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

In the Matter of the Statement of Issues
(Application for Reinstatement From
Industrial Disability Retirement) of:

THOMAS C. DURDEN,
Respondent,

and

DEPARTMENT OF FORESTRY AND
FIRE PROTECTION (CAL FIRE),
Respondent.

Case No. 2016-0897
OAH No. 2016120172

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on June 29, 2017

Austa Wakily, Senior Staff Attorney, represented Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Respondent Thomas C. Durden (respondent Durden) appeared and represented himself.

There was no appearance by, or on behalf of, respondent Department of Forestry and Fire Protection (respondent Cal Fire).

Evidence was received and the matter was submitted on June 29, 2017.

ISSUE PRESENTED

Whether respondent Thomas C. Durden remains substantially incapacitated for the performance of his usual duties as a Heavy Equipment Operator for respondent Cal Fire.
FACTUAL FINDINGS

1. Anthony Suine filed the Statement of Issues solely in his official capacity as Chief of the CalPERS Benefits Services Division.

2. Respondent Durden was employed by respondent Cal Fire as a Heavy Equipment Operator. By virtue of his employment, respondent Durden was a state safety member of CalPERS subject to Government Code section 21151.


4. On November 12, 2015, respondent Durden submitted a request to CalPERS for reinstatement from industrial disability retirement to his former position of Heavy Equipment Operator with respondent Cal Fire.

5. By letter dated December 21, 2015, CalPERS sent respondent Durden a request for additional information needed to process his application for reinstatement. In the letter, CalPERS asked respondent Durden to submit a current medical report signed by an internist that included that the internist had reviewed respondent Durden’s former job description and that clearly and decisively indicated the internist’s opinion that respondent Durden was able to perform all of the duties of the job without restrictions or limitations.

6. By letter dated April 6, 2016, CalPERS informed respondent Durden that it had arranged an appointment with Thomas S. Allems, M.D., an internist, to perform an independent medical examination of respondent Durden on April 14, 2016. Respondent Durden was examined by Dr. Allems on April 14, 2016, and Dr. Allems prepared a report that he submitted to CalPERS.

7. In considering respondent Durden’s application for reinstatement, CalPERS reviewed medical reports concerning respondent Durden’s pulmonary condition, including Dr. Allems’ report. After reviewing all the reports and other information, CalPERS determined that respondent Durden was still substantially incapacitated for the performance of his former duties as a Heavy Equipment Operator with respondent Cal Fire.

8. Respondent Durden was notified of CalPERS’ determination and was advised of his appeal rights by a letter dated June 30, 2016.

Usual Duties for a Heavy Equipment Operator Employed by Respondent Cal Fire

10. A document entitled "Position Essential Functions Duties Statement" for a Heavy Equipment Operator employed by respondent Cal Fire was received in evidence. Also received in evidence was a document entitled "Physical Requirements of Position/Occupational Title" for a Cal Fire Heavy Equipment Operator signed by respondent Durden on November 12, 2015, and a supervisor on December 4, 2015. Other sources of information regarding respondent Durden's usual duties were his statements to Dr. Allems during his medical evaluation and respondent Durden's testimony at the administrative hearing.

11. As noted below, the pulmonary condition that resulted in respondent Durden's industrial disability retirement was his chronic asthma with acute episodes. The documented duties of a Cal Fire Heavy Equipment Operator most relevant to this condition are the operation of heavy equipment in fire suppression work, wearing respiratory protection equipment including a self-contained breathing apparatus (SCBA) that requires an annual medical clearance, and frequent exposure to dust. The testimony of respondent Durden and Dr. Allems established that respondent Durden's usual duties required that he work a 24-hour schedule for up to a week at a time in forest fire conditions that produced dust and smoke. Respondent Durden typically operated a bulldozer in an enclosed pressurized cab with a HEPA charcoal filter. Approximately 10 to 20 percent of the time he was out of the cab scouting or in discussions with other fire suppression personnel. When out of his bulldozer cab, he could wear a valved respirator mask with a charcoal filter.

Competent Medical Opinion

Complainant's Medical Opinion Evidence

Thomas S. Allems, M.D.

12. Respondent Durden was evaluated by independent medical examiner Thomas S. Allems, M.D., board-certified in internal medicine and also in occupational and environmental medicine, at the request of CalPERS. Dr. Allems examined respondent Durden on April 14, 2016, and prepared a report on May 11, 2016, which was received in evidence. Dr. Allems testified at the administrative hearing and explained the contents of his report.

13. Dr. Allems reviewed the cover letter sent to him by CalPERS outlining his assignment and the relevant legal standards. Dr. Allems also reviewed the documents describing respondent Durden's usual duties, which are summarized above. He reviewed medical records and associated documents.

14. Dr. Allems obtained a history and description of respondent Durden's illness by interviewing respondent Durden. Respondent Durden told Dr. Allems that he was 53 years old and he became a Heavy Equipment Operator in 2000. Respondent Durden was
first diagnosed with asthma in 2003 when he was noted to be wheezing during a required Department of Motor Vehicles biannual physical examination relating to his job. A chest x-ray was taken. He had previously passed annual spirometry examinations mandated for firefighters for respirator fitness. He was prescribed Advair and albuterol inhalers as a result of the asthma diagnosis. Respondent Durden noticed noisy breathing but no shortness of breath. Although he described the symptoms as more persistent over the following years, he continued to work without problems.

15. In the fall of 2009, respondent Durden was off work for stress relating to marital and workplace difficulties. While off work in the fall of 2009 and spring of 2010, his asthma condition flared. His first acute asthma attack occurred in the spring of 2010. In years 2010 and 2011, respondent Durden was hospitalized four times for acute asthma episodes. The last very severe attack required intubation. In between attacks, respondent Durden experienced daily symptoms and his treatment regimen was enhanced. During this period, it was discovered that respondent Durden was allergic to nonsteroidal anti-inflammatory drugs (NSAIDS), and the discontinued use of Ibuprofen and other NSAIDS reduced symptoms. Respondent Durden returned to a modified work assignment in 2011 and performed mechanical work on equipment during the non-fire season. He was not permitted to take the required spirometry test to return to full duties because of his hospitalizations and he filed for industrial disability retirement.

16. Following what Dr. Allems described as the “rocky period of asthma” during 2010 and 2011, and the discovery of respondent Durden’s NSAID allergy, respondent Durden has not had another acute asthma attack. His symptoms continued however, and in the fall of 2011, respondent underwent a new treatment, Bronchial Thermoplasty. Respondent Durden had three treatment sessions at University of California, Davis, Medical Center. The treatment has been successful in improving respondent Durden’s asthma symptoms. Since the treatment, respondent Durden is back to having mild intermittent asthma with minor upper respiratory infection-related flares. His breathing status is normal. He takes Breo daily. His last use of an albuterol inhaler before his evaluation by Dr. Allems was three to four weeks earlier. His asthma is being managed by an allergist who has him on monthly Xolair injections. Respondent Durden does not wheeze during the day or night. His asthma can be triggered by a cold and when he has a cold, he proactively seeks a steroid burst. In 2015, there was a forest fire near his home and he was not bothered by the smoky air that lingered for several weeks.

17. Dr. Allems, following his examination of respondent Durden and a review of medical records relating to respondent Durden’s treatment for asthma, reached the following diagnoses:

1. Asthma in a firefighter with allergic and irritant triggers and severe life-threatening exacerbations, currently mild intermittent on medications and avoidance of triggers.
2. Nonsteroidal anti-inflammatory drug allergy, asthma trigger resolved with cessation of NSAIDS.

18. In the “Comments and Conclusions” section of his report, Dr. Allems summarized his review of respondent Durden’s history with asthma. Thereafter, Dr. Allems opined that respondent Durden’s clinical stability was not enough to clear him to return to work as a firefighter. Dr. Allems explained that respondent Durden’s particular job was to operate heavy equipment for days at a time in large wildland and forest fire scenes. This, in Dr. Allem’s opinion, posed an “unequivocal and direct risk of unavoidable airway injury from inhalation of airborne ambient smoke, in situations that cannot be adequately controlled or protected against.” Dr. Allems added that it was not enough that respondent Allems could wear a mask or that the cab of his bulldozer was enclosed with a HEPA filter, as the overall environment posed a real and present danger to someone with asthma and life-threatening episodes. Dr. Allems conceded that respondent Durden’s asthma was reasonably controlled on a day-to-day basis but given his history, the future is unpredictable. Dr. Allems also pointed out that if respondent Durden experienced a serious attack, medical care would likely be some distance away from the fire scene. Dr. Allems concluded that respondent Durden was unable to perform the duties of a Heavy Equipment Operator. More specifically, his asthma condition rendered him substantially incapacitated for the performance of such duties.

19. On May 20, 2016, CalPERS wrote Dr. Allems asking whether he believed respondent Durden was currently substantially incapacitated for the duties of his former occupation, rather than at greater risk of injury in the future. The letter pointed out that, prophylactic restrictions were insufficient to meet the present unfitness standard. CalPERS also asked Dr. Allems to describe objective physical findings of incapacity and consider the benefits of the Bronchial Thermoplasty that respondent Durden had undergone. CalPERS attached an article published in the December of 2013 Journal of Allergy and Clinical Immunology entitled “Bronchial thermoplasty: Long-term safety and effectiveness in patients with persistent asthma.”

20. On June 20, 2016, Dr. Allems sent CalPERS his response to the May 20, 2016 letter. Dr. Allems related that he had reviewed his earlier evaluation and had read the article on Bronchial Thermoplasty. His opinion that respondent Durden was substantially incapacitated for his usual duties remained unchanged. Dr. Allems explained that patients who underwent the procedure experienced sustained benefits in spirometry, reduction in medication use and fewer severe flares requiring emergency room visits and hospitalizations. However, the procedure did not “cure” their asthma or eliminate the inherent risk of severe life-threatening flares in certain conditions, including fighting wildland and forest fires. Dr. Allems noted that respondent Durden had improved with medical management, but he continued to have mild intermittent asthma symptoms on daily medications. His condition requires that he avoid triggers to flares, and working fire scenes is an “unequivocal trigger.”
Respondent's Medical Opinion Evidence

21. Respondent Durden did not call any medical experts to testify regarding his pulmonary condition. He did, however, question Dr. Allems regarding the views expressed by other medical experts that were outlined in Dr. Allems' initial report under the heading, "Medical Records Reviewed." Following the Bronchial Thermoplasty procedure, two doctors who evaluated respondent Durden in the context of a worker's compensation claim related to respondent Durden's asthma opined that respondent Durden could return to his former employment for Cal Fire. Patricia Wiggins, M.D., had evaluated respondent Durden for his severe asthma before the Bronchial Thermoplasty. On July 8, 2015, she noted that his treatment for asthma had improved his pulmonary function and his asthma control. The treatment included his use of an immune mediator medication, Xolair, and the Bronchial Thermoplasty. She felt that respondent's aerobic capacity was adequate for him to return to work as a firefighter. Samuel Louie, M.D., a UCDMC allergist, noted on June 16, 2015, that respondent Durden felt that after the Bronchial Thermoplasty he no longer had asthma. Dr. Louie wrote that respondent Durden was passionate about returning to his former employment as a firefighter, and Dr. Louie opined that respondent Durden could return to fire work and dusty conditions, as long as he wore a respirator.

22. Dr. Allems knows Dr. Wiggins and described her as a very competent physician. He disagreed with her opinion that respondent Durden could return to his firefighting duties for respondent Cal Fire. Dr. Allems noted that it took a great deal of effort to get respondent Durden to his present stability. His asthma is a chronic condition which can flare into a life-threatening event and such flares are unpredictable. If returned to his former Heavy Equipment Operator position, respondent Durden would again be exposed to days, or weeks, of dust and smoke and the constant wearing of a respirator was impractical. Dr. Allems also pointed out that Richard Musselman, D.O., respondent Durden's primary care physician, wrote that respondent Durden should never return to fire work or dusty conditions. Also, Ronald Reynard, M.D., the internist who treats respondent Durden's asthma symptoms, wrote on August 1, 2014, that respondent Durden wanted to restart his Xolair injections because without systemic cortisone, respondent Durden had experienced a significant increase in asthma. Dr. Reynard wrote that respondent had severe, chronic asthma with a significant allergic component.

23. Respondent Durden did not, as noted, submit any competent medical opinion to support his assertion that he is no longer substantially incapacitated for the performance of his duties as a Heavy Equipment Operator for respondent Cal Fire. And even if the opinions of Dr. Louie and Dr. Wiggins were considered, Dr. Allems effectively refuted them.
LEGAL CONCLUSIONS

1. Government Code section 21192 reads:

The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, shall also cause the examination to be made upon application for reinstatement to the position held at retirement or any position in the same class, of a person who was incapacitated for performance of duty in the position at the time of a prior reinstatement to another position. The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

2. Government Code section 20026 reads, 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.

3. Incapacity for performance of duty means the substantial inability to perform usual duties. (Mansperger v Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 876.) In Hosford v. Board of Administration (1978) 77 Cal.App.3d 854, at page 860, the court rejected contentions that usual duties are to be decided exclusively by State Personnel
Board job descriptions or a written description of typical physical demands. The proper standard is the actual demands of the job. (See also, *Thelander v. City of El Monte* (1983) 147 Cal.App.3d 736.) The ability to substantially perform the usual job duties, though painful or difficult, does not constitute permanent incapacity. (*Hosford, supra*, 77 Cal.App.3d 854, at p. 862.)

4. Respondent Durden applied for reinstatement from his industrial disability retirement. A medical examination was conducted by Dr. Allems in accordance with the procedure set forth in Government Code section 21192. Dr. Allems concluded that respondent Durden is still physically incapacitated for the duties of a Heavy Equipment Operator with respondent Cal Fire by reason of his pulmonary condition (chronic asthma). Therefore, respondent Durden is not entitled to reinstatement from industrial disability retirement in accordance with Government Code section 21192.

ORDER

Respondent Thomas C. Durden's request for reinstatement from industrial disability retirement to his former position as a Heavy Equipment Operator for respondent Cal Fire is DENIED.

Dated: July 19, 2017

[Signature]

KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings