

**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:

JONATHAN D. SULLIVAN  
Respondent,

and

COUNTY OF COLUSA,  
Respondent.

Case No. 2015-0508

OAH No. 2015070978

**PROPOSED DECISION**

Administrative Law Judge Ed Washington, Office of Administrative Hearings (OAH), State of California, heard this matter on February 2, 2016, in Sacramento, California.

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

Ellen Mendelson, Attorney at Law, represented Jonathan D. Sullivan (respondent).

CalPERS properly served the County of Colusa (County) with the Notice of Hearing. The County made no appearance. This matter proceeded as a default against the County pursuant to Government Code section 11520.

The record remained open through February 23, 2016, to allow respondent to submit a declaration and curriculum vitae (CV) from his treating physician, Lawrence Palladino, M.D., and to allow CalPERS to submit any objections to those materials. OAH received Dr. Palladino's declaration and CV on February 16, 2016, and they were marked collectively as Exhibit D. CalPERS filed no objection. Exhibit D was received in evidence and considered to the extent permitted by Government Code section 11513, subdivision (d).<sup>1</sup> The record

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<sup>1</sup> Government Code section 11513, subdivision (d), provides, in pertinent part, that "[h]earsay evidence may be used for the purpose of supplementing or explaining other

also remained open to allow both parties to submit simultaneous closing briefs. On February 23, 2016, OAH received both CalPERS' and respondent's closing briefs. The briefs were marked as Exhibit 22, and Exhibit E, respectively. The record was closed on February 23, 2016, and the matter was submitted for decision.

## ISSUES

1. Is respondent permanently and substantially incapacitated from performing his usual duties as a Building Service Worker for the County of Colusa, on the basis of orthopedic (back) conditions?
2. If respondent is permanently and substantially incapacitated from performing his usual duties as a Building Services Worker for the County of Colusa, on the basis of orthopedic (back) conditions, did he make a mistake which was the result of inadvertence, mistake, surprise or excusable neglect correctable by Government Code section 20160, which would have entitled him to an effective retirement date retroactive to June 29, 2013?

## FACTUAL FINDINGS

### *Respondent's Employment History*

1. Respondent is 44 years old and began working for the County in 1995 as a Maintenance Worker I. He last worked for the County on June 29, 2013, as a Building Service Worker and is a local miscellaneous member of CalPERS subject to Government Code section 21150 with the minimum service credit to qualify for retirement.<sup>2</sup>

### *Respondent's Disability Retirement Application*

2. On August 12, 2013, respondent signed a Disability Retirement Election Application (Application) and filed it with CalPERS on April 8, 2014. Through the Application, respondent requested an effective retirement date of June 29, 2013. On the Application, respondent checked the box which indicates "Disability Retirement" as the Application Type. He specified his disability as "[s]evere pain and weakness from my kneck [sic] to my feet" and that his disability occurred on March 4, 2013. In response to the question on the Application asking how his disability occurred, respondent wrote "[o]ver the

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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 ... ."

<sup>2</sup> Government Code section 21150 provides: "Any 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 Section 21077."

last 15 yrs getting worse with arthritis starting in my damaged discs and moving to all my joints.” Respondent did not respond to the question on the Application asking him to specify his “limitations/preclusions due to [his] injury or illness.” He also provided no response to the question that asked him to specify “[h]ow [his] injury or illness affected [his] ability to perform [his] job.”

3. By letter dated June 5, 2014, CalPERS notified respondent that additional information was needed regarding his requested effective retirement date. On June 12, 2014, respondent provided additional information requested by CalPERS as follows:

- a. [Did any physician instruct you to stop working as a building service worker because of permanent disability? If no when did your doctor determine that you were incapacitated for your former job duties?]

Yes, I was off work and receiving state disability at the end of 2012. At that time I was told that my condition would prevent me from going back to work as a building service worker without restrictions. I was under the care of Dr. Guerrero and Dr. Bonilla. Around 1/2014. I convince my doctor to let me return to work with restricted duties, in hopes of trying to save my job. I tried going back to work but was unable to cope with the pain of my condition even under limited conditions. My last if physically being at work was March 6, 2013. I continue to be under doctors care and started receiving state disability again. My doctor informed me that I should apply for Social Security disability. In the meantime, I continue to receive state disability until March 2014 under the care of Dr. Guerrero.

- b. [Did you advise the County of Colusa that you had to retire because of a disability? If no, why not? Did you believe that you are unable to perform your duties at that time because of incapacity?]

No, actually the County of Colusa advised me that I could apply for retirement, disability based on my disability/incapacity for my former job duties.

- c. [Did you contact CalPERS for information regarding disability retirement before you ceased working? If no, why not? If yes, what assistance did you receive?]

I didn't contact CalPERS for information regarding disability retirement before I stopped working. I always hoped I

would be able to return to work and I wasn't planning on retiring.

- d. [On what date did you become aware that you could submit an application for disability retirement? Why did you not apply at that time?]

Originally, I thought that I had to apply for Social Security disability and didn't realize that I could receive both. It was in July but I was told that I could apply for both so I contacted Holly Gallagher the Colusa County payroll/employee benefit specialist and she provided me with a disability retirement election application. I have included a copy of her letter. I started my CalPERS disability retirement application in August 2013, you have a copy of my initial application dated 8/2013 on file. At the time I was working with. So, security on my so security disability packet, I lost my home and had to rent a place, but after a few months I could not afford the rent because I was having to pay approximately \$500-\$600 per month to keep my health insurance active in order to continue being under the care of my doctor. Because of this I was behind on my rent and received an eviction notice and had to move. Needless to say I was under tremendous amount of stress and was doing the best I could at the time. It took a while to get my physician's statement completed by Dr. Guerrero, to the point that I've been received a letter from your office indicating that I needed to get another more up-to-date form from Dr. Guerrero. Dr. Guerrero then requested another copy of the job duty. Requirements so I had to go back to my employer to get that information. Also in the middle of all of this I had to change insurance companies because my state disability stopped and I had to go off of Obama care and onto medical this then caused me to have to change doctors because my doctor doesn't accept MediCal. This has been a very stressful process.

4. By letter dated February 2, 2015, CalPERS notified respondent that his disability retirement application was denied and also advised him of his right to appeal. By letter dated March 3, 2015, respondent appealed from CalPERS's denial of his disability retirement application.

*Duties of a Building Service Worker*

5. As set forth in the County's class specification bulletin, a Building Service Worker is to lead and perform skilled duties in providing a variety of building maintenance, construction, repair, and improvements on County buildings, facilities and grounds as required by the County. The County Building Service Worker is expected to perform the following duties:

- a. Maintain all aspects of buildings and equipment for the County owned facilities, inspect, diagnose and troubleshoot equipment and operating problems and develop timely and cost-effective solutions, perform repairs and install new equipment, respond to emergency requests from departments, perform preventative maintenance tests and inspect completed work.
- b. Inspect, maintain, repair and install plumbing systems throughout County facilities.
- c. Install electrical services, rewire, repair, and remodel electrical services as required.
- d. Remodel and rearrange offices in building structures, move walls and electrical services, paint offices and buildings as required.
- e. Perform carpentry duties in making cabinets, bookcases, tables and furniture.
- f. Install gates, handrails, brackets and similar fixtures. Repair structures such as partitions counters doors, window frames, sheds and fences.
- g. Install and repair office furniture, equipment and fixtures, maintain and repair floors and roofs. Inspect and repair building sprinkler systems.
- h. Operate power tools, maintain hand tools and assigned equipment.
- i. Perform routine preventive maintenance on County vehicles and trucks.

6. On April 8, 2014, respondent filed with CalPERS a document titled "Physical Requirements of Position/Occupational Title" for the County Building Service Worker position. The document had been signed by respondent and a County representative on September 1, 2013, and August 27, 2013, respectively. The document described the type and frequency of physical activities performed by a Building Service Worker. This included constant (over six hours) walking, constant repetitive hand use, constant simple grasping, and constant exposure to extreme temperatures humidity and wetness; frequent (three to six hours) standing, frequent bending and twisting at the neck and waist, frequent reaching above and below shoulder level, frequent pushing and pulling, frequent power grasping; frequent lifting up to 25 pounds, frequent driving, frequent exposure to excessive noise, dust,

gas fumes, or chemicals, and frequent working at heights; occasional (up to three hours) sitting, occasional crawling, occasional kneeling, occasional climbing, occasional squatting, occasional fine manipulation; occasional keyboard and mouse use, occasional carrying 26 pounds to more than 100 pounds, occasional walking on uneven ground, occasional working with heavy equipment, occasional operation of foot controls or repetitive movements, occasional use of special visual or auditory protective equipment, and occasional working with biohazards.

### *Respondent's Evidence*

#### Dr. Ethelwoldo Guerrero

7. Respondent submitted a Physician's Report on Disability signed by Ethelwoldo Guerrero, M.D., on December 11, 2013, to support his Application. This report is a form containing pre-printed questions for completion by an applicant's physician. The report was received in evidence as administrative hearsay.<sup>1</sup> Dr. Guerrero is an associate physician specializing in internal medicine. He did not testify at hearing. Much of Dr. Guerrero's 2013 report is illegible. It appears to specify that respondent obtained both a work-related and non-work related injury on October, 21, 2003, and has been unable to perform his job duties since June 3, 2013. In response to the question in the report asking him to describe how the injury occurred, Dr. Guerrero specifies "chronic lifting at work and when doing contractor work on the side." The report specifies that respondent has subjective complaints of "[l]ow back pain limitation of extension [illegible] pain with extension." The information provided as Diagnosis 1 on the 2013 report is illegible. The objective examination findings in support of Diagnosis 1, specifies "tenderness of [illegible] spine, limited extension, pain with extension." Diagnosis 2 on the 2013 report specifies "degenerative disc disease lumbar [illegible]." The objective examination findings in support of Diagnosis 2, is largely illegible but specifies, in part "MRI," "Disk protrusion." In response to the question asking whether respondent was then substantially incapacitated from performance of his usual duties, Dr. Guerrero checked the box marked "Yes." When asked to describe the specific job duties/work activities respondent was unable to perform due to incapacity by reference to respondent's job duty statement and Physical Requirements of Position/Occupational Title form, Dr. Guerrero's stated "see physical limitations on physical requirements sheet." In the 2013 report, Dr. Guerrero also indicates that respondent is permanently incapacitated and that he (Dr. Guerrero) reviewed the job description and the Physical Requirements of Position/Occupational Title form for respondent's position prior to making his determination.

8. Respondent also submitted a second Physician's Report on Disability signed by Ethelwoldo Guerrero, M.D., on May 6, 2014. This report was also received in evidence as administrative hearsay.<sup>1</sup> Much of Dr. Guerrero's 2014 report is also illegible. It appears to specify that respondent obtained a non-work-related injury on October, 21, 2013, and has been unable to perform his job duties since March, 4, 2013. In response to the question in the report asking him to describe how the injury occurred, Dr. Guerrero specifies "seen by [illegible] for low back pain related to work activity at work." The report specifies that

respondent has subjective complaints of severe low back pain. The legible portions of the diagnosis specify that respondent has “severe pain with extension and rotation of back.” In response to the question asking whether respondent was then substantially incapacitated from performance of his usual duties, Dr. Guerrero checked the box marked “Yes.” When asked to describe the specific job duties/work activities respondent was unable to perform, the legible comments in Dr. Guerrero’s 2014 report specify that respondent was “unable to stand for more than 30 minutes at a time, unable to do frequent bending, twisting, pushing, pulling over 20 pounds, unable to lift over 50 pounds.” In the 2014 report, Dr. Guerrero also indicates that respondent is permanently incapacitated and that he (Dr. Guerrero) reviewed the job description and the Physical Requirements of Position/Occupational Title form for respondent’s position prior to making his determination.

