ATTACHMENT E

THE PROPOSED DECISION
PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on September 12, 2018, in Sacramento, California.

Cynthia A. Rodriguez, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Derrick L. McGaskey represented himself.

No one appeared for or on behalf of respondent Department of Health Care Services (HCS), and its default was entered. This matter proceeded as a default proceeding pursuant to Government Code section 11520 as to HCS only.

Evidence was received, the record was closed, and the matter was submitted for decision on September 12, 2018.

SUMMARY

The sole issue on appeal is whether Mr. McGaskey was substantially incapacitated for the performance of his duties as an Associate Governmental Program Analyst with HCS due
to orthopedic (back, shoulder and hip) and cardiologic (heart) conditions at the time he applied for disability retirement. The persuasive medical evidence established he was not substantially incapacitated. Therefore, his application for disability retirement is denied.

FACTUAL FINDINGS

Procedural Background

1. On May 30, 2017, Mr. McGaskey signed, and CalPERS received, a Disability Retirement Election Application seeking disability retirement. He requested a retirement effective date of “EOB.”

2. Mr. McGaskey identified his disabilities as “Back, Rt Leg, Shoulder, Left Hip,” and indicated they occurred on September 8, 2016, when he “Tripped over wires/cords from under Cubicle, fell & hit floor & fell through a wall.” (Spelling original.) He indicated he was working on a part-time basis when he completed his application, and identified his job duties as “modified duties. duty statement attached. 5 hours a day 5 to 10 min off my feet due to pain.” (Spelling original.)

3. Mr. McGaskey identified the following limitations/preclusions due to his disabilities: “yes modified duty 5 HRS day 5 to 10 min off my feet.” (Spelling and punctuation original.) In response to a question about how his injuries have affected his ability to perform his job, he responded “yes.”


Employment History

5. According to a report prepared by a medical expert retained by CalPERS, Mr. McGaskey began working for the State of California as an Office Assistant in the Department of Juvenile Services in 2003.¹ Two years later, he accepted a position with the Board of Equalization. In 2012, he began working for HCS as an Associate Governmental Program Analyst. At hearing, he explained his last day of actual work was May 19, 2017, and he has been on “total temporary disability” since then, contrary to what he wrote on his application.

¹ It is more likely that Mr. McGaskey worked for the Division of Juvenile Justice within the California Department of Corrections and Rehabilitation.
Physical Requirements of an Associate Governmental Program Analyst

6. Neither party introduced a copy of a Physical Requirements of Position/Occupational Title for Mr. McGaskey’s position as an Associate Governmental Program Analyst with HCS. Apparently, however, one was provided to the medical experts retained by CalPERS. One of those experts wrote the following in his report about the physical requirements of Mr. McGaskey’s position:

The physical requirement information is that he sits three hours, stands three hours, walks three hours and kneels three hours. He bends at the waist and neck up to three hours. He does reaching overhead up to three hours and reaching below shoulder three hours. He does keyboard use up to six hours. He lifts 0 to 10 pounds occasionally up to three hours (he himself indicates he is able to lift 10 pounds at the present time). Lifting above 10 pounds is never according to his records.

7. At hearing, both of CalPERS’s medical experts described Mr. McGaskey’s job as “administrative” or “clerical,” and Mr. McGaskey did not dispute either description. He did not introduce any evidence of the physical requirements of his position either.

Medical Evidence

CALPERS’S EVIDENCE

HARRY A. KHASIGIAN, M.D.

8. At CalPERS’s request, Dr. Khasigian, a board-certified orthopedic surgeon, performed an independent medical examination (IME) of Mr. McGaskey on September 8, 2017. He prepared a report documenting his IME, which was admitted into evidence. He also testified at hearing.

9. Dr. Khasigian summarized his findings after physical examination of Mr. McGaskey in his report as follows:

Mr. McGaskey has multiple conditions superimposed upon severe cardiac disease and poorly controlled diabetes, as well as treatment for extensive stress and anxiety reactions. He had a fall approximately one year ago, which he alleges has led to further back pain, left hip pain, right leg pain, and left shoulder symptoms.

Presently, his presentation is so involved with secondary gain, somatic magnification, and Waddell findings that it is not possible to get a true physical evaluation on a clinical basis. His
presentation is rife with elaborative behavior, including gasping, heavy breathing, pain reaction, avoidance behavior, globalization, and other symptoms of symptom magnification that are not related to a true physical abnormality.

Notable is the absence of neurological deficits on examination with equal and symmetrical lower extremity reflexes and motor exam. It is able [sic] notable that the distortion between his sciatic stretch test and straight leg raising is extraordinary, yet despite all these conditions that he claims, he has equal and symmetrical measurements showing no areas of atrophy for any disuse activity. He will not allow any examination of his shoulder and he will not move his arm actively. Therefore, his presentation with his shoulder is beyond anything that could occur with the statements made regarding his MRI, of which the full report and films are not available for review. Despite all of his past treatment for a year, his statement is that he is not improved and unchanged from his initial situation, which is again inconsistent with the amount of treatment that he has received. Overall, Mr. McGaskey presents with an examination that is not medically reasonable or credible based upon the inconsistencies, the nature of the onset, and his current presentation.

10. At hearing, Dr. Khasigian testified consistently with his written report. He also commented that Mr. McGaskey refused to allow any tests on his shoulder during the IME, but he was using his left hand to shuffle papers throughout the hearing. Dr. Khasigian also explained physical examination revealed no neurological deficits, normal reflexes, no muscle atrophy, and a “gross distortion” of symptoms when testing for injury to the sciatic nerve. Specifically, Mr. McGaskey was able to lift each leg while in a sitting position without any complaints of pain, but complained of significant pain when lifting each leg while lying in a supine position. Dr. Khasigian explained such test results were inconsistent because both movements stretch the sciatic nerve in the same manner. He also stated Mr. McGaskey was able to climb off the examination table from a supine position “numerous times” throughout the examination to answer his cell phone.

11. Based on his IME, Dr. Khasigian opined there are no specific job duties of an Associate Governmental Program Analyst with HCS Mr. McGaskey could not perform due to an orthopedic condition. Therefore, he concluded Mr. McGaskey is not substantially incapacitated for the performance of his usual job duties.
12. CalPERS also requested that Dr. Schmitz, a board-certified cardiologist, perform an IME of Mr. McGaskey. Dr. Schmitz performed his IME on September 21, 2017. He subsequently prepared a report of his IME, which was admitted at hearing. He testified at hearing.

13. Dr. Schmitz provided the following discussion of his physical examination of Mr. McGaskey in his report:

Mr. McGaskey has a history of chest discomfort dating to the middle of 2016. Multiple doctors have evaluated him extensively and thoroughly. I would note first that he had a normal nuclear stress test in November of last year. Nonetheless, he did get admitted to the hospital where a myocardial infarction was excluded with the appropriate testing. He subsequently underwent cardiac catheterization where he was found to have an approximately 70 percent lesion of the mid-left anterior descending coronary artery. In the cardiac catheterization laboratory, he did have reproduction of his symptoms with the administration of intravenous adenosine and consequently Dr. Marquardt proceeded to perform coronary intervention. In spite of an excellent angiographic result, the claimant continued to experience symptoms of angina. In fact, he had a second cardiac catheterization, which demonstrated that the stents were widely patent. Two different cardiologists have evaluated Mr. McGaskey since his coronary intervention and most recently, Dr. Bayne suggested that the symptoms do not represent angina and referred him for gastroenterology evaluation. I agree with the most recent evaluation by Dr. Bayne that this is more likely gastrointestinal in origin and agree with his referral to a GI specialist.

Because of the above findings and the sequence of events, I do not think the claimant is restricted from engaging in his job activities on a cardiovascular basis.

14. Dr. Schmitz testified in a manner consistent with his report. He further explained Mr. McGaskey had a “normal exam” from a cardiovascular standpoint. He also explained Mr. McGaskey’s cardiac condition would not be aggravated or exacerbated by performing his work duties, and the fact that he had prior coronary intervention alone does not prevent him from working.

15. Dr. Schmitz opined there are no duties of Mr. McGaskey’s position as an Associate Governmental Program Analyst with HCS he could not perform due to a
cardiologic condition. Therefore, he concluded Mr. McGaskey is not substantially incapacitated for the performance of his usual job duties.

**MR. MCGASKEY'S EVIDENCE**

16. Mr. McGaskey did not call any medical experts to testify on his behalf at hearing. However, he introduced Physician’s Reports on Disability completed by Dennis Hembd, M.D., Thomas Brudz, PA-C (two), and Patrick Lau, M.D. He also submitted two work status reports indicating he could not perform any work for certain periods of time, two disability certificates from Hunter Greene, M.D., and a letter written by Dr. Lau.

17. While Drs. Hembd and Lau concluded Mr. McGaskey is substantially incapacitated for the performance of his usual duties as an Associate Governmental Program Analyst with HCS, and such incapacity is permanent, neither provided any explanation how his objective findings after physical examination of Mr. McGaskey supported such conclusions. Additionally, Dr. Hembd did not identify any specific job duties Mr. McGaskey could not perform due to his purported disability. Mr. Brudz also concluded Mr. McGaskey is substantially incapacitated, but indicated such incapacity will not be permanent or is unlikely to last more than six months to one year.

18. Dr. Lau wrote in his correspondence:

Mr. McGaskey has a history of Coronary Artery disease causing severe chest pain, shortness of breath and necessitating the placement of several stents in his heart. He is currently under the care of a Cardiologist and is taking Plavix to prevent another coronary event. In addition, he is also taking Metoprolol and Isosorbide Mononitrate. I feel that this patient is permanently disabled. Feel free to contact me with any questions.

19. One of the work status ports offered by Mr. McGaskey provides no reason why he was unable to work, and the other simply states “reportedly still TTD by his shoulder surgeon.” Neither of the disability certificates he offered indicates he is substantially incapacitated. Instead, each confirms he has been under Dr. Greene’s care for “Left shoulder surgery.” One also states “Patient is actively involved in physical therapy and in order to progress in therapy, I recommend that he maintain the ability to take 3-4 Oxycodone 30mg [sic] pills daily;” while the other states “No change in work status.”

**Discussion**

20. Mr. McGaskey has the burden of producing sufficient competent medical evidence to establish he was substantially incapacitated for the performance of his duties as an Associate Governmental Program Analyst due to orthopedic (back, shoulder and hip) and cardiologic (heart) conditions at the time he applied for disability retirement. He did not meet his burden. Neither Dr. Hembd nor Dr. Lau explained the factual basis for his
respective opinions, and each simply concluded Mr. McGaskey is substantially incapacitated. 

[“An ‘opinion unsupported by reasons or explanations’ establishes nothing”], citing Kelley v. 
(2003) 114 Cal.App.4th 1108, 1117 [a purely conclusory opinion “has no evidentiary 
value”].) Therefore, neither of their opinions were persuasive.

21. Mr. Brudz’s opinion was not persuasive either, because he admitted Mr. 
McGaskey’s alleged incapacity is not permanent in nature or of an extended or uncertain 
duration. Mr. McGaskey’s remaining documents were not persuasive either, because none 
contained a physician’s opinion that Mr. McGaskey is substantially incapacitated.

22. On the other hand, CalPERS presented persuasive medical evidence that Mr. 
McGaskey is not substantially incapacitated for the performance of his duties. Drs. 
Khasigian and Schmitz are board-certified in their respective medical specialties. Their 
respective conclusion and opinions were supported by the results of a physical examination 
of Mr. McGaskey, and both provided a detailed and thorough explanation for his conclusion 
and opinions in his report. Drs. Khasigian’s and Schmitz’s respective testimony was 
comprehensive, and each persuasively explained the bases for his conclusion and opinions.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Mr. McGaskey has the burden of proving he qualifies for disability retirement, 
and he must do so by a preponderance of the evidence. (McCoy v. Board of Retirement 
(1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5 ["As in ordinary civil actions, the party 
asserting the affirmative at an administrative hearing has the burden of proof, including both 
the initial burden of going forward and the burden of persuasion by a preponderance of the 
evidence"].) This evidentiary standard requires Mr. McGaskey to produce evidence of such 
weight that, when balanced against evidence to the contrary, is more persuasive. (People ex 
rel. Brown v. Tri-Union Seafoods, LLC (2009) 171 Cal.App.4th 1549, 1567.) In other words, 
he needs to prove it is more likely than not that he was substantially incapacitated for the 
performance of his duties as an Associate Governmental Program Analyst when he applied 

Applicable Statutes

2. Mr. McGaskey is a state miscellaneous member of CalPERS subject to 
Government Code section 21150, subdivision (a), by virtue of his employment with HCS. 
That statute provides the following with regard to his eligibility for disability retirement:

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 20026 provides, in pertinent part:

"Disability" and "incapacity for performance of duty" as the basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

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

(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.

5. The courts have interpreted the phrase "incapacitated for the performance of duty" to mean "the substantial inability of the applicant to perform his usual duties." (Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 877.) It is not necessary that the person be able to perform any and all duties since public policy supports employment and utilization of the disabled. (Schrier v. San Mateo County Employees' Retirement Association (1983) 142 Cal.App.3d 957, 961.) Instead, the frequency with which the duties he cannot perform are usually performed as well as the general composition of duties he can perform must be considered. (Mansperger v. Public Employees' Retirement System, supra, 6 Cal.App.3d at pp. 876-877 [while applicant was unable to lift or carry heavy objects due to his disability, "the necessity that a fish and game warden carry a heavy object alone is a remote occurrence"]).

6. Discomfort, which may make it difficult for one to perform his duties, is insufficient to establish permanent incapacity. (Smith v. City of Napa (2004) 120 Cal.App.4th 194, 207 [mere discomfort which makes it difficult to perform one's job does not constitute a permanent incapacity]; citing Hosford v. Board of Administration (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability retirement. (Hosford v. Board of Administration, supra, 77 Cal.App.3d. at p. 863.)
Conclusion

7. Mr. McGaskey did not produce persuasive medical evidence to establish he was substantially incapacitated for the performance of his duties as an Associate Governmental Program Analyst with HCS due to orthopedic (back, shoulder and hip) and cardiologic (heart) conditions when he applied for disability retirement. Therefore, his Disability Retirement Election Application seeking disability retirement is denied.

ORDER

Respondent Derrick L. McGaskey’s Disability Retirement Election Application dated May 30, 2017, seeking disability retirement is DENIED.

DATED: October 3, 2018

COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings