

**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:

JERRY DEAN BEASLEY,

Respondent

and

CALIFORNIA STATE UNIVERSITY AT  
FRESNO,

Respondent.

Case No. 2015-0136

OAH No. 2015031088

**PROPOSED DECISION**

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on October 14, 2015, in Fresno, California.

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

Respondent Jerry Dean Beasley represented himself.

No one appeared for or on behalf of respondent California State University at Fresno (CSUF), its default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to that respondent only.

Evidence was received, the record was closed, and the matter was submitted for decision on October 14, 2015.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED NOV 16 20 15  
Kady Hasley

## SUMMARY

This appeal is limited to determining whether Mr. Beasley is permanently and substantially incapacitated for the performance of his usual job duties as a building service engineer with CSUF due to an orthopedic (knees and hand) condition. Mr. Beasley did not introduce persuasive medical evidence demonstrating his substantial incapacity. Therefore, his application for disability retirement benefits should be denied.

## FACTUAL FINDINGS

### *Mr. Beasley's Employment History with CSUF*

1. Mr. Beasley has been employed by CSUF as a building service engineer since October 2005. The last day he actually worked was May 14, 2012. Since then, he has been on modified duty due to the injury discussed below, although CSUF has not accommodated any of his restrictions and, therefore, has not allowed him to return to work. The following is a history of his work restrictions:

- a. May 16 through July 6, 2012: sit down work only
- b. July 7, 2012, through January 10, 2013: sedentary work only
- c. January 11 through September 20, 2013: off work
- d. September 21 through November 17, 2014: no prolonged walking greater than 50 percent each day, walking on uneven surfaces or steep inclines, or repetitive stair climbing. No twisting, squatting, kneeling, running, or jumping activities
- e. November 18, 2014, through February 17, 2015: off work
- f. February 18 through June 30, 2015: sedentary work only
- g. July 1 through September 22, 2015: no prolonged walking greater than 50 percent each day, walking on uneven surfaces or steep inclines, or repetitive stair climbing. No twisting, squatting, kneeling, running, or jumping activities

At hearing, Mr. Beasley explained he would like to return to work, subject to the limitations imposed by his physician, but CSUF has always told him it cannot accommodate any work restrictions. He further explained his understanding that CSUF is awaiting the outcome of this appeal, and his employment will be terminated if he is denied a disability retirement because it will not accommodate any work restrictions imposed by his physician.

### *The Etiology of Mr. Beasley's Disability*

2. Mr. Beasley was descending a ladder at work on Friday, May 11, 2012, when his left foot either slipped off one of the rungs or missed it altogether. While he did not fall from the ladder, his accident placed the majority of his weight on his right hip and leg and caused hyperflexion of both. He immediately felt pain in his right hip and leg, and reported his injury to his supervisor. He also completed the necessary worker's compensation paperwork, but did not immediately seek medical treatment. Instead, Mr. Beasley opted to convalesce over the weekend to see if the injury improved.

3. Mr. Beasley returned to work the following Monday, but was unable to stay the entire day due to the pain and swelling of his right knee and hip. He first sought medical treatment on May 16, 2012, from Jere Ozaeta, M.D., through the worker's compensation process. Dr. Ozaeta imposed the work limitations outlined in Factual Finding 1. His treatment of Mr. Beasley is discussed below.

### *Mr. Beasley's Application for Disability Retirement*

4. At the suggestion of CSUF's human resources department, Mr. Beasley signed, and CalPERS received, a Disability Retirement Election Application on December 17, 2013. He wrote the following about his specific disabilities: "Cannot kneel. Have problems squatting, climbing, and walking on uneven surfaces. Hand is often numb and weak. Have loss of hearing and intermittent ringing in ears." And he said the following about his limitations/preclusions at work due to his disabilities: "unable to squat, and kneel, or frequently climb stairs or ladders. Numbness in part of right leg and right shoulder pain if trying to kneel."

Mr. Beasley confirmed at hearing that he is no longer claiming disability based on hearing loss. He is claiming disability based solely on injury to his right knee.

5. Based on its review of reports prepared by Dr. Ozaeta, Daniel D'Amico, M.D., and Donald Carter, M.D., CalPERS denied Mr. Beasley's application for disability retirement due to orthopedic (knees and hand) and audiologic (hearing) conditions. Mr. Beasley timely appealed the denial. On March 24, 2015, Diane Alsup, Interim Chief of the Benefit Services Division of CalPERS, signed the Statement of Issues solely in her official capacity.

### *Job Duties of a Building Service Engineer*

6. A building service engineer is responsible for operating, maintaining, repairing, and inspecting heating, ventilating, air conditioning, refrigeration, and water systems and equipment at CSUF. A person working in that position is expected to be able to perform the following physical requirements for the following durations during any given shift:

- a. **Constantly:** standing, walking, twisting at the neck, twisting at the waist, pushing and pulling, fine manipulation, power grasping, simple grasping, repetitive use of hands, and lifting/carrying up to 25 pounds
- b. **Frequently:** bending at the neck, bending at the waist, reaching above shoulder, reaching below shoulder, exposure to excessive noise, exposure to extreme temperature, humidity wetness, and working at heights
- c. **Occasionally:** sitting, crawling, kneeling, climbing, squatting, keyboard use, mouse use, lifting/carrying between 26 and 100 pounds, walking on uneven ground, driving, working with heavy equipment, operation of foot controls or repetitive movement, and working with biological hazards
- d. **Never:**<sup>1</sup> running and lifting/carrying greater than 100 pounds

### *Medical Evidence*

#### Mr. Beasley's evidence

7. Mr. Beasley did not call any medical experts to testify at hearing, but introduced several medical records. Those records included an Injury Management Report from Dr. Ozaeta's office, which identified the date of each of Mr. Beasley's visits to Dr. Ozaeta and provided a brief description of the treatment provided and restrictions, if any, imposed. The records also included two reports written by Theodore Georgis, Jr., M.D., and three MRI reports from Fresno Imaging Center. Mr. Beasley also introduced correspondence from Sierra Pacific Orthopedics and Advanced Physical Therapy.

#### **Dr. Ozaeta's treatment**

8. Mr. Beasley first sought treatment from Dr. Ozaeta on May 16, 2012. He was prescribed ibuprofen (800 mg) for mild to moderate pain and vicodin (500 mg) for severe pain. He was given a referral for an MR arthrogram of the right knee and a referral to an orthopedic surgeon for evaluation. Dr. Ozaeta imposed the work restrictions discussed in Factual Finding 1.

#### **Dr. Georgis's treatment**

9. Mr. Beasley was evaluated by Dr. Georgis, a board-certified orthopedic surgeon, on June 20, 2014, for a Qualified Medical Evaluation in his worker's compensation matter. At the time, Mr. Beasley complained of constant dull, achy pain in both knees, with

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<sup>1</sup> "Constantly" is more than six hours, "frequently" is three to six hours, and "occasionally" is up to three hours.

the right worse than the left. He described the average baseline pain level in his right knee as being a 2 or 3 on a scale of 1 to 10, with it increasing in intensity to as much as a 10. His average baseline pain level in his left knee was a 1, and increased in intensity to as much as a 7 or 8. Mr. Beasley described aggravating factors as walking for more than 30 to 45 minutes, climbing, squatting, crouching, and kneeling activities. Rest, elevating the legs, ice for swelling, and his prescriptions for hydrocodone (10 mg) and gabapentin were alleviating factors.

10. Upon physical examination, Dr. Georgis found the range of motion of Mr. Beasley's knees to be within acceptable limits, with the right knee showing a slight reduction upon flexion but the left knee showing normal range of motion. Range of motion upon extension was normal, bilaterally. Mr. Beasley had mild to moderate patellofemoral crepitus and snapping in both knees. McMurray's test was negative for tears in the lateral meniscus and medial meniscus, bilaterally.

11. Dr. Georgis opined that Mr. Beasley had not reached maximum medical improvement as of the date of examination (June 20, 2014), and provided the following recommendation regarding further treatment:

I recommend that the patient be afforded the opportunity to undergo the MR arthrogram of the right knee that has been recommended by his treating doctor. Based on his recurrent symptoms, specifically mentioning an episode of worsening following examination of his knee and after physical therapy ended, it is reasonable to perform a postoperative imaging study. Further recommendations for treatment, if any, will be based on the findings of the MR arthrogram.

Once I am provided with a copy of the report of the MR arthrogram, I will make a recommendation on whether any further treatment is indicated in his case, and whether or not the patient is at maximal medical improvement. Likewise, any followup visits with Dr. Ghazal, his surgeon, following the MR arthrogram, would also be helpful in determining the status and his treatment recommendations.

12. Mr. Beasley returned to Dr. Georgis on May 11, 2015, for a Panel Qualified Medical Reevaluation. His complaints of pain in both knees remained the same as on his original evaluation by Dr. Georgis. Physical examination, however, revealed increased range of motion upon flexion in both knees, and Dr. Georgis described Mr. Beasley's range of motion as "excellent," bilaterally.

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With regard to Mr. Beasley's disability status, Dr. Georgis wrote:

In my opinion, Mr. Beasley requires additional diagnostic testing prior to reaching maximal medical improvement.

I have ordered x-rays of the knees, as well as an updated MRI scan of the right knee.

He has an appointment with Dr. Simonian<sup>2</sup> in a month.

Once these are accomplished, I will be able to form an opinion on whether any further treatment is necessary or if the patient is at maximal medical improvement.

He is not permanent and stationary for rating purposes as of today's date. Once I receive the results of the upcoming studies as well as Dr. Simonian's upcoming report, I will submit a supplemental report regarding his disability status.

If the upcoming studies do not demonstrate a significant abnormality, or if Dr. Simonian does not recommend any additional treatment, then the patient will be considered to be at maximum medical improvement and I will submit a supplemental final rating report.

13. Dr. Georgis's two medical reports included a review of records from Drs. Malcolm Ghazal, Peter Simonian, and Gopi Katsuri.

#### Dr. Ghazal

14. Mr. Beasley was referred to Dr. Ghazal, an orthopedic surgeon, and first treated with him on July 25, 2012. Dr. Ghazal's diagnosis was right knee medial compartment with a lesser degree of patellofemoral joint space degeneration. He provided a series of viscosupplementation injections, which Mr. Beasley reported did not help.

15. On December 20, 2012, Dr. Ghazal performed arthroscopic medial meniscectomy of the right knee. His postoperative diagnosis was right knee posterior horn medial meniscus tear with grade II chondromalacia of medial femoral condyle and a chronic anterior cruciate ligament tear, which was missed on the preoperative MRI.

After appropriate healing, Dr. Ghazal performed arthroscopic synovectomy, anterior cruciate reconstruction with semitendinosus allograft on Mr. Beasley's right knee on April

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<sup>2</sup> Peter Simonian, M.D., was the orthopedic surgeon who assumed Mr. Beasley's treatment after Dr. Ghazal passed away in May 2015.

25, 2013. After surgery, Mr. Beasley wore a brace and underwent a course of physical therapy. He explained that surgery appeared to have helped, until he completed physical therapy. During one reevaluation with Dr. Ghazal's office after completing physical therapy, Mr. Beasley reported hearing a "pop" and feeling increased pain in his right knee, which he reported as being ongoing.

16. Dr. Ghazal ordered another series of three viscosupplementation injections, which Mr. Beasley reported did not help. An April 30, 2014 x-ray of the right knee showed good residual joint space in all three compartments, and the graft appeared to be well-placed. At that time, Dr. Ghazal's diagnosis was chronic right knee pain status post work-related injury, and he noted that Mr. Beasley's injury had failed surgical and conservative treatment.

#### Dr. Kasturi

17. Mr. Beasley treated with Dr. Kasturi, a pain management specialist, who prescribed gabapentin and hydrocodone (10 mg). Mr. Beasley reported that the former medication helped him "only slightly," and the latter gave him "partial relief."

#### Dr. Simonian

18. Dr. Simonian performed an arthroscopic multicompartamental synovectomy and debridement of torn ACL fibers and an arthroscopic partial medial meniscectomy on Mr. Beasley's right knee on October 28, 2014. A progress note from one-week post-surgery indicated that a physical examination of Mr. Beasley's knee was "good," and the immediate plans involved removing sutures and beginning a formal physical therapy program. A January 5, 2015 progress note stated Mr. Beasley was continuing to have pain in his right knee, which did not improve with rest. His range of motion upon flexion was 125 degrees, and he had mild effusion and mild crepitation.

#### Fresno Imaging Center

19. A May 24, 2012 MRI of Mr. Beasley's right knee showed a complex tear of the posterior roots of the medial meniscus, some irregularity of the central weight-bearing surface of the medial femoral condyle, and chondral fraying of the kneecap and the adjacent medial and lateral facets of the kneecap. A subsequent MRI on September 8, 2014, showed no "significant change [when] compared to the prior MRI," and a June 26, 2015 MRI showed "subtle enhancement of the inner free edge as well as mild extrusion of the mid zone is again identified."

#### Physical therapy correspondence

20. An August 13, 2015 letter from Sierra Pacific Orthopedics confirmed that Mr. Beasley participated in physical therapy after his April 25, 2013 surgery from April 29 through July 25, 2013. It also confirmed that "he was fully compliant with our instructions and asked good question [*sic*] in regards to appropriate and inappropriate activity for his post



operative time frames.” The correspondence stated Mr. Beasley reached his short-term goal of a range of motion of 130 degrees upon flexion within 19 days of surgery, when it typically takes four weeks or longer.

21. Correspondence from Advanced Physical Therapy confirmed that Mr. Beasley underwent physical therapy with them from November 13, 2014, through March 3, 2015, following his October 28, 2014 surgery. It stated, “he displayed continuous maximum effort to improve his stage of condition post-operatively. He participated fully in all aspects of treatment which included manual hands-on therapy as well as therapeutic exercise to improve strength and range of motion.”

22. Mr. Beasley did not submit any medical reports or any other documents in which a physician’s opined he is substantially incapacitated for the performance of his usual job duties as a building service engineer based on a disability to his right knee.

CalPERS’s evidence

**Daniel M. D’Amico, M.D.**

23. CalPERS called Dr. D’Amico as its medical expert at hearing. He is a board-certified orthopedic surgeon who was retained by CalPERS to perform an independent medical evaluation (IME) of Mr. Beasley on March 31, 2014. Dr. D’Amico prepared a report documenting his IME, and that report was introduced into evidence.

24. Upon physical examination, Dr. D’Amico observed that Mr. Beasley limps every “once in a while,” but opined that Mr. Beasley limps “only because he wants to favor the right knee. He does not need to limp.” The range of motion of Mr. Beasley’s right knee upon flexion was 128 degrees, while his left knee was 138 degrees. Neither knee showed signs of instability.

25. Dr. D’Amico concluded the following:

I believe that, if Mr. Beasley could do an active physical therapy program, he would be able to regain the atrophy and increase strength. The degree of pain can be controlled on analgesic medication and antiinflammatories. He would be able to work in spite of the demands of his job as a heating/air-conditioning engineer. He would probably be able to work at that capacity, however, because of his pain and because of his multiple complaints regarding the right knee, his treating physicians have placed him on disability and with restrictions. Mr. Beasley states that any restrictions given by the treating physician in his department at Fresno State University disables him from returning to his usual occupation. If this is the case, then his disability is based on the treating physician’s recommended

limitations regarding his right knee and the function of the supervisors in his department by not allowing for any minor modifications in the course of his work. I also do not believe he has cooperated with the proper rehabilitation. He does have medial compartment degeneration of the right knee and it can be painful at times, especially with overuse. However, I do not believe he has reached the level where he cannot do his job, especially if he is able to work in his own protection mechanisms during the course of his work day.

Dr. D'Amico further concluded that Mr. Beasley could not perform "unrestricted climbing, unrestricted crawling, unrestricted crouching, and being in a position where he cannot function with his right knee." However, those restrictions were only temporary, Dr. D'Amico estimated "less than six months." He opined that Mr. Beasley was not substantially incapacitated for the performance of his usual duties as a building service engineer.

26. Dr. D'Amico was provided additional medical records for Mr. Beasley after the March 13, 2014 IME. He prepared a supplemental report on December 1, 2014, in which he wrote, "in review of the medical records that were sent, they really did not add much to the information that I had presented." He also amended his previous conclusion that Mr. Beasley was not substantially incapacitated, but explained such incapacity was only temporary. And on September 29, 2015, Dr. D'Amico prepared a second supplemental report addressing additional medical records provided to him. Based on those additional records, he concluded Mr. Beasley "has probably rehabilitated his knee condition and is able to return to his usual work at this time." Therefore, Dr. D'Amico opined Mr. Beasley was not substantially incapacitated for the performance of his usual duties.

27. At hearing, Dr. D'Amico opined that Mr. Beasley has an "early arthritic knee." He explained, however, that such condition was not incapacitating because he believes it would improve with further rehabilitation. He also explained that a condition is not incapacitating if it will improve with rehabilitation. Dr. D'Amico opined that one year of rehabilitation should be sufficient for Mr. Beasley's right knee to improve sufficiently such that he is able to perform his usual duties.

### *Discussion*

28. When all the medical evidence is considered, Mr. Beasley did not meet his burden to introduce evidence that he is substantially incapacitated for the performance of his usual duties as a building service engineer. That is not to say he does not suffer from right knee pain or that such pain may make it more difficult for him to perform his job duties. But discomfort alone, even if it makes performance of one's duties more difficult, is insufficient to establish a substantial incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; citing, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) And the fact that Mr. Beasley's worker's compensation physician has imposed prophylactic work

restriction does not establish incapacity either because an increased risk of further injury is insufficient to constitute a present disability. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

Mr. Beasley was required to produce a competent medical opinion to establish his substantial incapacity. (Gov. Code, § 21156, subd. (a)(2).) He offered no expert medical testimony at hearing, and none of the medical records introduced contained a physician's opinion that Mr. Beasley is substantially incapacitated for the performance of his usual duties. Dr. Ozaeta's opinion that Mr. Beasley "is unable to return to his previous occupation," documented as a cursory note in the Injury Management Report, was not helpful without additional explanation. (See, *People v. Bassett* (1968) 69 Cal.2d 122, 144 [the value of an expert witness's opinion lies with his explanation of the factual predicate for his opinion]; *People v. Williams* (1962) 200 Cal.App.2d 838, 845 ["[T]he opinion of an expert is no better than the reasons upon which it is based".]) The most recent medical opinion Mr. Beasley introduced was that expressed by Dr. Georgis in his May 11, 2015 report. At that time, Dr. Georgis opined Mr. Beasley had not reached maximum medical improvement and therefore deferred offering an opinion about his disability status.

While Mr. Beasley demonstrated Dr. D'Amico's initial IME report contained several factual errors regarding the former's work history and the number of surgeries he underwent, such evidence was of little import without evidence establishing the extent, if any, to which such erroneous information served as the factual predicate for Dr. D'Amico's opinions. Besides, "the rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. (*Hutchinson v. Contractors' State License Board* (1956) 143 Cal.App.2d 628, 632.) Mr. Beasley's application for disability retirement should be denied.

## LEGAL CONCLUSIONS

### *Applicable Burden/Standard of Proof*

1. Mr. Beasley has the burden of proving he qualifies for a disability retirement, and he must do so by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

### *Applicable Statutes*

2. Government Code section 20026 provides, in pertinent part:

"Disability" and "incapacity for performance of duty" as the basis of retirement, mean disability of permanent or extended

and uncertain duration, as determined by the board ... on the basis of competent medical opinion.

3. 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, 21076.5, or 21077." And the employer of such a member may not terminate the member's employment based on his disability, but instead must apply for a disability retirement on the member's behalf. (Gov. Code, § 21153.)

4. Government Code section 21156, subdivision (a), provides, in pertinent part:

(1) If the medical examination and other available information show to the satisfaction of the board ... that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her 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 and shall not use disability retirement as a substitute for the disciplinary process.

5. The courts have interpreted the phrase "incapacitated for the performance of duty" to mean "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) Mr. Beasley did not meet his burden of demonstrating he is substantially incapacitated for the performance of his usual duties as a building service engineer due to an orthopedic (knees and hand) as explained in 8 through 22 and 28.

6. During closing argument, Mr. Beasley raised concerns over CSUF's refusal to accommodate the work restrictions imposed by Dr. Ozaeta. CalPERS previously addressed the situation where a member's employer concludes the member is unable to perform his usual job duties due to a disability but the member has been denied a disability retirement in the precedential decision *In the Matter of the Application for Disability Retirement of Ruth A. Keck* (*Keck*), Precedential Decision No. 00-05 (September 29, 2000):

Respondent Keck argues that an employee who is terminated for disability but later found ineligible for disability retirement is placed in a "catch-22" situation. Further, she asserts that because the purpose of disability retirement is to eliminate financial hardship, an employee, such as respondent Keck, should be given the benefit of the doubt and granted disability

retirement. She cites *Raygoza v. County of Los Angeles* (1983) 148 Cal.App.3d 985 and *Leili v. County of Los Angeles* (1983) 148 Cal.App.3d 985 in support of the foregoing.

In *Raygoza v. County of Los Angeles*, a deputy marshal had been medically terminated following a Workers' Compensation Appeals Board decision containing a restriction precluding him from "situations where he may have to use a weapon." (17 Cal.App.4<sup>th</sup> at 1242.) The deputy's employer filed for disability retirement on his behalf, but the county retirement board denied the application after a full hearing, finding that he was capable of performing his job duties. (*Id.* at 1243.) In reviewing the trial court's denial of the deputy's petition for a writ of mandate seeking reinstatement to his job, the Court of Appeal ruled that the deputy was entitled to reinstatement under Government Code section 31725, part of the County Employee's Retirement Law of 1937.

Under that section, a county employee who has been terminated based on a disability and is later denied a disability retirement because the evidence presented to the county retirement board does not establish "that the member is incapacitated physically or mentally for the performance of the duties," must be reinstated to his or her position. (*Id.* at 1244) If the employer disagrees with the retirement board's determination, the employer may file a petition for writ of mandate, or join in a writ filed by the employee, seeking to compel a disability retirement. If the employer fails to do so, or if the court upholds the retirement board's decision, the employee must be reinstated. (*Id.*) The *Raygoza* court explained:

*The purpose of enacting this section was to eliminate severe financial consequences to an employee resulting from inconsistent decisions between an employer and the retirement board concerning an employee's ability to perform his duties. Prior to the enactment of the statute, a local government employer could release an employee on the grounds of physical incapacity, and the retirement board could then deny the employee a pension on the ground that he was not disabled. (Id., quoting Leili v. County of Los Angeles, supra, at 988).*

The court concluded that, in such a circumstance, the Legislature had left the final decision to the retirement board. (*Raygoza, supra*, at 1247)

Although Government Code section 31725 is part of a different statutory framework than the Public Employees' Retirement Law, Government Code section 20000, et. seq., which governs the operation of CalPERS, the *Leili* court noted that the California Attorney General had reached the conclusion that the same right to reinstatement exists for CalPERS members. (*Leili*, 148 Cal.App.3d at 988, citing 57 Ops.Cal.Atty.Gen. 86 [1974]<sup>3</sup>.)

