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: ROBERT PIERCE, Respondent, and CALIFORNIA DEPARTMENT OF STATE HOSPITALS, COALINGA SECURE TREATMENT FACILITY, Respondent.	Case No. 2016-0896 OAH No. 2016110474

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on February 9, 2017, in Riverside, California.

Charles Glauberman, Staff Attorney, represented complainant, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS), State of California.

Respondent, Robert Pierce, represented himself.[1]

No appearance was made on behalf of respondent, California Department of State Hospitals.

The matter was submitted on February 9, 2017.

[1] Respondent requested a continuance at the commencement of hearing, claiming the desire to hire counsel. Respondent stated he had an attorney helping him but the attorney stopped helping him "two weeks ago." Respondent never had a counsel of record. Respondent never requested a continuance prior to the commencement of the hearing. The Notice of Hearing was served on respondent on December 14, 2016. Thus, respondent's request was denied for lack of good cause, pursuant to Government Code section 11524.

ISSUE

Is respondent permanently disabled or incapacitated from performing the usual and customary duties of a psychiatric technician?

FACTUAL FINDINGS

General Background

1. Respondent started work as a psychiatric technician with the California Department of State Hospitals in February 2014. By virtue of such employment, respondent is a member of CalPERS.

2. Respondent was injured at work on April 17, 2014, while restraining a combative patient with the assistance of four other state hospital employees. He went to the hospital clinic to be treated for a small bite to his arm. Respondent testified that he did not notice any problems with his back at that time, perhaps, because "adrenaline" was still rushing through his body. Later that same day, he went to the Coalinga Medical Center to be treated further for the bite. According to respondent, when he arrived at the medical center, his pain was so intense that he could "barely move." The next day, he went to a "workers' compensation doctor" who, respondent said, put him off work for a "severe back injury."

3. Respondent said he returned to limited duty in May 2014, and worked in the office doing paperwork and computer work for 60 days. Between July 2014 and December 2014, respondent fluctuated between full duty and modified duty due to "pain." Respondent went on leave after December 2014 for "about a year."

4. Respondent filed a disability retirement election application on October 23, 2015. In the application, respondent claimed to be disabled as a result of "lower spine, back, left hip, and left upper arm." He did not specify what the disability was. He claimed he was unable to lift or carry anything over 20 pounds, could not bend or twist, could not stand or walk for long periods of time, and could not have contact with patients.[2]

5. CalPERS retained James Fait, M.D., on April 13, 2016, to conduct an independent medical examination. Dr. Fait conducted that examination on April 18, 2016, and prepared a report detailing his examination and conclusions. Dr. Fait concluded respondent was not substantially incapacitated from performing the usual and customary duties of a psychiatric technician.

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[2] Respondent's employer also filed a disability retirement election application on November 16, 2015, on his behalf.

6. On July 1, 2016, CalPERS denied respondent's disability retirement election application, based on a comprehensive review of respondent's medical records, as well as Dr. Fait's report.

7. In July 2016, respondent's employer ordered him back to work. Respondent arrived at the facility with his union representative. Respondent told his employer he was ready and willing, but unable, to return to work because of his ongoing pain. Based on respondent's representations that he could not return to work, his employer asked him to provide a resume in order to identify other positions to accommodate his claimed limitations. According to his employer, respondent never submitted a resume. Respondent claimed he did submit a resume. At any rate, no vacant positions were located and respondent was terminated from his position as a psychiatric technician.

8. Respondent timely appealed CalPERS's denial of his application for a disability retirement; this hearing ensued.

Duties and Physical Requirements of a Psychiatric Technician

9. The official duty statement pertaining to a psychiatric technician requires an employee to primarily supervise patients and provide a basic level of general behavioral psychiatric services to mentally ill inmates. A psychiatric technician, generally, is required to monitor patient activities, group therapy sessions, search for drugs and/or contraband, inspect facilities to identify security breaches, apply restraints, engage in general housekeeping duties and respond to emergencies. Other duties include, but are not limited to, the ability to teach patients health-related information, observe patient behavior, complete nursing assessments, and engage in therapeutic relationships.

10. The physical requirements of a psychiatric technician relevant to respondent's case are described by his employer as follows: lifting up to 50 pounds, sitting, running, kneeling, crawling, climbing, squatting, bending, twisting, reaching, pushing and pulling, among others. A psychiatric technician is required to frequently stand, walk, manipulate objects, grasp objects, and repetitively use his or her hands. A psychiatric technician is never required to lift or carry over 50 pounds, walk on uneven ground, drive, or work with heavy equipment.

Dr. Fait's Independent Medical Examination

11. Dr. Fait testified at the hearing regarding his independent medical evaluation on April 13, 2015, and his report. Dr. Fait is a board certified orthopedic surgeon. He obtained his medical degree in 1996 from the University of California, Davis. Following medical school, he completed his internship in surgery and his residency in orthopedic surgery. Dr. Fait also completed post-doctoral training in hip and knee reconstruction.

After completing his residency, Dr. Fait worked at Kaiser Permanente for approximately 11 years in the Department of Orthopedic Surgery. When he left Kaiser, he

worked in private practice for three years performing orthopedic surgery. Dr. Fait specializes in disorders of the joints or bones, predominantly joints and/or bones located in the back, mid-back, neck and extremities. He completes both operative and non-operative assessments of patients suffering from conditions of the joints and bones, treats fractures, performs reconstructive surgery, and treats patients for degenerative conditions.

Dr. Fait is familiar with the standard used by CalPERS to determine whether someone is substantially incapacitated from performing his or her usual and customary duties for purposes of an industrial disability retirement. CalPERS attached a letter describing the standard with the letter sent to Dr. Fait when it requested he evaluate respondent.

Dr. Fait conducted an interview with respondent regarding the mechanism of injury and his medical history. Dr. Fait's report indicated that respondent told him he twisted his back while restraining a patient, and although he did not have pain, he noted "tightness" and "pulling."[3] Respondent told Dr. Fait he walked to the hospital clinic where he received treatment for the bite. At that point, he found out the patient who had bitten him was Hepatitis C positive. Respondent told Dr. Fait he was sent to the Coalinga Regional Medical Center for further treatment, and when he arrived at the medical center, he had "severe pain."

Dr. Fait reviewed respondent's medical history, which included: duty statements for respondent's position; respondent's disability retirement election application; and respondent's past treatment history. In October 2015, right before respondent filed his disability retirement election application, a physician's report from J.C. Dunn, M.D., gave prophylactic restrictions as follows: "no bending or stooping, occasional twisting, allow sitting and standing for comfort, no prolonged walking or standing." Dr. Fait testified that multiple care providers put respondent back to work on full duty, although respondent never did return to full duty.

Dr. Fait reviewed an MRI conducted two years before he saw respondent which showed some degeneration in one of respondent's lumbar discs, but noted that the disc was not bulging to a point where it pinched any nerves. Dr. Fait also noted that the bulging disc could have been acute or chronic; in other words, there is no way to tell when or why the disc began to bulge.

Dr. Fait examined respondent's shoulders, upper arms, lumbar spine, reflexes, and extremities. Dr. Fait explained that he did not find any objective symptoms of damage or injury that would corroborate respondent's subjective complaints of back pain. He said one would expect to find that the circumferential measurements on the left side would be less than that on the right due to disuse, and atrophy on the allegedly injured side. Dr. Fait found respondent's circumferential measurements to be equivalent to each other and no evidence of

[3] This statement respondent made to Dr. Fait contradicted respondent's testimony concerning his injury. He told Dr. Fait he noted tightness and pulling in his back right after the patient was restrained. In his testimony, however, respondent said he did not notice a back injury or pain until he arrived at the Coalinga Regional Medical Center.

atrophy. Similarly, respondent's reflexes in the lower extremities were equivalent and unremarkable, meaning there was no indication of injury to the back.

Respondent's range of motion in the shoulders was normal. He did not have any crepitus (popping or grinding) in the shoulder. Dr. Fait explained that palpation is pushing on various landmarks of the body to determine unusual movement that would indicate abnormalities or inflammation of the shoulder. Dr. Fait found nothing unusual when he palpated respondent's upper arms. He also noted blood flow to the shoulders was normal. Respondent's manual strength and sensation in his lower extremities was also determined to be normal.

Dr. Fait also reviewed a document signed by respondent on January 19, 2016, when he commenced employment at Anka Behavioral Health, Inc. (Anka), as a vocational nurse. Dr. Fait noted that the essential functions of the vocational nurse position required respondent be able to lift 40 pounds, navigate stairs, and perform virtually the same physical requirements as his psychiatric technician position.

Dr. Fait diagnosed respondent with lumbar spine degenerative facet arthrosis, degenerative disc disease, and an annular tear at L5-S1 (as viewed on the two-year old MRI). Dr. Fait wrote in his report:

> On examination today, I do note observable pain behaviors and I do suspect a degree of symptom magnification in this case. Overall, while there are complaints of persistent left-sided low back pain and tenderness and paraspinal spasm with restricted range of motion in the lower lumbar spine, there are no complaints of radiating symptoms to the right or left lower extremity, and I find no evidence of sciatica or radiculopathy on physical examination.
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> [¶] . . . [¶]
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> Physical requirements of the position do indicate a need to lift between 25 and 50 pounds occasionally and I note that the examinee himself has attested in his job description for Anka Behavioral Health an ability to lift at least 40 pounds a few times a week as well as an ability to navigate several flights of stairs, perform facility chores and errands, and drive safely in heavy and inclement weather. This would suggest the examinee himself feels capable of sitting, standing, walking, bending at the neck and waist, [and] reaching at the upper and lower extremities to perform facility chores.
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> [¶] . . . [¶]

> [I]n my opinion, there are no specific job duties that the member is unable to perform because of a physical condition either to his low back or upper extremities.
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> While [respondent] reports complaints of pain in the lower back . . . I find no verifiable evidence of atrophy, weakness, radiculopathy, or functional impairment in the right or left lower extremity. Furthermore, the MRI while demonstrating degenerative changes in the facet joints, does not demonstrate significant evidence of neural foraminal or central spinal stenosis that would reasonably result in impaired function of the lower extremities.
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> [I]n my opinion, the member is not substantially incapacitated for the performance of his . . . duties.
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> [T]he member's [complaints] of pain and loss of function as well as loss of range of motion does not correlate with the relatively mild findings on the MRI . . . .

Dr. Fait also noted that the degeneration of respondent's lumbar disc was a pre-existing condition, not caused by his employment at the state hospital, and likely would have come on at some point in his life regardless of his injury at work in April 2016. Dr. Fait noted, however, that the incident in April 2016 likely accelerated the degeneration.[4]

Evidence Presented by Respondent

12. Respondent testified that he has been trying to get a doctor to treat him for the last year and was just recently approved by the State Compensation Insurance Fund for treatment. Respondent said he is in severe pain.

13. Regarding why he left his employment, respondent said he met with his human resources department after he was ordered to return to work in July 2016, and he was ready and willing, but in too much pain to go to work. Respondent said he did give his employer a resume, but his employer told him there were no open positions for him.

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[4] Dr. Fait reviewed a video made by an investigator for CalPERS purportedly showing respondent walking a very short distance without any evidence of pain. The video was not submitted as evidence. The investigative report of the investigator's observations was submitted as evidence. The report constituted administrative hearsay, and Dr. Fait, as an expert, is entitled to consider hearsay evidence in rendering a conclusion. The alleged video evidence and investigative report of the video, however, were not considered in rendering this proposed decision, as they did not supplement or explain any direct evidence.

14. Regarding his position at Anka, respondent said he signed the document indicating the essential functions of that position, which included a requirement that he lift up to 40 pounds. However, respondent said he agreed with that employer prior to commencing employment that he would work in a modified manner, where he could sit or stand when he wanted, not be subjected to any prolonged standing or sitting, and not engage in any bending or twisting. Respondent did not provide any evidence of this claimed agreement beyond his own statement and the document containing the job description did not contain any such agreement. Further, respondent said that the position was not like his position at the state hospital, which required physical restraint of patients. Respondent said if a patient becomes disorderly at Anka, they call the police. Respondent is no longer employed at Anka.

15. Respondent said he does not feel he can do the job of a psychiatric technician because he "cannot physically move" in a manner with patients should the need for physical restraint arise. Respondent is concerned that going back to work in his position might exacerbate his claimed back injury.

16. Respondent did not present any medical records concerning his claimed injury and did not present any expert medical testimony to contradict Dr. Fait's examination, diagnosis, or conclusion.

Courtroom Observations

17. Prior to the commencement of the hearing, respondent sat quietly in his seat. He was not fidgeting. He did not make any unusual movements. His respirations appeared normal. When respondent requested a continuance of the hearing, he also appeared normal. However, after the continuance was denied, respondent began groaning on and off as if he were in pain. His respirations became shallow. From time to time, he would gasp and shift in his chair. When asked if he was able to continue, respondent said he was in pain but could continue. He continued with the same behavior during the entirety of Dr. Fait's testimony.

When respondent presented his case, however, his conduct changed. He no longer shifted about in his chair. He no longer gasped or exhibited shallow breathing. His testimony was clear and concise. He obtained documents in front of him without incident. He did not exhibit any outward manifestations of pain. Similarly, during respondent's closing argument, he did not exhibit any outward signs of pain. His breathing was normal. His mannerisms were normal. He did not shift around in his chair.

Respondent's actions during the hearing call into question the veracity of his statements about his alleged pain. Dr. Fait opined that respondent was magnifying his symptoms during the examination. Respondent's actions during the hearing also seemed to support Dr. Fait's opinion.

LEGAL CONCLUSIONS

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

Applicable Statutes

2. 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.

3. Government Code section 21151, subdivision (a), provides in part:

> 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.

4. 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 . . . .
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> (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 and shall not use disability retirement as a substitute for the disciplinary process. . . .

Appellate Authority

5. "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 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.) 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.)

Cause Does Not Exist to Grant Respondent's Application for An Industrial Disability Retirement

6. A preponderance of the competent medical evidence and testimonial evidence established that respondent is not substantially incapacitated from performing the usual and customary duties of a psychiatric technician with the Department of State Hospitals. Respondent was cleared to return to work following his injury. His employer set a date for him to return to work, and he did not, claiming continued pain. Subsequent to his termination, respondent underwent an examination by Dr. Fait. Dr. Fait conducted a comprehensive examination of respondent, noting the likelihood of symptom magnification. Dr. Fait did not find any objective symptoms to support respondent's claim of pain. Dr. Fait reviewed the duties and physical requirements of respondent's job and concluded there was no duty or physical requirement that respondent could not perform or meet.

Respondent's claim of extreme pain to the point of not being able to do his job, in light of the competent medical evidence to the contrary, is highly suspect. Indeed, respondent's behaviors changed throughout the hearing also evidencing a degree of symptom magnification, as Dr. Fait also observed during his examination. Regardless of whether respondent's complaint of pain is credible and authentic, pain or difficulty in performing one's job duties is not sufficient to obtain an industrial disability retirement. No evidence, other than respondent's testimony, demonstrated that he cannot perform the listed physical requirements or job duties of a psychiatric technician. Indeed, respondent himself noted that he is concerned about restraining patients; a prospective concern or speculative worry about worsening a condition, although reasonable, does not meet the standard to grant an application for an industrial disability retirement.

Finally, no competent medical evidence was presented to contradict Dr. Fait's conclusion that respondent is not substantially incapacitated from performing the usual and customary duties of a psychiatric technician with the Department of State Hospitals. Respondent's testimony is insufficient to meet his burden.

Accordingly, respondent's application for an industrial disability retirement is denied.

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ORDER

Respondent's appeal is denied. The determination by CalPERS that respondent Robert Pierce is not substantially incapacitated from the performance of his usual and customary duties of a psychiatric technician with the Department of State Hospitals, is affirmed.

DATED: February 16, 2017.

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Kimberly Belvedere
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KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings