

**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:

CalPERS No. 2014-0451

LESLIE C. RILEY,

OAH No. 2014060911

Respondent,

and

DEPARTMENT OF INDUSTRIAL  
RELATIONS,

Respondent.

**PROPOSED DECISION**

This matter was heard before Erin R. Koch-Goodman, Administrative Law Judge, Office of Administrative Hearings, State of California, on March 7, 2015, in Fresno, California.

The California Public Employees' Retirement System (CalPERS) was represented by Elizabeth Yelland, Senior Staff Counsel.

Leslie C. Riley (respondent) was present and represented himself.

There was no appearance by or on behalf of respondent California Department of Industrial Relations. The matter proceeded as a default against the Department pursuant to California Government Code section 11520, subdivision (a).

**ISSUE**

Is respondent currently disabled or incapacitated from the performance of his usual job duties as an Associate Safety Engineer based upon his orthopedic (carpal tunnel syndrome, neck and right knee) conditions?

PUBLIC EMPLOYEES RETIREMENT SYSTEM  
FILED April 4, 2016  
*Ruthie K. Schretz*

## FACTUAL FINDINGS

1. Anthony Suine, Chief, Benefit Services Division, CalPERS, made and filed the Statement of Issues in his official capacity.

2. Respondent was employed by the Department of Industrial Relations (DIR) as an Associate Safety Engineer (Engineer) at the time he filed his application for disability retirement. By virtue of his employment, respondent is a local miscellaneous member of CalPERS subject to Government Code section 21150.

3. On July 28, 2011, respondent filed an application for service retirement. Respondent retired for service on December 31, 2011. On October 23, 2012, respondent filed an application for disability retirement (Application), claiming a disability on the basis of his orthopedic conditions.<sup>1</sup>

4. After reviewing respondent's medical evidence, concerning his orthopedic conditions, CalPERS determined respondent's conditions were not disabling and respondent was not substantially incapacitated from the performance of his job duties as an Engineer with DIR. By letter dated March 17, 2014, CalPERS notified respondent of its decision to deny his Application and advised him of his appeal rights. Respondent filed an appeal on or about April 16, 2014.

### *Job Duties*

5. Respondent worked for DIR as an Engineer for 22 years, from October 1989 through December 2011. The California State Personnel Board class specifications for Safety Engineer lists the position duties as follows:

conducts safety surveys; investigates occupational safety and health complaints associated with industrial and other occupational safety and health-related disciplines; investigates accidents, determines the cause and the means of preventing their recurrence; reports on seriousness of violations and makes recommendations where possible prosecution is indicated to the Division's Bureau of Investigation; interprets safety orders and consults with employee organizations, employers and the public in the development of revisions to, or additions of safety orders. Conducts seminars and workshops for industry and consults with labor, management, employees and other governmental agencies on how compliance with safety orders can be achieved. Reviews

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<sup>1</sup> The Statement of Issues identified respondent's orthopedic conditions as neck and knee only.

new and existing Federal standards, regulations, and directives for comparison with State standards. Participates in the preparation of documents, materials, and exhibits used in Standards Board's hearings; and may participate as a technical advisor for the Standards Board at public hearings and meetings.

6. On the CalPERS Physical Requirements of Position/Occupational Title form, DIR provided the following information about the physical requirements of the Associate Safety Engineer position.

- a. Occasional tasks, for up to three hours per shift, include: standing, walking, climbing, squatting, bending (neck and waist), twisting (neck and waist), reaching (above and below shoulder), pushing and pulling, simple grasping, lifting/carrying 0 to 50 pounds, walking on uneven ground, driving, working with heavy equipment, exposure to excessive noise, exposure to extreme temperature and humidity wetness, exposure to dust gas, fumes or chemicals, working at heights, operation of foot controls or repetitive movement, use of special visual or auditory protective equipment, and working with bio-hazards (e.g. blood borne pathogens, sewage, hospital waste.)
- b. Frequent tasks, for three to six hours per shift, include: sitting, fine manipulation, repetitive use of hands, keyboard use, and mouse use.

#### *Respondent's Medical History*

7. In his Application, respondent identified his disabilities and date of injury as follows: "Carpal Tunnel Syndrome – 10/02/1999 – computer use. Neck and cervical spine injury – 11/17/2003 – computer use. [Anterior cruciate ligament] ACL Rt. knee torn – 7/17/2006 – aircraft seating." Respondent submitted a Physician's Report on Disability by Diego Allende, D.O. with his Application. Dr. Allende diagnosed respondent with a permanent disability based on bilateral upper extremity overuse syndrome. Dr. Allende found respondent substantially incapacitated from his usual duties. Dr. Allende's report was not submitted at hearing and Dr. Allende did not testify at hearing.

8. At hearing, respondent submitted three medical reports: a Panel Qualified Medical-Legal Re-Evaluation by Max Moses, M.D., Fellow American Academy of Orthopedic Surgeons (AAOS)/American Academy of Disability Evaluating Physicians (AADEP), dated March 12, 2012, evaluating respondent's right knee; an Orthopedic

Consultation by S.S. Shantharam, M.D., Orthopedic Surgeon, dated September 6, 2006, regarding respondent's right knee; and a Physical Medicine and Rehabilitation Consultation – Nerve Conduction Study (NCS) and Electromyography (EMG) Study, Upper Extremities by K. Do, M.D., dated December 19, 2012, evaluating respondent's upper extremities. All three reports were prepared for worker's compensation claims filed by respondent: October 2, 2000 – bilateral wrists and hands, November 17, 2003 – cervical spine, including headaches and his bilateral upper extremities, and July 17, 2006 – right knee. The three reports were admitted as administrative hearsay pursuant to Government Code section 11513.<sup>2</sup> None of the doctors testified at hearing.

9. Respondent first injured his right knee in or around 1975 while playing sports in school. The same year, respondent had an open ligament reconstruction of the right knee to repair a torn ACL. On July 17, 2006, respondent filed a worker's compensation claim for a right knee injury, having sat in an airplane seat with his knees pushed up against the seat in front of him and hearing a pop and feeling pain. Respondent reported the injury to DIR. He was evaluated and referred for a surgical consultation. On October 4, 2006, S.S. Shantharam, M.D., orthopedic surgeon, completed an arthroscopy meniscectomy, medial and lateral, debridement, and anterior cruciate ligament reconstruction with tendoachilles allograft. On August 25, 2011, Peter T. Simonian, M.D., orthopedic surgeon, operated on respondent's right knee, completing a partial medial and lateral meniscectomies with chondropathy of the medial and lateral compartments of the knee, chondropathy of the patellofemoral chondromalacia in a separate compartment of the knee, and limited synovectomy of the partially torn anterior cruciate ligament graft with chondroplasty. Thereafter, respondent received four orthovisc injections: November 30, 2011, December 12, 2011, December 19, 2011, and February 3, 2012.

10. On October 2, 2000, respondent filed a worker's compensation claim for his bilateral wrists and hands. In 2000 and 2001, respondent had bilateral carpal tunnel release surgeries. Respondent continued to have numbness in his hands.

11. On November 17, 2003, respondent filed a worker's compensation claim for his cervical spine, including headaches, and his bilateral upper extremities. On December 19, 2012, respondent's upper extremities were evaluated by K. Do, M.D. using a nerve conduction study. Dr. Do concluded: "findings are suggestive of a severe bilateral carpal tunnel syndrome" and "bilateral chronic active C5-C6 radiculopathy."

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<sup>2</sup> Gov. Code § 11513, subdivision (d) states, in part:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

*Independent Medical Examination – Dr. Joseph Serra, M.D.*

12. CalPERS requested an Independent Medical Examination (IME) of respondent. Joseph Serra, M.D., retired orthopedic surgeon, was selected and paid by CalPERS to evaluate respondent and his orthopedic conditions.<sup>3</sup> Dr. Serra has not performed surgeries for 13 years. He currently teaches orthopedics to physical therapy students at the University of the Pacific and fracture and dislocation management to medical students at Stanford University.

13. Dr. Serra drafted an IME Report and a Supplemental Report. Both reports were admitted into evidence. Dr. Serra testified at hearing consistent with his reports. To write his reports, Dr. Serra examined respondent on October 22, 2013, and he reviewed respondent's medical and non-medical (e.g., job duty statement) records.

14. At the examination, Dr. Serra took a medical history from respondent and an accounting of his medical complaints. Respondent reported constant sharp pain in the cervical spine; numbness and pain in the anterior aspect of the right shoulder extending to the tip of his right middle finger; numbness in the tips of the fingers bilaterally involving the thumb, index, middle, and ring fingers with radiation to the volar wrists; constant, throbbing pain in the lumbosacral area of the spine with no radiation to his lower extremities; constant, dull aching pain generalized over the medial and lateral aspects of the right knee; sharp, constant pain over the anterior aspect of his left knee joint with occasional swelling; and migraine headaches once every two months. His back symptoms increased with any attempt at lifting, leading to sharp pain. His knee occasionally locked, preventing him from bending for a few moments; and at times, his knee gave way, and he would catch himself to avoid a fall.

15. Dr. Serra also completed a thorough orthopedic physical examination of respondent, including his cervical spine, low back, and upper and lower extremities. Dr. Serra reviewed respondent's duty statement and medical file. The medical file included medical reports for respondent's worker's compensation claims, a few surgical and doctor visit notes, and diagnostic studies, including MRIs and x-rays.

16. Dr. Serra's findings and diagnostic impressions of respondent were as follows:

- (1) Status post significant ligamentous injury to the right knee, 1977, non-industrial;
- (2) Carpel tunnel syndrome by history;
- (3) Status post bilateral carpel tunnel decompression;

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<sup>3</sup> Dr. Serra testified his IME covered respondent's orthopedic conditions, including carpel tunnel syndrome, neck, and right knee.

- (4) Degenerative disc disease and degenerative joint disease, cervical spine, chronic;
- (5) Osteoarthritis, lumbosacral spine, with degenerative disc disease and degenerative joint disease;
- (6) Early osteoarthritic changes, left knee;
- (7) Status post second surgery, right knee, with debridement and apparent ACL reconstruction;
- (8) Status post third procedure, right knee, with debridement partial meniscectomy, and chondroplasty in 2011;
- (9) Morbid obesity.

17. Dr. Serra was the only physician to testify in this case. Dr. Serra opined that there were no specific job duties that respondent was unable to perform; therefore respondent was not substantially incapacitated from the performance of his duties. Dr. Serra applied the CalPERS disability standard.

18. Respondent has failed to establish, through competent medical evidence, that his orthopedic (carpel tunnel, neck and right knee) conditions are substantially disabling and prohibit him from performing his regular duties as an Engineer with DIR. No doctors testified on respondent's behalf. The medical reports submitted by respondent do not use the CalPERS disability standard to determine disability. With the exception of Dr. Serra, no other physician evaluated respondent specifically applying the CalPERS disability standard (Legal Conclusion 2).

## LEGAL CONCLUSIONS

### *Applicable Laws and Statutes*

1. In determining whether a member is eligible to retire for disability, the board makes a determination on the basis of competent medical opinion. (Gov. Code, § 21156, subd. (a)(2).) Disability, as a basis of retirement, means disability that is permanent or extended and of uncertain duration. (Gov. Code, § 20026.)

2. A member incapacitated for the performance of duty shall be retired for disability if they are credited with five years of state service, regardless of age. (Gov. Code, § 21150, subd. (a).) An applicant must demonstrate their substantial inability to perform their usual duties on the basis of competent medical evidence. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.)

3. According to Government Code section 21154, "[o]n receipt of an application

for disability retirement of a member, the board may order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty.”

4. 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 her duties and is eligible to retire for disability, the board shall immediately retire them for disability. (Gov. Code, § 21156, subd. (a)(1).)

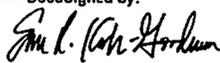
*Determination*

5. Respondent failed to establish that his Application should be granted within the meaning of Government Code sections 21156, and applicable case law. Respondent did not establish that he is permanently disabled or incapacitated from the performance of his duties as an Associate Safety Engineer with DIR, based upon competent medical evidence, on the basis of his orthopedic conditions. At hearing, respondent failed to submit competent medical evidence upon which CalPERS can rely. (Factual Findings 7 and 8.) Dr. Serra testified competently about his examination of respondent and his review of his medical files. (Factual Findings 13, 14, and 15.) Dr. Serra applied the CalPERS standard of substantial incapacity and determined that respondent is not disabled; and he can perform the essential functions of his job. (Factual Finding 17.) In other words, respondent failed to prove that he is medically precluded from performing his usual duties as an Associate Safety Engineer with DIR.

ORDER

The application of Leslie C. Riley for CalPERS Disability Retirement is DENIED.

DATED: April 1, 2016

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ERIN R. KOCH-GOODMAN  
Administrative Law Judge  
Office of Administrative Hearings