

**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:

RORY SMITH,

Respondent,

and

STATE CENTER COMMUNITY  
COLLEGE DISTRICT,

Respondent.

Case No. 2012-0228

OAH No. 2014041161

**PROPOSED DECISION**

Administrative Law Judge Jill Schlichtmann, Office of Administrative Hearings, State of California, heard this matter on September 25, 2014, in Oakland, California.

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

Respondent Rory Smith represented himself and was present throughout the hearing.

No appearance was made by or on behalf of respondent State Center Community College District.

The record was left open for respondent to submit medical records and written closing argument by October 10, 2014, and for CalPERS to respond to any post-hearing submissions by November 7, 2014. Respondent timely submitted a letter, a report from Nina Birnbaum, M.D., and a report from Gary Mills, Ph.D., which were marked as Exhibits E, F and G respectively, and received in evidence. CalPERS timely responded with additional evidence and offered respondent the option of attending an additional psychiatric independent medical examination. The CalPERS evidence and letter were marked as Exhibit 18 and received in evidence. Respondent agreed by letter to attend an additional psychiatric examination; his letter was marked as Exhibit H and received in evidence. The psychiatric examination report

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was received on January 7, 2015; it was marked as Exhibit 19 and received in evidence.

The record closed and the matter was deemed submitted on January 7, 2015.

## FACTUAL FINDINGS

### *Introduction*

1. Rory Smith (respondent) was employed by the State Center Community College District as a computer operation/information technical support employee. By virtue of his employment, respondent is a local miscellaneous member of CalPERS, and subject to Government Code section 21150.

2. Respondent signed an application for disability retirement on March 31, 2009, identifying orthopedic (neck, bilateral extremities and low back) conditions as the basis for the disability. The application was received by CalPERS on March 24, 2010.

3. CalPERS obtained respondent's medical records concerning his orthopedic conditions, and sent respondent for an independent medical examination by orthopedic surgeon, Martha Singer, M.D., on December 7, 2010.

4. On March 1, 2011, after reviewing pertinent medical records and Dr. Singer's report, CalPERS denied respondent's application. Respondent filed a timely appeal by letter dated March 21, 2011.

5. In his appeal letter, respondent contested the denial of his orthopedic disability, and referred to his severe depression and emotional difficulties. In addition, in her December 7, 2010 report, Dr. Singer discussed a possible psychological condition impacting respondent's ability to work. As a result, CalPERS set up an independent medical examination with psychiatrist Andrea Bates, M.D. Respondent went to Dr. Bates's office for the appointment on March 2, 2012.

When respondent arrived for the interview, however, Dr. Bates was unable to reach an agreement with respondent regarding the purpose and parameters of the evaluation. Respondent insisted on having his wife sit in on the interview, and his wife wanted to record the meeting. Dr. Bates was uncomfortable with the interview being recorded, and began to feel that they were not engaging effectively. She did not find respondent to be open and cooperative, and she felt that he was unable to be receptive to the examination process. Dr. Bates began to feel increasingly uncomfortable, even intimidated, and concluded the process. Dr. Bates was unable to draw any conclusions concerning respondent's psychological condition or his ability to work.

6. After a review of Dr. Bates's report, CalPERS again denied the application and this hearing followed.

7. After the hearing in this matter, CalPERS offered to have respondent evaluated by a different psychiatrist. Respondent agreed and was evaluated by Michael Goldfield, M.D., on December 10, 2014.

*Respondent's Job Duties and Work History*

8. The duties of a computer operation/information and technical support employee for the State Center Community College District include maintaining computers and printers, on rare occasion assisting with the installation and maintenance of computers, managing the backup/restore functions, maintaining reports and logs, responding to problem calls from district personnel, providing technical support, conducting research and development for programs, ordering supplies, maintaining district web pages and performing a variety of other tasks.

During the course of work, the employee utilizes a computer keyboard, mouse and views a monitor; utilizes a writing utensil to complete paperwork; utilizes a copier to make copies; retrieves and sets paperwork/files in and out of file drawers; answers and makes telephone calls; operates a personal vehicle to perform errands; utilizes a screwdriver; and utilizes a cart or dolly to transport office supplies and equipment.

9. The physical requirements of the position include standing for two to three hours per day; walking less than one hour per day; sitting for four to five hours for 30 minutes to one hour at a time; less than 15 minutes of kneeling; less than 15 minutes of crawling; climbing stairs once or twice daily; bending at the waist; bending the head for two to three hours per day; bending the wrist one to two hours per day; twisting the waist less than 10 minutes per day; twisting the head and neck less than one hour per day; twisting the wrist less than 30 minutes per day; reaching with arms two to five hours per day; reaching above shoulder level once or twice per day; reaching between waist and shoulder level two to three hours per day; pushing or pulling less than 15 minutes per day; lifting zero to 10 pounds two to three hours per day; lifting 11 to 25 pounds two times per week; lifting 26 to 50 pounds two times per month; grasping for two to three hours per day; power grasping less than five times per month; and fine manipulation for three to six hours per day.

10. Respondent added to this description that he carried five to 10 pounds routinely and occasionally in excess of 60 pounds in the way of forms, paper products, supplies and parts. He sometimes was required to crawl under a desk in order to resolve issues. Respondent described his job duties as very physically demanding, including doing extensive typing and using his hands, sitting and standing. He used hand trucks and pallet jacks. Respondent's primary job was as the help desk supervisor, where he was the primary support center for the district mainframe computer services.

11. Respondent began work for the State Center Community College District in approximately 1990. He worked on a periodic basis until 1999 when he became a permanent employee. Respondent last worked at the State Center Community College District on

February 17, 2004. Respondent resigned from his position on September 8, 2006.

### *Disabling Conditions*

12. Respondent described his orthopedic injuries as cumulative trauma and repetitive stress injuries to the low back, cervical and upper extremities. Respondent states that he gradually developed symptoms beginning in November 2002. In addition, he reports having developed pain in his legs after an epidural in 2008.

13. Respondent's orthopedic complaints were evaluated by orthopedist Ken Light, M.D., on October 23, 2005. Dr. Light examined respondent, who was reporting pain at a level of almost 10 out of 10 in his neck, back and hands. Dr. Light noted that respondent could lift 20 pounds, could walk on his toes and heels, forward flex, touching his hands to his shin, and extend. He found respondent's motor, sensory and reflexes in the upper extremities to be normal. The MRI of respondent's cervical spine showed disc degeneration and protrusion of the C5-C6 disc. The MRI scan of the lumbar spine appeared very close to normal. There was no evidence of cervical or lumbosacral radiculopathy or peripheral nerve compression, other than absence of the peroneal F waves. Dr. Light concluded that respondent was not a candidate for surgery.

14. On January 4, 2006, respondent was evaluated by orthopedist Stephen E. Conrad, M.D., for an agreed medical evaluation relating to respondent's workers' compensation claim. Dr. Conrad reported that an MRI of the lumbar spine showed mild degenerative change and no central stenosis. An MRI of respondent's cervical spine revealed some spondylosis. Based on respondent's pain complaints, Dr. Conrad opined that respondent was restricted from prolonged sitting and repetitive forceful gripping, and prolonged fine dexterous movements, such as keyboarding.

15. On January 19, 2006, respondent began treating with pain specialist, Hasami Hattori, M.D. Dr. Hattori reported that respondent's cervical spine MRI showed some disc degeneration and protrusion, and that the lumbar MRI was normal. Dr. Hattori felt respondent's symptoms had a myofascial component. Respondent reported significant pain levels to Dr. Hattori, who prescribed opioid pain medication. In October 2007, Dr. Hattori reviewed an EMG of the upper extremities that was normal. On October 16, 2007, Dr. Hattori performed a right L3-L4, L4-L5, and L5-S1 lumbar medial branch block with local anesthesia. In January 2008, Dr. Hattori reported that surgery was not recommended for respondent's cervical or lumbar spine.

16. Respondent was evaluated again by Dr. Conrad on April 1, 2008. Dr. Conrad's impressions regarding respondent's orthopedic issues were: 1) cervical disc disease with cervical radiculitis; 2) lumbar disc and facet disease with lumbar radiculitis; and, 3) repetitive strain injury, upper extremities, with manifestations of tendinitis, tenosynovitis, and lateral epicondylitis. Dr. Conrad precluded respondent from repetitive forceful gripping, and prolonged fine dexterous movements such as keyboarding. Dr. Conrad found no evidence of neurologic deficit. Dr. Conrad noted that respondent had completed a functional

restoration program on July 14, 2006. Dr. Conrad reported that respondent had made excellent progress while participating in the program and was able to discontinue opiates; however, respondent had reverted back to opiates afterward.

17. On July 7, 2008, Dr. Hattori recommended that respondent undergo a psychological evaluation.

18. On April 24, 2009, respondent was seen by psychologist Bruce Singer.<sup>1</sup> Dr. Bruce Singer felt respondent was suffering from severe and chronic multifocal pain syndrome, that he was severely depressed, and was at risk for alcohol dependence. Dr. Bruce Singer opined that respondent needed immediate pain management, functional restoration and depression management. He recommended that respondent attend a comprehensive inpatient, nonnarcotic pain management program, emphasizing functional restoration, strengthening, detoxification, pain self-management and mood control.

19. Dr. Conrad saw respondent again on April 29, 2009. From an orthopedic perspective, Dr. Conrad did not recommend a pain management program. He did not feel that respondent would become pain-free after the program inasmuch as they had been unable to relieve respondent's pain in the past and he felt it was medically probable that they would be unable to do so in the future. He noted that respondent self-treated with alcohol, and that his extreme pain complaints were not supported by the objective findings. Dr. Conrad's diagnoses on April 29, 2009, were chronic pain syndrome and depression.

20. On December 7, 2010, respondent's orthopedic condition was evaluated by orthopedist Martha Singer, M.D., at the request of CalPERS. Dr. Singer opined that from an orthopedic perspective, there were no specific orthopedic findings that would prohibit respondent from performing his usual and customary job duties. She would not apply any work restrictions on respondent. Dr. Singer found a significant discrepancy between respondent's perception of pain and the objective physical signs of limitations; she noted that his objective physical findings were very limited. Dr. Singer found that the nerve testing was normal and his MRI findings were exceedingly minimal. Dr. Singer also pointed out that despite years of not working and being treated with injections, a Medrol Dosepak, a facet block and narcotic medications, his pain had not been relieved. Dr. Singer suspected that his pain manifestations were based on a more central psychological issue. She was impressed by how profoundly depressed respondent appeared, and noted that his family history included mental illness and substance abuse.

21. Dr. Singer issued a supplemental report on September 12, 2011, after reviewing additional records, including a report from Maureen Miner, M.D., dated October 10, 2004, in which Dr. Miner opined that respondent would be restricted from computer use of more than 30 minute per hour, two hours per day.

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<sup>1</sup> Respondent has been evaluated by orthopedist Martha Singer, M.D., and psychologist Bruce Singer, Ph.D. Bruce Singer, Ph.D., will be referred to as Dr. Bruce Singer; Martha Singer, M.D., will be referred to as Dr. Singer.

Dr. Singer also reviewed medical reports in 2005, from Timothy Shen, M.D. Dr. Shen performed a lumbar radiofrequency ablation<sup>2</sup> on April 5, 2005 and on May 24, 2005, and started respondent on Neurontin. Dr. Shen felt the severity of respondent's pain complaints was beyond the physical findings and recommended a pain psychology consultation.

Dr. Singer also reviewed records from family practitioner Nina Birnbaum, M.D., who had been respondent's primary care physician for five years. Dr. Birnbaum began seeing respondent after he had stopped working. Dr. Birnbaum felt that respondent was unable to consistently perform any kind of work due to pain from his orthopedic issues; she also found him depressed and irritable due to the pain.

After reviewing the new information, Dr. Singer continued to opine that diagnoses of chronic pain and depression were the major issues, and that there were no specific orthopedic findings that would prevent respondent from performing his usual and customary duties. Dr. Singer went on to say that it seemed increasingly unlikely that respondent had the potential for future gainful employment; she noted that as an orthopedic surgeon, her opinion was somewhat limited, but that she noted a generalized agreement among the physicians that respondent was not functioning well and appeared to be unemployable.

22. Respondent submitted a report from Dr. Birnbaum dated June 30, 2012. She reported that during the entire time she had worked with respondent, his pain had never been under control. Dr. Birnbaum opined that respondent was chronically disabled from any work.

23. Respondent submitted a report from Dr. Conrad dated September 4, 2012. Dr. Conrad's impressions were: 1) cervical disc disease with cervical radiculitis; 2) repetitive strain injury, hands, wrist, and forearms with manifestations of tendinitis, tenosynovitis and lateral epicondylitis; and, 3) lumbar disc and facet disease with lumbar radiculitis. Dr. Conrad did not recommend that respondent return to his previous work.

24. Respondent submitted a report from Gary Mills, Ph.D., of Pacifica Pain Management, dated January 8, 2014. Dr. Mills reported that respondent had stopped taking opioid medications. Dr. Mills expressed concern regarding the elevated level of prescribed opioids respondent had been provided. Dr. Mills described respondent's condition as a "well-developed catastrophic pain syndrome" with minor gait disturbance, major depression, suicidal ideation without plan or intention, and repeated emergency room visits for pain management. Dr. Mills noted negative predictors of success included high levels of psychosocial distress, the duration of his disability and extensive opioid and other drug exposure. Dr. Mills recommended a comprehensive functional recovery pain management program, emphasizing functional restoration, strengthening, detoxification, addiction control,

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<sup>2</sup> A lumbar radiofrequency ablation is a procedure that uses radio waves to stop the lumbar medial branch nerve from transmitting pain signals from the injured facet joint to the brain.

pain self-management, and mood control with a new primary treating physician.

Respondent attended the functional restoration program recommended by Dr. Mills from January 2014 to March 2014. The program included individual psychotherapy, group psychotherapy, physical therapy and occupational therapy. Respondent felt that the program helped him to become more physical and active.

25. During her testimony, consistent with her reports, Dr. Singer opined that respondent was able to work from an orthopedic standpoint. She noted that none of the physicians recommended surgery because there is no identifiable mechanical issue. Dr. Singer also pointed out that Dr. Conrad's opinions were made in a different setting (workers' compensation) with different standards in mind, a setting in which the benefit of the doubt is given to the employee with regard to pain in the absence of objective findings. Dr. Singer also noted that respondent had taken dangerously high levels of opioids without apparent relief. She found respondent's family history of alcoholism and domestic violence to be significant from a psychological point of view. However, because there were no significant objective findings, Dr. Singer found respondent not to be incapacitated for the performance of his duties from a physical or orthopedic standpoint.

26. Dr. Singer submitted a supplemental report dated October 20, 2014, in response to post-hearing documents submitted by respondent. Dr. Singer reviewed the January 8, 2014 report by Dr. Mills, and the June 30, 2012 report from Dr. Birnbaum. After reviewing the new information, Dr. Singer did not alter her opinion that there were no orthopedic findings that would prohibit respondent from performing his job duties. She commented that her opinion does not mean that respondent does not have pain, or that psychiatric issues do not affect his ability to return to work, but she reiterated that those issues were outside of her area of expertise. Dr. Singer noted that respondent's description of his symptoms, rather than his objective findings has been the basis for his ongoing work limitations by his treating physicians. Dr. Singer's testimony and reports concerning her evaluation of respondent's orthopedic condition were persuasive.

27. Respondent was evaluated by psychiatrist Michael Goldfield, M.D., on December 10, 2014. Dr. Goldfield spent three hours reviewing respondent's medical records and one and one-half hours examining him. He wrote a 13-page report of his findings dated December 10, 2014.

Dr. Goldfield noted that respondent had attended film school at the San Francisco Academy of Art from 2005 until 2007, where he earned a master's degree in motion pictures and television. Dr. Goldfield also noted that respondent was able to ride his bicycle to the appointment, which took approximately 35 minutes. Respondent reported to Dr. Goldfield that he goes to the gymnasium three times each week, where he lifts weights and works out on the treadmill. Respondent has lost weight after beginning to ride his bicycle and work out at the gymnasium regularly. Respondent also reported that he is able to drive a car, shop for groceries, do the laundry, wash dishes and use a vacuum.

Dr. Goldfield noted that respondent was anxious, tense and nervous, and had low self-esteem and confidence. Respondent was also quite irritable and angry. Dr. Goldfield found respondent to be unmotivated to look for work currently.

Dr. Goldfield diagnosed respondent with depressive disorder, not otherwise specified; a personality disorder, not otherwise specified with marked anger, irritability and suspiciousness; and, pain complaints without objective findings. Dr. Goldfield found that respondent was currently mildly depressed, for which he was receiving weekly psychotherapy. In Dr. Goldfield's opinion, respondent's mild depression does not impede his ability to perform his job duties as a computer operator and information technician support employee.

## LEGAL CONCLUSIONS

1. By virtue of his employment, respondent is a local miscellaneous member of the CalPERS, and subject to Government Code section 21150. A CalPERS member may retire for disability if he becomes "incapacitated for the performance of duty." (Gov. Code, § 21150.) The burden of proving an incapacitating condition is on the applicant for a disability retirement, and the standard of proof is a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051; Evid. Code, § 115.)

2. The term "incapacitated for the performance of duty" is defined as "disability of permanent or extended and uncertain duration . . . on the basis of competent medical opinion." (Gov. Code, § 20026.) An applicant is "incapacitated for performance of duty" if he is substantially unable to perform the usual duties of his position. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876; accord *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.)

3. The issue here is whether respondent has established that when he submitted his application for disability retirement, he was substantially unable to perform the usual and customary duties of a computer operation/information and technical support employee, and that the disability was permanent or of an extended or uncertain duration. Medical proof is required to prove disability except in obvious cases. (*Bstandig v. Workers' Compensation Appeals Board* (1977) 68 Cal.App.3d 988.)

Dr. Conrad's reports indicate that he found respondent to be substantially unable to perform his usual duties due to his orthopedic complaints in evaluating respondent's workers' compensation claim. However, the standard applied in disability retirement cases is different from the standard applied in evaluating a worker's compensation claim. (*Winn v. Board of Pension Commissioners* (1983) 149 Cal.App.3d 532.)

None of the physicians that evaluated respondent's orthopedic condition was able to document objective findings to support respondent's pain complaints. Surgery was not recommended because no mechanical problems could be identified. Respondent's pain was

not relieved after numerous alternatives were tried, including medication, injections and other treatments. Several physicians commented that respondent's pain complaints were out of proportion to his objective findings. Dr. Singer's testimony and findings regarding respondent's orthopedic claims were persuasive. Respondent has not carried his burden of establishing that he is incapacitated for the performance of his usual and customary duties based on his orthopedic complaints.

Respondent did not submit medical evidence from a psychiatrist or psychologist supporting his claim for disability retirement based upon a psychological condition. Dr. Singer's statements that respondent might be unable to return to work due to a psychological condition were tempered by her acknowledgement that this is not her area of expertise. CalPERS sent respondent to see Dr. Bates, a psychiatrist, to determine whether respondent was disabled from a psychological condition; however, Dr. Bates was unable to evaluate respondent's condition due to his refusal to cooperate with the evaluation. CalPERS then sent respondent to see another psychiatrist, Dr. Goldfield, for an evaluation. Dr. Goldfield noted some encouraging changes in respondent's condition; namely, that following his attendance at the functional restoration program recommended by Dr. Mills, respondent had lost weight and become more physically active, including riding his bicycle and working out regularly. Based on his examination and record review, Dr. Goldfield diagnosed respondent with mild depressive disorder, but opined he was not incapacitated for performance of his usual and customary duties as a result of his psychological condition. Respondent did not establish that he is substantially unable to perform his usual or customary duties as a result of a psychological condition.

Considering all of the evidence presented, and the standards applicable in this proceeding, respondent has not met his burden of establishing that he was substantially incapacitated for the performance of his usual and customary duties as a computer operation/information technical support employee for the State Center Community College District.

#### ORDER

The application of Rory Smith for a disability retirement is denied.

DATED: February 3, 2015

  
JILL SCHLICHTMANN  
Administrative Law Judge  
Office of Administrative Hearings