

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA

In the Matter of the Application for  
Disability Retirement of:

TERRANCE G. ROMAN,

and

DEPARTMENT OF INDUSTRIAL  
RELATIONS,

Respondents.

Agency Case No. 2013-0143

OAH No. 2015021169

**PROPOSED DECISION**

Administrative Law Judge Thomas Y. Lucero heard this matter on September 13, 2016, in San Luis Obispo, California.

Rory J. Coffie, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Terrance G. Roman, respondent, was self-represented.

The Department of Industrial Relations did not appear.

Oral and documentary evidence was received. The record was left open for respondent's submission of medical records by September 30, 2016 and response by CalPERS on or before October 7, 2016. At the hearing, CalPERS objected that any medical records respondent might submit should be admitted as "administrative hearsay," that is, subject to Government Code section 11513, subdivision (d).

With a two-page description of the records and their contents, respondent timely submitted medical records, to which CalPERS made no further objection. The documents were collectively marked Exhibit A and admitted subject to Government Code section 11513, subdivision (d).

The record was closed and the matter was submitted for decision on October 7, 2016.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED 9/11/16 2016  
*[Signature]*

## FACTUAL FINDINGS

1. Acting in her official capacity, Diane Alsop, Interim Chief of the Benefits Services Division of CalPERS, filed the statement of issues.

2. By virtue of his employment by the Department of Industrial Relations (DIR), Division of Workers Compensation, respondent is a state miscellaneous member of CalPERS, subject to Government Code section 21150. Respondent has the minimum service credit necessary to qualify for disability retirement.

3. On January 23, 2012, DIR submitted an application for respondent's disability retirement (application). DIR employed him as a Hearing Reporter. (Exhibit 3.)

4. The application was based on an orthopedic condition of the neck, back, shoulders, and knees. Attached to the application and included in Exhibit A is a medical report regarding a Fitness for Duty Examination performed on August 12, 2011 by Anthony G. Rodas, M.D., Q.M.E., A.M.E., Board-Certified in Internal Medicine and Board-Certified in Occupational Medicine. The report is quoted in part below.

5. Before acting on the application, CalPERS engaged an expert, Brendan V. McAdams, Jr., M.D., Diplomate, American Academy of Orthopedic Surgeons, who performed an Independent Medical Examination (IME) of respondent on August 29, 2012. Dr. McAdams also reviewed medical reports from physicians who had examined respondent in 2003 or later: (i) Michael S. Haverty, M.D., (ii) Jeffrey E. Spoo, M.D, and (iii) Dr. Rodas's Fitness for Duty Examination. Reports by these doctors are included in Exhibit A. Not included in Exhibit A, but mentioned in Dr. McAdams's IME report, are reports from (iv) a Dr. Patel, to whom respondent went for pain management at an unspecified time, (v) a Dr. Dandilia, who found at an unspecified time mild carpal tunnel syndrome of the left hand, and (vi) a Dr. Blackburn, a "back specialist," who examined respondent on September 14, 2012. (Exhibit 7.)

6. In a November 7, 2012 letter to respondent, CalPERS determined "you are not substantially incapacitated from the performance of your job duties as a Hearing Reporter with the Department of Industrial Relations. Therefore, the application for disability retirement is denied." (Exhibit 4.)

7. In a November 29, 2012 letter, respondent timely appealed the denial. (Exhibit 5.)

8. The issue on appeal is whether respondent is substantially incapacitated from the performance of his job duties as a DIR Hearing Reporter on the basis of the orthopedic condition of his neck, back, shoulders, and knees.

### *Respondent's Job Description*

9. Respondent, 73 years old, held his position as a Hearing Reporter for approximately 15 years, starting in 1995. His last day on the job was August 11, 2010. Before 1995, respondent worked for several years as a security guard.

10. The DIR's Division of Workers Compensation publishes the duties of a Hearing Reporter, including this summary:

The Hearing Reporter takes verbatim accounts of conferences, hearings, proceedings, trials, and other formal or informal meetings in machine shorthand and transcribes verbatim accounts of proceedings, hearings, and other meetings. (Exhibit 8.)

11. On January 23, 2012, Victoria Goodwin, Staff Services Manager II, DIR, Division of Workers Compensation, provided CalPERS, on a form it supplied, a description of respondent's duties, the "Physical Requirements of Position/Occupational Title." Ms. Goodwin indicated that on the job for over six hours per day respondent was required: (i) to sit for long periods, (ii) twist his neck, (iii) engage in fine manipulation, and (iv) repeatedly use his hands to work a keyboard and computer mouse; she also indicated that occasionally respondent's job required: (v) reaching above and below the shoulder, (vi) pushing and pulling, and (vii) lifting or carrying weight up to 25 pounds. (Exhibit 9.)

### *History of Injuries*

12. In January 2003, respondent started treatment with Dr. Haverty, who continues to treat him. Dr. Haverty's reports supplement and explain respondent's testimony. Dr. Haverty's report dated February 25, 2005 stated in part:

The patient comes in with a complaint of back pain. The pain is achy in nature. The pain has been present for 1 month. The pain is in the right low back. The pain is made worse by sitting. The pain is made worse by bending. There is no numbness. There is no reported weakness. The patient has had previous episodes of back pain.

Dr. Haverty's report dated February 23, 2006 stated in part:

The patient comes in with complaints of right knee pain. The pain started about 1 week ago. It started with low back pain. (Exhibit A.)

13. Approximately eight years ago, respondent's symptoms increased, especially in his back. Seeking further treatment from Dr. Haverty, respondent was referred to physical therapy. He underwent the therapy and continued to work. The therapy provided only brief respite from his symptoms and he soon discontinued it. In about the same period, Dr. Haverty and a pain specialist advised that injections and back surgery might be advisable. Respondent declined invasive treatment.

14. In approximately 2009, respondent slipped and fell down a few stairs at work, injuring his knee. He did not seek treatment immediately. Some months before he stopped working in 2010, respondent felt sharply increased back pain after he was required to move into a new office, to which he carried boxes of documents and small belongings.

15. In a report dated May 11, 2010, Dr. Haverty stated in part:

The patient has had back pain for years. He had an MRI in 2006 showing disk disease and spinal stenosis. He works as a court reporter. He has to sit for hours at a time. Sitting causes pain and it has been getting gradually worse over the alst [sic] year. He now has to get up after even 20 min to stand. He has been through PT in the past and there was temporary improvement but the pain came back. . . . [I]t is work that is making the problem worse . . . .  
(Exhibit A.)

16. Dr. Haverty's August 11, 2010 report, the last day respondent worked, noted that respondent was suffering back pain, and stated in part:

He continues to have pain in his back radiating down his legs. It comes on with any long period or sitting. It seems better if he can stand or walk. In his job as a court reporter this is not an option. I did fill out the disability form, and told the patient I marked that I thought this was work related. I also gave him a note to give to his supervisor limiting him to sitting no more than 30 min. and saying this is a work related injury. (Exhibit A.)

17. Respondent had another minor slip and fall in approximately mid-2011, hurting his right shoulder. Physical therapy for this injury slowly relieved some of his shoulder pain. He continues to experience pain, especially in his lower back, knees, and shoulders, which is not constant, and is negligible at times.

18. The August 12, 2011 Fitness for Duty Examination performed by Dr. Rodas, included in Exhibit A, stated in part:

The patient does not have any significant limitations in repetitive reaching and doing fingering or lifting and would have no limitations in a competitive 8-hour work day using the upper extremities. However, at this time, the patient has moderate to significant impairment using the right arm for reaching overhead as a result of the shoulder injury.

19. Other medical reports in Exhibit A that respondent submitted are from: (i) Paul E. Christensen, M.D., (ii) Thomas J. Church, M.D., (iii) Arthur C. Duberg, M.D., (iv) Alex Harrison, M.D., F.A.C.C., (v) Dr. Haverty, (vi) Erik M. Olson, M.D., (vii) Dr. Rodas, (ix) Jeffrey E. Spoo, M.D., (x) William Wright, M.D., and (xi) Mark A. Ziemba, M.D. Like Dr. Haverty's, these medical reports were considered to the extent permitted under Government Code section 11513, subdivision (d), for purposes of supplementing or explaining other medical evidence and respondent's testimony regarding his condition.

20. Respondent left his position as a reporter because of pain, especially in his back, knees, neck, and shoulders. The pain is not constant. On some days it feels disabling, but on others it is negligible. An example is August 29, 2012, the day that respondent was examined in an independent medical evaluation (IME) by CalPERS expert, Dr. McAdams. As respondent testified, he felt relatively good as he was being examined. Dr. McAdams summarizes the ailments respondent said he had experienced in the recent past:

[Respondent] has not worked since August 2010 because Dr. Michael Haverty took him off work. Dr. Haverty is the patient's family doctor. He states that at that point in time, he was having so much pain in his back, particularly after sitting for any length of time and getting up, that he was just unable to work. He states that he initially had low back pain in the left side going to his left leg and now that has transferred to his right leg to the buttocks, sometimes to the knee, but never beyond the knee. He furthermore describes some buzzing in his neck on the left side that goes down to his shoulder . . . .

Respondent's testimony at hearing was roughly consistent with Dr. McAdams's description.

21. In a March 22, 2012 report, Dr. Haverty noted that respondent had had tingling in his left upper arm for six months, without weakness or pain, however. Dr. Haverty also treats respondent for diabetes mellitus, neuropathy, and spinal stenosis, as indicated in reports from the doctor, such those dated August 29, 2013, several reports in the latter half of 2014, and reports dated February 20, 2015 and June 10, 2015. Dr. Haverty noted in an October 2, 2014 report that respondent's neuropathy, causing tingling and coldness in his feet, among other symptoms, was likely due to either diabetes or spinal stenosis. (Exhibit A.)

#### *Expert Testimony at Hearing*

22. Dr. McAdams testified at the hearing regarding his examination of respondent, as set out in his IME report. He did not at the hearing discuss reports by other physicians. In addition to taking a history of respondent's description of his condition, Dr. McAdams testified he closely observed respondent throughout the IME, taking note of how he walked about and otherwise moved and whether the movements appeared to cause respondent pain or discomfort.

A. Walking: Dr. McAdams observed that respondent walked about with no discomfort.

B. Limb movements: Dr. McAdams observed that respondent had no difficulty bending over to remove his pants, shirt, and shoes, in preparing to be examined.

C. Flexion: As respondent was standing erect and facing away, Dr. McAdams asked him to bend forward toward the floor as far as he could comfortably go. Respondent had good flexion, able to forward flex his fingertips to within two inches of the floor.

Respondent was also able to rotate his body with his feet fixed to the floor without apparent difficulty.

D. Extension: Respondent showed good extension upon being asked to stand up and lean back as far as he comfortably could.

E. Range of motion: various observations indicated to Dr. McAdams no significant limitation of range of motion.

F. Fingers: Dr. McAdams percussed or tapped the fingers to test for tingling or a sensation of "pins and needles," testing for irritated nerves and found a slight positive for Tinel's Sign.

G. Dr. McAdams diagnosed respondent as suffering: degenerative arthritis, of the right shoulder and of the low back and cervical spine; and degenerative joint disease of the knees.

H. Dr. McAdams noted that respondent's degenerative arthritis and joint disease were not accompanied by any limitation of range of motion or neurologic defects.

I. Dr. McAdams concluded: "There are no specific job duties that Mr. Roman is unable to perform because of any kind of physical condition" and respondent is "not substantially incapacitated from the performance of his usual duties . . ." (Exhibit 7.)

23. Respondent testified at hearing that he is no longer able to work. He noted that, as in the three days before the hearing, he has at times suffered disabling pain. At such times respondent is mostly immobile and reliant on a heat pad to lessen his pain.

## LEGAL CONCLUSIONS

1. 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 disability retirement. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

2. Government Code section 21150, subdivision (a) provides in pertinent part:

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 . . . .

3. Government Code section 20026, states, in pertinent 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. “Incapacity for performance of duty” means “the substantial inability of the applicant to perform his usual duties,” as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) The increased risk of further injury is not sufficient to establish current incapacity. The disability must exist in the present. Restrictions imposed only because of a risk of future injury are insufficient to support a finding of disability. (*Ibid.*, 77 Cal.App.3d at 862-863.)

5. Respondent’s testimony was entirely credible. There is no doubt that he suffers pain, at times disabling, including from minor injuries and from sitting for long periods to take testimony down verbatim, as well as from performing other, lesser duties of the job he held at DIR.

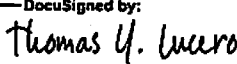
6. However, it was not established through competent medical evidence that respondent’s orthopedic conditions substantially incapacitate him from the performance of his usual and regular duties as a Hearing Reporter. Dr. McAdams’s report and testimony comprised the only competent and direct medical evidence in this case regarding incapacity for performance of duty. Dr. McAdams recognized that respondent experienced discomfort and difficulty performing certain activities, but he nevertheless opined that there are no job duties that respondent could not perform because of his physical condition, and that respondent is not substantially incapacitated for the performance of his duties. Respondent presented no competent medical evidence to the contrary.

7. Respondent did not meet his burden of showing that at the time of the application for disability retirement, on the basis of orthopedic conditions, he was substantially incapacitated for performance of his duties as a Hearing Officer.

## ORDER

The appeal of respondent Terrance G. Roman is denied.

Dated: November 7, 2016

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THOMAS Y. LUCERO  
Administrative Law Judge  
Office of Administrative Hearings