation of life and property. Members of the California Highway Patrol shall not be assigned to permanent limited duty positions which do not require the ability to perform these duties.

(b) Subdivision (a) does not apply to any member of the California Highway Patrol who, after sustaining serious job-related physical injuries, returned to duty with the California Highway Patrol and who received a written commitment from the appointing power allowing his or her continued employment as a member of the California Highway Patrol. This subdivision applies only to commitments made prior to January 1, 1984.

(c) Nothing in subdivision (a) entitles a member of the California Highway Patrol to, or precludes a member from receiving, an industrial disability retirement.

5. A California Highway Patrol officer must be able to perform all of the 14 critical tasks for the classification irrespective of the particular duty assignment of the officer claiming disability (*Beckley v. Board of Administration* (2013) 222 Cal. App.4th 691, 699)

6. Respondent Nagel is physically capable of performing all of the usual duties associated with his position as a CHP Traffic Officer, including the 14 critical tasks identified by the CHP. Respondent Nagel failed to establish on the basis of competent medical opinion that he has a physical disability of permanent or extended and uncertain duration that incapacitates him for the performance of his required duties as a CHP Traffic Officer.

ORDER

Respondent Nagel's appeal from CalPERS' determination that he is not permanently disabled or incapacitated for the performance of his duties as a Traffic Officer with the California Highway Patrol is denied.

Dated: November 4, 2014



KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings