

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:

Case No. 2016-0127

GARY L. FIEF,

OAH No. 2016071111

Respondent,

and

CALIFORNIA HIGHWAY PATROL,

Respondent.

PROPOSED DECISION

This matter was heard before Administrative Law Judge (ALJ) John E. DeCure, Office of Administrative Hearings (OAH), State of California, on June 13, 2017, in Fresno, California.

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

Gary L. Fief (respondent) was present at the hearing and represented himself.

There was no appearance by or on behalf of the California Highway Patrol (CHP). CalPERS established that CHP was properly served with the Notice of Hearing. Consequently, this matter proceeded as a default hearing against CHP under Government Code section 11520.

Evidence was received and argument was heard. The record was held open for respondent to submit further evidence by June 20, 2017, and CalPERS to lodge any objections by June 27, 2017. On June 14, 2017, respondent submitted a copy of an undated letter he had sent to a CalPERS analyst, Jonathan O'Haver. The letter was marked as Exhibit U. On June 19, 2017, respondent submitted a faxed copy of his undated letter to Mr. O'Haver, containing a facsimile date-stamp. This second letter was marked as Exhibit V. CalPERS did not lodge any objections. The record was closed and the matter was submitted for decision on June 27, 2017.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED July 11 20 17
Silvia Serrano

ISSUE

On the basis of an orthopedic (neck and back) condition, is respondent permanently incapacitated for the performance of his usual duties as a CHP Assistant Chief?

FACTUAL FINDINGS

1. Respondent is 61 years old. He began working as an Officer employed by CHP in approximately 1990, and his last position held was as an Assistant Chief. On February 18, 2015, respondent submitted a Disability Retirement Election Application (Application) to CalPERS for industrial disability retirement. Respondent retired for service effective June 30, 2009, and has been receiving his service retirement allowance since that date.

Respondent's Disability Retirement Application

2. Respondent's Application identified the application type as "Industrial Disability Retirement." In the Application, respondent's disability was described as:

Degenerative disc disease, herniated nucleus pulposus, spondylosis [without] myelopathy[,] thoracic pain chronic – cervical spondylosis and cervical disk herniation C4-C5 and hypertrophy.

3. The Application identified the date respondent's disability occurred as "November 21, 2003- cumulative trauma through [June 28,] 2009." In response to the question asking how the disability occurred, the Application stated: "On duty motor vehicle accident broadsided by [illegible] driver- cumulative trauma through [June 28] 2009."

4. The Application described respondent's "limitations/preclusions" due to his injuries as:

Cannot sit/stand long periods of time- cannot push-pull[,] drag people without pain[.] Cannot run/jump of (sic) fight people [illegible] weight 10 [pounds-plus].

5. In response to the question asking how respondent's injury affected his ability to perform his job, the Application stated:

See above[.] Additionally cannot bend more than 90 [degrees,] pick up objects or carry without pain- spasms occur occasionally- have to stop to catch breath[.] Pain is moderate to chronic[.] Pain med[ication]s have little affect (sic)- see

physicians report/[Qualified Medical Examination] on work related.

6. The Application indicated that respondent was not working in any capacity. In the space provided for "other information," the following information was included:

Have had several surgical procedures giving me temporary relief only[.] Constant headaches- unable to sleep more than 3-4 [hours] a night- see attached physicians report and [Qualified Medical Examination] on job related injury- unable to bend more than 90 [degrees].

7. On November 24, 2015, CalPERS notified respondent in writing that his application for disability retirement had been denied, and informed him of his right to appeal. Respondent timely appealed from CalPERS' denial.

Duties of an Assistant Chief

8. As set forth in the California State Personnel Board Job Specifications for CHP Assistant Chief, the Assistant Chief performs the following duties, in relevant part: identifies potential problems; provides visible support for area commanders; evaluates grievances, investigations, and adverse action packages; directs area commanders or staff; monitors command activities for compliance; works with subordinates in establishing objectives; exercises recruitment and hiring and encourages managers toward upward mobility; supervises personnel and staff through commanders; implements new policies, procedures and laws; prepares employee evaluations and reviews evaluations prepared by subordinates; responds to legal and policy questions; ensures anti-harassment and discrimination policies and procedures are met in the workplace; prepares oral presentations; chairs committees; takes enforcement action; and performs public service activities.

9. Respondent's employer submitted a CalPERS Physical Requirements of Position/Occupational Title form containing information regarding the physical requirements of the Assistant Chief position. The requirements include up to three hours of: running; crawling; kneeling; climbing; squatting; reaching above and below the shoulder; pushing and pulling; fine manipulation; power grasping; lifting and carrying from zero to 100 pounds; walking; driving; exposure to extreme temperatures, humidity, or wetness; exposure to dust, gas, fumes or chemicals; operation of foot controls or repetitive movement; and use of special equipment. Respondent was further required to use a keyboard for three to six hours. Respondent was never required to work with heavy equipment, work at heights, or work with biohazards.

Respondent's Work History and Injury

10. Respondent began his employment with CHP in November 1990. Over the course of his career, he worked his way up through the ranks from an officer to eventually

becoming an Assistant Chief, which was his final position upon retirement. As an Assistant Chief, he was responsible for overseeing field commands, major highway collisions, training "ride-alongs," and CHP officers' firearms shooting-range practice, among many other supervisory tasks. His duties covered six geographic command areas including San Luis Obispo and Santa Barbara. He worked in the field constantly and had to be physically fit for duty at all times.

11. On November 21, 2003, respondent was involved in a serious motor-vehicle accident on the job, injuring his neck and right shoulder. At the time he was an Assistant Chief. In the years that followed, he continued to work but experienced persistent neck and back pain. He regularly spent long hours sitting in an automobile while working, resulting in a stiff back. He underwent right-shoulder arthroscopic sub-acromial decompression and debridement surgery in 2008, followed by a physical therapy regimen. In October 2010, he sought treatment from Jerry Smith, M.D., a pain management specialist who obtained MRIs of respondent's cervical spine (i.e., neck) and thoracic (i.e., upper and middle back) spine, performed an upper-extremity electro-diagnostic study, and referred respondent for a whole body bone scan. Dr. Smith has since provided pain management treatment by administering multiple spinal injections in respondent's cervical spine and thoracic spine, and prescribing pain medications. In October 2014, Don Williams, M.D., a Qualified Medical Evaluator (QME), performed a QME examination of respondent to evaluate disability and determine his eligibility for workers' compensation benefits.

12. Respondent testified that in the years since the 2003 accident, he lost the ability to do the tasks required of every CHP officer, including subduing a combatant driver, defending himself during an attack, moving an immobile person weighing up to 200 pounds away from a car by dragging or pulling him or her, running, or jumping to climb over a fence. His back "locks up," preventing him from completing these tasks. Respondent stated that when he retired, he was no longer physically capable of doing a CHP officer's job. He generally theorized that his spinal stenosis, which has worsened over time, was caused by the original trauma of the 2003 accident. He submitted a 2015 video recording that his wife had made in their home, in which he was sitting in an easy chair and experienced a back spasm that immobilized him with pain.

13. Presently respondent works part-time as an instructor for the CHP Academy, as Director of Training. Respondent coordinates the academy's training curriculum, particularly the classes it offers to CHP trainees.

Expert Opinion

14. CalPERS called Ghol Ha'Eri, M.D., as its expert witness. On July 7, 2015, CalPERS directed respondent to see Dr. Ha'Eri for an Independent Medical Evaluation (IME). Dr. Ha'Eri is a board certified orthopedic surgeon, has practiced for 50 years, and has been licensed in California for 35 years. He currently works in private practice in Bakersfield, and in two other offices in Southern California. On August 4, 2015, Dr. Ha'Eri saw respondent, took a medical history, including an accounting of respondent's current

medical complaints, conducted a physical examination, and reviewed respondent's medical and non-medical (e.g., job duty statement) records. Dr. Ha'Eri then drafted an IME Report.

15. In his IME report, Dr. Ha'Eri reviewed the history of respondent's November 2003 neck and right shoulder injury and subsequent treatment. He reviewed respondent's job demands. Respondent stated that in the course of his work he was required to stand, walk, and sit frequently. He also engaged in bending, including twisting frequently, repetitive use of hands, keyboard and computer mouse use, and occasionally lifting up to 100 pounds. Due to these demands, he experienced upper back pain.

16. Upon physical examination, Dr. Ha'Eri found that respondent, who was then 59 years old, had a normal stance and gait, walked with no limp, and wore no physical braces. Visual inspection of the spine revealed normal curvature and no deformity. Palpation of the cervical and thoracic region revealed "mild diffuse tenderness." No paraspinal muscle spasm was noted. Active range of motion testing of the cervical spine resulted in findings of: flexion- 50 degrees (versus 60 degrees normal range); extension- 20 degrees (versus 60 degrees normal range); lateral bending- 20 degrees right/left (versus 45 degrees right/left normal range); and lateral rotation- 40 degrees right/left (versus 80 degrees right/left normal range). Range of motion testing of the lumbar spine resulted in findings of: flexion- 70 degrees (versus 90 degrees normal range); extension- 20 degrees (versus 25 degrees normal range); lateral bending- 20 degrees right/left (versus 35 degrees normal range); and lateral rotation- 45 degrees right/left (versus 50 degrees normal range). Bilateral straight leg-raise testing resulted in a finding of 90 degrees, which is normal. A neurological examination led to normal results.

17. Respondent's complaints at the time of the IME were: occasional headaches; daily neck pain, at times associated with his bilateral fourth and fifth fingers going to sleep; mid back pain associated with prolonged standing, walking, sitting and bending; and inability to run. Dr. Ha'Eri noted that respondent's blood pressure was elevated at 156/129, and advised respondent to see his primary care physician as soon as possible regarding that condition.

18. Dr. Ha'Eri reviewed several medical records regarding respondent's care and treatment, including a report from August 2008 by Steven Thaxter, M.D., declaring respondent's right shoulder to be permanent and stationary, and Dr. Thaxter's April 24, 2009 status report following a right-shoulder arthroscopic subacromial decompression and debridement procedure that he performed. Additional reports reviewed included: a January 2015 Physician's Report on Disability by Jeff Gardner, M.D., opining that respondent was permanently incapacitated from performing his duties as an Assistant Chief; progress and procedure reports from Jerry Smith, M.D., a pain management specialist, detailing multiple spinal injections for complaints of headache and right cervical and thoracic pain, beginning in October 2010; an October 2014 Qualified Medical Examination report from John Williams, M.D., opining that respondent had multilevel cervical and thoracic degenerative disc disease, and a right-shoulder subacromial impingement with pain status post arthroscopic surgery; 11 weeks of post-surgical physical therapy reports from July to

September 2010; and a November 2010 electrodiagnostic study of bilateral upper extremities, by Dr. Smith, noting no significant abnormalities.

19. Imaging studies Dr. Ha'Eri reviewed included: a July 2, 2013 whole body nuclear bone scan in which radiologist Mark Bernard, M.D., noted facet arthritis; a July 26, 2013 CT scan in which radiologist Mark Alson, M.D., noted multilevel facet arthropathy; a November 2010 MRI of the cervical spine in which radiologist Ivan Ramirez, M.D., noted minor degenerative changes at multi-levels associated with minimal posterior disc bulge and right-sided neural foraminal narrowing at C3-C4; a November 2009 MRI of the cervical spine in which radiologist Phillippe Vanderschelden, M.D., noted spondylosis and neural foraminal narrowing; and a July 2012 MRI of the thoracic spine in which Dr. Ramirez noted mild degenerative disc disease with disc bulges and neural foraminal narrowing.

20. After examining respondent, Dr. Ha'Eri diagnosed him as suffering from mild cervical and thoracic degenerative disc disease. In his IME report, Dr. Ha'Eri concluded that respondent is not substantially incapacitated for the performance of his duties because:

[a] mild degree of degenerative change of the cervical and thoracic spine are consistent with the age of the [respondent] (naturally occurring degenerative aging changes), and will not prevent the [respondent from] performing his usual duties.

21. In his IME report, Dr. Ha'Eri stated this medical condition did not meet the criteria for a "serious bodily injury," because it was not severe enough. In his testimony, he opined that the imaging studies he reviewed all showed degenerative changes throughout respondent's spine, which is a naturally occurring phenomenon with advancing age. Dr. Ha'Eri noted that Dr. Williams' October 2014 Qualified Medical Examination findings of "degenerative disc disease," show evidence of this "naturally occurring process" due to aging. Respondent was not disabled by his shoulder injury, but instead received appropriate treatment and recovered, with the shoulder showing no signs of significant physical limitations. The evidence of spondylosis, a fusion of the joints, is rheumatoid in nature and not work-or-service-related. The evidence of spinal stenosis, a narrowing of the bone channel occupied by the spinal nerves or the spinal cord, is degenerative, not related to injury or trauma. Upon examination and testing, respondent showed only "limited abnormal findings" in terms of range of motion. His complaints of pain were subjective and not explainable by any objective medical evidence.

Other Medical Reports

22. At the hearing, respondent submitted additional documents and medical records, which were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).¹

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

23. On August 21, 2006, Mark Mandel, M.D., performed an EMG (electromyogram) and nerve conduction study on respondent. In a report dated the same, Dr. Mandel made a diagnosis of "suprascapular nerve injury."

24. On October 18, 2011, Dr. Smith reviewed a previous cervical MRI and noted "cervical disc herniation," recommending a right C4-C5 transforaminal epidural steroid injection for pain management.

25. On March 14, 2012, Dr. Smith wrote an operative report detailing a C7-T1 interlaminar steroid injection he administered on respondent.

26. On September 25, 2013, Dr. Smith wrote an operative report detailing a bilateral T6 transforaminal epidural steroid injection he administered on respondent.

27. On October 31, 2014, Don Williams, M.D., wrote a report following a Qualified Medical Evaluation (QME) based on respondent's workers' compensation claim of cumulative trauma injury to his neck, right shoulder, and thoracic spine. Dr. Williams' impressions were: multilevel cervical disc disease, worst at C5-C6; thoracic degenerative disc disease; and right shoulder impingement, postop surgery. His objective findings "show good motion in the right shoulder," but respondent's neck "has significant loss of motion, and the MRI's show the cervical and thoracic disc disease." On the issue of apportionment of permanent disability, Dr. Williams opined:

[Respondent's] neck and shoulder are apportioned 100 [percent] to the 2003 motor vehicle accident. The thoracic spine is apportioned 100 [percent] to the cumulative trauma of his work through his last day of work in 2009.

28. Respondent submitted a January 2015 CalPERS Physician's Report on Disability completed and signed by Jeffrey Gardner, M.D., in which he stated respondent has "neck [and] back pain stiffness with spasms [and] headaches," and lower back pain with stiffness," and that respondent "is unable to lift, carry [and] run as [the] job requires."

29. On June 5, 2015, Dr. Gardner wrote a letter to CalPERS stating that he had treated respondent since December 2005, and that:

[b]etween June and December of 2009 I evaluated him for his neck and back pain. After my evaluation on June 8, 2009, I placed [respondent] on temporary disability. I advised him to continue taking his medication and rest as much as possible. I

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.

again evaluated [respondent] in July and again in December 2009. Subsequently I recommended he follow up with his doctors at the Sierra Pacific Orthopedic Medical Group for further evaluation and treatment of the pain in his neck and back.

30. On March 24, 2017, Henry Aryan, M.D., a Clinical Professor of Neurosurgery at University of California, San Francisco, wrote a report of his consultation with respondent and assessed respondent as having: ankylosing spondylitis (arthritis affecting the spine) at multiple sites; scoliosis (sideways curvature of the spine); radiculopathy (compression of nerves as they exit the spine) of the cervical and lumbar regions; and spinal stenosis of the cervical, lumbar, and thoracic regions. On the issue of whether respondent could work, Dr. Aryan opined that “any significant amount of physical activity” would result in respondent’s “entire spine fusing.”

31. Respondent submitted a May 2017 CalPERS Physician’s Report on Disability completed and signed by Mauro Leyba, Jr., M.D., in which he stated respondent has “ankylosing spondylitis discovered [in] 2005 by Dr. Clark D.C.,” and that respondent “cannot [do] activities [number] 1 thr[ough] [number] 9” of the 14 critical activities.

32. Respondent submitted a May 2017 CalPERS Physician’s Report on Disability completed and signed by J. Gregory Clark, D.C., in which he stated respondent has “neck pain, upper back pain [and] stiffness, and lower back pain with stiffness,” and that respondent “cannot perform activities [number] 1 thr[ough] [number] 9” of the 14 critical activities.

33. On June 12, 2017, J. Gregory Clark, D.C., wrote a letter to whom it may concern in which he described treating respondent from June 2005 to the present, and opined that respondent could not perform nine of the 14 California Highway Patrol Officer Critical Physical Activities² (the 14 critical activities) prior to his retirement on June 30, 2009.

Subsequent Expert Reports

34. On September 28, 2015, Dr. Ha’Eri submitted a “supplemental report” to his IME report on respondent, stating that he had reviewed all of the 14 critical tasks, and that in his opinion, respondent “is capable of performing all the duties as described.”

35. On February 19, 2017, Dr. Ha’Eri submitted a second “supplemental report” to his IME report on respondent, stating that he had reviewed several additional medical records and summarizing his impressions as follows. An April 11, 2013 CT scan of the abdomen and pelvis showed bilateral symmetric ankylosis (abnormal stiffening) of the sacroiliac joints associated with ankylosing spondylitis (arthritis affecting the spine). A July 26, 2013 CT

² As part of the job description of an officer, the CHP has enumerated the “14 critical tasks” an officer must be able to carry out in order to perform those duties.

scan reported by Dr. Bernard showed multilevel facet arthropathy (disease of the joints). An April 20, 2016 note by Dr. Clark referenced a March 2016 thoracic spine MRI and noted smooth indentation, posterior thoracic cord at T7, calcification of ligamentum flavum from T5 through T7, and no foraminal narrowing at any thoracic level. Dr. Aryan wrote a May 4, 2016 note that x-rays of the thoracic spine revealed spondylosis without stenosis, and recommended a rheumatology referral for possible pharmacological treatment. Dr. Smith saw respondent on January 22, 2016 and noted a history of injections, facet blocks, and radiofrequency treatment. Dr. Smith recommended an evaluation by Dr. Aryan. On December 12, 2016, Dr. Leyba noted that respondent was HLA-B27 positive, a test which correlates with ankylosing spondylosis. Dr. Ha'Eri summarized his impressions regarding these additional records by stating:

The above conditions are all non-industrial, naturally occurring degenerative changes associated with aging and also a rheumatoid condition [spondylosis] for which he is recommended to be seen by a rheumatologist.

Dr. Ha'Eri further stated that respondent's degenerative changes were not caused by his employment. Dr. Ha'Eri concluded that his original opinions regarding respondent's application for industrial disability were unchanged.

Respondent's Impressions of CalPERS' IME

36. Respondent testified that Dr. Ha'Eri's IME examination was hurried and cursory. On that day, respondent arrived 30 minutes early for his appointment, but Dr. Ha'Eri's medical office was locked and people were waiting outside. This went on for approximately 45 minutes, and Dr. Ha'Eri, who was also present, became agitated and irritated with the delay. When the office was finally unlocked, Dr. Ha'Eri was one hour behind schedule for the day. His staff asked respondent to fill in background information in a multi-page document, but respondent did not have his reading glasses, nor did he bring medical records, so he knew that completing the document accurately and fully would be difficult. For those reasons respondent offered to take the background paperwork home, complete it fully, and return it, but the staff directed him to fill it in as best he could there. When respondent saw Dr. Ha'Eri, the doctor asked him if he had received a questionnaire previously in the mail and filled it in. When respondent said he had not received any such mail, Dr. Ha'Eri was frustrated, stating that the questionnaire should have been mailed to respondent and completed prior to the appointment.

37. Respondent sharply disagreed with Dr. Ha'Eri's statement in the IME report that his face-to-face examination of respondent lasted 45 minutes. Due to respondent's medical history of chronic back and neck pain, he has undergone multiple medical examinations administered by qualified physicians, and the standard procedure is thorough. During the examination the patient lies on his back with his feet raised, and is also placed on his stomach, face-down. The examiner spends substantial time placing his hands on the patient's spine, touching the patient all the way from the neck down to the base of the spine.

The examiner repeatedly has the patient indicate any pain he is experiencing using a one-to-ten scale. Respondent estimated that by contrast, Dr. Ha'Eri's total face-to-face time spent with respondent lasted less than 10 minutes, and the physical examination was abbreviated. Respondent wrote a letter of complaint to CalPERS following his receipt of the IME and, among other concerns, described Dr. Ha'Eri's physical examination as follows:

the only physical examination I received from Dr. Ha'Eri's (sic) was he asked me to stand up[,] he placed his hand on the middle of my back for less than 5 seconds and then had me sit down.

Respondent testified that during the "less-than-five-seconds"-long spinal examination, Dr. Ha'Eri did not require him to remove his shirt.

38. Dr. Ha'Eri testified that he had no independent recollection of either respondent or the IME he performed on August 4, 2015.

Discussion

39. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, at the time he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of an Assistant Chief. The medical evidence established that he recovered from his original injury and returned to work full time for approximately five and one-half years.

40. The medical reports that were admitted as administrative hearsay did not support a finding that respondent is substantially and permanently incapacitated from performing the usual duties of a CHP Assistant Chief. To the extent the doctors who authored those reports applied evaluation standards applicable in workers' compensation cases, their opinions can be given little weight in this proceeding. The standards in disability retirement cases are different from those in workers' compensation. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Kimbrough v. Police & Fire Retirement System* (1984) 161 Cal.App.3d 1143, 1152-1153; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132 [a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different].) Furthermore, administrative hearsay may supplement or explain 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. In this case, none of the treating or evaluating healthcare professionals whose reports respondent relied upon testified on respondent's behalf. Consequently, their reports and findings do not support or explain any other direct evidence received in the record, and thus, can be afforded little weight.

41. Dr. Ha'Eri, in reaching his opinion that respondent was not substantially and permanently incapacitated from performing the usual duties of an Assistant Chief, employed the standards applicable in these types of disability retirement proceedings. His opinion that respondent's degenerative changes throughout his spine are a naturally occurring

phenomenon with advancing age, and that there was no objective medical evidence of a serious work-related injury in the records and images he reviewed, was persuasive and consistent with the medical records offered at hearing.

42. Despite respondent's credible testimony that Dr. Ha'Eri's IME was hurried, Dr. Ha'Eri did make multiple findings upon examination which were detailed in his IME report, none of which were disputed by respondent. Dr. Ha'Eri testified at length, considering multiple medical records that respondent presented as part of respondent's case. Dr. Ha'Eri consistently noted evidence in those records supporting Dr. Ha'Eri's overall conclusion that respondent's ongoing neck and spinal conditions are degenerative and naturally occurring due to aging.

43. In sum, when all the evidence is considered, respondent failed to establish that, at the time he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of an Assistant Chief. Consequently, his disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of his employment, respondent is a state safety member of CalPERS, pursuant to Government Code section 21151.

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 in the state service." (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. The determination of whether respondent is substantially incapacitated must be based on an evaluation of whether, at the time he applied for disability retirement, he was able to perform the usual duties of an Assistant Chief. (*California Department of Justice v. Board of Administration of California Public Employees' Retirement System (Resendez)* (2015) 242 Cal.App.4th 133, 139.)

4. 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 employee in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations and apprehend violators,

issuing warnings and serving citations, and serving warrants and making arrests. He suffered an injury to his right arm while arresting a suspect. He could shoot a gun, drive a car, swim, row a boat (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 a prisoner away. The court noted that “although the need for physical arrests do[es] occur in petitioner’s job, they are not a common occurrence for a fish and game warden.” (*Mansperger, supra*, 6 Cal.App.3d at p. 877.) Similarly, the need for him to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding that the game warden was not incapacitated for the performance of his duties, the *Mansperger* court noted that the activities he was unable to perform were not common occurrences and that he could otherwise “substantially carry out the normal duties of a fish and game warden.” (*Id.* at p. 876.)

5. The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, reached a similar conclusion with respect to a state traffic sergeant employed by the CHP. The applicant in *Hosford* had suffered injuries to his left ankle and knee, and had strained his back. The court noted that the sergeant “could sit for long periods of time but it would ‘probably bother his back;’ that he could run but not very adequately and that he would probably limp if he had to run because he had a bad ankle; that he could apprehend persons escaping on foot over rough terrain or around and over obstacles but he would have difficulty and he might hurt his back; and that he could make physical effort from the sedentary state but he would have to limber up a bit.” (*Id.* at p. 862.) Following *Mansperger*, the court in *Hosford* found that the sergeant:

is not disabled unless he is substantially unable to perform the usual duties of the job. The fact that sitting for long periods of time in a patrol car would “probably hurt his back,” does not mean that in fact he cannot so sit; . . . [¶] As for the more strenuous activities, [a doctor] testified that Hosford could run, and could apprehend a person escaping over rough terrain. Physical abilities differ, even for officers without previous injuries. The rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the function; renders [the doctor’s conclusion that Hosford was not disabled] well within reason. (*Ibid.*)

In *Hosford*, the sergeant argued that his condition increased his chances for further injury. The court rejected this argument, explaining that “this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently existing.” (*Hosford, supra*, 77 Cal.App.3d at p. 863.) As the court explained, prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (*Ibid.*)

6. In *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff was not permanently incapacitated for the performance of

his duties, finding, "A review of the physician's reports reflects that aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the appellant's condition are dependent on his subjective symptoms."

7. When all the evidence in this matter is considered in light of the courts' holdings in *Resendez*, *Mansperger*, *Hosford*, and *Harmon*, respondent did not establish that his disability retirement application should be granted. There was not sufficient evidence based upon competent medical opinion that he is permanently and substantially incapacitated from performing the usual duties of a CHP Assistant Chief. Respondent offered no competent medical opinions in support of his application, because none of his treating doctors, and no medical experts, testified on his behalf. Respondent had the burden of proving his case, yet in this key regard, he failed to meet that burden. Consequently, his disability retirement application must be denied.

ORDER

The application of respondent Gary L. Fief for disability retirement is denied.

DATED: July 10, 2017

DocuSigned by:

John DeCure

17FD47F60F0543E...

JOHN E. DeCURE

Administrative Law Judge

Office of Administrative Hearings