

**ATTACHMENT A**  
**THE PROPOSED DECISION**

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

In the Matter of the Application for  
Disability Retirement of:

PETER P. HERNANDEZ,

Applicant/Respondent,

and

CALIFORNIA DEPARTMENT OF  
TRANSPORTATION, DISTRICT 2,

Employer/Respondent.

CalPERS Case No. 2013-0986

OAH No. 2014120503

**PROPOSED DECISION**

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 12, 2015, in Orange, California.

Jeanlaurie Ainsworth, Senior Staff Counsel, California Public Employees' Retirement System, State of California, represented petitioner, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System, State of California.

Applicant/respondent, Peter P. Hernandez, appeared on his own behalf and was present throughout the administrative proceeding.

No appearance was made by or on behalf of employer/respondent, California Department of Transportation, District 2.

On August 12, 2015, the matter was submitted.

**ISSUE**

Was Peter P. Hernandez permanently disabled or incapacitated from performing the usual and customary duties of a Transportation Surveyor Party Chief with the California Department of Transportation, District 2, as a result of orthopedic conditions involving his

PUBLIC EMPLOYEES RETIREMENT SYSTEM

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neck, shoulders, arms, hands, and lower back when he filed his application for a disability retirement on July 30, 2012?

## FACTUAL FINDINGS

### *Preliminary Matters*

1. Applicant/Respondent, Peter P. Hernandez was employed by respondent, California Department of Transportation, Division 2 (CalTrans), as a Transportation Surveyor Party Chief. By reason of his employment, Mr. Hernandez was a state miscellaneous member of the California Public Employees' Retirement System (CalPERS).

2. On July 30, 2012, Mr. Hernandez filed a Service Pending Disability Retirement Application with CalPERS. In his application, Mr. Hernandez claimed the right to receive a disability retirement allowance on the basis of disabling conditions involving severe pain in his neck, shoulders, arms, hands and lower back. He represented that his disabilities limited his driving, computer work, writing, and use of survey equipment. He did not mention any disability related to dizziness. In his application, he represented that Frederick Close, M.D., was his treating physician.

Mr. Hernandez retired from service with CalTrans effective March 11, 2012. Mr. Hernandez has received a service retirement allowance since then, pending the resolution of his application for a disability retirement.

3. CalPERS obtained medical records and reports related to Mr. Hernandez's orthopedic condition. CalPERS selected a board-certified orthopedic surgeon to conduct a disability evaluation. Following an independent medical examination, that orthopedic surgeon provided CalPERS with a narrative report containing his findings and conclusions related to Mr. Hernandez's disabilities.

After reviewing various records and reports, CalPERS determined that Mr. Hernandez was not permanently disabled or incapacitated from performing the usual and customary duties of a Transportation Surveyor Party Chief when he filed his application for a disability retirement.

4. By letter dated June 25, 2013, CalPERS notified Mr. Hernandez that his application for a disability retirement had been denied. The letter also advised Mr. Hernandez of his right to appeal that determination.

5. By letter dated August 30, 2013, Mr. Hernandez appealed from CalPERS's adverse determination. In his letter, Mr. Hernandez mentioned that he had been awarded a worker's compensation disability rating; that he had always worked as a surveyor; that the CalTrans duty statement that was relied upon was outdated and inapplicable; that his supervisor, Tom Dale, sent him an email in March 2011 that stated Mr. Hernandez could not return to work unless he "was rated 100%"; that his injuries limited the use of his neck,

shoulders, arms and lower back; and that as a result of his condition, he had given up or reduced to a minimum level all of his hobbies.

6. On November 17, 2014, petitioner signed the Statement of Issues. The Statement of Issues and other jurisdictional documents were served on Mr. Hernandez and CalTrans.

7. The matter was set for an administrative hearing.

8. On August 12, 2015, the record in this administrative proceeding was opened; jurisdictional documents were presented; no appearance was made by or on behalf of CalTrans; a stipulation was recited; sworn testimony was received; documentary evidence was produced; closing arguments were given; the record was closed; and the matter was submitted.

#### *Applicant's Background and Circumstances*

9. Mr. Hernandez was born in 1955. He grew up in Southern California and graduated from Fallbrook High School in 1973. He attended the University of Pacific for one year and then began working. He has worked in the land surveying profession his entire adult life.

Mr. Hernandez became licensed as a land surveyor in 1993. On February 15, 1993, he began employment with CalTrans. During his employment, he was promoted to Transportation Surveyor Party Chief. In his capacity as Transportation Surveyor Party Chief, Mr. Hernandez was responsible for the operation of a three-person surveying crew comprised of himself and two others. His field responsibilities included extremely vigorous physical activities, exposure to dust, gas fumes, marked changes in temperature and humidity, and loud noises. His position as party chief did not permit him to delegate his demanding physical responsibilities to others. He often worked on or in close proximity to public roads and highways. His inability or failure to carry out required activities posed a risk of danger to himself, his crew, and members of the public. He was in the field almost all the time.

Mr. Hernandez wanted to remain in public service for at least 20 years. On November 2, 2010, he underwent an anterior cervical discectomy and fusion (ACDF) and was off work for about a year. He returned to work in early 2012. After he returned to work, he fell as a result of experiencing a bout of dizziness. He testified that his supervisor notified him by email that he could not return to work until he was cleared by his physician.<sup>1</sup> Mr. Hernandez retired from his employment with CalTrans on March 11, 2012.

Mr. Hernandez was married and living in Redding, Shasta County, during his employment with CalTrans. He and his wife divorced and, following his father's death, he moved to his father's "little ranch" in Pala, San Diego County.

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<sup>1</sup> Mr. Hernandez did not produce this email.

The ranch where Mr. Hernandez lives is nearly 40 acres, but only five acres have been developed. Mr. Hernandez lives on the ranch with his cousin, who helps maintain the ranch. Mr. Hernandez spends about two and one-half hours a day caring for citrus, fig, plum and peach trees. He walks about the ranch, pulls weeds, irrigates, and mows, but he does not perform any activity that requires him to reach above his head. Activities such as tree trimming and fruit picking are performed by others. Mr. Hernandez also tends a very small vegetable garden where he grows tomatoes and peppers. When he does not engage in these activities, he walks about the ranch and sits.

Mr. Hernandez experiences pain in his neck, shoulders, arms, and hands while caring for the orchard and garden. Mr. Hernandez has difficulty sleeping. He sometimes becomes dizzy. He takes a large number of medications for pain, depression, and insomnia. He described his level of pain, when medicated, as 6 or 7 on a scale of 10. He believes that his condition is not improving. He testified, "With my pain, I cannot work and have a life, or I can work and not have a life." Mr. Hernandez strongly believes he is entitled to a disability retirement.

10. Mr. Hernandez's family physician, Dr. Richard Ferreras, maintains a practice in Fallbrook, a nearby town. Mr. Hernandez also remains under the care of Dr. Frederick W. Close, an orthopedic surgeon who maintains offices in San Diego and Murrieta.<sup>2</sup>

#### *The Duties of a Transportation Surveyor Party Chief*

11. Notice is taken that a CalTrans Transportation Surveyor Party Chief must have knowledge of various matters including: surveying, mathematics, and basic science as applied to surveying; methods of survey measuring; the use and adjustment of precision surveying instruments; the ability to utilize conventional and state of the art surveying procedures, equipment, and materials; mapping and drafting techniques; the California Coordinate System; Code of Safe Surveying Practices; photogrammetric mapping procedures; real property acquisition and mapping laws; monumentation; the Land Surveyors' Act; the Subdivision Map Act; relevant CalTrans plans, standards, policies, and procedures for planning, design, right of way, and construction relating to surveys; state-of-the-art surveying and related equipment; principles of effective communication; and principles of effective personnel management.

A CalTrans Transportation Surveyor Party Chief must: supervise the work of a crew; plan and direct the work of a survey party; make necessary corrections and/or revisions to construction plans, under direction of the Resident Engineer, when required; plan and direct the work of staff engaged in resolution of legal property descriptions; prepare clear and comprehensive reports and technical correspondence; review the work of others; analyze situations accurately and adopt effective courses of action; effectively promote equal employment opportunity in employment; and maintain a work environment that is free of discrimination and harassment.

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<sup>2</sup> Neither Dr. Ferreras nor Dr. Close provided a report of disability in this matter, and neither testified.

12. The completed Physical Demands of Employee's Job Duties form and the completed Physical Requirements of Position/Occupational Title form used by CalPERS were received. Each form related to the position of a Transportation Surveyor Party Chief. Mr. Dale signed the forms and likely completed each of them. The information contained in the forms was nearly identical.

According to the forms, a Transportation Surveyor Party Chief is never required to run or work with bio-hazards. A Transportation Surveyor Party Chief is occasionally (up to three hours) required to crawl, climb, squat, push and pull, use a keyboard, use a mouse, lift and carry objects weighing 51 to 75 pounds, drive, work at heights, operate foot controls, and use protective equipment. A Transportation Surveyor Party Chief is frequently (from three to six hours) required to sit, bend at the waist, twist at the waist, grasp objects in a powerful manner, and walk on uneven ground. A Transportation Surveyor Party Chief is constantly (over six hours) required to stand, walk, bend at the neck, twist at the waist, reach above shoulder level, reach below shoulder level, and engage in fine manipulation with the hands. A Transportation Surveyor Party Chief is constantly exposed to excessive noise, extreme temperature, humidity, dust, gas and fumes.

13. Mr. Hernandez believed that his activities were more vigorous than the activities set forth in the forms Mr. Dale completed. Mr. Hernandez revised the Physical Demands of Employee's Job Duties form to reflect that he was occasionally required to sit and climb (up to 33 percent of the time); was frequently required to engage in activities that involved stooping, twisting from the waist, and lifting objects weighing from 26 to 50 pounds (up to 66 percent of the time); and was continuously required to engage in activities that required bending at the neck, keyboarding and mouse use, grasping, fine manipulation, and reaching at shoulder level (67 to 100 percent of the time).

14. Mr. Hernandez stressed that he was "a working supervisor" of a three-man surveying crew that was supposed to include at least four to five crew members.

#### *Medical Evidence and Testimony*

15. Jeffrey S. Schiffman, M.D., is a board-certified orthopedic surgeon. Dr. Schiffman obtained a medical degree from the University of Pennsylvania in 1987. He completed a residency in orthopedic surgery at Montefiore Medical Center/Albert Einstein College of Medicine in 1992. He completed a spine fellowship at Scripps Clinic and Research Foundation in July 1993. He was board certified by the American Academy of Orthopedic Surgery in 1995. He practices orthopedic medicine in North San Diego County, California, with a specialty of spine surgery.

Dr. Schiffman has performed approximately five independent medical examinations at CalPERS's request to determine whether an applicant's orthopedic condition qualified the applicant being examined for a disability retirement. According to Dr. Schiffman, he has determined the applicants he examined were qualified to receive a disability retirement following "most" of his examinations.

16. On May 8, 2013, Dr. Schiffman evaluated Mr. Hernandez at CalPERS's request. He prepared a comprehensive 34-page narrative report following that evaluation.

Dr. Schiffman obtained background information directly from Mr. Hernandez, together with his present complaints, a job history, a medical history, a social history, and a family history. Dr. Schiffman reviewed 88 separate medical records prepared from April 27, 2000, to December 13, 2012, each of which was summarized in his report. He reviewed the job descriptions Mr. Dale prepared. He conducted a physical examination of Mr. Hernandez's cervical spine, shoulders, upper extremities, hands, and lumbar spine. He reviewed available imaging studies and reports. He obtained and evaluated x-rays of Mr. Hernandez's cervical spine, shoulders, upper extremities, and lumbar spine.

In connection with his employment, Mr. Hernandez told Dr. Schiffman that his basic work duties required him to lift more than 50 pounds, bend and stoop, engage in prolonged standing, drive a vehicle, work with his arms at or above shoulder level, engage in forceful pushing and pulling, squat and kneel, climb, engage in repetitive grasping, and walk on uneven ground.

Mr. Hernandez reported to Dr. Schiffman that his present complaints consisted of neck pain and bilateral cervical radiculopathy (left greater than right), some pain and numbness extending down the left arm to the wrist, tingling in the palms of each hand (left greater than the right), and low back pain that radiated down the right leg to the ankle. Mr. Hernandez did not mention dizziness or sleeping issues. Mr. Hernandez reported that he was taking Naprosyn, Neurontin, Hyzaar, and Ultracet.

A review of available medical records revealed a history of lower back pain originating from before April 2000; bilateral shoulder pain in 2008; treatment of bilateral shoulder pain thereafter that included cortisone injections and medications; a history of neck pain beginning around January 2010, followed by findings of a disc herniation at C5-6; a history of low back pain in August 2010; and an ACDF surgery in November 2010, followed by time off work, physical therapy, and medications.

A medical record dated April 14, 2011, authored by Clayton Reinhardt, D.O., stated Mr. Hernandez had returned to work, his condition worsened, he missed a day's work due to neck pain as a result of having to lean forward to look through a survey scope, and he became lightheaded and fell. Dr. Reinhardt's diagnoses included cervicalgia [pain in the neck], degeneration of the cervical spine with intervertebral disc disorder, lumbago [pain in the lower back], panic attack disorder, and an unspecified phobia. Dr. Reinhardt restricted Mr. Hernandez from performing overhead work and from lifting more than 25 pounds. On June 24, 2011, Mr. Hernandez reported that his supervisor was unable to accommodate his work restrictions and would not permit him to return to work.

In a visit with Robert Stanfield, M.D., Mr. Hernandez reported that prescribed medications were no longer working and that his symptoms had worsened.

The report of Rosaline Hsia, M.D., a Qualified Medical Examiner, dated February 8, 2012, was summarized. Dr. Hsia concluded that Mr. Hernandez was not a qualified injured worker and “could return to his usual and former occupation.”

An examination conducted by Mark C. Nelson, M.D., an orthopedic surgeon, noted the presence of a complicated past medical history, cervical spondylosis, ACDF surgery, and symptoms of radiating upper extremity pain that were not explained by MRIs and an EMG. Dr. Nelson later interpreted an MRI as demonstrating some evidence of mild right-sided foraminal stenosis at C3-4, but being otherwise generally benign.

In a report dated May 31, 2012, Dr. Close, Mr. Hernandez’s current treating orthopedic surgeon, wrote, “The patient may continue with his usual and customary occupation without restrictions,” although Dr. Close later directed Mr. Hernandez to remain off work until October 11, 2012.

Dr. Schiffman’s examination of Mr. Hernandez’s cervical spine revealed normal alignment, no swelling, and a surgical scar. There was no tenderness or spasm. Range of motion was within normal limits. Examination of the upper extremities included a normal neurological examination (reflexes were 2+ and equal bilaterally), a normal motor examination, and a normal sensory examination except for numbness in the right and left thumb, index, and middle fingers and in the ring finger of the left hand. The examination of the shoulders was within normal limits. The shoulders were symmetrical and there was no tenderness on palpation. Range of motion was full and equal bilaterally. Shoulder muscle strength was equal bilaterally. There were no negative results with any testing. There were no remarkable findings on examination of the elbows, forearms, and wrists. The curvature of the lumbar spine was normal. There was no tenderness or spasm in the lumbar spine on palpation. There was a painful but appropriate range of motion in the lumbar spine. Gait was normal. There was no evidence of malingering.

Dr. Schiffman’s review of the x-rays he ordered of the cervical spine revealed cervical straightening, good consolidation of the fusion at C5-6, and C4-5 spondylosis [degeneration] with ossicle [small bone] formation anteriorly. His review of the x-rays he ordered of the lumbar spine demonstrated multilevel spondylosis. His review of the x-rays he ordered of the upper extremities were normal, except for an ulna styloid non-union of the right wrist and a small osteophyte in the left elbow. His review of the x-rays he ordered of the shoulders revealed degeneration in the acromioclavicular joint.

Dr. Schiffman found that Mr. Hernandez was candid and cooperative during the examination. Mr. Hernandez did not exaggerate any complaints during the examination.

Dr. Schiffman’s impression was a cervical disc protrusion at C5-6 that was treated with an ACDF; cervical spondylosis at C4-5, above the level of the fusion; lumbar strain with radiculopathy; and bilateral shoulder complaints that had resolved. He believed these orthopedic conditions were the result of Mr. Hernandez’s employment.

Dr. Schiffman opined that the shoulder pain Mr. Hernandez complained about was radiating pain from the cervical spine. The imaging he reviewed demonstrated a solid bony fusion at C5-6 without any nerve impingement to support Mr. Hernandez's complaints of severe neck pain radiating bilaterally down his arms to his wrists. While he opined that Mr. Hernandez experienced lumbar pain and sciatic pain in the right lower extremity, his review of the February 2011 MRI demonstrated nothing to explain that sciatic pain.

In his narrative report, Dr. Schiffman concluded that Mr. Hernandez's orthopedic condition was permanent and stationary, that his symptoms remained unchanged over an extended period of time, and that Mr. Hernandez achieved maximum medical improvement. Dr. Schiffman concluded that Mr. Hernandez was restricted from repetitive motions of the neck, but this restriction did not preclude him from driving. Dr. Schiffman concluded that Mr. Hernandez's lower back condition did not warrant any work restrictions. He believed Mr. Hernandez was not substantially incapacitated from performing his usual duties.

17. Dr. Schiffman authored a second report, dated May 27, 2012, that clarified his previous report. In that report, he stated his use of the phrase "no repetitive motions of the neck" was intended to establish a restriction that applied to a person working on an assembly line where the worker had "to constantly move and rotate [his] neck throughout the day." His report stated that while Mr. Hernandez worked in an active outdoor job, "it does not meet the level of repetitive motions of the neck." His report further stated, "His job description is that he has to constantly bend his neck throughout the day, but this is an intermittent activity at best, and does not meet the criteria for repetitive motion. It is my medical opinion that he can perform all his job duties after a one level solid anterior cervical fusion."

18. Dr. Schiffman testified about his evaluation of Mr. Hernandez, which was conducted in the same manner he performs all disability evaluations. His testimony was consistent with his reports.

Dr. Schiffman testified that a single-level anterior cervical discectomy and fusion is a surgical procedure used to treat the pain that results from cervical nerve root or spinal cord compression. ACDF surgery involves decompressing the cervical spinal cord and nerve roots by removing herniated disc material and stabilizing the disc space where the material was removed with a bony fusion. He testified that a single-level ACDF is "a universally successful surgery" and, for that reason, it is a spinal surgeon's favorite surgery.

Dr. Schiffman testified that his review of Mr. Hernandez's x-rays and MRIs revealed the presence of a very successful ACDF surgery. Cervical x-rays showed no hint of pseudarthrosis (a nonunion or false joint), although there was some degeneration at C4-5. Lumbar spine x-rays revealed multi-level arthritis consistent with the extent of arthritis that is expected in an individual over 50 years of age; in other words, the degeneration evident in Mr. Hernandez's lumbar spine x-ray was age appropriate. The bone chip in Mr. Hernandez's right wrist, which was depicted on x-ray, was not significant. MRIs of the cervical spine did not provide any explanation for the severe pain Mr. Hernandez said he experienced in his shoulders, upper extremities, and hands. MRIs of the lumbar spine revealed nothing that supported the presence of sciatica.

Dr. Schiffman believed that Mr. Hernandez, in fact, experienced some pain in his neck, shoulders, upper extremities, hands, and low back. However, his examination and the objective medical evidence did not support a conclusion that Mr. Hernandez was unable to perform his usual and customary duties as a Transportation Surveyor Party Chief. He did not understand why Dr. Rei Reinhardt issued a work restriction precluding no lifting, pushing, pulling, and carrying of weights greater than 25 pounds. He felt it possible that Dr. Reinhardt was not a spine surgeon.

On cross-examination, Dr. Schiffman testified he was familiar with the usual and customary duties of a land surveyor as a result of having examined and treated a number of land surveyors over the course of his medical practice. On cross-examination, Mr. Hernandez asked Dr. Schiffman to assume that a Transportation Surveyor Party Chief was required to move and place surveying equipment, stand behind a surveying instrument in a bent position without touching the instrument for up to four to five hours a day, with the neck flexed forward, while, at the same time, constantly twisting and looking for oncoming traffic. He asked Dr. Schiffman to assume that a Transportation Surveyor Party Chief was required to engage in fine repetitive hand movements 80 percent to 90 percent of the day. Dr. Schiffman testified that if these activities were required, they did not change his opinion. Even if these activities were required, he believed that Mr. Hernandez was able to perform his usual and customary duties as a Transportation Surveyor Party Chief.

On cross-examination Dr. Schiffman testified that Mr. Hernandez's dizziness had nothing to do with his cervical condition and was not a result of having undergone ACDF surgery. He did not believe that Mr. Hernandez's sleep issues, of which he was unaware, were related to any orthopedic condition. He did not believe that Mr. Hernandez's excessive sweating, of which he was unaware, was related to any orthopedic condition.

On cross-examination, Mr. Hernandez presented seven vials of prescribed medications and asked Dr. Schiffman to comment on his use of those medications and their relationship to his orthopedic condition.

Dr. Schiffman identified Losartan as a medication used to treat high blood pressure, a condition unrelated to Mr. Hernandez's orthopedic injuries. He identified Trazadone as an antidepressant medication that is sometimes used to treat insomnia. He identified Lyrica as a pain medication that is typically prescribed to treat diabetic neuropathy, but is sometimes prescribed off label to treat "nerve pain." He identified Tramadol as a narcotic-like pain medication, which could be prescribed to treat Mr. Hernandez's orthopedic pains. He identified Duloxetine (Cymbalta) as a medication used to treat depression. He identified Lexapro as a medication used to treat depression. Finally, he identified Methadone as a methadone-based medication used to treat moderate to severe pain or as a prescribed substitute for heroin. Methadone could be used to treat Mr. Hernandez's orthopedic conditions.

Dr. Schiffman was a credible medical expert.

## *Arguments*

19. Mr. Hernandez argued that he was a working supervisor who performed all the demanding physical duties required of a field surveyor, that his duties required him to bend and twist his neck “all the time,” and that Mr. Dale’s description of his actual physical activities was inaccurate. He mentioned that he retired almost immediately after he became dizzy and fell, and did so because he believed his dizziness made him a danger to himself and others. He intended to work in state service for at least 20 years, and his retirement four months before reaching that goal was evidence of the disabling nature of his orthopedic conditions. Mr. Hernandez was very unhappy with the fact that he took home just \$900 per month in service retirement benefits after nearly two decades of faithful service with CalTrans. With regard to Dr. Schiffman’s medical opinion, he believed that Dr. Schiffman improperly relied on the physical requirements Mr. Dale erroneously described, and that the credible evidence established that he was unable to continue his employment due to the pain arising out of his orthopedic conditions.

20. Counsel for petitioner argued that Mr. Hernandez stopped working because of his dizziness and fall at work, events unrelated to the orthopedic injuries on which Mr. Hernandez based his disability retirement claim. Counsel for petitioner argued that as a field supervisor, Mr. Hernandez could reassign many of the arduous physical tasks that he claimed he could not physically perform. Counsel for petitioner argued Dr. Schiffman provided the only credible medical opinion in this matter and Mr. Hernandez failed to establish his right to a disability retirement based on the credible medical evidence.

## *Evaluation*

21. Mr. Hernandez was a sympathetic witness. His work with CalTrans was extremely demanding. His employment history established he worked as a Transportation Surveyor Crew Chief despite having a medical history that included numerous orthopedic problems not limited to chronic low back pain, shoulder pain, a herniated disc in his cervical spine requiring surgery, and radiating pain down both arms and right leg.

Mr. Hernandez had the burden of proof. His testimony about his employment history, medical history, complaints of pain, and need for powerful prescription medications to control his pain, while plausible, did not equate to competent medical evidence.

The competent medical evidence in this matter involved Dr. Schiffman’s testimony. As an orthopedic surgeon, Dr. Schiffman was educated, trained, and highly experienced in evaluating the orthopedic conditions at issue in this proceeding and in determining the impact of such conditions on Mr. Hernandez’s ability to perform his usual and customary duties. Dr. Schiffman’s opinion was based upon his independent medical examination and a careful review of Mr. Hernandez’s medical records. Dr. Schiffman did not arbitrarily ignore medical evidence that was contrary to the ultimate conclusions he reached. He reasonably relied on information Mr. Dale provided concerning Mr. Hernandez’s usual and customary activities, but even if Mr. Dale’s reports were not completely accurate, Dr. Schiffman’s

responses to Mr. Hernandez's hypothetical questions on cross-examination removed any doubt about Mr. Hernandez's ability to carry out his usual and customary duties.

Dr. Schiffman's credible medical testimony cannot be disregarded. His testimony was far more persuasive than the medical evidence to the contrary.

## LEGAL CONCLUSIONS

### *Burden and Standard of Proof*

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

### *Applicable Statutes*

2. Government Code section 20026 provides in part:

“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.

3. Government Code section 21150, subdivision (a), provides:

(a) A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076, 21076.5, or 21077.

4. Government Code section 21152 provides in part:

Application to the board for retirement of a member for disability may be made by:

(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member. . . .

[¶] . . . [¶]

(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

(d) The member or any person in his or her behalf.

5. Government Code section 21156 provides in part:

(a)(1) If the medical examination and other available information show . . . that the member in the state service is incapacitated physically or mentally for the performance of his or his duties and is eligible to retire for disability, the board shall immediately retire him or his for disability. . .

(2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion . . . .

#### *Appellate Authority*

6. “Incapacitated” means the applicant has a substantial inability to perform his usual duties. When an applicant can perform his customary duties, even though doing so may be difficult or painful, the public employee is not “incapacitated” and does not qualify for a disability retirement. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 886-887.)

7. Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854; *Bowman v. Board of Administration* (1984) 155 Cal.App.3d 937.)

#### *Evidentiary Matters*

8. Government Code section 11513, subdivision (d), provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

9. The uncontradicted and unimpeached testimony of an expert witness may not be arbitrarily disregarded. A trier of fact may disregard expert testimony and draw its own conclusions from the evidence only when the evidence conflicts or the expert’s testimony is rebutted. (*Lauderdale Associates v. Department of Health Services* (1998) 67 Cal.App.4th 117, 126.)

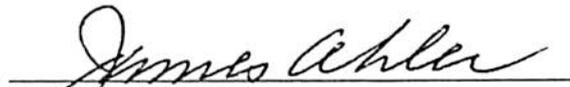
*Cause Exists to Deny the Application*

10. Cause exists to deny Mr. Hernandez's application for a disability retirement. A preponderance of the competent medical evidence did not establish that Mr. Hernandez was unable to perform the usual and customary duties of a Transportation Surveyor Party Chief with the California Department of Transportation, District 2, as a result of orthopedic conditions involving his neck, shoulders, arms, hands, and lower back when he filed his application for a disability retirement on July 30, 2012. The competent medical evidence established that Mr. Hernandez was capable of performing his usual and customary duties as a Transportation Surveyor Party Chief, although doing so may have been difficult.

ORDER

The application for a disability retirement filed by Peter P. Hernandez with the California Public Employees Retirement System on July 30, 2012, is denied.

DATED: August 27, 2015

  
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JAMES AHLER  
Administrative Law Judge  
Office of Administrative Hearings