

**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:

GERALD S. WOLFF,

Respondent,

and

EMPLOYMENT DEVELOPMENT  
DEPARTMENT,

Respondent.

Case No. 2014-0736

OAH No. 2014120399

**PROPOSED DECISION**

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on August 18, 2015, in Sacramento, California.

Preet Kaur, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Gerald S. Wolff was present throughout the hearing and represented himself.<sup>1</sup>

Evidence was received, the record was closed, and the matter submitted for decision on August 18, 2015.

**ISSUE**

The following issue is before the Board of Administration for determination:

<sup>1</sup> There was no appearance by or on behalf of the Employment Development Department.

CALIFORNIA PUBLIC EMPLOYEES'

RETIREMENT SYSTEM

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Based upon respondent's orthopedic (back) condition, is respondent permanently disabled or substantially incapacitated from performing the usual duties of a Customer Service Representative (CSR) for the Employment Development Department (EDD)?

## FACTUAL FINDINGS

### *Respondent's Disability Retirement Application*

1. CalPERS received respondent's Disability Retirement Election Application on December 26, 2012. In his application, respondent described his disability as follows:

Mid-back pain resulting from compression fracture of the T6 vertebra.

Respondent described his limitations/preclusions as: "Unable to sit or stand continuously for over 30 minutes." Respondent stated that the injury has affected his ability to perform his job in that he is "unable to sit or stand for the extended period of time required to perform call center work."

Respondent stated in his application that the injury occurred on April 15, 2010, while exercising at a fitness center.

2. Respondent retired for service effective December 29, 2012, and has been receiving his retirement allowance since that date.

### *Duties of a CSR*

3. On February 6, 2013, respondent signed a document titled Physical Requirements of Position/Occupational Title, which described the physical requirements of the job as including sitting "Constantly Over 6 hours" and standing "Occasionally Up to 3 hours."

4. On October 29, 2008, a disability management consultant prepared a Job Analysis of the CSR position for the EDD, stating as follows:

The Customer Service Representative (CSR) takes incoming calls from individuals who are filing Unemployment Insurance (UI) claims and/or answers questions related to claim filing and status of claim or other programs the Department administers. Utilizing a computer the worker inputs information received from the caller to file and reopen claims. The computer is also used to access information concerning claims status and to research any other information requested by the caller.

### *Respondent's Injury*

5. Respondent injured his back while exercising in a fitness center. He testified that he “applied too much weight, stood up, and heard a pop” in his back. Respondent went to the hospital emergency room where he was examined, given medications, and discharged home.

### *Respondent's Evidence*

6. Respondent did not call any physician or other clinician to testify. Respondent did not present any clinical records or written reports at the hearing in this matter.

7. Respondent testified that his compression fracture healed some time ago, and that this is not causing him pain. He continues to experience pain across the upper portion of his back. Respondent testified that his pain is atypical, and he can see why a doctor would be confused.

8. Respondent has experienced chronic back pain ever since his injury. Respondent is restricted in his activities because of the pain. For example, it is difficult for him to take long walks because he can feel the weight of his arms pulling down on his back. It is difficult for him to sit for long periods of time, such that he cannot sit through a movie. It is also difficult for respondent to complete simple tasks in daily life because of the pain he experiences every day.

9. Prior to his injury, respondent led a very active life including bicycling up to 3,000 miles per year, skiing since he was 16 years old, and kayaking.

10. Respondent's testimony is corroborated by letters from family members including his brothers-in-law, sister-in-law, and stepdaughter, all of whom knew respondent for many years as a very active and outgoing man, and now see that he is no longer able to participate in many family activities. He is far less outgoing and has become more quiet and withdrawn since his injury.

### *CalPERS's Expert*

11. CalPERS retained Joseph B. Serra, M.D., an orthopedic surgeon, to conduct an independent medical examination (IME). Dr. Serra conducted an IME of respondent on March 3, 2014, and issued an IME report on that date.

12. Dr. Serra took respondent's history, conducted a physical examination, and reviewed respondent's medical records and diagnostic studies. In his IME report, Dr. Serra listed his impressions as follows:

1. Compression fracture T6, mild, healed

2. Subjective thoracic pain related to activities Etiology undetermined
3. Objectively normal examination of thoracic and lumbar spine on this date

13. Dr. Serra reviewed the usual duties of a CSR. He concluded that there are no specific job duties that respondent is unable to perform, and that respondent is not presently substantially incapacitated from performing the work of a CSR.

14. There is no doubt that respondent continues to experience pain. However, he did not offer any medical opinion or other persuasive evidence to support that he is permanently incapacitated from performing the usual duties of a CSR. In the absence of such opinion, respondent failed to establish that he qualifies for disability retirement. Consequently, respondent's disability retirement application must be denied.

#### LEGAL CONCLUSIONS

1. By reason of his employment, respondent is a member of CalPERS and eligible to apply for disability retirement under Government Code section 21150.<sup>2</sup>

2. To qualify for disability retirement, respondent must prove that, at the time he applied, he was "incapacitated physically or mentally for the performance of ... his duties in the state service." (Gov. Code, § 21156.) As defined in Government Code section 20026,

"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, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

3. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.) An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of

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<sup>2</sup> Government Code section 21150, subdivision (a), provides:

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 or 21077.

the application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697 [finding that a deputy sheriff was not permanently incapacitated from the performance of his duties, because “aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the [sheriff’s] condition are dependent on his subjective symptoms.”].)

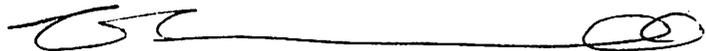
4. *Mansperger*, and *Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date he applied for disability retirement, he was substantially unable to perform the usual duties of a CSR due to his orthopedic injury (mid-back). Respondent did not present sufficient evidence to meet this burden.

5. In sum, respondent failed to show that, when he applied for disability retirement, he was permanently and substantially incapacitated from performing the usual duties of a CSR due to an orthopedic injury (mid-back). His application for disability retirement must, therefore, be denied.

ORDER

The application of respondent Gerald S. Wolff for disability retirement is denied.

DATED: September 8, 2015



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TIMOTHY J. ASPINWALL  
Administrative Law Judge  
Office of Administrative Hearings