

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 the
Industrial Disability Retirement of:

MICHAEL ANTONUCCI JR.,

Applicant/Respondent,

and

CITY OF UPLAND,

Employer.

Case No. 2015-0855

OAH No. 2015110231

PROPOSED DECISION

Roy W. Hewitt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on June 29, 2016.

Staff Attorney Preet Kaur represented Anthony Suine, Chief of the Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Respondent, Fire Chief Michael Antonucci, Jr. (ret.), represented himself.

No one appeared on behalf of the City of Upland.

The matter was submitted on June 29, 2016.

ISSUES

1. Did CalPERS properly cancel respondent's May 8, 2014, application for industrial disability?

PUBLIC EMPLOYEES RETIREMENT SYSTEM

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2. Does competent medical evidence establish that respondent was substantially disabled or incapacitated from performing the usual and customary duties of a Fire Chief for the City of Upland when he retired on September 30, 2011?

SUMMARY

Respondent's May 8, 2014, disability retirement application was untimely and was not the result of a correctable "error or omission," as defined by California Government Code section 20160. Accordingly, CalPERS properly cancelled respondent's application for industrial disability retirement.

Additionally, the only competent medical evidence presented established that respondent was not substantially incapacitated from performing the usual and customary duties of an Upland City Fire Chief on September 30, 2011, the effective date of his retirement.

FACTUAL FINDINGS

Jurisdictional Matters

1. From March 21, 2006, until September 30, 2011, respondent was employed by the City of Upland as the Fire Chief. By virtue of his employment, respondent was a local safety member of CalPERS subject to Government Code section 21151.

2. On July 23, 2011, respondent signed, and thereafter submitted to CalPERS, an application for regular/service retirement. His application was accepted and respondent retired, effective September 30, 2011.

3. On May 8, 2014, respondent signed, and thereafter submitted to CalPERS, an application for disability retirement on the basis of an orthopedic (back) condition. In the application respondent requested that his disability retirement be retroactive to September 30, 2011, the effective date of his service retirement.

4. CalPERS canceled respondent's application for disability retirement, respondent timely appealed, and the instant hearing ensued.

Summary of Relevant Events in Chronological Order

5. Respondent began his employment with the City of Upland on March 21, 2006.

6. On June 14, 2010, respondent underwent back/spinal surgery due to Bilateral Sciatica and Spondylolisthesis. The surgical procedure consisted of the following:

“Laminectomy of bilateral L4-5 as well as a partial facetectomy and foraminotomy decompressing L4 & L5 nerve root.” A bone graft, rods and set screws were placed in respondent’s back/spinal area. Jae Chon, M.D. was the surgeon who performed the surgery.

7. Dr. Chon’s records concerning respondent’s post-operation progress, as related to his ability to perform the usual and customary duties of the Fire Chief for Upland, are summarized as follows:

- a. June 22, 2010: Off work (Exh C¹-10, pg. 8.);
- b. July 22, 2010: Work Status —“. . . will release him to light duty starting August 1, 2010, on sedentary work, with a lifting limit of 5 pounds, and no climbing or bending, and a 5 hour work day” (Exh C-10, pg. 10.);
- c. September 9, 2010: Continued on light duty (Exh. C-10, pg. 13.);
- d. October 28, 2010: Increased respondent’s hours of work from five hours per day to eight hours per day. The limitations/restrictions on respondent’s lifting, climbing and bending remained the same (Exh. C-10, pg. 16.);
- e. December 9, 2010: Same restrictions as those imposed on October 28, 2010 (Exh. 10, pg. 18.);
- f. April 21, 2011: Increased respondent’s hours of work from eight hours per day to 10 hours per day and increased the lifting restriction from a limit of five pounds to a limit of 15 pounds (Exh. C-10, pg. 20.);
- g. June 2, 2011: No change in work hours or restrictions (Exh. C-10, pg. 23.);
- h. July 28, 2011: Respondent’s lifting limit was increased to 30 pounds (Exh. C-10, pgs. 22 & 24.); and
- i. September 23, 2011: Respondent was released to “full duty to see how he tolerates it” (Exh. C-10, pg. 26.).

Respondent worked until September 30, 2011, without complaining about any inability to tolerate performing his full job duties.

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¹ “C” refers to CalPERS’ Exhibits.

8. Respondent authored two letters, both dated September 13, 2013, to Stephen Dunn, City Manager for the City of Upland. One of the letters read as follows:

Dear Mr. Dunn,

This is an official document to notify you that I can no longer function (due to medical issues resulting from my service as fire chief) for the City of Upland. I have also provided you a letter of retirement from my position with the city. The functions of the Fire Chief in the City of Upland has [sic] increased due to budget deficits and cutbacks, to include the functions of a Battalion Chief, Fire Investigator, Arson Investigator and functions at the scene of a fire that I can no longer sustain, due to the injuries I have received on the job. I am requesting full PERS industrial disability retirement per the Government section code [sic] 21150-21176. Please approve my disability retirement as required by the code.

I was also denied workers comp time off for my June 10th surgery and I request you reinstate my vacation, sick leave and administrative time I used during my worker comp surgery and recuperation.

I enjoy [sic] working for the City and when I retire, I have supporting evidence that shows I have left the fire department better than when I came here. I enjoyed working with the executive staff and the entire work force of the City of Upland.

Thank you for the opportunity you have given me as your Fire Chief. (Exh. R²-3, pg. 84.)

The second letter was distinctly different. It read as follows:

Dear Stephan,

This is an official notification of my intent to retire from the City of Upland Fire Department. I have enjoyed my time being the fire chief and working with the excellent men and women of this department as well as the employees of this city. I will miss the challenge of being the leader of this fine organization. I am available to assist anyway [sic] that I can to keep the fire department and the city moving forward in a positive direction.

I enjoy [sic] working for the City and when I retire, I have supporting evidence that shows I have left the fire department better than when I came here. I enjoyed working with the executive staff and the entire work force of the City of Upland.

Thank you for the opportunity you have given me as your Fire Chief. (Exh. R-4, pg. 85.)

Respondent testified that after a meeting with Steve Adams, the Upland Chief of Police in 2011, he hand delivered to Mr. Dunn, one of the letters, quoted above.³

² "R" refers to respondent's exhibits.

9. By letter, dated September 19, 2011, CalPERS notified respondent of the following:

You may be entitled to receive a disability retirement if you are unable to work because of an illness or injury. To request a service pending disability retirement, you must complete a Disability Retirement Election Application. Please note that your retirement date cannot be earlier than the day following your last day on paid status. (Exh. R-1, pg. 38.)

10. By letter, dated September 20, 2011, attorney at law Alex M. Moisa, Esq. notified CalPERS that he had been retained by respondent to “prepare the Domestic Relations Order” concerning respondent’s August 13, 1984, divorce. The order was required by CalPERS so that respondent’s ex-wife’s entitlement to any retirement benefits could be determined. In the letter, attorney Moisa indicated that respondent “will retire effective September 30, 2011.” Mr. Moisa also wrote: “I understand the time to process the DRO [Domestic Relations Order] takes from 60 to 90 days. If we can expedite this matter in any way please let me know and I will do what I can from my end.” (Exh. R-1, pg. 40.)

11. Respondent retired (regular, service retirement, as opposed to industrial disability retirement), effective on September 30, 2011. Respondent did not cite back problems as the reason he elected to retire; rather, he retired because Upland was downsizing; and, according to Upland file notes concerning respondent,⁴ respondent was displeased with the termination of lifetime medical insurance.

12. On October 1, 2011, the day after respondent retired from Upland, an employment contract between respondent and Upland became effective. Pursuant to the contract respondent began working as an independent contractor for Upland in his former position as Fire Chief. The contract provided for respondent’s employment from October 1, 2011, until December 31, 2012. (Ex. R-10, pgs. 162-167.)

13. Respondent retained Paul Minerich, Esq., Attorney at Law, to represent him and assist him in providing necessary documentation concerning his ex-wife’s community property interest in his service retirement. CalPERS sent Mr. Minerich a letter, dated January 6, 2012. In part, that letter stated:

[¶] . . . [¶]

³ It was unclear from the testimony which letter respondent showed Chief Adams; however, according to respondent, Chief Adams advised him to revise the letter and present the revised letter to the City.

⁴ Jeanette Vagnozzi, the Deputy City Manager for the City of Upland testified about the “file notes.”

A hold has been placed on [respondent's] account pending a determination of the community property interest of the parties. No [retirement] benefits will be paid until that determination is made.

Attached is information regarding CalPERS' procedure and requirements for community property. This is intended to provide guidance when negotiating a property settlement. Specific questions regarding a member's account should be directed to the System. Please contact this office at the above address or telephone number if you have any questions. (Exh.R-1, pg.51.)

14. On February 17, 2012, CalPERS notified respondent that "it is critical for CalPERS to receive an acceptable filed court order resolving the community property claim before benefits can be paid to either party. No benefits, including any health benefits, if applicable, will be paid until we have received and approved the filed court order resolving the community property claim." (Exh. R-1, pg.53.)

15. On February 26, 2012, respondent, while working as Fire Chief for the City of Upland, as an independent contractor, was injured when he was "T-boned by a car that was pulling out of a driveway." Respondent complained of "Mid back pain and low back pain radiating to both lower extremities rated 6/10, aggravated by sitting for long periods." The treatment plan was "Physical therapy two times a week for six weeks; follow-up in six weeks." (Exh. C-17, pgs. 3 & 27.) Nonetheless, respondent continued to work, under contract, as the Upland Fire Chief.

16. On March 9, 2012, CalPERS received a letter from respondent concerning the domestic relations/community property issue. In the letter, respondent requested that CalPERS "Please resolve this matter ASAP or send me some of MY funds to continue my debts [sic] and keep my credit rating sound." (Capitalizations in the original; Exh. R-1. Pg. 56.)

17. Respondent retained a second attorney, Alex Moisa, Esq., to represent him in the community property matter. By letter, dated March 13, 2012, CalPERS acknowledged "receipt [from Mr. Moisa] of the proposed Stipulated Domestic Relations Order pertaining to Michael Antonucci's retirement benefits with CalPERS. This order, as proposed, is acceptable to CalPERS for the purpose of separating the account and dividing the service credit and contributions earned during the marriage pursuant to sections 21290 through 21298 of the Government Code." (Exh. R-1, pg. 58.)

18. The evidence established that CalPERS, respondent, and respondent's attorney, Mr. Moisa, continued corresponding concerning the community property issue until a third attorney, Edward P. Zappia, Esq., filed a Verified Petition for Writ of Mandate with the San Bernardino Superior Court on July 13, 2012.

19. Respondent was also pursuing a Workers' Compensation claim.⁵ As part of that process, he underwent an Agreed Medical Examination (AME) on November 2, 2012. The resulting report indicated the following: "Regarding the cervical spine . . . it is my professional medical opinion that 90% of [respondent's] disability and impairment is apportioned to the industrial injury of February 2012. It is felt that 10% is due to degenerative disc disease/arthritis. In other words, absent this specific industrially related accident which occurred in February 2012, he would have 10% of his present impairment/disability." (Exh. R-7, pg. 141.)

20. On January 17, 2014, after reviewing "supplementary records, the doctor who performed the AME issued a supplemental report. In the report, the doctor wrote, in part:

DISCUSSION:

After reviewing the above medical records, my assessment with regard to apportionment of [respondent's] lumbosacral spine condition is modified as follows.

With regard to the **lumbosacral spine**, based upon Labor Codes 4663 and 4664, it is felt that 25% is due to a prior slip-and-fall injury, which occurred on February 10, 2001. Ten percent (10%) is due to degenerative disc disease, i.e. the normal aging process. The remaining 65% is due to the specific injury that occurred in February of 2012 and the continuous trauma of his job-related duties from March 21, 2006, through March 30, 2012.

With regard to the specific injury of February 2012 and the continuous trauma through March of 2012, it is felt that these are inextricably intertwined. One cannot separate out, with reasonable medical probability, the apportionment between these aspects.

[¶] . . . [¶] (Exh. R-7, pg. 95.)

21. On May 8, 2014, respondent filed his Industrial Disability Retirement Election Application with CalPERS.

22. By letter, dated July 8, 2014, the City of Upland responded to five questions, posed by CalPERS, concerning respondent's request to change his retirement benefits and status from service to industrial disability retirement. CalPERS' questions and the the City's responses were as follows:

The City received your [CalPERS'] correspondence on June 23, 2014[,] regarding the request to change retirement status and benefits from service to industrial disability retirement. Following is [sic] the response[s] to the five questions you posed:

⁵ It was unclear from the evidence exactly when respondent filed his Workers' Compensation claim; however, the evidence did reflect that it was after respondent's February 26, 2012, motor vehicle accident and resulting back injuries.

1. Did the member indicate he was retiring because he was too disabled to continue working?

No.

2. What did the member state as the reason for stopping work?

At that time the City was downsizing and reducing benefits for executives. The City was discontinuing a lifetime reimbursement benefit for executive employees[,] effective October 1, 2011. Mr. Antonucci was an executive level employee, and, therefore, elected to retire[,] effective September 30, 2011. He chose to apply for a service retirement.

3. At the time the member stopped working was an industrial injury/illness claim pending or filed within the preceding three years?

No.

4. What information or counseling was the member given regarding disability retirement?

He did not seek any advice regarding his retirement.

5. Will the City of Upland object if CalPERS accepts Mr. Antonucci's untimely application?

Yes, at the time he retired there was no disability impacting his ability to work. Additionally, Mr. Antonucci continues to be employed with a County Agency in an administrative position (Exh. C-6, pg.1.)

The letter was signed by the City's Administrative Services Director.

23. On July 9, 2014, respondent replied to seven questions, and four sub-questions questions posed to him by CalPERS. The questions and answers were as follows:

1. What is the specific disability which prevented you from performing your duties?

I suffered a lower back injury requiring surgery on L4, L5 and S1 vertebra June 10, 2010.

a. At the time you filed for a service retirement, were you under regular medical care for this condition?

Yes – Dr. Jae Chon.

2. Did any physician instruct you to stop working in your former position because of permanent disability?

Yes – Dr. Jae Chon.⁶

3. Did you advise your employer that you had to retire because of a disability?

No.

a. If no, why did you not do so?

The City of Upland denied my worker comp. claim for my back and as such I did not think I could file for Industrial Disability retirement with PERS unless the claim was accepted.⁷ Since then workers comp doctors have rated me disabled from my work at the City of Upland and the claim had been accepted and I filed with PERS accordingly.

4. Did you contact PERS for information regarding disability retirement before you retired for [sic] service?

No.

a. If no, why did you not do so?

The City of Upland denied my worker comp claim for my back and as such I did not think I could file for Industrial Disability retirement with PERS unless the claim was accepted. [not so; see footnote 7.] Since then workers comp doctors have rated me disabled from my work at the City of Upland and the claim had been accepted and I filed with PERS accordingly.

5. Why didn't you request disability retirement at the time you applied for service retirement?

The City of Upland denied my worker comp claim for my back and as such I did not think I could file for Industrial Disability retirement with PERS unless the claim was accepted. [See footnote 7.] Since then the claim had been accepted and I filed with PERS accordingly.

⁶ As set forth Finding 7, subsection (i), this answer was not accurate. Actually, Dr. Joe Chon had released respondent to full duty by the time he elected to retire.

⁷ Again, this response is not accurate. The evidence, including the City's responses in Finding 22, established the inaccuracy of respondent's answer.

6. How did you learn of the right to apply for reconsideration that is found under Government Code section 20160?

I spoke with an attorney about my worker comp case and asked if there was a way to ask PERS to reconsider my service retirement because the City of Upland had now accepted my worker compensation claim. I was made aware of the code on or about April 2014 and went to the PERS office in San Bernardino and filed for the Industrial Disability retirement.

7. Did you file a workers' compensation claim at the time?

Yes. (Exh. C7.)

8. Respondent and CalPERS exchanged letters on a fairly regular basis from the time respondent requested to change his service retirement to disability retirement until respondent filed an appeal from CalPERS' cancellation of his disability retirement application. CalPERS canceled his application on January 12, 2015, and respondent appealed on May 13, 2015. The exchange of letters was focused on respondent's claimed disability. CalPERS requested, and respondent provided, all of the medical records supporting respondent's disability claim. Those records were received in evidence and were considered in reaching the decision in this matter.

Summary of the Testimony

24. The testimony of CalPERS Retirement Program Specialist II Mari Cobbler is summarized as follows: She was not the analyst who originally determined that respondent's application was inexcusably late and that he failed to provide sufficient medical evidence supporting his disability claim, even after CalPERS requested him to do so; after reviewing the complete file concerning respondent she agreed with the previous analyst's assessment of respondent's disability application; most of the medical evidence respondent provided was "after the fact [after respondent retired in 2011, and after a subsequent traffic accident in 2012]"; the medical evidence available at the time respondent retired indicated that he was capable of performing his full duties as a Fire Chief; and immediately after respondent retired he continued working as Fire Chief under a contract as an independent contractor with the City.

25. Deputy City Manager Jeanette Vagnozzi's testimony is summarized as follows: She was not the Deputy City Manager at the time respondent retired; she reviewed respondent's personnel file; she found it "unusual that an incapacitated person would be hired to work [pursuant to contract] in the same position he retired from"; she also found it peculiar that respondent wrote two "retirement letters" to the city "one discussed his claimed incapacity, and one that did not"; there was a note in respondent's file that said respondent was retiring because he was "displeased with the termination of lifetime medical in October"; and after respondent finally left the City in December of 2012, he began employment with the City of San Bernardino in "Emergency Services."

26. The testimony of Police Chief Adams is summarized as follows: He and respondent discussed the first letter quoted in Finding 8, above (Exh. R-3), in 2011 and during the meeting respondent said he was going to present the letter to City Manager Stephen Dunn; Mr. Dunn had recently become the City Manager; and the City had not been “running smoothly,” there were budget issues and the City Manager (Mr. Dunn’s predecessor) was undergoing a federal investigation.

27. Respondent’s testimony is summarized as follows: He retired because his back surgery and cumulative back injuries prevented him from completing the duties the City was requiring him to perform as Fire Chief; the City was downsizing and would not replace certain employees, therefore, respondent was required to perform additional duties; his disability prevented him from performing those duties, so he chose to retire; he was led, by City officials, to believe that the City would submit to CalPERS, a disability application on his behalf; and he was also told by City staff that he had to wait until his Workers’ Compensation matter had been resolved before the City could submit his Disability Retirement application to CalPERS.

Analysis of the Evidence

28. There is no question that respondent suffered from back pain when he retired and that performing the extra duties imposed on him due to the City budget problems made performing those extra duties physically uncomfortable for him. He appears to have retired in 2011 due to a combination of reasons; mainly, his dissatisfaction with losing certain benefits if he remained a City employee. He chose to retire and remain working as Fire Chief with the City under contract because, his contractual duties were reduced - for example, pursuant to his contract he was a “non-responding Fire Chief”; and he could perform his contractual duties without the same discomfort he experienced when he performed the former, pre-retirement “extra duties” imposed on him due to budget cuts and downsizing.

Respondent’s testimony that at the time he retired City officials led him to believe that he could not apply to CalPERS for disability retirement until after his Workers’ Compensation matter had been settled and that the City would apply to CalPERS for him at the right time, is not credible. This is so because the evidence indicated that at the time respondent elected to take a service requirement he had not yet filed a Workers’ Compensation claim with the City.⁸

CalPERS notified respondent by letter, dated September 19, 2011, that he “may be entitled to receive a disability retirement if you are unable to work because of an illness or

8. This finding is based on the City’s responses to the questions posed by CalPERS (Finding 22, above) and the fact that the Agreed Medical Examination for the Workers’ Compensation claim did not occur until November 2, 2012, after his post-retirement, February 2012, car accident and resulting back injuries. The focus of the AME was on the November 2, 2012, injuries. (See Exh. R-7.)

injury.” (Finding 9, above.) Any reasonable person in respondent’s position would certainly have contacted CalPERS to gather information and advice concerning disability retirement. Respondent, however, neglected to do so.

Furthermore, in 2012, well before respondent filed his industrial disability application with CalPERS, he and at least two attorneys representing him in a CalPERS retirement matter were in frequent communication with CalPERS. Certainly, the question of disability retirement, if respondent were truly disabled on the date he filed for service retirement, would have been discussed and considered.

Respondent’s reliance on any representations by City personnel that his disability retirement application would be timely filed and pursued by the City was not reasonable under the circumstances presented in this case. Furthermore, the only competent medical evidence presented in this case indicated that at the time respondent chose to retire, he was not substantially incapacitated from performing his duties as Fire Chief for the City of Upland.

The medical evidence revealed that respondent had been released to full duty before he retired to see how he tolerated full duty. There were no medical records or medical opinions presented that indicated respondent could not tolerate performing his full duties as Fire Chief at the time he elected to retire. Due to respondent’s February 26, 2012, motor vehicle accident and resulting back injuries, the Agreed Medical Examination conducted on November 2, 2012, shed no light on respondent’s condition when he took service retirement from the City on September 30, 2011.

LEGAL CONCLUSIONS

Timeliness of Respondent’s Application for Disability Retirement

1. Government Code section 21154 is a statute of limitations. It establishes the mandatory time limitations for applying with CalPERS for disability retirement. In pertinent part, that section provides:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of Discontinuance of state service to the time of application

2. Respondent retired from service on September 30, 2011, and did not apply for disability retirement until May 8, 2014, almost three years after he retired. Thus, his application for disability retirement was untimely.

3. If a member's application is untimely, CalPERS can only forgive the untimeliness under certain statutorily specified conditions. As set forth in Government Code section 20160, the ability to correct mistakes in disability applications, including the timeliness of an application, are only permitted if there was a "correctable error or omission." Pursuant to section 20160, "Failure by a member . . . to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an 'error or omission' correctable under this section." As set forth in Finding 28, a reasonable person in the same or similar position as respondent would have consulted with CalPERS about disability retirement before electing to retire. Thus, respondent's failure to timely file his disability application does not constitute a "correctable error or omission." Accordingly, CalPERS properly canceled respondent's application.

Incapacitated for Performance of Duties

4. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

5. Pursuant to 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 . . . on the basis of competent medical opinion.

6. Government Code section 21156, subdivision (a), provides in part:

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

(2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion

7. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his or her customary duties, *even though doing so may be difficult or painful*, the employee is not

incapacitated and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887 [emphasis added].) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854.) Further, respondent must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Id.* at 863.)

8. Respondent failed to establish by a preponderance of the evidence that he was "incapacitated," as defined by the statutes and case law governing CalPERS' retirement system. In fact, the only competent medical opinion presented proved that respondent was not incapacitated for performance of his duties as Fire Chief. The results of the November 2, 2012, AME and subsequent, supplemental evaluation of additional medical evidence received in 2014, failed to establish that respondent was incapacitated as of the date he chose to retire. Respondent retired on September 30, 2011, and the AME was not done until November 2, 2012, over one year later. Between the date respondent retired and the date of the AME he was involved in a February 2012 motor vehicle accident. In fact, the AME focused largely on the 2012 accident in evaluating respondent's medical condition for the Workers' Compensation case. Respondent's condition as a result of the 2012 accident and any "cumulative trauma" from past back problems is not relevant in determining respondent's ability to perform the job functions of a Fire Chief on September 30, 2011. Thus, the only competent medical evidence concerning respondent's ability to perform his job functions at the time he elected to retire overwhelmingly established that he was fully able to do so. His subsequent work history served to buttress this conclusion.

ORDER

Respondent's appeal is denied. CalPERS properly cancelled his disability retirement application.

DATED: July 27, 2016

DocuSigned by:
Roy Hewitt
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ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings