

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Involuntary Reinstatement
from Industrial Disability Retirement of:

OSCAR FUENTES,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
SAN QUENTIN STATE PRISON,

Respondents.

Case No. 2010-0521

OAH No. 2011020434

PROPOSED DECISION

On January 26, 2016, a hearing in this matter convened before Marilyn A. Woollard, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, in Sacramento, California.

John Shipley, Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Robert McCann, Attorney at Law, represented Oscar Fuentes (respondent) who was present.

Respondent California Department of Corrections and Rehabilitation, San Quentin Prison, (CDCR) did not appear.¹

Oral and documentary evidence was received and the parties offered oral closing arguments. The record was then closed and the matter was submitted on January 26, 2016.

¹ CDCR was duly served with a Notice of Continued Hearing. The matter proceeded as a default against this respondent, pursuant to California Government Code section 11520, subdivision (a).

ISSUE AND SUMMARY

The issue is whether respondent is substantially incapacitated from the performance of his duties as a Warehouse Manager II at CDCR.

CalPERS met its burden of establishing that respondent is not substantially incapacitated from performing his job duties and should be involuntarily reinstated to work from his industrial disability retirement. Respondent did not offer any competent medical evidence to the contrary.

FACTUAL FINDINGS

1. Respondent worked with CDCR, San Quentin, as a Warehouse Manager II. By virtue of his employment, respondent was a state safety member of CalPERS.
2. On August 14, 2003, respondent sustained an on-the-job injury. This was his last date of work. Respondent was ultimately determined to be 45 percent disabled in his workers' compensation claim.²
3. On August 18, 2004, CalPERS received respondent's Disability Retirement Election Application (Application), seeking an Industrial Disability Retirement based on this injury, which he described as: "neck, back, chest, right arm, left arm, right hand, left hand. Moving double bed units onto flatbed truck." He described the "limitations/ preclusions" due to his injury as: "lots of pain to neck, back; cannot seat [sic], walk; stand, for more than 1 hour at a time." The injury affected respondent's ability to perform his job: "...do [sic] to the ability to move and the drugs I am taking."
4. On December 1, 2005, CalPERS notified respondent that his application for industrial disability retirement was approved, based upon his orthopedic (back and neck) condition. Respondent was also informed that he may be reexamined periodically to determine his qualification for reinstatement if he was under the minimum age for service retirement.
5. In 2007, respondent, through his attorney, petitioned to re-open his prior claim with the Workers' Compensation Appeal Board (WCAB) and State Compensation Insurance Fund (SCIF). Respondent claimed that his condition had worsened from the 45 percent disability rating and that he was now suffering cognitive dysfunction. He claimed he was 100 percent disabled.

² It is well-established that Workers' Compensation awards do not have collateral estoppel effect on determinations by retirement boards, since there is no identity of issues or parties. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 568; *Winn v. Board of Pension Commissioners* (1983) 149 Cal.App.3d 532, 539-540.)

During this process, SCIF retained a private investigator, Joseph Holmberg, to observe and videotape respondent's physical activities. Mr. Holmberg did so on five days in 2007 and 2008. His reports and video surveillance tapes were made available to CalPERS.

6. On November 2, 2009, CalPERS notified respondent that his file was under review and that a further medical examination may be necessary.

On April 14, 2010, at CalPERS' request, orthopedic surgeon Joseph W. McCoy, M.D., conducted an Independent Medical Examination of respondent and prepared a report documenting his opinion that respondent is not substantially incapacitated from the performance of his Warehouse Manager II duties at CDCR.

7. On May 28, 2010, CalPERS notified respondent that, after reevaluation of his qualifications for industrial disability retirement, it had determined he was no longer substantially incapacitated from the performance of his duties based on his orthopedic (back and neck) conditions. Consequently, he would be reinstated to his former position.

8. On June 17, 2010, CalPERS received respondent's appeal. He asserted that: "I remain as disabled as I was when approved for Industrial Disability Retirement. There has been no improvement and medical records will confirm my ongoing disability."

The matter was then set for an evidentiary hearing pursuant to Government Code section 11500, et seq. On September 7, 2011, the hearing was taken off calendar until resolution of a pending criminal case against respondent.

9. On December 13, 2012, in *People v. Oscar Josef Fuentes III*, Case Number SCR-602423, Superior Court of California, County of Sonoma, following a jury trial, respondent was found guilty of felony violations of: (1) Insurance Code section 1871.4, subdivision (a)(1) (make or cause to be made a knowingly false or fraudulent material statement or representation for the purpose of obtaining compensation); (2) Penal Code section 550, subdivision (a)(6) (knowingly make or cause to be made any false or fraudulent claim for payment of a health care benefit); and (3) Penal Code section 550, subdivision (a)(1) (knowingly present or cause to be presented any false or fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance). A special allegation that the amount at issue exceeded \$950 was found true. These convictions were predicated on respondent's efforts to obtain a 100-percent disability rating in his workers' compensation case.

On January 18, 2013, respondent was placed on probation for 36 months and ordered, *inter alia*, to serve a term in county jail (served as 180 days home detention), to pay various fines and fees, and to pay \$23,576.36 in restitution to the State Compensation Insurance Board. Probation was set to expire on January 18, 2016.³

³ Respondent's criminal case was subsequently transferred to Mendocino County, Case Number SCUK-CRCR-14-25726-02.

10. At the January 26, 2016 hearing, CalPERS called as witnesses Mr. Holmberg, CDCR's Return to Work Coordinator Terri McKay and Dr. McCoy, and it played portions of the video surveillance tapes during Dr. McCoy's testimony. Mr. Fuentes testified on his own behalf. The testimony of these witnesses is paraphrased as relevant below.

Job Duties of a Warehouse Manager II

11. Warehouse Manager II is the highest position in the Materials and Stores Supervisor Correctional Facility Class series. The entry level class is the Materials and Stores Supervisor I (Mat I). Individuals in this class are supervised by the Materials and Stores Supervisor II (Mat II). Individuals in the Warehouse Manager I position supervise individuals at the Mat II level and are supervised by the Warehouse Manager II. The Warehouse Manager II: "...is the second level of full supervision in this series. Incumbents plan, organize and direct the operation of one of the largest and unusually complex complete redistribution or point-of-use warehousing functions in State service."

In addition to certain knowledge requirements, individuals in the Warehouse Manager I and II classes must have the ability to:

plan and direct the work of others, meet and deal effectively with those contacted in the course of business, determine whether incoming supplies meet the standards set up in the Office of Procurement and agency specifications; direct the work of a group of assistants, develop a storekeeping activity budget, estimate possible future demands of various supplies based upon past needs, keep accurate records and prepare reports of work done; speak and write effectively, analyze situations accurately and take effective action.

Individuals must "have and maintain sufficient strength, agility, and endurance to perform during stressful (physical, mental and emotional) situations. . ." Assignments may include sole responsibility for supervision of inmates..."

12. *Physical Requirements of Position and Testimony of Terri McKay:* From 1998 through April 2007, Ms. McKay was the Return to Work Coordinator at CDCR, San Quentin. In this capacity, she acted as a liaison between injured San Quentin employees and SCIF, CalPERS and medical providers for workers' compensation and disability claims.

In 2004, Ms. McKay was provided a May 18, 2004 letter addressed to SCIF employee Alina Siangio from Dr. Matheson, who was respondent's treating physician at the time. Dr. Matheson advised that respondent had described his job duties that included "frequent" physical work beyond his managerial functions. On June 8, 2004, in response to this letter, Ms. McKay forwarded a copy of the duty statement for Warehouse Manager II to Ms. Siangio and indicated:

Mr. Fuentes is clearly miss-representing [sic] his job duties to his treating physician. Mr. Fuentes is not required, and has specifically been directed not to perform the physical activities assigned to subordinate staff, and inmate workers.

On September 20, 2005, Ms. McKay completed the CalPERS form entitled "Physical Requirements of Position/Occupational Title" (Physical Requirements) for respondent's Warehouse Manager II position. The Physical Requirements described activities "never" required, as well as those required: "occasionally" (up to three hours), "frequently" (three-to-six hours), and "constantly" (over six hours). Frequent activities of the position were: sitting and using keyboard and mouse. Occasional activities included: standing, walking, climbing, squatting, bending, twisting, reaching, pushing/pulling, simple grasping, repetitive hand use, walking on uneven ground, and lifting/carrying of 0 to 10 pounds. Lifting of more than 10 pounds and working with heavy equipment was "never" required. Ms. McKay including the following handwritten comments:

Manager position is supervisory. Occasional activity of bending, twisting etc. would be administrative, training or research. Employee would not perform any physical activities or lifting unless extreme state of emergency.

Further, she indicated:

Clarification of physical requirements. Originally indicated as occasional on the basis of extreme emergency. This position has never been required to perform the physical activity.

In testimony, Ms. McKay confirmed her authorship of these documents and her understanding that the essentially managerial requirements of the Warehouse Manager II position have not changed.

13. On January 14, 2010, CDCR's Return to Work Coordinator Rachael Murray prepared a Physical Requirements form for the Warehouse Manager II position. These Physical Requirements indicate that the incumbent never lifts more than 50 pounds, occasionally lifts 11 to 50 pounds and frequently lifts up to 10 pounds. Standing, walking (including on uneven ground), fine manipulation and repetitive hand use are frequent-to-constant activities. Working with heavy equipment was occasionally required.

14. *Testimony of Joseph Holmberg:* Mr. Holmberg is a licensed private investigator (PI), at Holmberg & Associates, with over 23 years of experience. He was hired by SCIF to observe and document respondent's activities in public over 24 hours. In 2007, Mr. Holmberg observed and recorded respondent's activities on August 31 (from 4:26 a.m. through 8:07 p.m.) and on September 1 (from 5:41 a.m. to 6:15 p.m.). In 2008, Mr. Holmberg observed and recorded respondent's activities on April 12 (from 7:01 a.m. to 3:01 p.m.), on April 13 (from 6:36 a.m. to 5:01 p.m.) and on April 14 (from 6:16 a.m. to 11:41

a.m.). As reflected in Mr. Holmberg's testimony, in the September 3, 2007 and April 16, 2008 Surveillance Reports and on the videos themselves, respondent engaged in many physical activities with fluidity and without any indication of pain.

For example, on August 31, 2007, while repairing a large van, respondent lowered himself to the ground on multiple occasions to work under the van. Respondent showed no signs of discomfort, but did appear "a little stiff" getting up after working under the van. He bent forward easily to pick up tools from the ground; he rolled over quickly on the ground from a standing position and stood back up quickly to demonstrate a technique to young football players; he tossed baseballs into the air with one arm and hit them with a bat using the other arm with ease; he pitched balls, bent forward and caught baseballs and frequently turned his neck. On September 1, 2007, respondent's observed activities included: walking a distance over rough terrain; bending to pick up stones and skipping them vigorously over the water; and swimming and kicking vigorously. In April 2008, respondent's observed activities included: lifting a metal equipment car out of the van; carrying "the huge bag" of baseball equipment and a five-gallon bucket and walking 100 yards carrying them to the diamond; coaching baseball, bending, kneeling, leaning forward, throwing and hitting baseballs; raking and chalking the field; pushing a loaded equipment cart 100 yards back to the van and lifting the equipment into the van; and pulling an all-terrain vehicle (ATV) out of a van. Although respondent walked with a slight limp, he walked and jogged with no sign of discomfort or restricted movement and he used no visible support devices. Mr. Holmberg had no direct interaction with respondent and had no idea what medications, if any, respondent was taking. Based on his experience, respondent did not appear to be disabled and he only showed minor stiffness getting up from under the van. On sequential days of observation, Mr. Holmberg did not notice respondent to manifest any pain or stiffness from the activities he engaged in the previous day.

Dr. McCoy's Independent Medical Examination (IME) and Testimony

15. On April 14, 2010, at CalPERS's request, Dr. McCoy conducted an IME of respondent, who was then 47 years old. Dr. McCoy is certified by the American Board of Orthopedic Surgery (ABOS). After completing his surgical residency, Dr. McCoy began practicing orthopedic surgery in 1988. In 2010, he stopped performing surgery and turned his focus to non-surgical orthopedic care. His current practice consists of roughly equal parts of orthopedic care, workers' compensation evaluations (Agreed Medical Evaluations [AMEs] and Qualified Medical Evaluations [QMEs]), and medical-legal work, including IMEs for CalPERS. Dr. McCoy was most recently recertified by ABOS in 2011.

Dr. McCoy interviewed respondent and obtained a history of his injury, treatment and current complaints. He conducted a physical examination of respondent's spine and upper and lower extremities. He viewed extensive medical records, job description/Physical Requirements, prior evaluations, the video surveillance tapes, and respondent's July 2008 deposition. As reflected in his April 14, 2010 IME Report, when respondent was asked to describe his current complaints, he indicated he did not have any. He then described pain that extended from behind his left ear to the scapula and down his left posterior arm, causing

numbness and tingling in the ulnar aspect. He described his low back pain as good without any significant ongoing problems. In 1992, respondent had surgery on his left leg following a motorcycle accident. Respondent still favors his left leg, which causes a limp, and he was planning on surgery on this leg in the future. Since his 2003 injury, respondent has received approximately seven years of conservative treatment from numerous providers, including chiropractors, a neurosurgeon and, more recently, from pain management physician Michael Tran, M.D. At the time of the IME, respondent was taking four Vicodin 7.5 milligrams tablets, as well as Ibuprofen and Prilosec, daily.

In his examination of respondent's cervical, thoracic and lumbar spine, Dr. McCoy found no palpable spasm. Respondent displayed "excellent" range of motion in each of these areas of his spine. His neurologic exam was "entirely normal," with no motor or sensory deficit, abnormal reflexes or obvious signs of radiculitis. He had no apparent atrophy. Respondent displayed exaggerated behavior (grimacing) during range of motion testing. Respondent's upper extremities were also grossly normal. The circumference of his bilateral forearms and biceps were essentially equal, with slightly a greater size of his dominant right arm. Dr. McCoy was "unable to identify any significant neurologic deficit" in either respondent's upper or lower extremities. His deep tendon reflexes were strong and symmetric and his motor strength was 5/5. On measuring grip strength with the Jamar dynamometer on three sequential attempts, respondent's right strength was substantially greater than his left: with the right measuring at 125, 130 and 125 pounds; and the left measuring 80, 85 and 90 pounds. Dr. McCoy concluded that this result was "inconsistent with the remainder of his examination, suggesting incomplete effort."

Dr. McCoy's diagnostic impressions of respondent "would include degenerative disc disease of the cervical spine without evidence of myelopathy or radiculopathy and lumbar degenerative disc disease without evidence of any significant impairment. He has a long-term smoking history. He has prior diagnoses of fibromyalgia and chronic pain."

After reviewing the 2010 Physical Requirements of the Warehouse Manager II position, Dr. McCoy was "unable to identify any specific job activities that Mr. Fuentes appears incapable of performing. His description of his incapacity is far greater than what is observed in the video surveillance and in my examination today." In Dr. McCoy's opinion, respondent:

is not substantially incapacitated for the performance of his duties. It would also appear that numerous different practitioners who have evaluated Mr. Fuentes over the past several years also found him to be not substantially incapacitated from the duties of his job. There is substantial conflict regarding this issue.⁴

⁴ At CalPERS' request, respondent participated in IMEs with Neal S. Birnbaum, M.D., on April 29, 2005, and with Baer I. Rambach, M.D., on May 9, 2005. In his May 4, 2005 IME Report, Dr. Birnbaum concluded that respondent had musculoskeletal pain

Dr. McCoy noted that respondent appeared to cooperate with the examination “although he definitely does display exaggerated pain behavior and also does not appear to be putting forth his best effort, particularly when measuring grip strength. I do believe that he is certainly exaggerating his difficulties and displays obviously exaggerated pain behavior during the examination.”

16. Dr. McCoy’s testimony expanded on his observations and opinions. Dr. McCoy reviewed the surveillance tapes as a whole for the IME and he was shown portions of those tapes during his testimony. Dr. McCoy explained that respondent’s physical activities seen on the surveillance tapes were consistent with his own assessment of respondent’s abilities, as well as with his review of the medical records. Respondent demonstrated effortless function on various activities, and he did so without pain behavior. While atrophy or loss of muscle mass would be indicative of significant nerve irritation or malfunction due to disc disease, respondent did not have atrophy. Dr. McCoy found no weakness in respondent’s specific muscle groups that correspond to specific levels of the cervical and lumbar spine. Respondent’s medical records included reference to a 2008 MRI which demonstrated a mild annular bulge and osteophyte formation at C5-6, and a mild left paracentral bulge at C6-7. There was no neural foraminal stenosis. In Dr. McCoy’s opinion, the degenerative disc disease shown in this imaging study was not sufficient to create the neurological symptoms respondent reported and there was no objective evidence of any anatomic problem to support respondent’s claims. Respondent’s demonstrated abilities on the video supported Dr. McCoy’s conclusion that respondent could easily meet the physical requirements of his job.

Dr. McCoy disagreed with Dr. Tran’s reports, including his diagnosis of fibromyalgia and suggestion that there was cervical radiculopathy. He noted that respondent’s electromyography/nerve conduction study was inconsistent with cervical radiculopathy. In Dr. McCoy’s opinion, the only restriction that should be placed on respondent when he returns to his job is that he should not engage in frequent, heavy over-head lifting or in repetitive forward bending or lifting of over 100 pounds.

17. *Respondent’s Testimony:* In 1988 or 1989, respondent had a low back injury while working at the Susanville facility, but he recovered fully and returned to work. Respondent injured his left leg in a motorcycle accident and this causes him to limp. The injury that led to respondent’s disability retirement was to his neck, C-5 to C-7. He has seen lots of doctors, but did not recall meeting with Dr. McCoy.

complaints consistent with fibromyalgia; however, he was capable of performing his job duties as a warehouse supervisor. On July 21, 2005, after reviewing additional Worker’s Compensation claim documents, Dr. Birnbaum confirmed this opinion. In his June 3, 2005 IME Report, Dr. Rambach concluded that respondent was not substantially incapacitated from performing his usual duties and that he should be able to perform his job duties “provided he is able to work in a supervisory capacity.” On July 18, 2005, after reviewing a QME for workers’ compensation, Dr. Rambach changed his opinion in a supplemental report, because he “would be unable to become involved in altercations with inmates.”

Respondent testified that there were no “non-working supervisors” at San Quentin. His Warehouse Manager II job duties included running of support, maintenance and food warehouses, and supervising a 10-person regular staff and 15-to 20 inmates. When questioned about his responsibility for supervising inmates, respondent acknowledged that he is the fourth-tier supervisor for this task.⁵ Respondent explained that he “came up from the bottom” and performed all the physical requirements of lower level warehouse workers. He did not recall ever being instructed, either verbally or in writing, not to do physical labor and to just focus on his essential duties of supervision. He asserted that the Physical Requirements were state-mandated ones, but were not consistent with his actual duty requirements. Respondent had no reason to believe that either of the Return-to-Work Coordinators (Ms. McKay in 2004-2005 or Rachael Murray in 2010) had any reason to misrepresent the essential physical requirements of his job when they completed the Physical Requirement documents. Respondent recalled that John Kerzon, a procurement officer at the facility, told him to do “whatever it took” to get the job done and to fill in as needed. At the time of his injury on August 14, 2003, respondent was involved in moving heavy bunk beds. Respondent testified that John essentially threatened him by directing him to move the beds himself and said that, if respondent did not do it, he would be disciplined. Respondent was injured when he tried to stop one of the beds when it began to slip. Respondent never filed a complaint about this threat because he was not represented and had no one to complain to.

Respondent explained the circumstances surrounding his activities what were captured on the video. Essentially, he was taking Norco, Neurontin and anti-inflammatory medications at the time. This helped him move. He participated in his youngest son’s sports activities on a seasonal basis only, perhaps three days a week with an occasional weekend. He was typically sore in the evenings after such activities. He could go two-to-four days at a time of activities and he would then “be down” for one-to-two days. He followed his doctor’s recommendations by engaging in swimming and water aerobics. His right arm is the “good one” and his left arm usually starts out stiff. Respondent can loosen it up after a hot shower but, after using it, he will experience pain later in the afternoon. The ATV he was seen moving was a child’s ATV that weighed 50 pounds. It was not lifted. He rolled it out with his right arm. He then “walked it” off the truck and let it drop.

Respondent continues to see doctors, physical therapists and chiropractors. He has tried shots for his neck and is hoping to have surgery. He is still treating with Dr. Tran, who told respondent he does not believe he can do his job duties and recommended that he not return to work. Respondent’s documents from his treatment providers in 2014 and 2015 were admitted as administrative hearsay to corroborate his testimony.

Discussion

18. Respondent’s testimony that the job duties of the Warehouse Manager II require heavy lifting and intense physical activity beyond that documented in the job

⁵ Respondent testified that, as Warehouse Manager II, “if something crazy happens with an inmate, I would eventually have to deal with it.”

description was not credible. To the contrary, Ms. McKay persuasively testified that the Warehouse Manager II position at San Quentin is a supervisory position and that respondent was specifically instructed that his duties did not require him to engage in the physical activities of the staff working under him. Ms. McKay carefully documented these instructions on the 2005 Physical Requirements form, which remained substantially the same in 2010. (Finding 12.)

Respondent's history of engaging in dishonest conduct for personal gain undermines his credibility. As captured on the surveillance tapes, just two years after his disability retirement was approved, respondent's unguarded physical abilities demonstrated that he had significant freedom of motion in his neck, back and upper extremities, as well as the ability to lift, carry and operate equipment without apparent pain or fatigue. Respondent's felony convictions for fraudulently attempting to obtain a higher disability rating, coupled with his physical abilities seen on surveillance and Dr. McCoy's findings, establish that his testimony is to be viewed with distrust.

19. Dr. McCoy is a well-qualified orthopedic surgeon who carefully reviewed the medical and legal records relating to respondent's disability. As set forth in Findings 15 and 16, Dr. McCoy persuasively testified that there are no objective findings to support respondent's physical complaints and that he appeared to be exaggerating or not putting forth his best efforts during his examination. Dr. McCoy noted that medical examiners for respondent's initial disability determination also questioned whether he was substantially incapable of performing his job duties. Dr. McCoy's conclusion that respondent is not substantially incapacitated from performing his job duties as a Warehouse Manager II provides competent medical evidence that respondent no longer qualifies for an industrial disability retirement and that he can return to work. Respondent offered no competent medical evidence to the contrary.

LEGAL CONCLUSIONS

1. When used as a basis of retirement, the terms "disability" and "incapacity for performance of duty" mean "disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion." (Gov. Code, §§ 20026, 21156.)⁶

⁶ The Public Employees' Retirement Law (PERL), Government Code section 20000, et seq., is administered by the Board of Administration of the Public Employees' Retirement System. (Gov. Code, § 20021.) Government Code section 21156, in pertinent part, provides:

(a)(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

2. Respondent was a state safety member of CalPERS. (Gov. Code, § 20405.) Government Code section 21151, subdivision (a), provides that “any. . . state safety. . . member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.” In 2005, respondent was determined to be substantially incapacitated from performing his job based upon his orthopedic (back and neck) condition. (Finding 4.) Since that time, he has received industrial disability retirement.

3. In this Accusation to involuntarily reinstate respondent from his industrial disability retirement, CalPERS bears the burden of establishing, by a preponderance of evidence, that respondent is no longer substantially incapacitated from performance of his Warehouse Manager II duties with CDCR, based on competent medical evidence.

4. Government Code section 21192 provides, in pertinent part, as follows:

The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. . . . The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency . . . where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

5. Respondent is subject to the provisions of Government Code section 21192. The minimum age for voluntary retirement for service is 50 years of age. (Gov. Code, § 21060). Respondent was born in 1962. He was 47 years old and under the minimum age for voluntary service retirement for members of his classification when he underwent medical examination by Dr. McCoy.

disability, the board shall immediately retire him or her for disability. . .

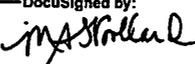
6. "Incapacity for the performance of duty" under Government Code section 21022 [now section 21151] "means the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Substantial inability to perform usual duties must be measured by considering applicant's abilities. Discomfort, which makes it difficult to perform ones duties, is insufficient to establish permanent incapacity from performance of one's position. (*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.) A condition or injury that may increase the likelihood of further injury, as well as a fear of future injury, do not establish a present "substantial inability" for the purpose of receiving disability retirement. (*Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal. App. 3d 854, 863-864.)

7. As set forth in the Factual Findings and Legal Conclusions as a whole and, particularly in Findings 15, 16, 18 and 19, CalPERS persuasively established that respondent is not substantially incapacitated from the performance of the duties of Warehouse Manager II with CDCR, based on his orthopedic (back and neck) conditions. There was no competent medical evidence to the contrary.

ORDER

Respondent's appeal from CalPERS' determination that he is no longer substantially incapacitated from performing the job duties of a Warehouse Manager II with CDCR is DENIED.

DATED: February 12, 2016

DocuSigned by:

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MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearing