ATTACHMENT E

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

In the Matter of the Statement of Issues of:

RICHARD M. GOMULA,
Respondent,

and

CALIFORNIA STATE UNIVERSITY,
NORTHRIDGE,
Respondent.

Case No. 2017-0112
OAH No. 2017060913

PROPOSED DECISION

This matter came before Cindy F. Forman, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on October 23, 2018.

Austa Wakily, Senior Staff Attorney, Legal Office, represented complainant Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Richard M. Gomula (respondent) represented himself at the hearing.

Respondent California State University, Northridge (CSUN), did not appear at the hearing.

Oral and documentary evidence was received and the matter was submitted for decision at the close of the hearing.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues, dated June 15, 2017, in his official capacity. The Statement of Issues seeks to determine whether respondent was permanently
disabled or substantially incapacitated from the performance of his duties as a Painter I for CSUN at the time of his application for disability retirement.

Background

2. Respondent started working as a Painter I for CSUN on December 2, 1996. By virtue of his employment, respondent was a local miscellaneous member of CalPERS subject to Government Code section 21150. Respondent has the minimum service credit to qualify for retirement, and he retired from service effective April 11, 2016. (Exhibit 3, at p. 1.)

3. As a painter for CSUN, respondent’s responsibilities included preparing, priming, and painting the interiors and exteriors of campus buildings as well as sweeping, cleaning, sanding, and spray painting. Respondent was responsible also for taping drywall and installing carpet, linoleum, and floor tile. Respondent used scaffolding, ladders, and rigging to perform his work. Respondent’s job duties required constant (over six hours per shift) standing, bending from his neck and waist, and twisting of his neck; frequent (three to six hours per shift) walking, kneeling, climbing, squatting, and twisting from the waist, carrying weights up to 25 pounds, exposure to excessive noise, and exposure to fumes and chemicals; and, occasional (up to three hours per shift) sitting, reaching above and below the shoulder, pushing and pulling, fine manipulation, simple and power grasping, carrying weight exceeding 25 pounds, walking on uneven ground, driving, working with heavy equipment, exposure to extreme temperature, humidity, and wetness, use of special visual or auditory protective equipment, working at heights, repetitive movement, and working with biohazards. (Exhibit 9.)

4. Respondent sustained a number of injuries after he began his employment as a painter at CSUN. Off the job, respondent was involved in a motorcycle accident in January 2004, in which he fractured his left tibia and fibula. The fracture was treated surgically, and metal rods were installed in his leg to brace it. While employed at CSUN, on a date not made clear in the record, respondent reported an injury to his right wrist while performing cardiopulmonary resuscitation (CPR) on a mannequin as a required training. On January 6, 2005, respondent was standing on a ladder, when it collapsed. Respondent fell, broke a door with his left knee, and landed on his back. In 2012, respondent noticed the onset of gradual pain in his lower back, which he attributed to the repetitive bending and lifting required of his job duties. On August 22, 2013, a part of a two-piece desk fell on respondent’s back when he was in a crouching position while painting. Respondent reported he healed from each of these injuries, but still suffers residual pain.

5. On January 30, 2014, respondent was lifting a five-gallon bucket of paint out of a golf cart, when he experienced a severe tearing pain extending through his spine and his right upper extremity to his wrist. His supervisor witnessed the injury. Respondent immediately sought medical treatment. In February 2014, respondent was examined for his injury, prescribed medication, and subsequently provided with physical therapy. In March 2014, after

---

1 The evidence regarding the weight of the paint can is inconsistent. In some medical records, the weight is 75 pounds,
he filed a worker's compensation claim, respondent was treated by Edward Opoku, D.O., who examined respondent and prescribed medication. Dr. Opoku also prescribed physical therapy, acupuncture, electro-stimulation therapy, and chiropractic treatment. In March 2015, respondent was released from Dr. Opoku's care.

6. After his January 30, 2014 injury, respondent was placed on Total Temporary Disability. He returned to work, but over the next two years, until February 17, 2016, respondent was again placed on temporary leave on several occasions. Each time respondent returned to work, his permitted duties were limited, and CSUN was unable to provide respondent with reasonable accommodation.

7. Respondent sought and received worker's compensation benefits for his injuries. According to David Heskiaoff, M.D., an orthopedic surgeon who examined respondent in connection with his worker's compensation claim, respondent's work-related injuries, consisting of continuous trauma to the lumbar spine and lower extremities as well as specific injury to the neck and upper extremities, reached "Maximum Medical Improvement" as of January 9, 2015, and his condition could be regarded as "Permanent and Stationary." (Exhibit 8, p. 20-21.)

8. Respondent filed a Disability Retirement Election Application, which CalPERS received on July 12, 2016 (Application). In the Application, respondent described his disability as "injured back, knees, + upper extremities." (Exhibit 3, p. 2.) He wrote that the disability occurred on January 30, 2014, after he lifted a bucket of paint. Respondent listed his work limitations, noting that he was unable to lift more than 20 pounds and had limited ability to bend, stand, and squat. Respondent also noted his injury affected his ability to perform his job because of "job function capability." At the time he submitted the application, respondent was not working in any capacity. (Ibid.)

9. At the request of CalPERS, John D. Kaufman, M.D., examined respondent on September 15, 2016. Dr. Kaufman is a Board-certified, California-licensed orthopedic surgeon. He has practiced orthopedic surgery since 1975. Dr. Kaufman has been a reviewer for several medical journals. He has also published extensively on orthopedic issues as well as lectured and presented at numerous symposia and meetings. As part of his examination of respondent, Dr. Kaufman reviewed medical records provided by CalPERS, including records from Dr. Opoku and Dr. Heskiaoff.

10. During his examination, Dr. Kaufman obtained a medical history and presenting complaints from respondent. According to Dr. Kaufman's report, respondent complained of

---

2 Pursuant to California Code of Regulations, title 8, section 10152, a "disability is considered permanent when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment."
severe pain (seven on a scale of one to 10) in his lower back and moderate pain (four, five, and six on a scale of one to 10) in his neck, right and left shoulders, right elbow, and right and left knees, present all or some of the time. Respondent also complained of depression, although that was not a basis for his request for disability benefits. (Exhibit 8^3, pp. 1-2.)

11. Respondent indicated that his infirmities caused him much difficulty with grooming, climbing stairs, eating, and doing housework. They also caused him some difficulty with bathing, dressing, performing oral care, toileting, walking, using a phone, managing medication, managing money, laundry, cooking, shopping, and driving. (Exhibit 8, p. 2.)

12. At the time he was examined by Dr. Kaufman, respondent had not visited a doctor since November 3, 2015. He had treated his pain with a TENS (transcutaneous electrical nerve stimulation) unit, ice, heat, stretching, and the medication ibuprofen.

13. Dr. Kaufman's physical examination of respondent found him to be "entirely normal." (Exhibit 8, p. 10.) Dr. Kaufman found no objective evidence of any impairment or physical problem related to respondent's neck, back, shoulders, elbows, or knees. He found no spasm in respondent's cervical or lumbar spine. He observed good muscle strength, symmetric reflexes, no atrophy, and no sensory deficit in respondent's upper extremities. Dr. Kaufman also observed no areas of tenderness, swelling, or deformity in respondent's right or left elbows. With respect to respondent's lower extremities, Dr. Kaufman did not find any atrophy, sensory deficit, swelling, or tenderness; he observed that respondent's hips, shoulders, and knees had good muscle strength and exhibited a normal range of motion. Dr. Kaufman noted that a 2014 MRI of respondent's right knee had shown a torn meniscus but that respondent had no objective signs of pathology related to the knee, leading Dr. Kaufman to believe that the finding was incidental or the tear was small and was not causing problems. (Id. at pp. 6-9.) Based on his examination, Dr. Kaufman found that respondent was able to do all the job duties of his occupation. (Id. at p. 10.)

14. On October 17, 2016, CalPERS denied respondent's application for disability retirement. (Exhibit 4.) On November 8, 2016, respondent appealed CalPERS's denial. (Exhibit 5.)

15. At hearing, respondent challenged the adequacy of Dr. Kaufman's examination. He asserted that Dr. Kaufman's examination was perfunctory and took less than the hour Dr. Kaufman had reported. Respondent also took issue with Dr. Kaufman's findings.

16. Respondent did not provide any independent medical report to support his claim that he was permanently disabled or substantially incapacitated at the time he filed his Application. Instead, respondent relied on records of earlier medical examinations excerpted in Dr. Kaufman's report and reports of medical visits after his examination by Dr. Kaufman. None of these records, however, is sufficient to overcome Dr. Kaufman's findings.

^3 On her own motion, the Administrative Law Judge placed Dr. Kaufman's medical report and all other reports regarding respondent's medical condition under seal.
(a) The earlier medical records excerpted in Dr. Kaufman's report were in large part generated in connection with respondent's worker's compensation claim. The medical records excerpted note respondent's pain, at times severe, in his back, neck, and shoulders, and many contain recommendations or orders for modification of respondent's work responsibilities, including limited lifting, no overhead working, and no heavy pushing and pulling. (Exhibit 8, pp. 12-25.) Many of the excerpted records focus on determining respondent's impairment/disability ratings for his various injuries. The excerpts, however, do not contain any evaluation of respondent's ability to continue to work or conclude respondent was substantially incapacitated from working as a painter by his condition. Respondent provided no evidence that his treating or examining doctors conducted any such evaluation or made any findings regarding whether he was permanently disabled or substantially incapacitated from working as a painter.

(b) In addition, excerpted notes by F. Marina Russman, M.D., a pain management consultant who examined respondent on November 3, 2015, indicate that she recommended acupuncture, physical therapy, and aqua therapy to treat respondent's pain. (Exhibit 8, pp. 24-25.) However, there is no record of any subsequent examination of respondent to determine whether these recommended treatments improved his condition. Nor is there evidence of any further examination by Dr. Russman closer to the time respondent filed the Application.

(c) The medical records regarding respondent's condition that were generated after Dr. Kaufman's examination are likewise unhelpful. (Exhibits A - Q.) Since his visit with Dr. Kaufman, respondent has continued to complain of pain in his back, elbows, and knees. Respondent submitted medical records of visits with his physician as well as records of X-rays, CT scans, and MRIs he recently received. Those records indicate that respondent is suffering from intraarticular loose bodies and lateral epicondylitis (tennis elbow) in the right elbow (exhibit B); mild degenerative changes of the thoracic spine (exhibit C); osteoarthritis and chondromacia (inflammation of the patella) of both knees (exhibits D and G); and a meniscus tear in the right knee (exhibit E). On December 14, 2017, respondent's orthopedic surgeon, Dr. Raj Ahluwalia, provided a certificate noting that respondent could return to work with limitations (exhibit H), but there are no records from Dr. Ahluwalia or any other treating physician concluding that respondent was permanently disabled by his condition or substantially incapacitated from performing his duties as a painter for CSUN. Respondent's meniscus tear was surgically treated on August 17, 2018; at the same time, respondent received an abrasion chondroplasty (smoothing) of his medial femoral and tibial articular surfaces. (Exhibit O.) The medical records do not indicate when respondent will obtain the full benefits of the procedure, but respondent testified he continues to be in pain.

LEGAL CONCLUSIONS

1. As the applicant for government benefits, respondent bears the burden of proof. (Lindsay v. San Diego Retirement Bd. (1964) 231 Cal.App.2d 165; Gov. Code, § 20160, subd.
2. Government Code section 20026 defines the following relevant terms: "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." "Incapacitated for the performance of duty," means the "substantial inability of the applicant to perform his usual duties." (Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 877.) Subjective discomfort or pain, which may make it difficult to perform one's duties, is not sufficient to establish permanent disability or substantial incapacity. (Smith v. City of Napa (2004) 120 Cal.App.4th 194, 207; Harmon v. Bd. of Retirement (1976) 62 Cal.App.3d 689, 696-697.)

3. Government Code section 21156 provides, in pertinent part: "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...."

4. The nature of evidence and evaluation of disability in a retirement hearing are different from that in a Workers' Compensation case. In the Workers' Compensation system, permanent disability is a permanent injury that impairs a worker's earning capacity or bodily function, or creates a competitive handicap in the open labor market. In the disability retirement system, the applicant must prove that he has the substantial inability to perform the usual duties of his particular job. (See Bianchi v. City of San Diego (1989) 214 Cal.App.3d 563, 568 (Bianchi); Franklin v. Workmen's Compensation Appeals Board (1978) 79 Cal.App.3d 224, 237.)

5. A finding that respondent is eligible to receive a worker's compensation award is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different in each proceeding. (Bianchi, supra, 214 Cal.App.3d at p. 567; Summerford v. Bd. Of Retirement (1977) 72 Cal.App.3d 128, 132). As observed in Bianchi, "a [worker's compensation] proceeding decides whether the employee suffered any job-related injury. If that injury results in some permanent residual loss (i.e., loss of normal use of a body part, impaired earning capacity, or some other competitive handicap in the labor market) the [worker's compensation appeals board (WCAB)] awards the employee a permanent disability rating. [Citations omitted.] Retirement boards, on the other hand, focus on a different issue: when an employee has suffered an injury or disease of such magnitude and nature that he is incapacitated from substantially performing his job responsibilities. [Citation omitted.] Because of the differences in the issues, "[a] finding by the WCAB of permanent disability, which may be partial for the purposes of workers' compensation does not bind the retirement board on the issue of the employee's incapacity to perform his duties." [Citation omitted.]

(214 Cal.App.3d at 567.)
6. For the reasons set forth in Factual Findings 2 through 16 and Legal Conclusions 1 through 5, respondent has not established by a preponderance of evidence that he is permanently disabled or substantially incapacitated for the performance of his duties as a painter within the meaning of Government Code sections 20026 and 21156. The competent medical evidence received at the hearing shows that, at the time of his application, respondent was not permanently disabled or substantially incapacitated because of any orthopedic condition related to his neck, shoulders, right elbow, back, or knees.

ORDER

The appeal of respondent Richard M. Gomula is denied. CalPERS’s denial of the Application for Disability Retirement submitted by respondent Richard M. Gomula is affirmed.

DATED: November 21, 2018

[Signature]

Cindy F. Forman
Administrative Law Judge
Office of Administrative Hearings