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<sup>3</sup> The Attorney General was asked whether a state civil service employee may be medically terminated pursuant to Government Code section 19253.5, subdivision (d), after CalPERS has denied him a disability retirement. Concluding the employee could not be medically terminated, the Attorney General concluded: "upon a determination by the Public Employees' Retirement System that a member *can* perform the duties of his position, an employer of said member cannot thereafter terminate said employee on the grounds that he *cannot* perform such duties under Government Code section 19253.5." (57 Ops.Cal.Atty.Gen. 86, 89 [1974]; italics original.) In reaching such conclusion, the Attorney General explained that Government Code section 19253.5, subdivision (d), applies only when the member is not eligible for a disability retirement due to an insufficient number of years of service with CalPERS, whereas Government Code section 21153 applies when the member has the minimum five years of service credit and is therefore eligible for a disability retirement. (57 Ops.Cal.Atty.Gen. 86, 87 [1974]). Finally, the Attorney General concluded:

The decision of the Public Employees' Retirement System (PERS) is determinative in the employer's subsequent effort to terminate the employee for medical reasons. A contrary decision would create a severe financial consequence to an employee resulting from inconsistent decisions between an employer and the Board of Administrators of the Public Employees' Retirement System as to whether a particular employee is incapacitated and unable to perform the duties of his position. ... [¶] ... The employer is thus bound by the PERS decision. To conclude otherwise would render the procedures outlined by Government Code section [21153] meaningless. It is not reasonable for the employee to go through the PERS hearing if the employer is not bound by said decision. The employer cannot terminate an employee for medical reasons after the PERS has denied disability retirement to the member upon a finding that the employee can perform the duties of the position.

(57 Ops.Cal.Atty.Gen. 86, 88 [1974])

Consequently, an employer cannot terminate a member of CalPERS, such as respondent Keck, for medical reasons after CalPERS has denied disability retirement to the employee on a finding that he/she is able to perform the duties of his/her position.

*Raygoza* and *Leili* established that, following the final decision denying her application for disability retirement, respondent Glendora Unified School District is required to reinstate her to her former position. If respondent Glendora Unified School District refuses, respondent Keck's remedy is to file a petition for writ of mandate compelling respondent Glendora Unified School District to do so.

Based on the forgoing analogy, since CalPERS has determined that respondent Keck is able to substantially perform her usual duties, she must be reinstated.

Respondent Glendora Unified School District, a respondent in this case, had a right to participate in this hearing and elected not to do so. Respondent Glendora Unified School District has an obligation to reinstate her, even if the employer believes that she is not ready to return to work.

(Italics original.)

CSUF was named as a party but chose not to participate in this proceeding, just as the Glendora Unified School District did in *Keck*. Therefore, for the same reasons why the Glendora Unified School District was bound by CalPERS's determination of the employee's disability status, so is CSUF bound by CalPERS's determination of Mr. Beasley's disability status. Should CSUF act in a manner inconsistent with CalPERS's determination, Mr. Beasley has the same remedy Ms. Keck had.

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As an employee of CSUF, Mr. Beasley is a state employee, but he is exempt from the State Civil Service Act (Gov. Code, § 18500). (Cal. Const., art. 7, § 4, subd. (h); see, e.g., *Slivkoff v. California State University and Colleges* (1977) 69 Cal.App.3d 394, 401 [concluding a stationary engineer employed by California State College, Sonoma, was a state employee exempt from the State Civil Service Act].) Therefore, Government Code section 19253.5 does not apply to his employment, but Government Code section 21153 does since he is a member of CalPERS. (*Gonzalez v. California Department of Corrections and Rehabilitation* (2011) 195 Cal.App.4th 89, 97 [concluding that Gov. Code, § 19253.5 applies only to those subject to the State Civil Service Act, but Gov. Code, § 21153 applies to all CalPERS members].)


*Conclusion*

7. As set forth in Factual Findings 8 through 22 and 28, Mr. Beasley did not meet his burden of producing persuasive medical evidence demonstrating he is substantially incapacitated for the performance of his usual duties as a building service engineer with CSUF due to an orthopedic (knees and hand) or audiologic (hearing) condition. Therefore, his application for disability retirement should be denied.

**ORDER**

Respondent Jerry Dean Beasley's application for disability retirement is **DENIED**.

**DATED:** November 12, 2015

  
COREN D. WONG  
Administrative Law Judge  
Office of Administrative Hearings