9. Respondent submitted portions of reports and notes related to his office visits with Dr. Guerrero. The dates these office visits occurred is not apparent, other than an indication on one of the pages that it was electronically signed by Dr. Guerrero on April 14, 2009. These notes reflect that respondent complained of pain related to degenerative disc disease and negative side effects from pain medication. These documents also reflect that two physical examinations were performed on respondent that were largely normal, other than a limited range of motion and tenderness in respondent’s back. The narrative portion of the notes indicates evidence of advanced degenerative disc changes at C4-5 and C5-6 and a narrowing of the RC4 neural foramen. The notes state that respondent’s pain is exacerbated by his engaging in manual labor because he is running his own business that requires frequent heavy lifting. The narrative also specifies that respondent “feels he is no longer able to continue his regular work. He has tried to continue working despite the pain but at this point he cannot do the requirements of the job and they have recommended he go on disability.”

#### Dr. Lawrence Palladino

10. Respondent submitted a Physician’s Report on Disability signed by Lawrence Palladino, M.D., on August 20, 2014. The report was received in evidence as administrative hearsay.<sup>1</sup> Dr. Palladino is a board-certified family practitioner with training in the diagnosis and treatment of orthopedic conditions. He began treating respondent in May 2014. Dr. Palladino did not testify at hearing. In his report, Dr. Palladino specifies that respondent has a non-work-related injury, but does not specify when or how the injury occurred. His report lists no examination findings, and describes respondent’s diagnosis as “low back pain” and “lumbar disc degeneration.” In response to the question on the form that asks whether respondent was then substantially incapacitated from performance of his usual duties, Dr. Palladino checked the box marked “Yes.” When asked to describe the specific job duties/work activities respondent was unable to perform due to incapacity by reference to respondent’s job duty statement and Physical Requirements of Position/Occupational Title form, Dr. Palladino provided no response. He then stated in the report that respondent is permanently incapacitated and that he (Dr. Palladino) did not review the job description and the Physical Requirements of Position/Occupational Title form for respondent’s position prior to making his determination.

11. Respondent also submitted a one-page report from Dr. Palladino, dated February 25, 2015. This report was received in evidence as administrative hearsay.<sup>1</sup> In this report Dr. Palladino states that respondent saw him for renewal of his current pain management plan, which included Fentanyl, Elavil, ibuprofen, and omeprazole. Respondent complained of pain at a level of eight on a ten pain scale and had difficulty with extension and leg raises during examination due to pain. In this report, Dr. Palladino noted that he reviewed the physical requirements for respondent's position and reached the following assessment and conclusions after examination:

- a. Lumbar spondylosis with herniated lumbar disk which impinges both L5 nerve roots right and left side according to the last MRI scan in 2013.
- b. The patient has continuing chronic back pain.
- c. He is on chronic opiate therapy, maximum anti-inflammatory therapy and tricyclic agent therapy.

It does not seem medically practical for him to be required to carry 50 to 100 pounds on an occasional basis as part of a job description. Most industrial standards limit weightlifting by employees to 50 pounds maximum, in an effort to prevent injuries. The patient will not be able to stand on a frequent basis 3 to 6 hours a day from the waist as well. As such, he cannot meet the requirements of his former employment as outlined in the work description.

12. Respondent also submitted a decision from the Social Security Administration (SSA), Office of Disability Adjudication and Review, dated October 20, 2015. In that decision it was determined that respondent was disabled pursuant to Sections 216, subdivision (i) and 223, subdivision (d), of the Social Security Act.

13. Post hearing, respondent submitted a declaration from Dr. Palladino, dated February 10, 2016. In this declaration, Dr. Palladino states, in part, that he treats respondent (with opiates) for chronic pain related to his degenerative herniated lumbar disc. He also states that he has never observed aberrant behaviors from respondent that are recognized as hallmarks of addictive behaviors and that respondent's CURES<sup>3</sup> prescription drug monitoring report has never shown improper use of a controlled drug. Dr. Palladino concludes his declaration by stating that the opiates respondent uses to control his pain have

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<sup>3</sup> CURES is an acronym for Controlled Substance Utilization, Review and Evaluation System. It is a database of Schedule II, III and IV controlled substance prescriptions dispensed in California. Its purpose includes stemming prescription drug abuse by patients and the over-prescribing of pain medications.

side-effects that may interfere with his balance and alertness and would present a danger in using power tools and working at heights.

### *Respondent's Testimony*

14. Respondent testified that he worked a seven and a half hour work shift at the County maintenance shop. Overtime was frequent, but permissive. Respondent used all forms of tools as part of his daily work activities, including air compressors, cutoff saws, chainsaws, mowers, and blowers. He loaded and unloaded these tools into and out of vehicles regularly. Respondent worked on ladders and built and climbed scaffolding as part of his duties. He painted desks, cabinets, and vehicles and worked with toxic chemicals such as paint thinners, weed killers and drain cleaners.

15. Respondent began experiencing sporadic back pain in 2000. When this occurred respondent would ask his supervisor if he could "take it easy" or go home. He initially treated his condition with regular physical therapy and stretching exercises. He began seeing Dr. Guerrero in 2006, who diagnosed respondent with degenerative disc disease at some point "between 2006 and 2009." Dr. Guerrero treated respondent's pain with opioid therapy, which continued as of the date of the hearing. Over time, respondent's pain became more severe and frequent. He testified that "around 2012" his pain became so severe that he was frequently missing work "because the pain medication he was taking gave him heart problems." Respondent did not describe specific job duties he had difficulty performing. Instead, he testified that "[i]t's not a matter of what I can't do. Whatever I do, I will pay for it if I over exert myself. I will be in bed for days." His pain management medication also interferes with his ability to perform his job. Respondent's treatment plan used to include Norco, but he stopped using it before he stopped working. Throughout the day he takes two different types of morphine, one immediate release and one extended release, amitriptyline for pain, omeprazole for acid reflux and 800 milligrams of ibuprofen every eight hours. Respondent also uses a fentanyl patch. Side effects vary, but include weakness, difficulty breathing, and pain in his arms. He stated that attempted to keep working but kept missing more and more time. Respondent stopped working in March 2013. When he stopped working, he provided the County with medical note indicating he was unable to work through June 1, 2013. He did not return to work after June 1, 2013, and was terminated for job abandonment. He testified that he did not return to work because "a doctor would not clear him to return to work."

16. In addition to the Application filed with CalPERS in April 2014, Respondent asserted that he also filed an Application with CalPERS in August 2013. He did not recall if he filed the application by fax, mail, or some other method. Respondent also did not produce a receipt of mailing, fax confirmation, or any other evidence to verify that he filed an Application in August 2013.

*Report of CalPERS's Expert*

17. Harry A. Khasigian, M.D., testified at hearing. Dr. Khasigian is a board-certified orthopedic surgeon and certified Fellow of the American Academy of Orthopedic Surgeons with training and experience in the diagnosis and treatment of orthopedic conditions. On October 1, 2014, he performed an Independent Medical Evaluation (IME) on respondent and prepared a nine-page report.

18. Respondent told Dr. Khasigian that he (respondent) was disabled due to severe pain from his cervical spine to his feet, arthritis pain, and damaged lumbar discs and joints. He reported that he had spondyloarthropathy and lumbar disc damage. Respondent complained of lumbar spine pain when bending, stooping, lifting and twisting. He told Dr. Khasigian that lifting while bending over was particularly painful and that sitting, standing and walking were also painful. Respondent also complained of chronic irritation and aching in his knees and pain, swelling, and irritation in his ankles. He also complained of severe immediate pain when pushing or pulling and claimed to always have pain when he sits. As of the date of his IME respondent was using a fentanyl patch, and was taking Indocin, amitriptyline, and omeprazole.

19. After conducting a physical examination of respondent and reviewing his medical records, Dr. Khasigian reached the following diagnostic impressions:

1. From history, narcotic abuse and habituation.
2. Mild degenerative disc disease at L5 S1 with negative EMG.
3. Negative seropositive osteoarthritis with negative ANA rheumatoid factor and C reactive protein.
4. Chronic pain syndrome with chronic subjective complaints.

20. In the October 2014 report, Dr. Khasigian noted that respondent had a history of complaints of pain with multiple examinations and treatment. He opined that respondent's treatment had developed into narcotic abuse and habituation and that the available reports from medial testing were largely normal. The medical records were sparse and contained none of the diagnostic test reports or x-rays. Based on the information available to him, Dr. Khasigian concluded there were two physical job requirements that respondent could not perform: Respondent could not frequently bend at the waist or occasionally lift and carry more than 50 pounds. After considering these limitations, it was Dr. Khasigian's opinion that respondent was not substantially incapacitated. He noted that although there was a "high level of subjective claims," the objective medical evidence available to him did not indicate respondent was substantially incapacitated for performance of his job duties.

21. In November 2014, Dr. Khasigian received additional medical records for respondent, including an April 2013 lumbar spine MRI and a December 2011 abdomen and pelvis CT scan. After reviewing these materials he prepared a supplemental report, dated November 19, 2014, containing the following opinion:

Mr. Sullivan presents subjectively without radiculopathy.<sup>4</sup> His clinical examination does not show neurological disorders or radicular abnormalities. He had an EMG previously, which is normal. He had an MRI, which reports some component of degenerative disc disease, but does not report distinct nerve root or spinal canal compression. [M]y conclusions and opinions remain unchanged, as the current additional information does not provide additional findings that would require modification or a change of my previously expressed opinions and conclusions.

22. About March 2015, Dr. Khasigian received a medical report reflecting a February 2015 examination performed on respondent. After reviewing these materials he prepared a supplemental report, dated March 24, 2015, containing the following assessment and conclusions:

#### RECORDS REVIEW

Mr. Sullivan is on multiple medications. He complains of chronic back pain. Is BMI is 21. He now has straight leg raise testing at 60 degrees where previously it was 90 degrees without pain. His motor strength is normal, but [he] says he has hamstring weakness. Assessment – Lumbar spondylosis.<sup>5</sup>

#### DISCUSSION

Mr. Sullivan has had multiple examinations in which he has learned how to make positive findings. He has a negative EMG that supersedes MRI findings which have a high degree of false positives and for which MRI findings do not correlate with clinical syndromes.

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<sup>4</sup> The Merriam-Webster Online Medical Dictionary defines “radiculopathy” as “irritation of or injury to a nerve root (as from being compressed) that typically causes pain, numbness, or weakness in the part of the body which is supplied with nerves from that root.” (<http://www.merriam-webster.com/medical/radiculopathy>)

<sup>5</sup> The Merriam-Webster Online Medical Dictionary defines “spondylosis” as “disintegration or dissolution of a vertebra.” (<http://www.merriam-webster.com/medical/spondylolysis>)

His examination on 10/1/2014 did not show any radicular or sciatic stretch abnormalities. He now, after several examinations, is able to produce an abnormal examination. He has had a lengthy period of treatment, negative testing, and a non-work status since March 2013. Despite treatment and a non-work status, his pain level has not changed and in fact has worsened.

#### CONCLUSIONS

I find no basis for a modification or change of my previous expressed opinions which are that he is able to perform the essential duties of his job description and that he is not substantially incapacitated for his work.

(Capitalization in original.)

23. Dr. Khasigian prepared another supplemental report, dated April 23, 2015, after reviewing updated job information provided by CalPERS. In that report, he noted that respondent could occasionally lift up to 100 pounds as specified in his job description and also opined that respondent was not substantially incapacitated remained unchanged.

24. At hearing, Dr. Khasigian reiterated the opinions specified in his reports. He opined that respondent was not substantially incapacitated for the performance of his job duties. Dr. Khasigian testified that respondent had a high level of subjective complaints of pain with no medical evidence to support them. He disagreed with Dr. Palladino's February 2015 lumbar spondylosis with herniated disc diagnosis, as he could not correlate that diagnosis through EMG test reports or physical examination. He opined that respondent's mild degenerative disc condition was not abnormal for his age and was not incapacitating. He stated respondent "can still perform most [of his job duties], despite bending limitations and a 50 pound lifting restriction." Dr. Khasigian opined that respondent's primary limitation appeared to be his addiction to narcotic pain medication and its side effects. He testified that his examination of respondent and his medical records revealed no physical abnormality that, in his opinion, required narcotics and emphasized that respondent still complains of significant pain after years of opioid pain treatment.

#### *Discussion*

25. Incapacity for performance of duty must be based on competent medical evidence. Dr. Khasigian opined that respondent is not substantially incapacitated from performing his job duties. He reached this opinion based on his medical training and expertise, examination of respondent, and review of respondent's medical records. Dr. Khasigian testified that respondent's subjective complaints of severe pain from his neck to his feet were not supported by his examination or respondent's medical records. While he agreed that respondent's mild degenerative disc condition may cause pain when respondent engages in certain activities, there was no competent medical evidence this condition

prohibits respondent from performing his job. No medical expert testified on behalf of respondent. His medical evidence was provided entirely through the hearsay statements of Drs. Guerrero and Palladino. Those statements alone are not sufficient to support a finding in an administrative hearing.<sup>1</sup> Moreover, those statements appear to be based primarily—if not entirely—on respondent’s subjective complaints. The SSA decision is also not competent medical evidence and, can only be used to supplement or explain other admissible non-hearsay evidence. Although the content within the SSA decision was considered, because the SSA determination was based on a different standard for disability than the standard at issue in this matter, the determination was given no weight. Respondent also did not identify specific job duties he could not perform. In fact, he testified that “[i]t’s not a matter of what I can’t do,” but that he will be in bed for days if he over exerts himself while working. When all the evidence is considered, Dr. Khasigian’s opinion that respondent is not substantially incapacitated from performing his usual and customary duties as a Building Service Worker for the County was persuasive. Respondent did not present competent medical evidence to support his disability retirement application. Absent supporting medical evidence, respondent’s disability retirement application must be denied.<sup>6</sup>

#### LEGAL CONCLUSIONS

1. By virtue of his employment, respondent is a state miscellaneous member of CalPERS, who is subject to disability retirement under Government Code section 21150.<sup>7</sup>

2. To qualify for disability retirement, respondent must prove that he is “incapacitated physically or mentally for the performance of ... [his] duties.” (Gov. Code, § 21156.) Government Code section 20026 defines “disability” and “incapacity for performance of duty,” as follows:

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and

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<sup>6</sup> Because respondent did not establish that he is substantially incapacitated, there is no need to determine whether, when applying for disability retirement, he made a mistake which was the result of inadvertence, mistake, surprise or excusable neglect correctable by Government Code section 20160, which would have entitled him to an earlier effective retirement date.

<sup>7</sup> Government Code section 21150, in relevant part, provides:

(a) 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.

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

(Italics added.)

3. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876 (*Mansperger*), 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.) In *Mansperger*, the court found that a fish and game warden who had applied for disability retirement was not incapacitated for the performance of his duties, because the work activities that he was unable to perform were not common occurrences, and he could otherwise "substantially carry out the normal duties of a fish and game warden." (*Mansperger, supra*, 6 Cal.App.3d at p. 876.)

4. In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, 860 (*Hosford*), the court found that prophylactic restrictions imposed to prevent the risk of future injury or harm were not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (*Hosford, supra*, 77 Cal.App.3d at p. 863.)

5. In *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697 (*Harmon*), the court found that a deputy sheriff was not permanently incapacitated from the performance of his duties, because "aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for [the sheriff's] condition are dependent on his subjective symptoms."

6. *Mansperger, Hosford* and *Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date he applied for disability retirement, he was permanently and substantially unable to perform his usual duties as a Building Service Worker for the County. The evidence established that respondent has relatively limited work restrictions, to address largely subjective complaints of pain, which do not preclude him from performing the majority of his regular job duties. Although respondent asserted subjective complaints of disability, he did not present competent medical evidence to establish that he was permanently and substantially incapacitated from performing his usual duties as a Building Service Worker. His application for disability retirement must therefore be denied.

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ORDER

The application of Jonathan D. Sullivan for disability retirement is DENIED.

DATED: March 30, 2016

DocuSigned by:  
*Ed Washington*  
D1857747BA4F405

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ED WASHINGTON  
Administrative Law Judge  
Office of Administrative Hearings