

ATTACHMENT A
THE PROPOSED DECISION

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for
Disability Retirement of:

ALFREDO MACIAS,

Respondent,

and

CALIFORNIA STATE LOTTERY,

Respondent.

Case No. 2014-1290

OAH No. 2015050214

PROPOSED DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, heard this matter on August 22, 2016, in San Diego, California.

Austa Wakily, Senior Staff Counsel, represented petitioner Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Alvin M. Gomez, Attorney at Law, represented respondent Alfredo Macias, who was present throughout the hearing.

No appearance was made by or on behalf of respondent California State Lottery.

The record remained open to allow for a closing brief to be submitted. The matter was submitted on September 6, 2016.

ISSUE

When he filed his disability application, was Mr. Macias substantially incapacitated from performing the regular and customary duties of a District Sales Representative for the California State Lottery due to his orthopedic conditions?

**CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM**

FILED

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Debra D. Nye-Perkins

FACTUAL FINDINGS

Procedural Background

1. On May 6, 2015, complainant filed the Statement of Issues in his official capacity.
2. Mr. Macias was employed as a District Sales Representative by the California State Lottery. By virtue of his employment, Mr. Macias is a state miscellaneous member of CalPERS subject to Government Code section 21150.
3. On May 29, 2013, Mr. Macias signed and filed an application for service pending disability retirement based on orthopedic conditions in the neck, toe, shoulder and knee. CalPERS denied his application for disability and notified him of that decision by letter dated May 13, 2014.
4. By letter dated June 10, 2014, Mr. Macias filed a timely appeal of CalPERS's decision to deny his application for disability retirement. This hearing followed.

The Usual Duties of a District Sales Representative

5. Three documents describing the usual duties required of a District Sales Representative for the California State Lottery were received in evidence. One of those documents, entitled "Physical Requirements of Position/Occupational Title," described the physical requirements of the position. The second document entitled "Duty Statement" described the essential functions of a District Sales Representative. The third document entitled "Physical Requirements of District Sales Representative" also described the physical requirements of the position.

6. District Sales Representatives must be able to perform all of the critical physical tasks listed in the three documents. The required tasks relevant to this matter, based on the testimony and reports of the medical expert, were for a six hour period: Sitting, standing, walking, bending at the neck and waist, twisting at the neck and waist, reaching above the shoulder, simple grasping, repetitive use of hands, lifting up to 25 pounds, walking on uneven ground, and driving. Additional required tasks occasionally for up to three hours were: Crawling, kneeling, climbing, squatting, and lifting up to 75 pounds. Other required tasks frequently for three to six hours were: Reaching below the shoulder, power grasping, and operating foot controls or repetitive movement. Other required tasks include use of hand carts frequently, and going up and down steps frequently.

Testimony of Alfredo Macias

7. Mr. Macias is currently 54 years old and was employed by the California State Lottery as a District Sales Representative beginning in 1985 until June 29, 2013. He worked in the San Diego regional office of the California State Lottery from 2010 to 2013

distributing lottery tickets, setting up play centers and servicing accounts at stores throughout Coronado, Imperial Beach, National City, San Ysidro and Otay Mesa. He also affixed marketing materials on store doors and windows and installed vending machines to dispense tickets in the stores. From 2010 to 2013, Mr. Macias drove a state issued Dodge Caravan about 20 to 30 miles per day and made a total of 16 stops along his route. He testified that he spent about three hours per day driving and about five hours per day working in stores. He stated that his Dodge Caravan had been retrofitted for him so that he only had to step up approximately one foot to get into the van. Mr. Macias stated that his job duties required him to squat, kneel and lift items.

8. Mr. Macias stated that he suffered an injury to his right knee in 2006 and had surgery on that knee in 2008. He stated that after the surgery he underwent physical therapy several times, but he was constantly aggravating the knee injury during his work. Mr. Macias also stated that in 2011 he injured his right toe by dropping a 40 pound box on the toe while working. He saw a physician at Kaiser Permanente for the toe injury. His doctor told him there was a possible fracture that required him to wear a boot, but the doctor sent him back to work. He saw another doctor regarding his toe, and after he did so, he was placed on medical leave for a couple of months. After he returned to work, Mr. Macias had continuous pain in his right toe and right knee that progressed throughout the day. Mr. Macias stated that he had pain when pressing the accelerator of the van and had pain when he pushed off with his foot to walk. He had pain when he used a hand cart, lifted boxes, knelt, and walked on uneven surfaces. Mr. Macias took naproxen during the day, which reduced the pain for about six hours, but the pain never completely disappeared. He took tramadol at night to relieve the pain, but he could not take that during the day while working because of its effects. Mr. Macias stated that the pain he experienced throughout the day affected his ability to concentrate, and he would frequently be in a bad mood by the end of the day because of the pain. After numerous complaints to his supervisor, he was provided a retrofitted step on his van to allow him easier entry into the van, but his supervisor told him to do the best he could and do his job. Mr. Macias stated that he spoke with his "back to work" coordinator and she told him that he should retire pending disability because his pain was preventing him from effectively doing his job. Mr. Macias stated that he enjoyed his job. He wanted to retire at age 55, but because his pain was unbearable, he simply could not work anymore, forcing him to retire at the age of 52.

9. According to Mr. Macias, Dr. Serocki, the physician hired by CalPERS to evaluate Mr. Macias, examined him for a total of 15 to 20 minutes. Mr. Macias stated that Dr. Serocki never asked him what physical activities he was required to perform to do his job and never asked him to demonstrate how he would squat, get into his van, or perform any other required task. Mr. Macias also stated that he had taken naproxen before his exam by Dr. Serocki in order to relieve his pain. However, Dr. Serocki never asked him if he had taken naproxen or any other medication before the exam.

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Testimony of John Serocki, M.D.

10. CalPERS retained John Serocki, M.D. to examine Mr. Macias to determine whether he could perform the duties of a District Sales Representative. Dr. Serocki is Board Certified in orthopedic surgery and specializes in knee and shoulder reconstructive surgery. He is licensed as a medical doctor in California, and has been a qualified medical examiner for the State of California since 1994. He has conducted numerous evaluations for CalPERS to determine whether an employee was substantially incapacitated from performing his or her duties.

As part of his assessment of Mr. Macias, Dr. Serocki reviewed two of the three documents discussed above regarding the job duties of Mr. Macias. Specifically, he reviewed the documents entitled "Physical Requirements of Position/Occupational Title" and the "Duty Statement" related to the job duties of a District Sale Representative, and Mr. Macias's medical reports that were provided by CalPERS. Dr. Serocki did not recall if he reviewed the two documents related to the physical requirements of a District Sale Representative before or after he examined Mr. Macias. However, in his report, he noted under "Medical Record Review" that he reviewed the "Job Duty Statement of a District Sales Representative" as part of his evaluation.

On January 16, 2014, Dr. Serocki conducted an Independent Medical Evaluation of Mr. Macias. Dr. Serocki summarized his findings in his report dated January 16, 2014. He interviewed Mr. Macias and obtained information regarding his background, health and occupational history, current medications, current activities, alcohol and drug history, and current complaints. Dr. Serocki noted that Mr. Macias did not complain of any pain in his neck or shoulder but did complain of pain in his knee and toe. He conducted a physical examination of Mr. Macias and provided his diagnostic impressions. Dr. Serocki concluded that Mr. Macias suffered from chronic right knee pain following a knee injury and arthroscopy in 2006, and persistent pain in his right great toe following an industrial injury in 2011. Dr. Serocki wrote that Mr. Macias has remained symptomatic despite his previous conservative course of treatment.

Based on his examination of Ms. Macias, Dr. Serocki concluded that Mr. Macias experienced slight tenderness and loss of motion in his foot but had a normal gait and no limp. Dr. Serocki noted that the range of motion in Mr. Macias' right knee was identical to that of his left knee, which were both normal. He stated that there did not appear to be a meniscal tear or other problem with Mr. Macias's right knee cap; he found no significant clinical finding in the exam or on an x-ray of his knee. Dr. Serocki observed that the x-ray of Mr. Macias's right foot showed some degree of arthritis in the right toe joint.

Dr. Serocki examined Mr. Macias in his office for less than one hour. Dr. Serocki testified that he did not recall the details of his examination of Mr. Macias without reviewing the information in his written report. Dr. Serocki also did not recall asking Mr. Macias what time of the day he took his pain medication or if he took the medication before visiting Dr.

Serocki. Dr. Serocki opined, based on his examination, that Mr. Macias was not substantially incapacitated.

Dr. Serocki testified that objective findings, such as the findings from an x-ray or MRI, are not influenced by a patient's symptoms. Dr. Serocki stated he has no doubt that Mr. Macias is experiencing pain, but the objective findings from the x-rays and MRIs do not match a finding that his pain makes him substantially incapacitated to perform his job duties. Dr. Serocki explained that the standard used by CalPERS for "substantially incapacitated" to perform job duties requires a finding that the applicant is having more than some difficulties performing the required tasks of the job. He stated that worker's compensation cases have a different and lower standard than that of CalPERS disability cases. Dr. Serocki opined that while Mr. Macias may have some difficulty performing some weight bearing activities, crawling, kneeling, climbing, or squatting, those difficulties do not render him incapable of performing the essential duties of his job as required by the "substantially incapacitated" standard.

11. After Dr. Serocki provided his report to CalPERS, CalPERS asked him to clarify it by answering whether he found Mr. Macias had any limitations with respect to his neck and shoulder.

On April 10, 2014, Dr. Serocki provided a letter to CalPERS that stated:

At the time of Mr. Macias' evaluation, he did not report any complaints involving his neck or shoulder. During his examination, there were no indications that he had any specific limitations with respect to the neck or the shoulder. Therefore, at least at this point, there is no indication that there are any limitations with respect to Mr. Macias' neck and shoulders.

12. On October 14, 2014, Dr. Serocki wrote a letter to CalPERS supplementing his previous report after he had an opportunity to review an April 7, 2014, report written by Dr. John Lane after Dr. Lane performed a medical evaluation of Mr. Macias. Dr. Serocki stated that, while he respects Dr. Lane's opinions regarding Mr. Macias's ability to do all the tasks of his position, he disagrees with his opinion that Mr. Macias was substantially incapacitated to perform his essential job duties. Specifically, Dr. Serocki stated that while Mr. Macias may have difficulty performing certain tasks, that alone was not enough to support findings of disability according to the CalPERS standard for substantially disabled.

Testimony of Khalid Bashir Ahmed, M.D.

13. Khalid Bashir Ahmed, M.D. has been board certified in orthopedic surgery since 1978. He finished his orthopedic surgery residency at University of Minnesota in 1976 and completed a fellowship in hand surgery and spine surgery at University of Minnesota. He was on the teaching faculty of University of Minnesota from 1977 to 1979. Dr. Ahmed has been in private practice in Southern California since 1979 and has six offices in different

cities in Southern California. His practice focuses on occupational and orthopedic medicine, and 75 percent of his work focuses on worker's compensation and occupational medicine cases. He has a surgery-oriented practice and performs a full spectrum of orthopedic surgery. Dr. Ahmed is Mr. Macias's primary treating physician for his orthopedic injuries.

14. Dr. Ahmed performed his initial examination of Mr. Macias on February 19, 2013. According to Dr. Ahmed, Mr. Macias complained of right knee pain and right big toe pain, but Dr. Ahmed performed an examination of Mr. Macias's entire body for completeness. Mr. Macias told Dr. Ahmed that he injured both his right toe and his right foot on August 31, 2011, while working, and that he had no problems with his foot prior to that injury. Mr. Macias reported to Dr. Ahmed that on August 31, 2011, he stopped his van at a drop off area and, after opening the hatch of the van, a 35 pound box fell on his right foot. Mr. Macias was sent to Kaiser Permanente for treatment and care of his foot. Dr. Ahmed took over Mr. Macias's care from Kaiser Permanente. Dr. Ahmed observed upon palpation that Mr. Macias's right big toe was tender and had limited mobility. Dr. Ahmed's examination of Mr. Macias's right knee revealed that it appeared to be normal with good mobility. Dr. Ahmed ordered an MRI of Mr. Macias's right knee and right foot. Dr. Ahmed ordered physical therapy for Mr. Macias and prescribed naproxen and Ultram for pain. At that time, Dr. Ahmed concluded that Mr. Macias was not able to perform his job and placed him on temporary total disability for one month, during which time Dr. Ahmed reviewed Mr. Macias's prior treatment records and also allowed for the MRI studies to be completed.

On May 14, 2013, Dr. Ahmed had a follow up appointment with Mr. Macias to discuss the findings from the MRI examinations. Dr. Ahmed documented his findings and discussions with Mr. Macias in a report. The MRI examination of the right knee showed a tear of the lateral meniscus with cartilage abnormalities and internal derangement. The MRI of the right toe showed degenerative joint disease and moderate osteoarthritic changes of the right toe. Dr. Ahmed recommended to Mr. Macias that he undergo arthroscopic surgery to repair the torn meniscus with a meniscectomy.

On June 25, 2013, Dr. Ahmed performed another follow up examination of Mr. Macias and recorded his findings in a report. According to Dr. Ahmed, Mr. Macias continued to complain of pain in his right knee and right toe and was awaiting approval for arthroscopic surgery on his right knee. Dr. Ahmed examined Mr. Macias's right knee and noted that it had restrictive mobility with tenderness along the joint. Mr. Macias stated that the right knee pain was getting worse, and physical therapy did not help much. Dr. Ahmed also noted that Mr. Macias had developed hallux rigidus, a very stiff painful big toe, indicative of very bad arthritis, which made it difficult to walk and do activities. Dr. Ahmed opined that having such a painful big toe made it difficult to push off with the foot or to otherwise use the foot, including depressing a gas pedal. Dr. Ahmed asked Mr. Macias to demonstrate how he gets into and out of his work van so Dr. Ahmed could observe Mr. Macias's his leg functions to see if he was able to perform his job duties. Dr. Ahmed observed that Mr. Macias had significant impairment of his leg functions because of pain, including pain in his hip because of the load on his leg from the knee and foot pain. Dr. Ahmed recommended knee surgery, as well as custom foot orthotics for Mr. Macias's right

foot to improve his gait and ambulation. Dr. Ahmed recommended that Mr. Macias remain temporarily totally disabled for six weeks.

15. Dr. Ahmed also reviewed the Agreed Medical Evaluation Report of Dr. John Lane written after Dr. Lane examined Mr. Macias on April 7, 2014, for worker's compensation purposes. Dr. Ahmed testified that Dr. Lane's findings were similar to his own findings regarding Mr. Macias's condition. Dr. Lane concluded that Mr. Macias was limited in his ability to perform prolonged weight bearing, as well as to squat, to kneel, or to repetitively climb and that he was permanently disabled. Dr. Lane concluded that Mr. Macias was unable to return to work at all.

Dr. Ahmed further opined that although both he and Dr. Lane utilized a worker's compensation standard for disability in their reports, under the higher CalPERS standard, Mr. Macias was substantially incapacitated to perform the essential duties of his job because the pain he experienced prevented him from performing the essential duties of his job. Dr. Ahmed also opined that his review of Dr. Sarocki's report showed that Dr. Sarocki failed to perform a proper examination of Mr. Macias, including his failure to even examine Mr. Macias's neck, shoulder, arms, back, etc. Instead, Dr. Sarocki only examined the right knee and right toe. Dr. Ahmed also believed that Dr. Sarocki did not properly examine the job requirements of Mr. Macias's position for a proper determination of whether Mr. Macias could perform his job duties.

16. Dr. Ahmed testified that in addition to his right knee and right foot pain, Mr. Macias also had pain in his shoulders and neck that caused him to have difficulty pulling, pushing and grasping. Dr. Ahmed stated that Mr. Macias would have difficulty walking, walking on uneven ground, sitting, and standing, particularly for over six hours. He also opined that Mr. Macias could not crawl, kneel or squat for up to three hours a day as his job requires. Dr. Ahmed stated that Mr. Macias would also have problems carrying over 25 pounds for up to six hours as his job required. He further opined that because of the toe pain Mr. Macias would not be able to use a gas pedal for up to six hours a day and would have difficulty balancing because of his compromised knee. Dr. Ahmed also stated that Mr. Macias would have difficulty using a hand cart because he had wrist pain. Dr. Ahmed noted that he had examined Mr. Marcia's wrist, but that Dr. Sarocki never examined it.

LEGAL CONCLUSIONS

Burden of Proof

1. Mr. Macias has the initial burden to establish that he was, at the time of his application, permanently disabled or substantially incapacitated from the performance of his usual and customary duties as a District Sales Representative. (Evid. Code, §§ 500; 550.) The standard of proof is a "preponderance of the evidence." (Evid. Code, § 115.)

2. The Public Employees' Retirement Law (Retirement Law) governs disability retirement and reinstatements and grants sole jurisdiction to CalPERS to make such determinations. (See Gov. Code, §§ 20026, 20125, 21154, 21156, 21190, 21192 and 21193.)

Applicable Statutes Regarding Applications for Disability Retirement

3. Government Code section 20026 provides in part:

“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. Government Code section 21150 provides in part:

(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.

5. Government Code section 21152 provides in pertinent part:

Application to the board for retirement of a member for disability may be made by:

[¶] . . . [¶]

(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

(d) The member or any person in his or her behalf.

6. Government Code section 21154 provides in part:

The application shall be made only (a) while the member is in state service On receipt of an application for disability retirement of a member . . . the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. . . .

7 Government Code section 21156 provides in part:

(a)(1) If the medical examination and other available information show . . . 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

Case Law Authorities

8 In order for Mr. Macias to receive a disability retirement, he must establish he is disabled and incapacitated for the performance of duty as a District Sales Representative with the California State Lottery. The phrase "incapacitated for the performance of duty" means "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Further, Mr. Macias must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863.)

9 The applicant in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations and to apprehend violators; issuing warnings and serving citations; serving warrants and making arrests. He suffered injury to his right arm while arresting a suspect. There was evidence that Mr. Mansperger could shoot a gun, drive a car, swim, row a boat (but with some difficulty), pick up a bucket of clams, pilot a boat and apprehend a prisoner (with some difficulty). He could not lift heavy weights or carry the prisoner away. The court noted "although the need for physical arrests does occur in petitioner's job, they are not a common occurrence for a fish and game warden." (*Id.* at p. 877.) Similarly, the need for Mr. Mansperger to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding Mr. Mansperger was not incapacitated for the performance of his duties, the court noted the activities 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." (*Id.* at p. 876.)

10 In *Hosford*, the court held that in determining whether an individual was substantially incapacitated from his "usual duties," the court must look to the duties actually performed by the individual, and not exclusively at the job descriptions. Horace Hosford, a state traffic officer with the California Highway Patrol, suffered a back injury lifting an unconscious victim. In determining eligibility for a disability retirement, the court evaluated Mr. Hosford's injuries according to the job duties required of his position as a sergeant, as well as the degree to which any physical problem might impair the performance of his duties. Thus, the actual and usual duties of the applicant must be the criteria upon which any

impairment is judged. Generalized job descriptions and physical standards are not controlling nor are actual but infrequently performed duties to be considered. The *Hosford* court found that although Mr. Hosford suffered some physical impairment, he could still substantially perform his usual duties.

The *Hosford* court also rejected Mr. Hosford's contention that he was substantially incapacitated from performing his usual and customary duties because his medical conditions created an increased risk of future injury. The court held the disability must be presently existing and not prospective in nature.

Evaluation

11 Competent medical opinions support a finding that Mr. Macias is disabled and substantially incapacitated from performance of the job duties of a District Sales Representative. In performing their evaluations of Mr. Macias, Dr. Ahmed interviewed Mr. Macias and discussed his actual job duties and activities, including asking for a demonstration of how he would get into and out of his van. There is no evidence that Dr. Saroski did more than review the job description documents related to all district sales representatives. Dr. Saroski did not consider the duties Mr. Macias actually performed, and did not examine Mr. Macias's neck or shoulder at all and, for that reason, his opinion regarding Mr. Macias's ability to perform his job duties is less persuasive.

12 Although Dr. Sarocki testified at the hearing, he had no independent recollection of the specifics of his examination of Mr. Macias and simply testified from his report. Dr. Sarocki testified that Mr. Macias's symptoms of pain were not supported by his objective findings on examination. However, Dr. Ahmed did find objective evidence that Mr. Macias had conditions (as verified by MRI findings) that could cause the discomfort and pain of which Mr. Macias complained. Dr. Sarocki spent only 15 minutes to one hour interviewing and examining Mr. Macias. His experience with job duties of district sales representatives was limited at best, and he did not discuss Mr. Macias's specific job duties with him.


13 In contrast, Dr. Ahmed examined Mr. Macias on at least three or four occasions, examined his entire body and extensively interviewed him regarding the tasks and duties related to a District Sales Representative. Dr. Ahmed verified that Mr. Macias experienced pain that prevented him from performing the essential duties of a district sales representative, including objective evidence such as MRI and x-rays; those findings were corroborated by Dr. Lane's independent examination of Mr. Macias. While both Dr. Lane and Dr. Ahmed utilized a worker's compensation standard for their findings regarding Mr. Macias, Dr. Ahmed testified that he understood the different standards applied by CalPERS, and maintained that Mr. Macias's disability met those higher CalPERS standards. Mr. Macias's testimony supported Dr. Ahmed's report and opinions of his ability, or lack thereof, to perform essential functions of his job. Based on the above, Mr. Macias established he is substantially incapacitated from performing the usual and customary duties of a district sales

representative with the California State Lottery within the meaning of *Mansberger* and *Hosford, supra.*

ORDER

Alfredo Macias's appeal of CalPERS's determination that he was not permanently disabled or incapacitated from performance of his duties as a District Sales Representative at the time he filed his application for disability is granted.

DATED: September 29, 2016

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DEBRA D. NYE-PERKINS
Administrative Law Judge
Office of Administrative Hearings