

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:

REGINALD BOHANAN,
Respondent,

and

CALIFORNIA DEPARTMENT OF FISH
AND WILDLIFE,

Respondent.

Case No. 2014-0111

OAH No. 2015031185

PROPOSED DECISION

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on January 21, 2016, in Sacramento, California.

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

Steven W. Welty, Esq., of Mastagni Holstedt, P.C., represented Reginald Bohanan (respondent), who was present throughout the hearing.¹

Evidence was received, the record was closed, and the matter submitted for decision on January 21, 2016.

¹ There was no appearance by or on behalf of the California Department of Fish and Wildlife.

ISSUE

The issue before the Board of Administration for determination is whether respondent is permanently disabled or substantially incapacitated from the performance of his duties as a Staff Services Manager for respondent Department of Fish and Wildlife due to an orthopedic condition.

The experts who testified on behalf of CalPERS and respondent agree respondent is permanently disabled or substantially incapacitated from performing his duties. For the reasons discussed below, respondent's application for disability must be granted.

FACTUAL FINDINGS

Respondent's Disability Retirement Application

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

Chronic lumbar pain, radiculopathy both legs/feet, left shoulder, hearing loss.

2. Respondent stated in his application that his injury occurred as follows:

Cumulative trauma to lumbar spine. Impingement with biceps tear-left shoulder, hearing loss.

3. Respondent provided additional information as follows:

List of exhibits is included: copy MRI, x-ray, medical reports.

4. Respondent's application described his limitations/preclusions as: "sitting, standing, bending, squatting, lifting, concentration, hearing, left shoulder mobility." Respondent stated in his application that the injury has affected his ability to perform his job because of "constant pain and discomfort. Radicular symptoms down legs including numbness, tingling, sciatic pain. Hearing loss."

Physical Requirements of Position/Occupational Title

5. On July 20, 2012, respondent signed a document entitled Physical Requirements of Position/Occupational Title, which described the physical requirements of the job as including over six hours per day sitting, bending (neck), keyboard and mouse use; and up to three hours per day of standing, walking, kneeling, squatting, bending (neck and waist), twisting (neck and waist), reaching (below shoulder), walking on uneven ground,

driving, exposure to excessive noise, exposure to dust, gas fumes or chemicals, and operation of foot controls or repetitive movement.

Respondent's Evidence

6. Ardavan Aslie, M.D., a board certified orthopedic surgeon, testified on respondent's behalf. Dr. Aslie testified respondent is substantially incapacitated from performing his usual and customary job duties due to a lower back injury suffered at work on October 4, 2004, and significant collapse of his discs at the L4-5 level with bone on bone contact and severe impingement of the exiting nerve roots. Respondent's condition is evidenced by MRIs of respondent's lower back on January 22, 2010, and June 14, 2011, and moderate to severe pain in respondent's lower extremities. Dr. Aslie requested a nerve conduction study, the results of which were consistent with the MRIs and respondent's pain symptoms. Dr. Aslie referred respondent for two epidural injections which provided temporary pain relief. Respondent was not a good surgical candidate because it would be necessary to perform either a very large surgery or repeated smaller surgeries to treat the likely collapse of discs in the L-1 through S-1 region. Dr. Aslie instead referred respondent for pain management.

CalPERS's Expert

7. CalPERS retained Joseph Serra, M.D., a board certified orthopedic surgeon, to conduct an Independent Medical Examination (IME). Dr. Serra conducted an IME of respondent on June 7, 2013, and issued an IME report on that date concluding that respondent is not substantially incapacitated from performing his usual and customary duties. Dr. Serra issued a supplemental IME report dated August 6, 2013, to discuss respondent's shoulder complaints, and reached the same conclusion that respondent is not substantially incapacitated from performing his duties.

8. Directly prior to his testimony at hearing, Dr. Serra had the opportunity to review the 2011 MRI and other documents he had not seen at the time of his IME. Following his review of the additional documents, Dr. Serra testified that Dr. Aslie's work-up was excellent, and that he agrees with Dr. Aslie's conclusion that respondent is substantially incapacitated from performing his job duties. Dr. Serra also agrees with Dr. Aslie's sequence of treatment including the attempts at pain control and assessment of surgical risks.

Discussion

9. Both parties presented expert testimony, and both experts agree that respondent is, and was at the time of his disability application, substantially incapacitated from performing his usual and customary duties. CalPERS's counsel agreed in closing argument that respondent is substantially incapacitated. Based on the documentary evidence and expert testimony on behalf of both parties, it is established that respondent is

substantially incapacitated from performing his usual job duties. Consequently, respondent's disability retirement application must be granted.

LEGAL CONCLUSIONS

1. By reason of his employment, respondent is a miscellaneous member of CalPERS, and eligible to apply for disability retirement under Government Code section 21150.²

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

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

3. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.) An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of the application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697.)

4. In sum, the undisputed evidence established that respondent was substantially incapacitated from performing his usual and customary duties when he applied for disability retirement. Respondent's application for disability retirement must therefore be granted.

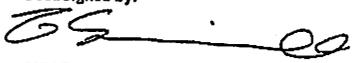
² Government Code section 21150, subdivision (a), provides:

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

ORDER

The application of Reginald Bohanan for disability retirement is granted.

DATED: February 22, 2016

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TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings