

**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:

ERIC D. FAUL,

Applicant.

and

CITY OF LODI,

Respondent.

Case No. 2015-0134

OAH No. 2015060413

**PROPOSED DECISION**

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California on January 21, 2016.

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

There was no appearance by or on behalf of Eric D. Faul.

Janice Magdich, City Attorney, appeared and represented the City of Lodi.

Evidence was received and the matter was submitted on January 21, 2016.

**PROCEDURAL AND JURISDICTIONAL FINDINGS**

I. Eric D. Faul (applicant) was employed by respondent City of Lodi (City), as a Park Maintenance Worker II (PMW II) at all times relevant to this Decision. Applicant was and is a miscellaneous member of CalPERS by virtue of the City's contract with CalPERS to provide retirement services and benefits for City employees. Applicant has the minimum amount of service credit to qualify for retirement.

2. Applicant filed an application for disability retirement with CalPERS on June 3, 2014. Respondent claimed in his application that he was disabled and unable to perform his work requirements due to orthopedic problems; thoracic and cervical pain. He wrote that he was injured on May 19, 2010, when he was mowing on a hillside and fell, hitting his head. He identified work restrictions to which he was then subject as no repetitive bending, no lifting more than 35 pounds, and simply being unable to perform his duties as a result of his head and neck pain.

3. CalPERS asked applicant to provide information from his current and former treating physicians and a written statement regarding his current condition. CalPERS also asked applicant to report whether he was currently working, and, if so, the details of any employment. CalPERS also notified applicant that he would be scheduled for an Independent Medical Examination (IME).

4. Applicant submitted medical records and other documentation in response to the CalPERS request. Respondent submitted his treatment records from Conner O'Neill, M.D., Abdallah Khourdaji, M.D., Randall Armstrong, M.D., Mark Radanovich, M.D., Kevin Buckman, M.D., Marshall Armstrong, M.D., Victor Gellineau, M.D., and Steven Mann, M.D.

5. CalPERS' Benefits Services Division engaged Gerald Barnes, M.D., a Board certified orthopedic surgeon, to perform an orthopedic IME to determine whether applicant was substantially incapacitated due to his claimed disabling orthopedic condition. CalPERS provided the medical records and other information applicant had submitted to Dr. Barnes for review and to further inform his evaluation.

6. Dr. Barnes conducted his orthopedic IME on applicant on October 9, 2014, in Stockton, California. Dr. Barnes submitted an October 9, 2014, written report of his IME findings and conclusions to the CalPERS Benefit Services Division staff for evaluation and review.

7. CalPERS' Benefit Services staff reviewed the medical and other reports submitted by applicant, as well as Dr. Barnes' IME findings and conclusions. CalPERS notified applicant in writing that CalPERS determined that he was not substantially incapacitated from performing the job duties of a PMW II for the City due to his claimed disabling orthopedic conditions. The notice also advised applicant of his right to appeal the determination.

8. Applicant timely appealed the CalPERS denial of his application. Applicant wrote in his appeal letter, in part:

I am basing this on the findings of Gina Loukedis, M.S.,C.R.C. Disability Management/Return to Work Consultant and after working with her and management from the City of Lodi. I am not able to do my job duties nor could the City of Lodi

reasonably accommodate my limitations with the restrictions my injury has caused. I have tried to do my job duties while injured for three years under severe pain. I am currently working my fifth job since March 20, 2014, when the City took me off payroll. I am finding it hard to return too much of work with working less than 20 hours a week presently.

9. Respondent attached a November 21, 2013 three-page letter written by Ms. Loukedis in support of his appeal. Respondent's supporting letter reviewed his work circumstances, medical limitations and applicant's reports of his work abilities and restrictions as those actually applied to doing his job. Respondent's letter from Ms. Loukedis advised applicant that the City agreed that there was no means by which the City could continue to reasonably accommodate him as a PMW II, and in spite of the City's ability to make some modest changes and accommodations, there were no mitigating measures sufficient to render a complete long-term solution.

10. Anthony Suine, Chief, Benefits Services Division of CalPERS, made the allegations contained in the Statement of Issues in his official capacity and caused it to be filed on May 8, 2015. Applicant timely requested an evidentiary hearing. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings.

11. Notice of the date, time and place of the evidentiary hearing on the Statement of Issues was given by CalPERS to all parties in accordance with Government Code sections 11504 and 11509. Applicant did not appear, and good cause did not exist for his failure to appear. The matter proceeded as a default with respect to applicant pursuant to Government Code section 11520.

#### STANDARD AND BURDEN OF PROOF

"As in ordinary civil actions, the party asserting the affirmative in an administrative hearing has the burden of proof going forward and the burden of persuasion by a preponderance of the evidence."<sup>1</sup> An applicant for a CalPERS disability retirement bears the burden of proof and the burden of going forward with the evidence.<sup>2</sup>

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<sup>1</sup> *McCoy v. Board of Retirement* (1986) 183 Cal.App. 3d 1044, 1051.

<sup>2</sup> *Id.*, *Harmon v. Board of Retirement* (1976) 62 Cal.App. 3d 689, 691, *Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.3d 234, 238; *In Re: Theresa V. Hasan*, Board of Administration of the California Public Employees' Retirement System Precedential Decision No. 00-01.

## ISSUE

Was applicant, at the time of his application, permanently disabled, i.e., substantially incapacitated from performing his usual and customary duties of his position as a PMW II with the City due to his orthopedic condition (cervical and thoracic pain and disability)?

## RESOLUTION OF ISSUES

Applicant failed to appear and prosecute his appeal of CalPERS' denial of his application for disability retirement. Applicant failed to carry his burden to prove he is eligible for a disability retirement by a preponderance of the evidence. The record does not contain sufficient persuasive, non-hearsay medical evidence to support a conclusion that applicant is substantially incapacitated from the performance of his usual and customary duties as a PMW II with the City. The appeal must be dismissed.

## FACTUAL FINDINGS

### ESSENTIAL FUNCTIONS OF THE POSITION

1. The City's Class Specifications for PMW II, February 20, 2013, (Class Specifications), describes the essential functions, duties and qualifications for the applicant's PMW II position. The Class Specifications describe a position with a diversity of semiskilled physical labor tasks. The Class Specifications describe the position as journey level, and provides examples of duties expected to be performed with a minimum of supervision, including, but not limited to:

a. Mows and edges parks grounds, waters and sprays shrubs, grass, trees, and flowers, prunes and trims trees and bushes, fertilizes and aerates parks, replaces sod, rakes and sweeps grounds, assists in supervising the installation and maintenance of sprinkler systems, adjusts, repairs and replaces timing mechanisms;

b. Rakes, sweeps, picks up and removes leaves and trash and other debris and parks grounds, prepares and maintains baseball diamonds, basketball courts and football fields by raking, cleaning, mowing or placing markers;

c. Operates and maintains a variety of hand and power landscaping tools and equipment, including hand and power mowers, small tractors, spreaders, edgers, blowers, hedge trimmers, weed eaters, chainsaws, rakes, shovels, hoes, brooms and other tools, operates trucks, trailers and tractors with attachments, uses electrical and gas building equipment;

- d. Operates a tractor gang mower; and
- e. Performs basic carpentry, concrete, plumbing, and electrical work in new construction and repair of park facilities, including small buildings, retaining walls, walkways and fencing.

2. The Class Specifications for PMW II require the incumbent to have the ability to:

- a. Perform a variety of semiskilled, journey level maintenance and gardening duties in the beautification of assigned City grounds and landscaped areas including parks, athletic fields, roadsides and buildings, operate a tractor gang mower and other equipment in maintenance tasks;
- b. Maintain, repair, troubleshoot and replace building and ground systems, make minor repairs to irrigation system pumps; and
- c. Operate appropriate equipment and vehicles related to Park maintenance.

3. The Class Specifications identify the expected physical requirements and working conditions to include: Essential and marginal functions: Physical ability to stand, walk, sit, drive, carry, push, climb, bend at the waist, stoop, crouch, reach, kneel, crawl, hear, have sense of smell and sense of touch, lift and pull up to 75 pounds.

4. The Physical Requirements of Position/Occupational Title statement for PMW-II for the City (Requirements) was completed and signed by a representative of the City and by applicant on June 2, 2014. The Requirements statement represents that applicant performed the following tasks constantly (over six hours per day): Standing, walking, repetitive use of hands, and walking on uneven ground. The Requirements statement represents that applicant performed frequently (between three and six hours per day) the following: Pushing and pulling, simple grasping, lifting and carrying up to 50 pounds, and be exposed to excessive noise. The Requirements statement identified tasks performed occasionally (from not at all up to three hours per day) as: Kneeling, squatting, bending and or twisting with the neck or waist, reaching both above and below the shoulder, fine manipulation, power grasping, lifting between 51 and 100 pounds, driving, working with heavy equipment, exposure to extreme temperature, humidity or wetness, exposure to dust, gas, fumes or chemicals, and operation of foot controls or repetitive movement. The Requirements statement identified tasks never performed included running, crawling, climbing, keyboard and mouse use, lifting in excess of 100 pounds, working at heights, use of special visual or auditory protective equipment, or working with bio hazards.

5. Dr. Barnes read and considered the Class Specifications and Requirements statement as part of his assessment of respondent for his IME. He used the Class Specifications, Requirements and applicant's description of his job and tasks he actually

performed in his work for the City as the basis against which he formed his opinion whether applicant had the capacity, in light of his orthopedic condition, to substantially perform the requirements of a PMW II for the City.

## WORK HISTORY

6. Applicant's hire date with the City was not disclosed, but there was no dispute that he had at least five years of credited service with the City at the time of his application. He continued to work off and on for the City at what appeared to have been several returns to work after periods of leave occasioned by his injury, at modified work assignments within his job class between May 19, 2010, the date he was injured, and his last day of work, March 20, 2014. He was 34 years old at the time of Dr. Barnes' IME, well below the minimum eligibility age for retirement.

7. Applicant described his actual work duties as a PMW-II for the City to Dr. Barnes during the IME in a fashion generally consistent with the Class Specifications. He told Dr. Barnes that he has to do weeding, edging, spraying, and preps the fields for baseball and soccer. He also picks up litter, empties garbage cans, sometimes weighing up to 100 pounds, maintains and paints the bathrooms, scrubs floors, mops, changes playground equipment, and fertilizes lawns and gardens.

## THE INJURY

8. Applicant was at work on May 19, 2010, mowing an area of long unattended, wet and overgrown grass on a steeply sloping hillside at the Lodi Grape Bowl, a city owned stadium. Applicant was mowing with a special type of two-stroke mower. Applicant slipped on an unseen rock on the side of the hill, fell backwards and hit the back of his head on perhaps a metal post or railing. He may have lost consciousness, and noticed immediate pain in the back of his neck and head. Applicant began to experience persistent headaches and nausea within three to four hours of his injury.

9. Applicant sought immediate medical attention, continuing to experience nausea, dizziness and pain in his head and neck. He was x-rayed and given a CT scan. Applicant's CT scan and x-rays showed no abnormality, and he was diagnosed with a concussion and a cervical strain. He was treated with pain relievers and anti-inflammatory. He continued to obtain medical treatment up until the time he filed his application for disability retirement, but discontinued the medications about one year before the time of the IME. He had a period of temporary disability and was off work for a few weeks post-injury for diagnosis and studies, treatments, and recovery.

## IME FINDINGS AND CONCLUSIONS

10. Dr. Barnes' IME of respondent on October 9, 2014, consisted of a clinical interview, including inquiry into applicant's past medical and mental health history, asking applicant for his description of his job duties and activities, his work history, and his

explanations of the circumstances that led to his injury. Dr. Barnes also asked applicant to describe the disabling effects of those injuries. Dr. Barnes reviewed a number of medical records and reports of diagnostic imaging studies submitted by applicant to CalPERS and forwarded to him that described applicant's previous medical evaluation and treatment for his claimed disabling injuries. Dr. Barnes also asked applicant about whether he was currently taking any medications, his history of taking medications, his social history, personal habits, prior injuries and surgeries, work status, and personal circumstances. Dr. Barnes also asked about and noted applicant's present complaints and limitations caused by his injuries.

11. Dr. Barnes concluded that applicant had a period of temporary disability following his head and neck injury in May 2010, during which he received appropriate medical evaluations, diagnostic imaging assessments, therapies thought to address applicant's complaints, and other treatment. Dr. Barnes observed that applicant made a significant but not necessarily complete recovery, and returned to work for the better part of three years, with some modest work restrictions, the most significant of which was to not lift anything more than 35 pounds. Applicant continued to perform at work in what appeared to be an adequate fashion, until 2014, when the City decided they could not continue to accommodate him with his work restrictions, and his employment ended.

12. Applicant told Dr. Barnes that he made some recovery after he returned to work and ultimately was required to quit. He quit taking the medications because they were not effective in dealing with his headaches and neck pain, and even though he gradually began to feel better and function more effectively, he still has persistent headaches and neck pain that make it very difficult for him to work. He told Dr. Barnes he has only been able to tolerate part-time work as an assistant laying flooring and delivering newspapers due to the continuing problem with pain in his neck. He described a moderate diminution in his enjoyment of activities of daily living and hobbies, because the pain and headaches prevent him from being as physically active as he once was and would still like to be.

#### MEDICAL AND DIAGNOSTIC RECORDS REVIEW

13. Dr. Barnes' reported and testified that his review of the medical and diagnostic imaging records he was provided contained reports that applicant had an initial MRI study that seemed to show bulging discs in his cervical spine area, but a later, better quality, better interpreted MRI showed applicant's neck to be grossly normal, with no disk bulging, spinal nerve encroachment or other objective anatomical abnormality or deficit that would explain applicant's reported symptoms. Dr. Barnes was quick to point out that he did not believe applicant was embellishing or overstating his symptoms, simply that there was almost no objective evidence of a medical condition that would explain applicant's pain, complaints of symptoms or claimed limitations and disabilities. Dr. Barnes noted that applicant received neck injections on at least two different occasions without improvement, as well as other medical treatment for cervical spinal and nerve problems that were also ineffective.

## CLINICAL EXAMINATION

14. Dr. Barnes performed an orthopedic clinical examination of applicant during the IME addressing specifically applicant's orthopedic functioning/limitations in his cervical and thoracic areas. Dr. Barnes found that applicant was somewhat tender in his cervical spine area, but had full range of motion of his neck and shoulders, except in the neck area bending to the left, causing some mild discomfort in the area of the right trapezius muscle. Dr. Barnes found applicant also had some tenderness in his midback area. Dr. Barnes found applicant had grossly normal range of motion otherwise throughout his neck, shoulders, back, and legs, with no evident atrophy, sensory deficits, or other orthopedic limitations indicative of the existence of a substantially disabling condition. Dr. Barnes found the results of his orthopedic clinical examination of applicant to be grossly normal, with the minor exceptions stated above. Dr. Barnes reported and testified that the second MRI study of applicant's cervical and thoracic spine, on April 30, 2012, showed mild conditions of cervical spondylosis, mild disc osteophyte complex causing mild central stenosis and mild to moderate bilateral foraminal narrowing, generally showing the condition of applicant's neck to be without significant disabling abnormality. Dr. Barnes pointed out the second MRI is consistent with his clinical findings on orthopedic examination, and with the findings of most of the treating physicians in the medical records. Dr. Barnes pointed out that none of applicant's treating physicians are able to clearly articulate and support in their treatment records any significant orthopedic finding or evidence that would support a conclusion that applicant suffers from any disabling orthopedic condition.

## DIAGNOSIS AND ASSESSMENT

15. Dr. Barnes diagnosed applicant as suffering from chronic back pain (thoracic spine), and chronic neck pain with radiation to the right trapezius, but not radicular. Dr. Barnes wrote in his report and testified that, "Based on the absence of significant objective findings we only have subjective complaints to consider. As I understand his job duties, I believe that he should be able to perform these." Dr. Barnes commented that on March 21, 2011, applicant's treating physician, Dr. Armstrong, said that applicant "is essentially released to his usual and customary job tasks, and there is a statement by Dr. Mann on October 16, 2013 in his permanent and stationary report in which applicant was declared permanent and stationary on April 28, 2011." Dr. Barnes observed that, "apparently Dr. Mann said applicant is not capable of performing his usual and customary duties, but then he said vocational realignment is appropriate." Dr. Barnes took exception with Dr. Mann's conclusion that applicant is not capable of returning to work as not supported by the medical evidence or the diagnostic studies, and inconsistent with his conclusion that applicant should be placed into vocational realignment. Dr. Barnes pointed out his findings and conclusions on clinical examination were objectively negative, which conclusions were supported by negative x-ray studies, almost all applicant's treatment records and the second, more reliable MRI.

16. Dr. Barnes concluded that "by definition" applicant is not substantially incapacitated from the performance of his job duties. Dr. Barnes' opinion was credible,

persuasive, solidly founded in the medical evidence, and was not disputed by any other non-hearsay expert opinion.

#### ANALYSIS OF THE MEDICAL EVIDENCE OF INCPACITY

17. Dr. Barnes was the only witness who testified. Dr. Barnes was the only witness who presented firsthand medical testimony regarding his appraisal of applicant's physical condition, his orthopedic injury claims, and the correlation between those claims and his ability to perform the work tasks applicant described and those set forth in the Class Specifications.

18. There is no credible, persuasive, non-hearsay medical evidence in this record that supports a conclusion that applicant is substantially incapacitated from the performance of his usual and customary duties as a PMW II for the City. The medical evidence submitted in support of claimed orthopedic disability supports only a conclusion that applicant experienced a period of temporary disability immediately after his injury from which he substantially, but not completely recovered. The period of temporary disability did not continue, nor does it equate to substantial incapacity, which requires evidence of a permanent and sustained substantially incapacitating disability. There is no current persuasive medical evidence of applicant's continuing substantial inability to perform his usual job tasks.

#### LEGAL CONCLUSIONS

1. Government Code section 20026 provides that "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 ... on the basis of competent medical opinion. Government Code section 21156 provides that if medical examination and other available information show to the satisfaction of the board ... that the member is incapacitated physically or mentally for the performance of his or her duties in the state service and is eligible to retire for disability, the board shall immediately retire him or her for disability.

2. "We hold that to be 'incapacitated for the performance of duty' means the substantial inability of the applicant to perform his usual duties."<sup>3</sup> *Mansperger* continues to be the definitive statement of California courts to date regarding the meaning the phrase "incapacitated for the performance of duty" in section 21156, in the context of evaluation of the merits of an application for a disability retirement. Substantial inability of the applicant to perform his usual duties has been held to mean that the fact that a person has a limiting and painful physical condition that limits, but does not preclude, the person's ability to perform his or her usual duties; or makes performing the usual and customary duties of one's occupation more difficult or unpleasant physically or mentally, does not necessarily

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<sup>3</sup> *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App. 3d 873, 876.

constitute a substantial incapacity for the purposes of a disability retirement.<sup>4</sup> An applicant's fear of suffering further injury if the applicant returns to work performing the same duties is also insufficient to establish substantial incapacity, as such a claim has been held to be speculative.<sup>5</sup> The fact that the physical or psychological condition may preclude the applicant from performing some but not all usual and customary job duties does not necessarily mean the applicant is substantially incapacitated within the meaning of *Mansperger* and section 21156.<sup>6</sup>

3. Applicant failed to carry his burden to prove by a preponderance of the evidence that he is substantially incapacitated for the performance of his usual and customary duties as a PMW II with the City. As set forth in the Factual Findings, the competent, persuasive, non-hearsay medical evidence does not support a claim of substantial incapacity on the basis of applicant's orthopedic (head, neck and shoulders) condition. There is evidence of continuing mild to moderate subjective complaints without objective medical support of continuing orthopedic incapacity. Applicant sustained a period of temporary disability immediately following his May 2011 accident at work that was acknowledged and treated. Applicant has recovered sufficiently that he is not substantially incapacitated, as revealed by the medical evidence and Dr. Barnes' testimony and IME report.

#### ORDER

The appeal of applicant Eric D. Faul of the CalPERS determination that he is not eligible for a disability retirement is DENIED. The determination of the CalPERS Benefits Division that applicant is not substantially incapacitated from the performance of his duties is AFFIRMED.

DATED: February 17, 2016.

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STEPHEN J. SMITH  
Administrative Law Judge  
Office of Administrative Hearings

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<sup>4</sup> *Hosford v. Board of Administration* (1978) 77 Cal.App. 3d 854, 861-863.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*