

ATTACHMENT E
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

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

JORDAN M. CONWAY,

Respondent.

and

DEPARTMENT OF FORESTRY AND
FIRE PROTECTION.

Respondent.

Case No. 2015-0580

OAH No. 2015071344

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, State of California, Office of Administrative Hearings, on March 8, 2016, in Sacramento, California.

The California Public Employees' Retirement System (CalPERS) was represented by Terri Popkes, Staff Attorney.

Jordan M. Conway (respondent) was present and represented himself.

There was no appearance by or on behalf of the California Department Forestry and Fire Protection (Department). The Department was duly served with Notices of Hearing. The matter proceeded as a default against the Department, pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on March 8, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 29 Mar 20 16
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ISSUE

1. Respondent was employed by the Department as a Firefighter I. On or about March 1, 2013, respondent applied for industrial disability retirement, on the basis of a left knee condition (orthopedic condition). Respondent's application was approved. His disability retirement was effective October 17, 2011. Because respondent was under the minimum age for voluntary service retirement, pursuant to Government Code section 21192, on March 10, 2015, CalPERS sent respondent for an independent medical examination (IME). After reviewing medical reports and other information, CalPERS determined that respondent was no longer substantially incapacitated from performing the duties of a Firefighter I with the Department. Respondent appealed from CalPERS' determination.

2. The issue for Board determination is whether CalPERS established that respondent is no longer substantially incapacitated from performing the usual duties of a Firefighter I on the basis of his orthopedic condition?

PROCEDURAL FINDINGS

1. On March 1, 2013, respondent submitted an application for industrial disability retirement (application) with CalPERS. At the time, respondent was employed as a Firefighter I by the Department. By virtue of his employment, respondent is a state safety member of CalPERS.

2. In filing the application, respondent claimed that his specific disability was "left knee impairment equivalent to a moderate laxity of collateral ligament." Respondent wrote the disability occurred on July 30, 2011, while he was "engaged in fire fighting [*sic*] activity." Respondent also wrote that he was "unable to perform fire fighter duties" because he could not "walk on uneven ground due to this injury knee pain."

3. On July 24, 2013, respondent was sent by CalPERS to an IME with Joseph Serra, M.D., who issued a report concerning his findings. Dr. Serra opined that respondent was temporarily incapacitated from the performance of his duties due to his orthopedic condition. Dr. Serra opined that temporary incapacity was expected to last for "one to two years."

4. On October 4, 2013, CalPERS notified respondent that his application for industrial disability retirement was approved. His retirement was effective on October 17, 2011. The letter stated that respondent was found to be substantially incapacitated from the performance of his usual duties as a Firefighter I for the Department, based upon his orthopedic condition. Respondent was informed that he may be reexamined periodically to determine his qualification for reinstatement if he was under the minimum age for service retirement. Respondent was 23 years old at the time of his retirement. He was under the minimum age for service retirement.

5. On October 23, 2014, CalPERS notified respondent that it would conduct a reexamination of his disability retirement. Part of the reexamination included an IME performed by Ghol B. Ha'Eri, M.D., on March 10, 2015.

6. On April 14, 2015, CalPERS notified respondent that based upon a review of "medical reports and other information," CalPERS determined that respondent was no longer substantially incapacitated from performing the job duties of a Firefighter I for the Department. Respondent was informed that he would be reinstated to his former position. Respondent was advised of his appeal rights. Respondent filed an appeal and request for hearing by letter dated May 5, 2015.

7. On July 23, 2015, Anthony Suine, Chief, Benefit Services Division, Board of Administration, CalPERS, signed and thereafter filed the Accusation.

FACTUAL FINDINGS

Respondent's Employment History and Work Injury

1. Respondent was hired as a Firefighter I for the Department in approximately July 2007. He was 18 years old. He worked in the Department's Kings Unit in Fresno, California, until approximately July 30, 2011.

2. On or about July 30, 2011, respondent was fighting a fire in a ravine. He was carrying a load of fire hose and other equipment that weighed approximately 70 to 80 pounds. Respondent approached a creek that was approximately four feet across. Respondent attempted to jump across the creek bed. His left knee hyperextended and gave out. He fell to the ground. With assistance, he hiked approximately one mile out of the fire area to be transported by ambulance to Saint Agnes Medical Center (St. Agnes).

3. Once respondent arrived at St. Agnes, his left knee was evaluated and x-rays were taken. No damage to the knee was observed on the x-ray. Respondent's knee was wrapped with an ace bandage. He was placed on crutches and given a prescription of Vicodin for pain. Respondent did not return to work.

Physical Requirements of a Firefighter I

4. A Firefighter I for the Department works under the supervision of a Captain or Engineer, "to do the heavy physical work involved in firefighting as a member of a crew." The "primary purpose" of the position is to "fight fires as a member of a fire crew using tools and equipment." When a Firefighter is not on the fire line, additional projects may include "clearing trails, cutting brush, assisting in building repair, and grounds and equipment maintenance." The physical work of the position is described as follows:

- Duties involve field work requiring physical performance calling for above-average ability, endurance, and superior condition including occasional demand for extraordinary strenuous activities in emergencies under adverse conditions and over extended periods of time, requires running, walking, difficult climbing, jumping, twisting, bending and lifting over 25 pounds, and the pace of work is typically set by the emergency situation.

5. CalPERS received a completed "Physical Requirements of Position/ Occupational Title," (Physical Requirements) form signed by a representative of respondent's employer on November 4, 2014. According to the Physical Requirements, when working as a Firefighter, respondent: (1) constantly (over six hours per day) used his hands repetitively, carried between zero and 25 pounds, walked on uneven ground, and was exposed to extreme temperature, humidity, wetness, dust, gas fumes and chemicals; (2) frequently (three to six hours per day) stood, walked, twisted his neck and waist, pushed and pulled, power grasped, lifted between 26 and 75 pounds, was exposed to excessive noise and used special visual or auditory protective equipment; and (3) occasionally (up to three hours a day) sat, ran, crawled, kneeled, climbed, squatted, bent his neck and waist, reached above and below his shoulder, used fine manipulation and simple grasping, used a keyboard and mouse, carried between 76 and over 100 pounds, drove, worked with heavy equipment, worked at heights, operated foot controls or repetitive movement and worked with bio hazards (e.g. blood borne pathogens, sewage, hospital waste, etc.).

Independent Medical Evaluation by Joseph Serra, M.D.

6. On July 24, 2013, at the request of CalPERS, Joseph Serra, M.D., an orthopedic surgeon, conducted an IME of respondent. Dr. Serra prepared a report. He did not testify at the hearing in this matter.

7. Dr. Serra's report indicated that as part of the IME of respondent, Dr. Serra interviewed respondent, obtained a personal and medical history, conducted a physical examination, and reviewed respondent's medical records related to his orthopedic condition, which Dr. Serra referenced in his report. Dr. Serra also reviewed respondent's duty statement and the physical requirements of his position as a Firefighter.

BACKGROUND AND COMPLAINTS

8. Dr. Serra obtained a history of the injury to respondent's knee, treatment and current complaints. Respondent informed Dr. Serra that he injured his knee on July 30, 2011, while he was working on a fire. At the time, he was carrying 80 pounds of fire hose. "He came to a dry creek bed, and as he stepped across the creek bed, his left knee hyperextended and gave out, causing him to fall." Respondent reported that he was able to continue working on the fire for another 20 minutes. He hiked for one mile out of the fire

area and was transported to the hospital, where x-rays were taken. The x-rays were "negative." Respondent was provided pain medication.

9. Shortly after the accident, respondent was treated by Kathleen Baron, M.D. A MRI of respondent's left knee was performed and revealed "mild strain versus tendinosis of the extensor mechanism without discrete tear defect." There was no evidence of acute sprain or tear, meniscal injury and "no significant chondromalacia." Respondent participated in physical therapy for his left knee.

10. Respondent was also evaluated by Michael Oberto, M.D., an orthopedic surgeon. Dr. Oberto opined that respondent "probably had a strain injury to the quadriceps mechanism and mild patellofemoral pain." Dr. Oberto recommended continued physical therapy, anti-inflammatory medication and use of a "Neoprene patella brace," which respondent had purchased for himself.

11. Respondent reported to Dr. Serra that he performed rehabilitation exercises for his left knee as instructed by his physical therapist. He also continued to wear the "elastic sleeve patella brace during the day." Respondent reported that he did not have any symptoms with normal activity, but that "occasionally the knee will hyperextend when the brace is not on and this can result in posterolateral pain." He had an "occasional episode of popping along the lateral aspect of his left knee especially if the knee begins to hyperextend." He also reported "temporary paresthesia after sitting in a theater, for example," which clears with movement. He also had a "sensation that the left knee is weak, especially when he is working out with weights, upper body."

PHYSICAL EXAMINATION

12. Dr. Serra conducted a physical examination of respondent. Respondent had full extension of both knees, with no discomfort on deep bends. Dr. Serra noted that respondent was "cautious as he rises from the deep knee bend position." Dr. Serra examined respondent's left knee. It appeared to be normal. There was "tenderness along the posterolateral aspect of the left knee in the region of the biceps tendon and posterolateral joint line." There was also "minimal laxity in the medial and lateral collateral ligaments" compared to the right knee. The range of motion for the left knee was "from 0 degrees extension to 143 degrees flexion, and this is comparable to the uninvolved right knee."

13. Dr. Serra also noted that on non-weight bearing flexion and extension, there was a "palpable clicking over the left biceps femoris, close to full extension." The clicking was not present in the right knee. He also found "increased hypermobility in the patella bilaterally."

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DIAGNOSIS AND IMPRESSION

14. Dr. Serra diagnosed respondent with the following:

- (1) Subluxation and tendinitis, biceps femoris insertion, left knee
- (2) Subsequent weakness, left lower extremity
- (3) Mild recurvatum, bilateral knees.

15. Dr. Serra opined that respondent was unable to perform job duties that required him to “walk on uneven ground and up and down hilly terrain.” Respondent was also “unable to carry the required loads of a firefighter, such as sections of hose weighing up to 70 pounds.” Dr. Serra opined that “all of these activities would tend to make the left knee susceptible to hyperextension and pain.”

16. Dr. Serra further opined that respondent was substantially incapacitated from the performance of his duties as a Firefighter I for the Department, and that the incapacity was temporary. The expected duration of the incapacity was “one to two years.” Dr. Serra wrote that “it is hopeful that further treatment will be provided improving the strength in the left lower extremity and reducing the posterolateral knee pain.”

Independent Medical Evaluation by Ghol Ha'Eri, M.D.

17. On March 10, 2015, at the request of CalPERS, Ghol Ha'Eri, M.D. conducted an IME of respondent. Dr. Ha'Eri prepared a report and testified at the hearing in this matter. Dr. Ha'Eri is a Diplomate of the American Board of Orthopaedic Surgery and the American Board of Neurological and Orthopaedic Surgery. Dr. Ha'Eri has been licensed to practice medicine for approximately 47 years. Until approximately 2010, Dr. Ha'Eri ran a private practice and treated orthopedic patients. For the last six years he has primarily performed IMEs and Qualified Medical Evaluations (QMEs) for the workers compensation system.

18. As part of the IME of respondent, Dr. Ha'Eri interviewed respondent, obtained a personal and medical history, had respondent complete a questionnaire, conducted a physical examination, and reviewed respondent's medical records related to his orthopedic condition, including the report issued by Dr. Serra. Dr. Ha'Eri also reviewed respondent's duty statement and the physical requirements of his position as Firefighter I.

BACKGROUND AND COMPLAINTS

19. During the evaluation, respondent provided an explanation of the work-related accident on July 30, 2011, that resulted in injury to his left knee. Respondent's explanation was similar to the explanation he gave Dr. Serra. Respondent gave a brief history of his

visits to Dr. Baron and Dr. Oberto. Respondent also reported that he was not under medical care for his left knee.

20. Respondent complained that he had left knee discomfort at the end of the day. He also reported that when he descended stairs, his left was “not trustworthy.” When he performed deep squats he heard a “pop” in his left knee.

PHYSICAL EXAMINATION

21. Dr. Ha’Eri conducted a physical examination of respondent. Dr. Ha’Eri examined respondent’s left knee. There was “no swelling or joint effusion.” Respondent was able to move his left knee “through full range of motion (0-140 degrees of flexion).” Dr. Ha’Eri did not hear any crepitus, which is grinding. Nor did he hear any “pop” with knee motion. Respondent had no tenderness of the knee during palpation. Dr. Ha’Eri manipulated the left knee and found “no ligamentous laxity.” Dr. Ha’Eri also tested the knee for stability and found no instability in the knee.

22. Dr. Ha’Eri measured respondent’s lower extremities. The circumferential measurements of respondent’s thighs were 38 centimeters. His right calf was 35 centimeters and his left calf was 34 centimeters. Dr. Ha’Eri testified that the measurements are significant in that they demonstrate respondent does not have atrophy in his left leg. Dr. Ha’Eri found no abnormalities during the physical examination.

23. Dr. Ha’Eri also performed a neurological examination of the left lower extremity and found no evidence of any nerve injury.

DIAGNOSIS AND OPINION

24. Dr. Ha’Eri diagnosed respondent with “left knee sprain/strain.” He opined that the respondent “sustained a left knee sprain/strain” on July 30, 2011. Thereafter, respondent “underwent a full course of conservative medical care, i.e. medications, knee brace and physical therapy.” Dr. Ha’Eri also noted that respondent was instructed to “continue with his own exercise program in order to strengthen his thigh muscle in the left lower extremity.”

25. Dr. Ha’Eri opined that there are no specific duties of a Firefighter I that respondent cannot perform. He further opined that respondent was not substantially incapacitated from the performance of his duties, as a result of his orthopedic condition.

FEBRUARY 5, 2016 SUPPLEMENTAL REPORT

26. On February 5, 2016, Dr. Ha’Eri issued a supplemental report after he was provided addition medical records to review related to respondent’s orthopedic condition. Specifically, Dr. Ha’Eri reviewed a December 8, 2015 report from Jessica Dumas, Physician’s Assistant at the Associated Family Physicians of Boca Raton, Florida. Ms.

Dumas opined in the report that respondent had “unilateral posttraumatic osteoarthritis of his left knee.” Dr. Ha’Eri noted that there was no objective evidence to support the diagnosis made by Ms. Dumas. There was no x-ray or MRI indicating that respondent had osteoarthritis.

27. Dr. Ha’Eri also reviewed a report dated November 4, 2015, from Alan Saperstein M.D., an orthopedic surgeon. Dr. Saperstein conducted a physical examination of respondent based on his complaint of left knee pain. Dr. Saperstein noted that the left knee “revealed no abnormality, except mild tenderness over the medial facet of patella and over the iliotibial band at lateral condyle.” Dr. Saperstein diagnosed respondent with “chondromalacia patella of the left knee.” Dr. Saperstein also diagnosed respondent with “iliotibial band friction syndrome and snapping of the lateral hamstring tendon of the left knee.” Dr. Saperstein recommended a course of physical therapy.

28. Dr. Ha’Eri testified that chondromalacia patella is roughness under the surface of the knee cap. Typically, the physician would also note crepitus. However, Dr. Saperstein did not note that he heard any cracking with knee motion. Iliotibial band friction syndrome and snapping of the lateral hamstring tendon can be felt as friction on the outside of the thigh muscle that connects the knee.

29. Dr. Ha’Eri also reviewed photographs taken by respondent showing how he stocked alcohol as a bartender, along with respondent’s explanation of his duties. Specifically, respondent wrote that he modified his job by using a cart with wheels to carry the alcohol, so that he did not have to walk with the heavy bottles.

30. The additional information provided to Dr. Ha’Eri did not change his initial opinion that respondent is not substantially incapacitated from the performance of his job duties as a Firefighter I for the Department.

Respondent’s Evidence

31. Respondent is 26 years old. In 2014, he moved to Florida with his girlfriend. He works as a bartender. After the accident on July 30, 2011, respondent participated in physical therapy until December 2012. After he was released from physical therapy he continued a home exercise program. Respondent still suffers from pain and weakness in his left knee when he stands for long periods of time. Respondent does not feel that he is able to perform the duties of a Firefighter, particularly the requirement that he lift heavy objects.

32. Respondent did not call any health care providers to testify. He offered the December 8, 2015 patient visit report from Ms. Dumas, the November 4, 2015 report from Dr. Saperstein and responses Dr. Saperstein gave to a January 14, 2015 letter from CalPERS. The response and reports were admitted as administrative hearsay, and have been considered to the extent permitted under Government Code section 11513, subdivision (d).

33. When respondent learned that his industrial disability would be reevaluated by CalPERS, he sought an evaluation from Dr. Saperstein, who diagnosed him with Iliotibal band friction syndrome. Dr. Saperstein recommended that respondent continue to wear his knee brace, avoid “aggravating activities such as stair climbing and incline walking” and start a course of physical therapy. Dr. Saperstein also wrote “I do not think he can return to work as a firefighter.”

In response to the January 14, 2015 letter from CalPERS regarding respondent’s ability to perform the duties of a Firefighter, Dr. Saperstein wrote that respondent could not squat or climb. He also wrote “yes” in response to the question: “In your professional opinion, does the member remain substantially incapacitated for the performance of his/her usual duties.”

Discussion

34. CalPERS established that respondent is no longer substantially incapacitated from performing the usual duties of a Firefighter I for the Department. Dr. Ha’Eri persuasively testified that there is no objective medical evidence that respondent is unable to perform the duties of a Firefighter I. Furthermore, Dr. Serra opined on July 24, 2013, that respondent’s incapacity was temporary. He opined that respondent should be able to return to his duties as a Firefighter within one to two years. Almost three years has passed since Dr. Serra issued his report.

35. Although respondent submitted reports from Ms. Dumas and Dr. Saperstein regarding recent evaluations, the reports were not persuasive. Ms. Dumas did not opine that respondent was substantially incapacitated for the performance of his duties as a Firefighter I due to his orthopedic condition. Dr. Saperstein did not provide an explanation as to why he believed respondent was substantially incapacitated from the performance of his duties. Additionally, because the authors of these reports and correspondence were not available at hearing for cross-examination, their opinions were admitted only as administrative hearsay and cannot be relied upon, standing alone, to support any findings as to respondent’s orthopedic condition. (Gov. Code, § 11513, subd. (d).)

36. When all the evidence is considered, CalPERS submitted sufficient evidence to meet its burden. As a result, CalPERS’ request that respondent be involuntarily reinstated from industrial disability retirement is granted.

LEGAL CONCLUSIONS

1. In accordance with Government Code section 21192, CalPERS re-evaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

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.... The examination shall be made by a physician or surgeon, appointed by the board.... 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.

2. Government Code section 21193 governs the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty and, in relevant part, provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

3. Government Code section 20026 defines “disability” and “incapacity for performance of duty,” and, in relevant part, provides:

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion.

4. Findings issued for the purposes of worker’s compensation are not evidence that respondent’s injuries are substantially incapacitating for the purposes of disability retirement. (*Smith v. City of Napa*, (2004) 120 Cal.App.4th 194, 207; *English v. Board of Administration of the Los Angeles City Employees’ Retirement System* (1983) 148 Cal.App.3d 839, 844; *Bianchi v. City of San Diego*, (1989) 214 Cal.App.3d 563.)

5. 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.) The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, held that a disability or incapacity must

currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient. Furthermore, in *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff's subjective complaints alone, without competent medical evidence to substantiate the complaints, were insufficient to support a finding that he was permanently incapacitated for the performance of his duties.

6. When all the evidence in is considered, CalPERS established that respondent is no longer substantially incapacitated for the performance of his usual duties as Firefighter I for the Department. Consequently, CalPERS' request that respondent be involuntarily reinstated from industrial disability retirement is granted.

ORDER

Respondent's appeal is DENIED. The request of California Public Employees' Retirement System to involuntarily reinstate respondent Jordan Conway from industrial disability retirement is GRANTED.

DATED: March 28, 2016

DocuSigned by:

Marcie Larson

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MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings