

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:

NAM LUU,

Applicant/Respondent,

and

CITY OF CORONA,

Contracting Entity/Respondent.

Case No. 2017-0246

OAH No. 2017041207

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on August 28, 2017, in San Bernardino, California.

Nam Luu, respondent, represented himself.

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

There was no appearance on behalf of the City of Corona.

The matter was submitted for decision on August 28, 2017.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED September 7, 2017

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FACTUAL FINDINGS

General Background

1. Respondent¹ worked for the City of Corona from 1999 to 2016. By virtue of his employment, respondent was a state safety member of CalPERS subject to Government Code sections 21150.

2. Until 2013, respondent worked for the Parks and Community Services Department (Parks Department) as Lead Parks Service Worker. In 2013, according to respondent, the City of Corona merged the Parks Department with the Department of Water and Power. Although respondent retained his job, his duties changed substantially. He said that before the merger, he was primarily functioning in a supervisor and inspection role. Following the merger, although he performed those duties occasionally, people in his position were also required to clean bathrooms, cut grass, and dispose of the trash. Respondent said he did “not think it was right from the beginning” that the city was using people who had obtained supervisory roles and certifications to clean bathrooms and tend to trash. When speaking about the merger that led to a change in his job duties, respondent clearly expressed frustration.

3. On May 1, 2015, respondent was involved in a vehicle accident while at work. He claimed to have back injuries and pain. He was seen by a doctor the date of the accident and sent home with medications. He received physical therapy but claimed that the physical therapy did not help with his pain. Respondent never returned to work after that date.

4. On May 19, 2016, respondent signed a “Disability Retirement Election Application” seeking a service retirement pending a disability determination. CalPERS received the application on July 13, 2016.² In the application, respondent identified his claimed disability as “cervical and lumbar disc herniation injuries” and stated he had “lifting limits” and chronic pain. Respondent did not identify a psychological condition as a basis for his industrial disability retirement and no documents submitted as exhibits showed that respondent claimed any psychological condition as a basis for an industrial disability retirement. Respondent also testified that he never claimed psychological conditions as a basis for a disability retirement and was still not claiming psychological conditions as a basis for his disability retirement. Although psychological conditions were never claimed in the

¹ In this decision, “respondent” refers to respondent Luu, and does not include the City of Corona.

² The Statement of Issues alleged that the City of Corona filed an application for disability retirement on respondent’s behalf on February 8, 2016, but when it did not receive further information from respondent, CalPERS cancelled the application. The application filed by the City of Corona was not included as an exhibit. The application filed by respondent supersedes the application filed by the City of Corona and therefore controls in this case.

application, because they were raised in the Statement of Issues and complainant called a witness to testify regarding them, they were still considered as if they had been claimed in the application.

5. CalPERS denied respondent's application for a disability retirement on December 6, 2016, stating "we have determined that your orthopedic (cervical and lumbar back) and psychological conditions are not disabling." Respondent timely appealed the denial. This hearing ensued.

Duties of a Lead Park Services Worker³

6. Under limited supervision, lead park services worker is expected to perform a "variety of technical and skilled work related to proper orientation and daily functions" of parks within the City of Corona. The position is identified as an advanced journey-level class having to do with park maintenance. The essential functions of the position include maintaining sprinkler systems; preparing for community events; carrying out large projects pertaining to all maintenance and construction within the parks; and providing direction to other employees as needed. The physical demands are listed as: lifting and moving tools and equipment weighing from 50-100 pounds; using hands and fingers to operate equipment and control tools; frequent standing, talking, climbing, sitting; kneeling, crouching, and smelling. Mental demands include: regular use of written and oral communications; reading and interpreting data; analyzing and solving problems; use of mathematical reasoning; and interaction with the public.

The physical requirements of a lead park services worker, as stated by a City of Corona Risk Manager Amy Rich on the CalPERS Form entitled, "Physical Requirements of Position/Occupational Title," include frequent standing, walking, crawling, kneeling, climbing, squatting, bending and twisting at the waist and neck; fine manipulation, power grasping, simple grasping, repetitive use of the hands, and lifting between 0 to 50 pounds. Occasionally, a lead park services worker must: sit, reach above the shoulder, reach below the shoulder, use a keyboard and mouse, lift 51-100 pounds, walk on uneven ground, drive, work with heavy equipment, work at heights, operate foot controls, use special visual or auditory protective equipment, and work with biohazardous material.

The Independent Medical Examinations

PSYCHIATRIC EVALUATION

7. CalPERS retained the services of Perry Maloff, M.D., to complete an assessment of respondent as it pertains to the claim of a psychological condition. Dr. Maloff has practiced in the field of psychiatry for 35 years. He is board-certified, has worked as a qualified medical examiner for workers' compensation cases and an independent medical

³ The following was taken from the City of Corona Class Specification Bulletin internet printout for a Lead Park Services Worker, dated July 14, 2016.

examiner for CalPERS cases, and has presented in the field of psychiatry before numerous professional organizations, retirement associations, insurance claims adjusters, and persons in the field of workers' compensation. Dr. Maloff qualifies as an expert in the field of psychiatry.

8. Dr. Maloff completed an independent medical examination of respondent on November 3, 2016, and completed a report detailing his examination and conclusions. Dr. Maloff testified at the hearing. The following is a summary of Dr. Maloff's testimony and report.

Dr. Maloff interviewed respondent in order to obtain a psychological history. He found respondent to be difficult, at best, from the beginning of the interview. Dr. Maloff said respondent did not want to talk about his family or any other personal background information that was needed to conduct a full assessment. According to his testimony and report, respondent refused to answer questions almost from the beginning of the interview, but when told the interview would terminate if he did not, respondent reluctantly complied.

Dr. Maloff conducted an extensive interview with respondent that covered everything from respondent's childhood and experiences growing up in a war-torn Vietnam, to his legal immigration to the United States. Dr. Maloff did not note any issues with Post Traumatic Stress Disorder (PTSD) relating to respondent's childhood or adult life. When speaking about respondent's job for the City of Pasadena, which pre-dated his employment with the City of Corona, respondent initially said he did not remember anything about his employment in Pasadena because it was "a long time ago." However, when Dr. Maloff began to ask respondent about the workers' compensation claim he filed with the City of Pasadena, which centered around a claimed back injury, respondent suddenly remembered. Dr. Maloff concluded respondent was not very credible because of his selective memory.

Nonetheless, the interview continued. When they began to speak about respondent's job with the City of Corona, respondent spoke highly of his position with the City of Corona prior to 2012. Respondent told him he was a supervisor and inspector and enjoyed the prestige of having supervisory authority. However, after the merger with the Department of Water and Power, respondent told Dr. Maloff he had to empty trash, prune trees, and cut the grass, just as he had done years prior before his promotion to supervisor. Dr. Maloff said respondent complained about formerly having an office, and all of a sudden being relegated to a cubicle near the bathroom. Respondent especially did not like having to cut the grass and told Dr. Maloff he complained to a supervisor; but respondent was told if he did not like it they would find someone to replace him. Respondent did not like feeling as if his job could be taken away. Thus, he began having difficulty sleeping and depression. Dr. Maloff's report showed respondent began taking medication for depression.

Dr. Maloff began probing into respondent's claim of depression and problems at work. Dr. Maloff said respondent was unable to articulate any symptoms of any psychological disorder, and would keep referring to "what they did" – meaning how he was treated at work – as a basis for "PTSD." Dr. Maloff asked respondent if he felt depressed,

hopeless, worthless, useless, anxious, nervous, or had panic attacks. These are all signs and symptoms that could indicate a psychological disorder. Respondent denied feeling any of those things and again complained about having to work in a cubicle near the bathroom. Later in the interview, Dr. Maloff learned that respondent had been committed to an acute psychiatric hospital in June 2016 after having thoughts of harming himself. When asked about that incident, respondent again said "they threatened to fire every one of us if we didn't like our jobs."

Respondent told Dr. Maloff that he has no plans to return to work because of his PTSD. Respondent told Dr. Maloff that he enjoys his home and spending time in his yard and with his wife.

Dr. Maloff, who reviewed respondent's medical history and job description, concluded that respondent does not suffer from any psychological disorder and was not substantially incapacitated from performing the usual and customary functions of his job. Dr. Maloff wrote that respondent's problem was primarily occupational and that respondent's job dissatisfaction with how his position changed following the merger is not a basis for a disability retirement.

MEDICAL EVALUATION

9. CalPERS retained the services of Robert Kolesnik, M.D., to conduct an independent medical evaluation of respondent to ascertain whether his claimed orthopedic conditions were substantially disabling. Dr. Kolesnik is a board-certified orthopedic surgeon, and has been a practicing physician since 1979. He has multiple professional memberships relating to orthopedics and has made numerous professional presentations concerning orthopedics in academic settings. He is also published in a peer-reviewed journal. Dr. Kolesnik is an expert in the field of orthopedics.

10. Dr. Kolesnik examined respondent on September 16, 2016. He also reviewed all of the medical records provided to him concerning respondent's claimed orthopedic injuries. The following is a summary of Dr. Kolesnik's testimony and report.

Dr. Kolesnik's comprehensive physical examination included assessing respondent's shoulders, upper arms, elbows, forearms, wrists, hands, lumbar spine, lower extremities, hips and thighs, knees, calves, ankles, and feet. Dr. Kolesnik noted that respondent complained of pain in almost every area of his body. When testing grip strength, Dr. Kolesnik felt respondent was only giving a "fair" effort. He further noted that respondent was "significantly" exaggerating his complaints of pain. Overall, Dr. Kolesnik concluded respondent had a cervical strain, disc bulge at C3-C4 with disc space narrowing and mild to moderate left neural foraminal stenosis; Grade-I cervical spondylolisthesis at C4-C5; disc bulge at C4-C5 with osteoarthritis and mild to moderate bilateral neural foraminal stenosis; lumbosacral strain; and a disc bulge at L5-S1.

Despite the diagnoses, and after reviewing respondent's job duties and the physical demands of his position, Dr. Kolesnik concluded respondent was not substantially disabled from performing the usual and customary functions of a lead park services worker.

Respondent's Testimony and Other Evidence

11. Respondent provided a report entitled, "notification of appointment: interactive reasonable accommodation meeting." The report was dated June 10, 2016. The report referenced prophylactic job restrictions that had been given to respondent by John Skubic, M.D., who did not testify at the hearing. The report stated that Dr. Skubic restricted respondent to lifting no more than 10 pounds and from bending or stooping. The actual report completed by Dr. Skubic was not provided so the reason for the prophylactic restriction is unknown.

12. Respondent testified that the limitations on his ability to lift, bend, and stoop were to prevent further injury. According to the report he provided, he asked for the reasonable accommodation meeting in order to facilitate his return to work subject to the restrictions that had been noted. Personnel at the City of Corona determined that no reasonable accommodations existed to permit for respondent's return to work and that placement within the city in an alternative position would be explored. The city provided respondent with a list of other vacant positions within the city for which he might qualify. Respondent expressed interest in one position and was given information about the process in order to apply for that position. No testimony was provided regarding whether respondent ever applied for the position.

13. Respondent was insistent that the city "forced" him to retire so he should get a disability retirement. However, the report he provided regarding the city's attempt to provide him with a reasonable accommodation showed that the city was merely following its reasonable accommodation process; nothing in the report indicated that the city "forced" respondent to retire. Given that the city ultimately filed an application for a disability retirement on respondent's behalf, it appeared respondent decided not to seek out the alternative position within the city and not to return to his position as a Lead Park Services Worker. When the city application was cancelled by CalPERS because respondent did not provide the information that had been requested, respondent filed his own application for a disability retirement.

14. Respondent expressed frustration with Dr. Kolesnik and Dr. Maloff. He said both doctors saw him for a very short period of time and did not review his entire medical file. He said they both lied in their testimony.

15. Respondent expressed frustration with the situation at his place of employment following the merger which resulted in his formerly supervisory position being modified to include things like emptying the trash, cutting the grass, and cleaning bathrooms. His testimony supported Dr. Maloff's conclusion that respondent was upset about the conditions of his occupation, rather than suffering from any psychological conditions.

16. Respondent continuously reiterated during the hearing that the difference in his retirement pay would only be a few hundred dollars a month and that he felt he was entitled to it because the city “forced” him to retire. He did not provide any competent medical evidence showing that he was unable to perform the usual and customary duties of a lead park services worker because of either an orthopedic or a psychological condition. He did claim to have pain from the back and neck injuries that resulted from his 2015 car accident, and noted that further injury could occur if he did not follow the restrictions placed on him by Dr. Skubic.

LEGAL CONCLUSIONS

1. Respondent has the burden of proving that he is entitled to an industrial disability retirement by a preponderance of the evidence. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Applicable Statutes

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

A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076, 21076.5, or 21077.

3. Government Code section 21152, subdivision (a), provides in part:

Application to the board for retirement of a member for disability may be made by:

(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

(b) The university if the member is an employee of the university.

(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

(d) The member or any person in his or her behalf.

4. Government Code section 21153, provides:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.

5. Government Code section 21154, provides:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

6. Government Code section 21156, subdivision (a), provides in part:

(a)(1) If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability . . .

(2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

Appellate Authority

7. “Incapacitated” means the applicant for a disability retirement has a substantial inability to perform his or her usual and customary job duties. The board must consider the duties actually and usually performed by the applicant, and not simply examine a job description or a list of job demands prepared by an employer, to determine if the applicant is incapacitated for the performance of duty. (*Hosford v. Bd. of Administration* (1977) 77 Cal.App.3d 854, 860-861.) Disability is not an inability to perform fully every function of a given position. When an applicant can perform his or her usual and customary job duties, *even though doing so may be difficult or painful*, the employee is not substantially incapacitated and does not qualify for an industrial disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887 [emphasis added].) Mere difficulty in performing certain tasks is also not enough to support a finding of disability. (*Hosford, supra*, 77 Cal.App.3d at p. 854.) Further, the claimed disability must be presently disabling; a disability that may be aggravated with time or that is speculative does not satisfy the requirements of the Government Code. (*Id.* at 863.)

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

8. Dr. Kolesnik and Dr. Maloff are experts in their field. Both conducted extensive examinations of respondent and reviewed the medical records provided to them. Both concluded respondent was not substantially incapacitated from performing the usual and customary duties of a lead park services worker based on orthopedic or psychological conditions.

Although respondent testified that he experiences pain and would receive further injury if he did not adhere to the restrictions placed on him by Dr. Skubic, prophylactic restrictions are not a basis for a disability retirement. Nor is the claim of hypothetical future injury if job duties are performed. Further, no competent medical evidence was presented to challenge either Dr. Kolesnik or Dr. Maloff's conclusions.

Accordingly, respondent did not establish by a preponderance of the evidence that he is substantially incapacitated from performing the usual and customary duties of a lead park services worker based on orthopedic or psychological conditions, and respondent's application for a disability retirement is denied.

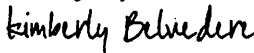
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ORDER

Respondent Nam Luu's application for industrial disability retirement is denied.

DATED: September 6, 2017

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KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings