ATTACHMENT A

RESPONDENT'S PETITION FOR RECONSIDERATION
BEFORE THE BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES’ RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for Disability Retirement of:

AARON J. HANSON,

Respondent,

and

DEPARTMENT OF CONSUMER AFFAIRS,

Respondent.

The Department of Consumer Affairs (DCA) hereby moves for reconsideration of the adopted decision. The basis for this Petition for Reconsideration (Petition) is simple: The Administrative Law Judge (ALJ) applied the wrong legal standard. She analyzed the evidence using an incorrect heightened standard and in doing so found that DCA had not met its burden to prove by a preponderance of the evidence, that Respondent Aaron J. Hanson (Hanson) was substantially incapacitated from performing his job duties. This is legally wrong. The Board, on reconsideration, should review the evidence using the correct legal standard, make factual findings based on the evidence, and issue a decision granting the Disability Retirement Election Application (Application) that DCA submitted on Hanson’s behalf.
INTRODUCTION

The Board should grant DCA’s Petition because the ALJ applied an incorrect standard for disability retirement. The correct disability standard is whether at the time of Application, Hanson was “permanently disabled or substantially incapacitated from the performance of his usual job duties” as an AGFA. The ALJ misapplied the standard’s disjunctive term “or” and improperly replaced it with a conjunctive “and.” By applying the incorrect legal standard, the ALJ misguidedly concluded that DCA had failed to provide competent medical evidence establishing that Hanson was permanently disabled and substantially incapacitated from performing his duties as an AGFA. Ample evidence presented during a two-day hearing overwhelmingly showed that Hanson was indeed substantially incapacitated from performing his duties as an AGFA and that the Application should have been granted on that basis alone. The Board should correct the ALJ’s fundamental legal error and reconsider its decision, and decide the case upon the correct legal standard.

STATEMENT OF THE CASE

The following facts were either affirmatively admitted or undisputed at hearing:

**Respondent Aaron J. Hanson’s Behavior**

Hanson is an AGFA for the Board of Registered Nursing (BRN) in the DCA. He began working for DCA in 2011 and was promoted to AGFA in 2012. Shortly thereafter, Hanson began exhibiting odd and unusual behavior at work that interfered with his job performance. For example, in meetings, Hanson would sit in a corner with a binder over his face. When colleagues entered his cubicle, he refused to talk to them and would cower in a corner. When colleagues passed him in the halls, Hanson would plaster himself against the wall in an exaggerated manner. Hanson also repeatedly refused to enter his supervisor’s cubicle to discuss casework, opting to sit in the doorway instead. On at least one occasion Hanson stated that he was going to go “Norman Bates” in his office.

This behavior persisted between 2012 and 2015, escalating in nature. DCA’s and BRN’s various attempts to assist Hanson were futile. Hanson was unreceptive to assistance of any sort.
Believing that a medical condition could be the cause, DCA requested Hanson undergo a fitness for duty evaluation (FFD).

**DCA's Evaluation by Dr. Jessica Ferranti**

DCA retained Dr. Jessica Ferranti, a Board Certified psychiatrist in General Adult Psychiatry and Forensic Psychiatry and the Director of the Workplace Safety and Psychiatric Assessment Clinic at the UC Davis Medical Center to evaluate Hanson.

Dr. Ferranti conducted a psychiatric evaluation of Hanson on September 2, 2015. She interviewed Hanson for four hours and 15 minutes and conducted a biopsychosocial and mental status exam. She spent about two hours reviewing hundreds of pages of personnel records, including Hanson's job duty statement. Dr. Ferranti did not review medical records because Hanson did consent to their disclosure.

Dr. Ferranti determined that based on a psychological condition, Hanson was substantially incapacitated from performing his job duties and thus, unfit for duty. She found that Hanson had a thought disorder marked by persecutory ideation, difficulties with misperception, and over-attribution. As a result, Dr. Ferranti found that Hanson's judgment was impaired and that he was unable to receive supervision, attend meetings, cooperate collaboratively, have professional, constructive, and collaborative personal contacts, and that his written and verbal communication skills were impaired in real time.

DCA then filed the Application on Hanson's behalf on January 22, 2016 and placed Hanson on leave. Hanson submitted his own disability retirement application on May 3, 2016.

CalPERS received both Applications and decided to evaluate Hanson before deciding on the Application.

**CalPERS's Evaluation by Dr. Laurie Davies**

CalPERS retained Dr. Laura Davies, a Board Certified psychiatrist that is contracted with CalPERS to perform Independent Medical Examination (IME) of Hanson.

On September 7, 2016, Dr. Davies evaluated Hanson; one year after DCA's expert

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1 Actual diagnosis is not included in Petition to protect the privacy of Respondent Aaron J. Hanson.
evaluated Mr. Hanson. Dr. Davies spent two hours reviewing medical records and one hour
examining Hanson. Dr. Davies also reviewed and relied on Dr. Ferranti’s evaluation. She took Dr.
Ferranti’s opinion quite seriously because she recognized that Dr. Ferranti more time with
Hanson than she did, and that Dr. Ferranti’s ability to assess Hanson in multiple spheres was much
greater than her ability. Dr. Davies did not review any personnel records and only briefly
referenced Hanson’s job duty statement.

Dr. Davies found no impairment or disability. She conceded, however, that she could not
speak about Hanson’s mental condition in 2015, when Dr. Ferranti evaluated him at the time of
the Application. All she found, again, a year later, was that Hanson was somewhat anxious, had
difficulty in social relationships, felt misunderstood, and was somewhat aloof, cold, and
uncompromising. Dr. Davies determined that Hanson’s symptoms did not meet the threshold for
a diagnosable condition.

Based on this finding, CalPERS denied Hanson’s Application on September 26, 2016. DCA
appealed CalPERS’s denial on October 25, 2016.

ARGUMENT

The record in this case establishes, by more than a preponderance of the evidence, that the
Application should be granted. The proposed decision applied the wrong legal standard that
imposed a heightened burden on DCA and entirely ignores the competent medical evidence Dr.
Ferranti presented showing Hanson was substantially incapacitated from performing his job
duties as an AGPA at the time of application.

I. THE ADOPTED DECISION SHOULD BE REJECTED BECAUSE THE ALJ APPLIED AN
INCORRECT STANDARD FOR DISABILITY RETIREMENT.

The sole issue on appeal was whether “at the time of the application...respondent Hanson is
permanently disabled or substantially incapacitated from the performance of his usual and
customary duties...” See Statement of Issues at p.2 (emphasis added). This is consistent with
what the statutes governing disability retirement state. Government Code section 21156 (a)(1)
provides that to qualify for disability retirement, respondent must prove that, at the time he or she
applied for disability retirement, he or she was “incapacitated physically or mentally for the
performance of...his or her duties and is eligible to retire for disability..." Moreover,
Government Code section 20026, provides that “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.” (emphasis added).
The ALJ, however, incorrectly stated that the issue was whether Hanson was “permanently
and substantially incapacitated from performing his duties.” See PD at p.2 (emphasis added).
This goes beyond a mere typographical error. The ALJ continued to analyze the evidence under
this incorrect standard throughout her decision. See PD at 6, ¶ 16 (“DCA did not ask Dr. Ferranti
to opine whether respondent was permanently and substantially incapacitated from performing
his usual job duties.”); 7, ¶ 21 (“This evidence does not support a permanent and substantial
incapacity on respondent’s part...”); 8 ¶ 22 (“...DCA did not present sufficient evidence to
establish that respondent was rendered permanently and substantially incapacitated...”).
Ultimately the ALJ improperly concluded that Hanson was not disabled under this incorrectly
heightened standard. This is legally wrong and the Board should grant this Petition to correct the
ALJ’s fundamental mistake.

II. DCA PRESENTED COMPETENT MEDICAL EVIDENCE TO SHOW HANSON WAS
SUBSTANTIALLY INCAPACITATED FROM PERFORMING HIS DUTIES AS AN AGPA.

Not only did the ALJ apply the wrong legal standard, but she also ignored the
overwhelming evidence presented by DCA showing Hanson was substantially incapacitated from
performing his job duties at the time of the Application. The ALJ improperly discredited Dr.
Ferranti’s extensive examination simply because she performed a FFD evaluation and not an IME.
In doing so, the ALJ mistakenly concluded that only an IME can satisfy the CalPERs’s disability
standard. This is contrary to law. As a matter of fact, Dr. Ferranti’s FFD evaluation elicited more
information about whether Hanson was substantially incapacitated from performing his job duties
as an AGPA than Dr. Davies’s IME.

A. There is no meaningful distinction between an IME and FFD in this case.
The ALJ was mistaken that a FFD evaluation did not apply to CalPERs’s disability
retirement standards. See PD at p.7. (finding that a FFD evaluation is not the same as
perform[ing] an IME under CalPERS’s standards.”). No law supports this assertion.

The California Fair Employment and Housing Act (FEHA) and Americans with Disabilities Act (ADA) govern compulsory exams by employers, and do not state the type of exams employers can require of employees. These laws allow an employer to require medical or psychological exams if they can show that it is job-related. See Gov. Code § 12940; 42 U.S.C.A. § 121112. Indeed, a FFD evaluation is consistent with this law, and examines whether an employee is physically or psychologically able to perform his job duties. DCA’s expert also extensively explained how a FFD evaluation sufficiently determines if someone is substantially incapacitated, stating “an IME is simply a different type of disclosure. So everything one would ask in an IME, I did do in the four hours and 15 minutes that I evaluated Hanson. I just didn’t disclose those details that were not directly related to business necessity to his employer.” Tr. 5/24/17 p.86-87:23-4.

B. It is improper for the ALJ to discredit DCA’s FFD evaluation for not including a review of medical records.

The ALJ discounts the FFD evaluation for not including medical records, but this is improper for two reasons. See PD at p.7 ¶ 21. First, the ALJ ignores that absent authorization, employers cannot mandate that employees provide their medical records. See Cal. Civ. Code section 56.10 (“A provider of health care...shall not disclose medical information regarding a patient of the provider of health care...without first obtaining an authorization.”). Here, Dr. Ferranti requested Hanson’s medical records, but Hanson denied her access. Second, medical records are not necessary to diagnose patients or render medical opinions. Dr. Ferranti testified repeatedly that she could make a diagnosis, and did make one, without these records. See e.g., Tr. 5/24/17 p.39:22-24 (“So there’s no diagnosis in my report, not because I didn’t make one, but because the employer is not entitled to it.”); p.105:22-24 (“And as a doctor, when you perform a fitness-for-duty evaluation, are you rendering a medical opinion? Yes.”). Thus, it is improper for the ALJ to fault Dr. Ferranti for not reviewing medical records she was not given legal access to and did not need to render a competent medical opinion.

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C. The ALJ ignored the importance of personnel records and job duty statements.

In addition, the ALJ ignores the fact medical records are not the only documents significant to rendering a competent medical opinion; personnel records provide critical insight into Hanson’s ability to perform his job duties. Dr. Davies did not review Hanson’s personnel records as part of her IME even though they were available to CalPERS from Dr. Ferranti’s report. Dr. Ferranti testified that personnel records are especially important “in this kind of situation, especially when one is considering a total disability from occupational functioning.” See Tr. 5/24/17 at 85:15-24. Instead, Dr. Davies dismissed the importance of personnel records and testified that she did not often receive personnel records, but “if I [did], I will look at those briefly.” See Tr. 5/8/17 at 12: 22-23. To ignore multiple corroborated accounts of disordered paranoid thinking, reported by employees at or near the time it occurred, is a fundamental flaw in Dr. Davies’s evaluation which took place more than a year later.

Beyond medical and personnel records, it is well-established that experts need to look at job duties to determine whether someone is substantially incapacitated from performing them. See CalPERS Precedential Decision 00-05, In the Matter of the Application for Disability Retirement of Ruth A. Keck. Dr. Ferranti worked closely with the duty statement during her FFD evaluation. In contrast, Dr. Davies testified that she did not “actually pay too much attention to” Hanson’s duty statement; yet supposedly could render an opinion on Hanson’s abilities to perform those duties. Tr. 5/8/17 32:10-17. The ALJ plainly ignored the precedent of Keck, and instead improperly dismissed DCA’s expert for not reviewing medical records or performing an IME.

D. The substance of DCA’s expert opinion meets CalPERS’s standards.

It is simply inaccurate to conclude that DCA’s expert did not meet CalPERS’s standards for substantial incapacity while CalPERS’s own expert supposedly did, based on the specific questions asked of each expert, as well as the timing of each exam. In Mansperger v. Public Employees’ Retirement System (1970) 6 Cal. App. 3d 873, 876, the court defined “incapacity for performance of duty” as the substantial inability to perform usual duties, and found that a warden was not incapacitated because he could perform activities that were normal, common occurrences.
DCA provided Dr. Ferranti a series of questions to answer, including but not limited to: whether there were any “existing medical condition(s) that currently affects Hanson’s performance of his duties as an [AGFA]”; if given his condition, he was “able to perform the essential functions of his job”; and if Hanson’s condition was “temporary or permanent.” Dr. Ferranti provided extensive testimony that Hanson had paranoid thought processing that was impairing his judgment. See Tr. 5/24/17 at 30:1-3, 35:2-3. Because of this thought disorder, Hanson had “impaired written and verbal communication,” and was among other things, unable “to receive supervision consistently and reliably,” “unable to attend meetings and cooperate collaboratively” and did not have “sufficient dependability, flexibility and ability to work cooperatively, or the ability to work independently with good judgment and decision making.” Id. at 36:1-18. Dr. Ferranti opined that Hanson’s condition was of uncertain duration. Id. at 68:12-23.

The outcome in Mansperger turned on the substantive analysis of whether the employee could perform usual duties, not the specific type of exam or the word choice of questions used in an expert report. Thus, it is unclear how a FFD evaluation, which addresses “essential functions of job duties does not meet CalPERS’s standard. In fact, though the decision implies that DCA provided the wrong questions to Dr. Ferranti—rendering her expert report incompetent medical evidence—when CalPERS’s own expert was asked if she looked at the essential functions of performing the job duties in her report, she also responded “Clearly I did.” See Tr. 5/8/17; 38-39:24-2.

The ALJ concluded that the CalPERS’s expert, Dr. Davies, supposedly satisfied the CalPERS standard, yet the questions asked of her are nearly indistinguishable, if not less applicable to the proper standard. Dr. Davies was asked to answer whether there were “specific job duties” that Hanson could not perform “because of his physical or mental condition”; and if Hanson was “presently substantially incapacitated for the performance of his duties.” However, unlike a focus on essential functions, which necessarily include “usual” job duties, the question of “specific job duties” appears less consistent with CalPERS standards. As outlined in Mansperger and Keck, the expert must testify to an evidenced incapacity to perform usual duties.
E. DCA’s evaluation was at the time of application.

Moreover, the ALJ was mistaken in believing that the CalPERS exam of Hanson was the closest in time to DCA’s disability retirement application. DCA’s expert conducted her exam of Hanson on September 14, 2015, and DCA applied for disability on Hanson’s behalf after assessing the expert’s conclusion. In contrast, CalPERS’s own exam occurred on September 7, 2016, a year after DCA determined Hanson was incapacitated. CalPERS’s own expert testified that her report could not speak to the approximate time of Hanson’s application, and that she was “not being asked to opine on [Hanson’s] ability to function in 2015 because that is impossible.”

See Tr. 5/8/17; 46:2-12.

Not only is the decision incorrect as to timing, but it misses the operative inquiry. The relevant period is whether “at the time of the application...respondent Hanson is permanently disabled or substantially incapacitated from the performance of his usual and customary duties...” See Statement of Issues at p.2 (emphasis added). DCA met its burden to present competent medical evidence to show, as of the date of the application, Hanson was substantially unable to perform his usual job duties. Dr. Ferranti’s exam speaks directly to the time of the application because it was conducted before DCA’s decision to file it. In contrast, CalPERS question posed to its own expert, whether Hanson was “presently substantially incapacitated,” fails to address the issue on appeal since it was taken eight months after the application.

CONCLUSION

The Board must grant the Petition to correct the ALJ’s puzzling misapplication of the CalPERS standard throughout the decision. The evidence DCA presented during the two-day hearing overwhelmingly exceeds its preponderance of the evidence burden to show that Hanson was substantially incapacitated from performing his usual job duties at the time of the application. Moreover, the Board should clarify that the law does not require an IME specifically for disability retirement applications but instead requires that exams by employers comport with FEHA and ADA. Therefore, the Board should grant the Petition and decide the case on its own.
Dated: August 31, 2017

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California

JOHN P. DEVINE
Supervising Deputy Attorney General

ROSAILDA PEREZ
Deputy Attorney General

ROBERT SANDOVAL
Deputy Attorney General

/s/ Rosailda Perez
ROSAILDA PEREZ

/s/ Robert Sandoval
ROBERT SANDOVAL

Deputy Attorneys General
Attorneys for Respondent DCA
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Disability Retirement of AARON J. HANSON, Respondent,

and

DEPARTMENT OF CONSUMER AFFAIRS, Respondent.

CASE NO. 2017-0181
OAH NO. 2017031112

DECISION

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own Decision the Proposed Decision dated June 7, 2017, concerning the appeal of Aaron J. Hanson;

RESOLVED FURTHER that this Board Decision shall be effective 30 days following mailing of the Decision.

I hereby certify that on, the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the Administrative Law Judge's Proposed Decision is a true copy of the Decision adopted by said Board of Administration in said matter.

BOARD OF ADMINISTRATION, CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
MARCIE FROST
CHIEF EXECUTIVE OFFICER

Dated: August 21, 2017

DONNA RAMAL LUM
Deputy Executive Officer
Customer Services and Support

DECISION

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In the Matter of the Application for Disability Retirement of:

AARON J. HANSON,  
Respondent,

and

DEPARTMENT OF CONSUMER AFFAIRS,  
Respondent.

Case No. 2017-0181  
OAH No. 2017031112

PROPOSED DECISION

This matter was heard before Heather M. Rowan, Administrative Law Judge, Office of Administrative Hearings, State of California, in Sacramento, California, on May 8 and May 24, 2017.

Elizabeth Yelland, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Rosaidla Perez and Robert Sandoval, Deputy Attorneys General, represented the Department of Consumer Affairs (DCA).

Eric Lambdin, Attorney at Law, represented Aaron Hanson (respondent), who was present.

Evidence was received on May 8, and May 24, 2017. The record was closed and the matter was submitted for decision on May 24, 2017.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
FILeD June 9, 2017

[Signature]
ISSUE

Is respondent permanently and substantially incapacitated from performing his duties as an Associate Governmental Program Analyst (AGPA) for DCA based on a psychological (stress and anxiety) condition?

FACTUAL FINDINGS

Disability Retirement Applications

1. Respondent was employed as an AGPA by DCA. On January 22, 2016, Leslie Gladden, a Staff Services Manager for DCA, filed a disability retirement application on respondent’s behalf. DCA’s stated reason for respondent’s disability was:

   Per Dr. Jessica Ferranti’s reports dated 9-14-15, 10-20-15, and 1-6-16, Mr. Hanson is deemed to have a medical disorder and is unable to perform the essential duties of his current position or any position within the state.

   On May 3, 2016, respondent also filed a disability retirement application, but he checked the box stating that the application was “employer generated.” On his application, he described his disability as: “stress, but my doctor’s not diagnosed me as having a disability.”

2. By letter dated September 26, 2016, CalPERS informed respondent that his medical reports from Bernard Bauer, Ph.D. and Laura Davies, M.D. had been reviewed and that his employer’s disability retirement application had been denied. Respondent was informed of his right to appeal. On October 25, 2016, DCA appealed CalPERS’s determination. Respondent did not appeal.

Respondent’s Employment History

3. Respondent began working for the Board of Registered Nursing under DCA in 2011, as a Staff Service Analyst. He was promoted to AGPA in 2012. He remains employed with DCA, but has been on medical leave since September of 2015. Respondent is 39 years old.

Duties of an AGPA

4. As set forth in DCA’s Position Duty Statement, an AGPA for the Board of Registered Nursing works under the direction of the Discipline Program Manager and is responsible for case management in the Enforcement Division. The AGPA reports directly to a Staff Services Manager I, and ensures accurate, timely, and effective legal action is taken
on critical enforcement cases in which a registered nurse licensee poses a threat to the public health and safety.

5. About 25 percent of the AGPA’s essential functions constitute analyzing, evaluating, and prioritizing cases for transmittal to the Attorney General’s office. The AGPA also assists in developing a plan of action for complex cases, follows the case from filing to resolution, and manages closure. After receiving pleadings from the deputy attorney general assigned, the AGPA reviews the pleadings to ensure all violations of the Nursing Practices Act are accurately depicted. The AGPA also reviews any mitigation evidence that a respondent may produce to assess whether settlement is appropriate, negotiates settlement agreements, and participates in settlement conferences.

6. The AGPA must consult with Staff Services Managers, the Deputy Chief of Discipline and Probation, the Enforcement Division Chief, Assistance Executive Officer, District Attorneys, and Deputy Attorneys General. The AGPA must have excellent written and verbal communication skills, work independently, take initiative, and exercise flexibility. He must exhibit courteous behavior toward coworkers and the public and exercise good judgment.

Independent Medical Evaluation

7. CalPERS retained Laura Davies, M.D, to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Davies has been licensed in California since 1998. She is an American Board of Psychiatry and Neurology diplomate, and is Board Certified in Child and Adolescent Psychiatry as well as Adult Psychiatry. Dr. Davies has operated a private practice in Child, Adolescent, and Adult Psychiatry since 2002.

8. As part of the IME process, Dr. Davies reviewed respondent’s duty statement and medical records. On September 7, 2016, she reviewed respondent’s medical records from respondent’s primary care physician, a report regarding a worker’s compensation industrial injury claim related to stress, a report by Dr. Jessica Ferranti, and a report by Dr. Bernard Bauer. She did not review respondent’s personnel records or complaints from his co-workers. Dr. Davies interviewed respondent and performed psychological testing. Dr. Davies found no acute Axis I disorder. Based on her psychological testing, she concluded

1 Dr. Bauer’s Qualified Medical Examination report was admitted as administrative hearsay under Government Code section 11513, subdivision (d). Dr. Bauer evaluated respondent for purposes of a workers’ compensation claim. In making findings, he applied the standards of a workers’ compensation case, and not a disability retirement proceeding. The standards in these two types of proceedings are different. (Bianchi v. City of San Diego (1989) 214 Cal.App.3d 563, 567.) The findings and conclusions in the workers’ compensation proceeding are not binding in this proceeding. (Smith v. City of Napa (2004) 120 Cal.App.4th 194, 207 [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].)
that respondent has no significant anxiety or depression. She further found that respondent has difficulty in social relationships, feels misunderstood, and that he “is somewhat aloof, cold, nongiving, and uncompromising.”

9. At hearing, Dr. Davies testified that respondent showed moderate elevation on paranoid and anxiety scales. The tests she used, the Hamilton Anxiety Scale and the Hamilton Depression Scale, are reliable tests because they are not based on a patient’s self-reporting, and have internal accuracy checks to ensure the user is not attempting to skew his results. Dr. Davies also determined that respondent did not have compromised cognition, did not suffer from ideas of reference (believing that general messaging is tailored to the person, specifically), thought broadcasting (believing one’s thoughts are broadcasted generally without one speaking aloud), or thought blocking (an inability to think or process, despite attempting to). Dr. Davies acknowledged that respondent experienced anxiety, but determined that his symptoms do not meet the threshold for diagnosable anxiety attacks or anxiety disorder.

10. Dr. Davies also explained at hearing that she was aware of respondent’s difficulties at work, reported conflicts with co-workers, stress and anxiety issues, and that he had exhibited “bizarre behavior” at work. None of these, however, are evidence of a psychiatric condition, nor do they indicate that respondent is substantially incapacitated from performing the usual duties of his job. She added that respondent is “not normal,” “unusual,” and “difficult to get along with,” but these traits are not substantially incapacitating. She stressed that respondent had difficulty at work, but he was never hospitalized, was never diagnosed with depression by a psychiatrist, and, though he was referred to a psychologist for stress, there was never an associated diagnosis. Dr. Davies opined that respondent did not have mental disorder or a diagnosable condition at the time of her examination in September of 2016.

Fitness for Duty Evaluation

11. Dr. Ferranti is a board certified adult psychiatrist and forensic psychiatrist. She is the Director of the Workplace Safety and Psychiatric Clinic at the University of California, Davis Medical Center. She conducts workplace assessments, threat assessments for workplaces, schools, and colleges, fitness for duty (FFD) evaluations and Americans with Disabilities Act (ADA) evaluations. Dr. Ferranti does not conduct IMEs for CalPERS. She explained at hearing that, unlike an IME, an FFD determines whether an individual can perform his job safely. In this context, “safely” refers to physical and psychological safety of respondent and his coworkers.

12. Dr. Ferranti assessed respondent on September 2, 2015 for an employer-requested FFD evaluation. She provided DCA with a report on September 14, 2015. DCA
asked Dr. Ferranti to answer 11 questions to determine whether respondent was fit for duty as an AGPA. The primary questions posed were:

a. In your opinion, is [respondent] fit for duty?

b. Do you perceive or can you safely predict if Mr. Hanson may be a potential threat to himself or others in the workplace?

c. In your opinion, is there an existing medical condition(s) that currently affects [respondent's] performance of his duties as an AGFA?

d. Given respondent's condition(s), is he able to perform the essential functions of his job with or without accommodations. . . ?

[1] . . [1]

k. Is/are [respondent's] condition(s) temporary or permanent?

Other questions posed to Dr. Ferranti included whether respondent's behavior adversely affects the health and safety of others, whether he could benefit from a reasonable accommodation, and whether his behavior could lead to workplace discrimination, harassment, hostility, and bullying.

13. At hearing, Dr. Ferranti explained that she is legally bound to confidentiality rules that do not allow her to reveal a diagnosis to respondent's employer following an FFD. Her report detailed the results of her examination, which included a review of records that DCA submitted, records that respondent submitted, a four hour and fifteen minute interview with respondent, and her review of respondent's position duty statement. She concluded that respondent was not fit for duty as an AGFA at the time of her examination based on a diagnosable mental illness.

14. Dr. Ferranti opined that respondent had "current psychiatric symptoms" that contributed to his occupational impairment and many of his behaviors were "volitional," meaning they were within respondent's ability to change. She further found that respondent demonstrated "a prominent pattern of some behavioral and interpersonal difficulties in the workplace that are not due to the symptoms of his mental disability." Respondent had the

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2 Dr. Ferranti’s report stated that she evaluated respondent to determine his fitness for duty as a Staff Services Analyst. Credible evidence conflicts with this statement. Respondent was an AGFA at the time of Dr. Ferranti’s assessment.

3 While Dr. Ferranti did disclose respondent’s diagnosis at hearing, the parties stipulated that the portion of the record that refers to the diagnosis would be sealed. The diagnosis is therefore not named here, and not dispositive in this decision.
ability to behave more collaboratively and cooperatively and to improve his communication with supervisors and co-workers, and he chose not to do so.

15. Dr. Ferranti reviewed respondent’s expected job duties and found that due to the combination of a mental disability and respondent’s volitional behaviors, he was not able to attend meetings and cooperate collaboratively, participate, provide presentations, and act professional. He was unable to take direction from supervisors, have “excellent organizational, written, and verbal communication skills,” be dependable, flexible, tactful, and courteous. In her report and testimony, Dr. Ferranti stated that she concluded that, although respondent’s risk of violence in the workplace was low, his negative impact on his co-workers’ psychological safety should be strongly weighed.

16. DCA did not ask Dr. Ferranti to opine whether respondent was permanently and substantially incapacitated from performing his usual job duties. DCA did ask, however, whether respondent’s disability was temporary or permanent. At hearing, Dr. Ferranti emphasized that a FFD evaluation is limited in that she was not a treating doctor; she only saw respondent one time, and her conclusion was based solely on the period in time she evaluated respondent. She stated that, at the time of her evaluation, respondent’s condition would likely respond to pharmacological treatment under the direction of a treating psychiatrist. Dr. Ferranti opined that because his condition was likely to respond to medication, and his behaviors were within his power to change and control, she could not say that it was a permanent condition. Nor could Dr. Ferranti estimate the duration of the condition, but she did note that several months later when Dr. Davies evaluated respondent for an IME, she did not find a diagnosable condition, which could suggest a change in his status since Dr. Ferranti performed the FFD evaluation. Should respondent undergo treatment, Dr. Ferranti suggested he could be reevaluated in six months for his fitness for duty.

17. Dr. Ferranti submitted two supplemental reports in response to DCA’s requests. DCA requested that Dr. Ferranti offer her opinion regarding respondent’s fitness to perform other state positions. The supplemental reports, on October 20, 2015 and January 6, 2016, found that respondent is not fit for duty for any positions about which the DCA requested her opinion because of his inability to be supervised, cooperate and collaborate with coworkers, and communicate adequately, whether verbally or in writing.

Testimony of Former DCA Employee Beth Scott

18. Beth Scott is the Chief of Enforcement at the Bureau of Private Post-Secondary Education. She worked at the Board of Registered Nursing from 2009 to 2016, in several capacities, culminating in her role as Chief of Enforcement. She supervised respondent indirectly, but was aware of his behavioral and other work-related issues. Ms. Scott explained the expectations of an AGPA and that respondent was not meeting expectations. She described him as being unwilling to participate in meetings or trainings, unwilling to take criticism or direction, argumentative, accusatory, and inappropriate in his communications. Respondent’s behaviors included hiding and “slinking down” in his
cubicle, stating on a phone call that he was going to "go Norman Bates," pacing in front of his supervisor's cubicle, dramatically jumping into an empty cubicle when someone was to pass him in the hallway, and covering his face with a book during staff meetings and trainings.

19. Respondent had several memoranda in his employee file that describe concerns with his performance and directives to correct his behavior and professionalism. He was denied a merit salary adjustment for at least two years in a row. He made people, including Ms. Scott, uncomfortable, and caused several employees to request medical leave due to the stress he had caused them. Even after working for DCA for two years, respondent demonstrated a poor understanding of how to do his job. Ms. Scott testified that when discussing a course of action, she determined that "progressive discipline" would not be effective for respondent, though it was an option she could have taken. Her superiors instead opted to order respondent to undergo a fitness for duty evaluation, followed by applying for disability retirement on respondent's behalf.

Discussion

20. Dr. Davies' opinion that respondent is not substantially incapacitated from performing his usual duties as an AGPA based on a psychological condition was persuasive. Her IME report and testimony provided clear and supported medical opinion that respondent does not have a diagnosable psychological condition that prevents him from performing his job functions. Dr. Davies formed her opinion by applying CalPERS's disability retirement standards to the competent medical evidence obtained through her thorough examination and evaluation. Her evaluation of respondent was also the closest in time to DCA's filing the disability retirement application on respondent's behalf. Dr. Ferranti's contrary opinion was not based on the CalPERS's disability retirement standards. She was not familiar with those standards, nor had she ever conducted an IME. She determined that he was not "fit for duty," not that respondent was substantially incapacitated from performing his usual job duties. Fitness for duty evaluations do not apply to CalPERS's disability retirement standards.

21. DCA did not submit respondent's medical records or send respondent to a doctor to perform an IME under CalPERS's standards. The questions posed to Dr. Ferranti were directed to determine whether respondent was fit for duty, whether DCA could provide a reasonable accommodation, and whether respondent posed a threat to himself or others in the workplace. Additionally, it was Dr. Ferranti's assertion, both in her report and at hearing, that respondent's condition could be treated with medication, and was not permanent in nature. She suggested that, with proper medication and psychiatric treatment, respondent could be reevaluated after six months to determine his fitness for duty. DCA presented substantial evidence to support the assertion that respondent was ineffective at his job as an AGPA, made people feel uncomfortable and unsafe, and displayed problematic, unprofessional behaviors. This evidence did not support a permanent and substantial incapacity on respondent's part to perform his usual job duties.
22. When all the evidence is considered, DCA did not present sufficient evidence to establish that respondent was rendered permanently and substantially incapacitated from performing the usual duties of an AGPA based on a psychological condition. Consequently, DCA’s appeal of CalPERS’s denial of the retirement application that DCA filed on respondent’s behalf must be denied.

LEGAL CONCLUSIONS

1. By reason of respondent’s employment, he is a state miscellaneous member of CalPERS and eligible for disability retirement under Government Code section 21151.

2. An applicant for an industrial disability retirement has the burden of establishing his or her eligibility by a preponderance of the evidence. (Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1332.) DCA applied for disability retirement on respondent’s behalf and appealed CalPERS’s denial. DCA, therefore, must prove by a preponderance of the evidence that respondent qualifies for disability retirement. (Evid. Code § 115.)

3. An employee qualifies for disability retirement if it is proved that, at the time of the application for disability retirement, 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, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

Government Code section 21156, subdivision (a)(2) further states that a determination regarding whether a member is eligible for disability retirement must be made on the basis of competent medical opinion, and the employer “shall not use disability retirement as a substitute for the disciplinary process.”

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.) In Mansperger, the court found that a fish and game warden who had applied for disability retirement was not incapacitated for the performance of his duties, because the work activities that he was unable to perform were not common occurrences, and he could otherwise “substantially carry out the normal duties of a fish and game warden.” (Mansperger, supra, 6 Cal.App.3d at p. 876.)
5. The burden was on DCA to present competent medical evidence to show that respondent was permanently and substantially unable to perform his usual duties as an AGPA due to a psychological condition. The evidence established that although respondent had been separated from employment due to Dr. Ferranti's opinion that he was unfit for duty, the claim of a psychological condition that rendered respondent substantially incapacitated from performing his usual job duties was not supported by the evidence. Dr. Ferranti's conclusion was not based on CalPERS's standards for disability retirement, which is the only standard that applies here. Rather, pursuant to Factual Findings 21 and 22, based on Dr. Davies's competent medical opinion, respondent does not meet CalPERS's standard of permanent and substantial incapacity to perform his usual job duties. DCA's application for disability retirement on respondent's behalf must therefore be denied.

ORDER

The Department of Consumer Affair's application for disability retirement on behalf of Aaron Hanson is DENIED.

DATED: June 7, 2017

HEATHER M. ROWAN
Administrative Law Judge
Office of Administrative Hearings
PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On August 21, 2017, I served the foregoing document described as:


on interested parties in this action by placing the original a true copy thereof enclosed in sealed envelopes addressed as follows:

G. Eric Lambdin
Law Office of G. Eric Lambdin
980 Ninth Street, 16th Floor, No. 1728
Sacramento, CA 95814

Office of Administrative Hearings
Sacramento
2349 Gateway Oaks Drive, Suite 200
Sacramento, CA 95833-4231
Via Email - sacfilings@dgs.ca.gov

Aaron Hanson
Personnel Officer
Department of Consumer Affairs
1625 N. Market Blvd, Suite N-321
Sacramento, CA 95834

Rosalinda Perez, Deputy Attorney General
California Department of Justice
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Robert Sandoval, Deputy Attorney General
California Department of Justice
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

[ XX ] BY OVERNIGHT MAIL (FedEx) -- As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Sacramento, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.

[ XX ] BY ELECTRONIC TRANSMISSION: I caused such document(s) to be sent to the addressee at the electronic notification address above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.

Executed on August 21, 2017, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Kady Pasley
NAME

Kady Pasley
SIGNATURE