

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 Industrial
Disability Retirement of:

FREDERICK J. ORSBORN,

Respondent,

and

CALIFORNIA DEPARTMENT OF
FORESTRY AND FIRE PROTECTION,

Respondent.

Case No. 2015-1027

OAH No. 2016040061

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on October 6, 2016, in Sacramento, California.

Charles H. Glauber, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Frederick J. Orsborn (respondent) represented himself.

There was no appearance by or on behalf of California Department of Forestry and Fire Protection (Cal Fire). CalPERS established that it duly served Cal Fire with a Notice of Hearing. Consequently, this matter proceeded as a default hearing against Cal Fire pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and this matter was submitted for decision on October 6, 2016.

ISSUE

On the basis of an orthopedic (left foot) condition, is respondent permanently disabled or substantially incapacitated from performing his usual and customary duties as a Fire Apparatus Engineer for Cal Fire?

FACTUAL FINDINGS

1. Respondent was employed as a Fire Apparatus Engineer for Cal Fire. On August 26, 2014, CalPERS received a Disability Retirement Election Application (Application) from respondent. In his Application, respondent stated that he was applying for "Service Pending Industrial Disability Retirement." Respondent retired for service effective August 29, 2014, and has been receiving his service retirement allowance since that date.

Respondent's Application

2. In his Application, respondent described his disability as: "Heel bone spur with plantar fascia inflammation." He stated that his disability occurred on August 7, 2014, from "running 2 miles at work." He described his limitations/preclusions as: "no running, climbing, walking." He stated that his disability affected his ability to perform his job duties of "walking or running on uneven rough terrain for 24 hours or longer."

3. By letter dated July 16, 2015, CalPERS notified respondent that, after reviewing the medical evidence, it had determined that his "orthopedic (left foot) condition" was "not permanently disabling." Consequently, CalPERS denied respondent's Application. By letter dated August 15, 2015, respondent appealed from CalPERS' denial.

Duties of a Fire Apparatus Engineer

4. CalPERS submitted two exhibits that described the duties of a Fire Apparatus Engineer: (1) a Cal Fire Physical/Mental Stress Job Description; and (2) a completed Physical Requirements of Position/Occupational Title form signed by respondent.

5. As set forth in Cal Fire's job description, a Fire Apparatus Engineer is a "key person in any fire crew system, on the fireline, or with a work crew," and is "primarily concerned with the care and operation of fire apparatus such as a pumper, water tank, or rescue vehicles in connection with extinguishing wildland, structural, and other fires, and in fire prevention and rescue work." During the "non-fire season," a Fire Apparatus Engineer "performs general station maintenance and repair work, assists in building roads, trails, and fences, and when required, does fire law inspections, investigates fire causes, prepares and presents fire prevention programs to the public, keeps records and prepares reports." A Fire Apparatus Engineer is "required to perform psychologically stressful and/or physically demanding duties consistent with firefighting, disaster response, and emergency medical

response, including working in isolated areas, walking or running on uneven terrain, and remaining on duty 24 hours or longer without a break while performing these duties.” As set forth in the job description, a Fire Apparatus Engineer must perform the following “arduous physical work”:

Duties involve field work requiring physical performance calling for above-average ability, endurance, and superior condition, including occasional demand for extraordinarily strenuous activities in emergencies, under adverse environmental conditions, and other 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.

6. As set forth in the Physical Requirements of Position/Occupational Title form, a Fire Apparatus Engineer: (1) occasionally (up to three hours a day) sits, runs, crawls, kneels, squats, bends and twists at the neck, engages in simple grasping, uses a keyboard and mouse, lifts and carries up to 100 pounds or more, and works with heavy equipment and bio-hazards; (2) frequently (three to six hours a day) climbs, bends and twists at the waist, reaches above and below his shoulders, pulls and pushes, engages in fine manipulation and power grasping, works at heights, and uses special visual or auditory protective equipment; and (3) constantly (over six hours a day) stands, walks, repetitively uses his hands, walks on uneven ground, is exposed to dust, gas, fumes and chemicals, and extreme temperature, humidity and wetness, operates foot controls, and engages in repetitive movement.

Expert Opinion

7. CalPERS retained Arthur M. Auerbach, M.D. to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Auerbach is board-certified in orthopedic surgery. Dr. Auerbach examined respondent, took a medical history, reviewed the duties of a Fire Apparatus Engineer and respondent’s medical records, and issued an IME report dated June 5, 2015. At the time of the IME, respondent was 57 years old, five feet nine inches tall, and weighed 235 pounds. Respondent told Dr. Auerbach that on August 7, 2014, he ran two miles while doing physical training to keep in shape. During the two-mile run, respondent developed pain in the bottom of his left foot near the attachment of the plantar fascia into the heel. Since that time, respondent experienced left foot pain. On March 16, 2015, an orthopedic surgeon performed a release of the plantar fascia on respondent’s left foot.

8. Respondent told Dr. Auerbach that he had constant pain in his left foot, which became worse with activity. At the time of the IME, Dr. Auerbach found that respondent had diffuse swelling in his left ankle and foot. He walked with a slight limp favoring his left foot. He was tender in the area of the surgery. After examining respondent, Dr. Auerbach diagnosed him as follows: “History of left plantar fasciitis post 3/16/2015 left plantar fascia surgery, recovering from surgery.”

9. In his IME report, Dr. Auerbach stated that respondent could not perform the following job duties because of his physical condition:

- He cannot stand constantly over 6 hours.
- He cannot run occasionally up to 3 hours.
- He cannot walk constantly over 6 hours.
- He is unable to walk at all over uneven ground. He cannot walk constantly on uneven ground over 6 hours.

Dr. Auerbach opined that respondent was “presently substantially incapacitated for the performance of his duties.” But Dr. Auerbach opined further that respondent’s incapacity was “temporary,” and that he expected that its duration would be “less than six months.” At the hearing, Dr. Auerbach testified that he expected that respondent would be sufficiently recovered to return to work about six months to one year after his surgery.

10. Respondent offered into evidence an Initial Orthopedic Consultation Evaluation dated September 16, 2016, prepared by Christopher Page, DPM. This evaluation report was admitted as administrative hearsay and has been considered to the extent permitted under Government Code section 11513, subdivision (d).¹ As set forth in the September 16, 2016 evaluation report, respondent described to Dr. Page the daily pain he experienced in his left foot when he walked on it, and the multiple treatments he had received, including injections, shoe inserts, physical therapy and surgery. Upon examination, Dr. Page found that respondent’s left foot had a high arch. Respondent reported sharp pain with palpation of the planter fascia along the medial band at the midfoot level. Dr. Page diagnosed respondent with “plantar fibromatosis” and “cavus foot.”²

11. At the hearing, Dr. Auerbach reviewed Dr. Page’s September 16, 2016 evaluation report. After reviewing this report, Dr. Auerbach testified that, based upon Dr. Page’s findings, respondent had not fully recovered, his surgery had not successfully corrected his foot problem, and he was still substantially unable to perform the duties of a Fire Apparatus Engineer. Dr. Auerbach recognized that plantar fasciitis surgery was not

¹ Government Code section 11513, subdivision (d), in relevant part, provides:

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

² The MedlinePlus Online Medical Dictionary defines “fibromatosis” to mean “a condition marked by the presence of or a tendency to develop multiple fibromas.” (<http://c.merriam-webster.com/medlineplus/fibromatosis>.) It defines a “cavus” foot as “a foot deformity characterized by an abnormally high arch.” (<http://c.merriam-webster.com/medlineplus/pes+cavus>.)

successful in some cases, but could not provide a percentage as to how often such surgery failed. Because Dr. Auerbach had not re-examined respondent, he could not offer a definitive opinion on whether respondent's substantial incapacity was permanent or of an extended and uncertain duration. But Dr. Auerbach believed that, based upon Dr. Page's findings, respondent "most probably" would not be able to return to work as a Fire Apparatus Engineer.

Respondent's Testimony and Exhibits

12. Respondent testified at the hearing. He explained that, as part of his job requirements for Cal Fire, he had to participate in one hour of physical training each day. On August 7, 2014, while he was running on pavement, he experienced pain in his left heel. He saw a physician assistant, a workers' compensation physician and Dr. Landaker, his orthopedic surgeon, about the severe pain he was experiencing. He received several different types of treatment for his plantar fasciitis, starting with a night boot, followed by a walking boot, cortisone injections and finally the surgery by Dr. Landaker in March 2015. He also attended multiple sessions of physical therapy.

13. In March 2016, Dr. Landaker retired. Respondent has recently been referred to Dr. Page in light of Dr. Landaker's retirement. Dr. Page conducted an initial evaluation on September 16, 2016, and recommended that respondent be sent for an MRI. The State Compensation Insurance Fund recently approved respondent for an MRI as recommended by Dr. Page.

14. Respondent experiences constant pain when he walks on his left foot. He has significantly curtailed his activities as a result of his foot pain. Because he felt he could no longer perform the duties of his job given his foot issues, he decided to retire early from state service.

15. Respondent did not call an expert to testify at the hearing. In addition to Dr. Page's September 16, 2016 evaluation report, respondent submitted a number of other documents, including: (1) a January 23, 2015 Qualified Medical Evaluation report written by Steven I. Subotnick, DPM, DC, in respondent's workers' compensation case; (2) March 2015 medical records from Stephen D. Landaker, M.D.; (3) a description of plantar fasciitis downloaded from the internet (which Dr. Auerbach reviewed and agreed was accurate); and (4) listings of respondent's doctor and physical therapy appointments. These documents were admitted as administrative hearsay under Government Code section 11513, subdivision (d).

Discussion

16. When all the evidence is considered, respondent established that his Application should be granted. Dr. Auerbach, CalPERS' expert, after examining respondent and reviewing his medical records in June 2015, opined that respondent was substantially incapacitated from performing his usual duties as a Fire Apparatus Engineer. But Dr.

Auerbach believed that respondent's substantial incapacity was temporary, and that he would sufficiently recover from his surgery in six months to one year to be able to return to his job. At the hearing, after reviewing Dr. Page's September 16, 2016 initial evaluation report, Dr. Auerbach testified that, although he could not opine definitively because he had not re-examined respondent, given the information included in Dr. Page's report, respondent's surgery had not successfully corrected his foot problems, and he was still substantially incapacitated from performing his usual job duties. Consequently, respondent "most probably" would not be able to return to work as a Fire Apparatus Engineer.

17. When Dr. Auerbach's IME report and testimony are considered in conjunction with respondent's testimony and submissions, there was sufficient evidence to establish that respondent is substantially incapacitated for an extended and uncertain duration from performing his usual and customary duties as a Fire Apparatus Engineer for Cal Fire. His Application should therefore be granted.

LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Fire Apparatus Engineer for Cal Fire, respondent is a state safety member of CalPERS, subject to Government Code section 21151.³

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

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

3. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.) The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, 863, explained that prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to

³ Government Code section 21151, in relevant part, provides:

(a) Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

support a finding of disability; a disability must be currently existing and not prospective in nature. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, the court found that discomfort, which may make it difficult for an employee to perform his duties, is not sufficient in itself to establish permanent incapacity. (See also, *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.)

4. When all the evidence in this matter is considered in light of the analyses in *Mansperger*, *Hosford*, *Smith*, and *Keck*, there was sufficient competent medical opinion to establish that respondent is substantially incapacitated for an extended and uncertain duration from performing his usual duties as a Fire Apparatus Engineer for Cal Fire. Consequently, his Application should be granted.

ORDER

The application of respondent Frederick J. Orsborn for disability retirement is GRANTED.⁴

DATED: October 7, 2016

DocuSigned by:

Karen Brandt

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KAREN J. BRANDT

Administrative Law Judge

Office of Administrative Hearings

⁴ As set forth in the Statement of Issues, any dispute as to whether respondent's disability is industrial or nonindustrial will be resolved pursuant to Government Code section 21166.