ATTACHMENT E

THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for Industrial Disability Retirement of: ROBERT MAHON, Respondent, and CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION, CENTRAL CALIFORNIA WOMEN'S FACILITY, Respondent.	Case No. 2012-0092 OAH No. 2014060841

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, Office of Administrative Hearings, on March 18, 2015, in Fresno, California.

The California Public Employees' Retirement System (CalPERS) was represented by Renee Salazar, Senior Staff Counsel.

Thomas J. Tusan, Attorney at Law, appeared on behalf of respondent Robert Mahon.

There was no appearance on behalf of the California Department of Corrections and Rehabilitation, Central California Women's Facility.

Evidence was received in the form of documents and testimony. Submission of the matter was deferred pending receipt of written closing argument. CalPERS and respondent filed closing briefs April 20, 2015, and they were marked respectively for identification as Exhibits 14 and I. The record was then closed and the case was submitted for decision on April 20, 2015.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
FILED 4-29, 2015

FACTUAL FINDINGS

1. Robert Mahon (respondent) was employed as a Baker II by the California Department of Corrections and Rehabilitation, Central California Women's Facility (Department). By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151.[1] On June 6, 2007, respondent filed an application for service pending industrial disability retirement with the Benefits Services Division of CalPERS. He described his specific disability as "Left knee meniscus injury."

2. CalPERS obtained medical reports concerning respondent's orthopedic (left knee) condition from competent medical professionals. After reviewing the reports, CalPERS determined that respondent was not permanently disabled or incapacitated from performance of his duties as a Baker II at the time his application for industrial disability retirement was filed. CalPERS' determination was based upon its review of medical records pertaining to respondent's orthopedic condition, including reports prepared by Alan Sanders, M.D., Theodore R. Johnstone, M.D., Shobha Sekhon, M.D., and Joseph B. Serra, M.D.

By letter dated July 22, 2008, CalPERS notified respondent of its determination and advised him of his appeal rights. Respondent filed an appeal and request for hearing by letter dated August 15, 2008. CalPERS filed a Statement of Issues on June 18, 2014. Per the Statement of Issues, respondent's appeal is limited to the issue of whether, on the basis of an orthopedic (left knee) condition, he is permanently disabled or incapacitated from performance of his duties as a Baker II for the Department.

3. Compliance with service requirements under Government Code sections 11504 and 11509 was established. This matter proceeded by way of default with regard to the Department under Government Code section 11520.

Physical Requirements - Baker II

4. Respondent is age 75. He worked in the Department's central kitchen and was responsible for supervising and instructing inmates in bakery production. His Baker II position responsibilities and duties included:

> Assigns work and inspects completed tasks; proportions ingredients, weighs and sifts flour, mixes dough, adds shortening, yeast, leavening agents, seasoning and water or milk in the preparation and baking of bread, rolls, cookies, pies, cakes, and other bakery products; prepares frozen and other desserts; prepares fruits, fillings and icings; is responsible for

[1] Government Code section 21151, subdivision (a) provides: "Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability pursuant to this chapter, regardless of age or amount of service."

standards of safety, sanitation, and maintenance of bakery equipment, utensils, and premises; operates bakery machinery; evaluates the performance of inmates from the inmate population and takes or recommends appropriate action; requisitions, receives, inspects stores, and inventories bakery supplies; keeps records and makes reports; maintains order and supervises the conduct of persons committed to the Department of Corrections; prevents escapes and injury by these persons to themselves and others or to property; maintains security of working areas and work materials; inspects premises and supervises inmates for contraband.

5. A Baker II is reasonably expected to have and maintain sufficient strength, agility and endurance to perform during physically stressful situations encountered on the job. The parties cooperated in completing a form (Physical Requirements of Position/Occupational Title) identifying the physical requirements of the Baker II position. Respondent's position required him to occasionally (up to three hours) sit, stand, run or walk. He occasionally engaged in bending (neck and waist), twisting (waist), pushing and pulling. Respondent would sometimes have to search for contraband stashed by inmates in the kitchen. In doing so he would get down on his hands and knees to search the lower areas. He also occasionally lifted up to 50 pounds. He occasionally worked with heavy equipment including a portable hand-operated forklift, and a mixer. Respondent walked a half mile from the parking lot to his worksite daily.

Medical History

6. On July 28, 2004, respondent slipped and fell onto his back and buttocks while at work. He caught his left foot on a bench leg, and twisted his left knee in the process.

On December 2, 2004, respondent underwent left knee surgery. The procedure performed was: 1) partial medial and lateral meniscectomy with chondroplasty of the medial compartment as a new procedure; and 2) chondroplasty of the patellofemoral joint. Peter Simonian, M.D., performed the surgery. His postoperative diagnosis was: "Left knee medial meniscal tear and arthritis, with small inner rim lateral meniscal tear and patellofemoral chondromalacia, and severe compartment arthritis."

7. Respondent was examined by his treating physicians, Theodore Johnstone, M.D., and later by Shobha Sekhon, M.D., on June 21, 2007. Dr. Sekhon prepared a "First Report of Work Injury" at that time, diagnosing respondent with degenerative joint disease. She determined that respondent was unable to work at that time, and recommended only "sedentary activity." Prior to Dr. Sekhon's evaluation, respondent was seen for an Agreed Medical Examination (AME) by Alan, Sanders, M.D. Dr. Sanders specializes in orthopedic surgery and arthroscopy. He saw respondent on September 13, 2006, and prepared a report that same date.

8. Dr. Sanders noted that respondent complained of left knee aches and pains associated with standing, walking, kneeling and squatting. He could not fully flex his knee, and he limped all the time. On examination, Dr. Sanders determined that respondent's left knee was limited in flexion to 90 degrees, and extension was limited to 20 degrees. Earlier x-rays indicated "Some degenerative changes." Dr. Sanders diagnosed respondent with "Chronic residual status post traumatic arthritis of the left knee with arthrofibrosis."

Dr. Sanders prepared a Supplemental Report dated November 9, 2006. It incorporated his review of additional medical records provided to him. Dr. Sanders noted that an earlier MRI scan of respondent's left knee revealed: "a torn cruciate ligament, a stretched posterior cruciate ligament, a tear to the medial meniscus, some mild and medial subluxation to the meniscus, no evidence of any gross osteochondral bone change, thinning of the articular cartilage, and a knee effusion and a Baker's cyst."

Dr. Sanders recommended in a Supplemental Report dated February 21, 2007, that respondent be limited to a sedentary job.

Physician Testimony

9. Cyril W. Rebel, M.D. Dr. Rebel is an orthopedic surgeon. Dr. Sekhon referred respondent to Dr. Rebel and he has followed respondent from February 4, 2008, to present. Dr. Rebel testified at hearing. He is familiar with respondent's medical history, as well the physical requirements of his Baker II position.

Dr. Rebel's first evaluation of respondent is set forth in a letter report dated February 4, 2008. On physical examination Dr. Rebel noted that respondent had a flexion contracture of 15 degrees, and range of motion from minus 15 to 90 degrees. He had pain with any flexion beyond this. X-rays indicated what Dr. Rebel characterized as "Grade IV osteoarthritic changes, particularly medial compartment. He has significant hypertrophic changes with abundant osteophyte formation, significant subchondral sclerosis." At hearing, Dr. Rebel explained that Grade IV represented advanced arthritic changes where most of the cartilage is eliminated. It results in "bone on bone" at the joint, contributing to both pain and decreased range of motion in the knee.

10. In February 2008, Dr. Rebel had extensive discussion with respondent about treatment alternatives, including knee replacement. Respondent had already been treated with anti-inflammatories, physical therapy and activity modification. Respondent indicated that he wished to keep knee replacement as a last resort. Dr. Rebel therefore recommended Synvisc injections – a series of injections into the knee joint, the lubricating effects of which allows for the cartilage surfaces of joints to glide upon each other in smooth fashion. Synvisc is used for symptom relief. Its benefits are not long term, and at best it will delay the need for knee replacement surgery. Respondent received the injections in March 2008.

Dr.Rebel opined at hearing that from at least February 2008, respondent was incapacitated for performance of his duties as a Baker II. He noted that the extent of respondent's Grade IV knee arthritis precluded him from performing his work at that time.

11. Dr. Rebel prepared a report dated December 7, 2009. By then, respondent's knee symptoms had worsened to include pain at the knee joint aggravated by activity and walking. He also complained of knee stiffness. Dr. Rebel diagnosed advanced osteoarthritis left knee, and noted that respondent wished to go forward with a repeat course of Synvisc injections. Regarding knee replacement, Dr. Rebel indicated:

> I had a brief discussion regarding further treatment including possible arthroplasty. Patient says that he is reserving that as a last resort and only to be considered if he has unrelenting pain. He says he is getting by fairly well. He says that he feels he will be able to judge when the pain is too severe and that he will asked [*sic*] for a knee replacement at that time.

12. Dr. Rebel last examined respondent on January 7, 2015, at which time respondent reported that his knee was doing "terribly," with a lot of pain and stiffness. Respondent reported that his symptoms were worsening. Dr. Rebel diagnosed left knee osteoarthritis and administered a cortisone injection for symptom relief. Dr. Rebel noted the following conversation he had with respondent.

> We again briefly discussed knee replacement. Patient has previously been trying to avoid knee replacement. He has a son-in-law who had four knee replacements, two on each side. He says initially it was done and his foot was pointing out. It is unknown if this was really a result of the knee replacement itself but the patient has had a poor perspective of knee replacement but on the other hand, now is feeling that there may be no other choice for him but to proceed with knee replacement.

13. At hearing, Dr. Rebel confirmed that arthroplasty or total knee replacement is a definitive medical intervention that would address the "bone on bone" issues, decrease respondent's pain, and increase mobility in his left knee. Dr. Rebel indicated that knee replacement is recognized as being 90 percent effective.

14. Joseph B. Serra, M.D. On May 20, 2008, respondent was seen for an independent orthopedic medical evaluation by Joseph B. Serra, M.D. Dr. Serra is board certified in orthopedic surgery, and has practiced over 40 years in the field. He has performed independent medical evaluations for CalPERS for over 10 years. Dr. Serra was provided with respondent's medical records including the operative report of the December 2, 2004 left knee arthroscopic surgery, and those records from Dr. Sekhon, Dr. Johnstone and Dr. Sanders. He was also provided with non-medical sources including respondent's job description, Physical Requirements of the Position, and disability information. He met with

respondent for over an hour, obtained his history and examinee questionnaire, and performed a physical examination.

15. Respondent reported constant aching in his left knee, with increased symptoms upon standing and walking. His symptoms were somewhat relieved by rest and elevation and medications as needed. On physical examination, Dr. Serra found range of motion of his left knee to be minus 10 degrees of extension, and flexion to 90 degrees. This compared to zero extension to 145 degrees flexion on the right knee. Dr. Serra diagnosed respondent with degenerative joint disease, left knee.

16. Dr. Serra opined that while respondent's subjective complaints may make performing certain tasks difficult by causing pain or discomfort, "there are not sufficient abnormal findings that support his subjective complaints, or that suggest that he would be unable to perform his usual and customary work activities." He concluded that respondent was not presently substantially incapacitated for the performance of his regular duties as a Baker II.

Regarding whether respondent's condition was permanent, Dr. Serra observed:

> Mr. Mahon is a definite candidate for left knee replacement. There is a very good possibility that this could result in an essentially pain-free knee as it often does. He would regain a normal range of motion in his knee, and it is my opinion that he could then resume his usual and customary work activities with very little limitation of his daily activities, as described in the job description. Indeed, he could perform supervisory tasks required in his current job capacity even without a total knee replacement. However, he would be much more comfortable if he would undergo knee replacement surgery. I understand that this is his decision, but at the same time it does affect whether or not he is considered substantially incapacitated. It is my opinion that he is not substantially incapacitated at this time.

17. Dr. Serra testified that knee replacement surgery was a major part of his work and that this procedure's success rate is more like 95 percent. He also noted that the characterization of respondent's condition being "bone on bone" is only partially true. He explained that the December 2, 2004 surgery was a partial medial meniscectomy, and that the severe Grade 4 chondromalacia was confined to the medial compartment, with lower Grades observed in other compartments. Dr. Serra recommended that respondent undergo knee replacement surgery, noting that such is not uncommon for individuals in their 70s.

Discussion

18. Dr.Rebel opined that from at least February 2008, respondent was incapacitated for performance of his duties as a Baker II. He testified persuasively that the

extent of respondent's Grade IV knee arthritis precluded him from performing his work at that time. Dr. Serra agrees that respondent's subjective complaints made performing certain tasks difficult by causing him pain or discomfort. It also appears from a review of the competent medical evidence and respondent's job duties that his left knee injury substantially incapacitated him from the performance of his regular duties as a Baker II. The only issue is whether respondent's disability is permanent. More specifically, did respondent have an affirmative duty to seek medical treatment, i.e., knee replacement surgery on his left knee, and whether in the absence of such surgery is CalPERS obligated to pay him disability retirement.

19. The First District Court of Appeal considered a similar fact pattern in *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208. In *Reynolds*, a 32-year-old San Carlos firefighter injured his knee while fighting a fire. At the time, Mr. Reynolds was an employee of the city and a local safety member of CalPERS. A few months after his injury, Mr. Reynolds was assigned to a temporary, light-duty job while continuing treatment for the knee injury. Although his treating physician and a consultant recommended surgery on his knee, Mr. Reynolds refused the surgery and applied for permanent disability retirement. The San Carlos Civil Service Commission (Commission) denied the application and determined that his disability was not permanent or of extended and uncertain duration, and "that the recommended medical treatment is the kind to which a reasonable man would submit." (*Id.* at p. 218.)

20. In upholding the Commission's denial the Court of Appeal explained its reasoning as follows:

> The Commission found that appellant's disability was not permanent because the "probabilities are great that [he] will be restored to normal functioning if he submits to surgery..." In making this finding, the Commission relied on Labor Code section 4056 (see part A above), which denies workers' compensation benefits if an injured employee unreasonably refuses recommended medical treatment. Section 4056 merely codifies the common law rule requiring mitigation of damages (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 870, p. 3158), which is properly applied in determining eligibility for disability retirement. The Commission has inherent power under Government Code section 21025 to determine whether a claimant has undergone the medical treatment that reasonably could be expected to effect a cure.

(*Id.* at p. 216.)

21. In *Reynolds*, the firefighter stated that he was "not inclined to go for surgery, that he is afraid of it, that he wanted a 100% guarantee for success since it was his body." (*Id.* at p. 218.) His physician had opined that Mr. Reynolds' chance for recovery was 98

percent if surgery were performed. A second physician had opined that he had a 90 percent chance of recovery after surgery. (*Ibid.*)

In this case, respondent is similarly not inclined to undergo knee replacement surgery, in part based on his son-in-law's negative experience. Dr. Rebel and Dr. Serra believe that such surgery would be 90 to 95 percent effective, respectively, in ameliorating respondent's symptoms. Dr. Rebel noted that respondent is a "definite candidate for left knee replacement" and that there is a very good possibility that this could result in an essentially pain-free knee. Dr. Rebel opined that respondent "would regain a normal range of motion in his knee, and it is my opinion that he could then resume his usual and customary work activities with very little limitation of his daily activities." As in *Reynolds*, respondent's disability cannot be considered permanent or of extended and uncertain duration because the probabilities are great that he would be restored to normal functioning if he submits to knee surgery.

22. Respondent has, and continues to have, an affirmative duty to take reasonable and appropriate steps to lessen or minimize the debilitating effects of his knee condition. Examining physicians have either recommended knee replacement surgery to him, or confirmed that this surgery would be appropriate treatment for improvement of his symptoms. California recognizes the "avoidable consequences doctrine," whereby a person injured by another's wrongful conduct will not be compensated for damages to the extent that the injured person could have avoided it by reasonable effort or expenditure. (*Green v. Smith* (1968) 261 Cal.App.2d 392, 396; *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 271-272; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1382, p. 852.) In view of the consistent medical recommendation for knee replacement surgery, as well the high success rate, respondent cannot continue to go without knee replacement surgery while his orthopedic condition remains the same, or worsens, and claim that his disability is permanent. The probabilities are great that knee replacement surgery will improve his orthopedic condition and that he will be restored to normal functioning.

23. Respondent disagrees, noting that he already consented to, and underwent surgery for his injured left knee in December 2004. He noted that the firefighter in *Reynolds* underwent similar surgery (meniscectomy), as compared to a total knee replacement. Respondent contends that there is not such overwhelming evidence in this case regarding the anticipated success of knee replacement surgery. He is informed that at age 75 he would need to have cardiac clearance and there would be a risk of blood clots. The record is that in February 2008, Dr. Rebel had had extensive discussion with respondent about treatment alternatives, including knee replacement. Respondent had already received treatment with anti-inflammatories, physical therapy and activity modification – essentially maximizing non-surgical treatment at that time. That was seven years ago. There remains uniform agreement that knee replacement surgery, even at this time, will be 90 to 95 percent effective. This is not unlike the medical opinion regarding knee surgery in *Reynolds*.

24. Respondent also contends that that there must have been a tender of the medical treatment by his employer, and that even if Dr. Rebel were to have requested

authorization for surgery, any request for medical treatment must be reviewed and approved through "utilization review" under Labor Code section 4610. Respondent cannot fairly raise this issue where he has already expressly refused to undergo the recommended medical treatment. Such tender of medical treatment by an employer may be an "essential prerequisite" for there to have been a forfeiture of workers' compensation benefits for failure to undergo treatment. (*Thompson v. WCAB and City and County of San Francisco* (1994) 25 Cal.App.4th 1781.) However, it does not clearly apply here, particularly where the treatment was recommended and there is no evidence that it would not have been approved.

Finally, any suggestion that CalPERS waived its right to assert respondent's refusal of medical treatment as a defense because it was not pled in the Statement of Issues is without merit. Respondent has the burden in this case of establishing that his disability is permanent. The reasonableness of his refusal of knee replacement surgery is a relevant consideration in determining whether he has a disability of permanent or extended and uncertain duration.

25. The above matters have all been considered in determining that respondent does not have a disability of permanent or extended and uncertain duration. Respondent has not demonstrated through competent medical evidence that he is permanently disabled or incapacitated from performance of his duties as a Baker II with the California Department of Corrections and Rehabilitation, Central California Women's Facility. In this regard, the evaluation reports and testimony by both orthopedic medical experts are persuasive that respondent's orthopedic (left knee) condition, while disabling, is not permanent.

Respondent's application for industrial disability retirement should therefore be denied.

LEGAL CONCLUSIONS

1. Under Government Code section 21151, subdivision (a), state safety members incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability regardless of age or amount of service. Government Code section 20026 provides that "'Disability' and 'incapacity for performance of duty' as a basis of retirement, means disability of permanent or extended and uncertain duration, as determined by the board... on the basis of competent medical opinion."

In *Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, the court construed the term "incapacitated for the performance of duties" to mean a substantial inability to perform the employee's usual duties. (*Id.* at p. 876.) The applicant in *Mansperger* was a warden with the Department of Fish and Game whose physician opined that he could no longer perform heavy lifting and carrying. The evidence established that such tasks were an infrequent occurrence, and the applicant's customary activities were the supervision of hunting and fishing. The *Mansperger* court found that the applicant was not entitled to disability retirement because, although he suffered some physical impairment, he could perform most of his usual job duties.

2. Subsequently, in *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, the Court of Appeal applied the *Mansperger* test to the disability retirement claim of a California Highway Patrol sergeant who sustained injuries to his back and leg, which restricted his ability to carry out some of the functions of a patrol officer, including driving a patrol car for lengthy periods. Regarding whether there must be actual present disability or whether fear or possibility of future injury is sufficient to find disability, the court noted that "Hosford relied and relies heavily on the fact that his condition increases his chances for further injury . . . this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently in existence." The *Hosford* court held that the disability or incapacity must presently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient. (*Id.* at p. 862.)

3. Respondent has the burden of proving entitlement to disability retirement. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691; *Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.3d 234, 238.) It is well accepted that CalPERS may rely on decisions affecting other pension plans when the laws are similar, and since Government Code section 31724 (County Employees' Retirement Law) is similar to Government Code section 21151 (California Public Employees' Retirement Law), the rule concerning burden of proof shall be applied to cases under CalPERS law. (*Bowman v. Board of Pension Commissioners for the City of Los Angeles* (1984) 155 Cal.App.3d 937, 947.)

4. The matters set forth in Findings 4 through 25 have been considered. Although it was established that respondent's orthopedic (left knee) condition substantially disables him from the performance of his duties as a Baker II, it was not established through competent medical evidence that such condition is permanent or of extended and uncertain duration. Respondent is a definite candidate and has been recommended for knee replacement surgery. This is a medical treatment that has a very high success rate and is the kind to which a reasonable person would submit. Respondent's refusal of surgery remains his right, but CalPERS also retains inherent power to determine whether he has undergone the medical treatment that reasonably could be expected to effect a cure. As the probabilities are great that knee replacement surgery will improve respondent's knee condition and that he would be restored to normal functioning, his condition cannot be considered permanent or of extended and uncertain duration. His application should therefore be denied.

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ORDER

The application of Robert Mahon for industrial disability retirement is DENIED.

DATED: April 27, 2015

JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings