

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:

THOMAS J. DEWITT,

and

CALIFORNIA DEPARTMENT OF
TRANSPORTATION – DISTRICT 2,

Respondents.

Case No. 2018-0938

OAH No. 2018110507

PROPOSED DECISION

Heather M. Rowan, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on May 8, 2019, in Sacramento, California.

Preet Kaur, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

There was no appearance by or on behalf of Thomas DeWitt (respondent) or the California Department of Transportation – District 2 (Caltrans). CalPERS established that it duly served both Caltrans and respondent with a Notice of Hearing. Consequently, this matter proceeded as a default hearing against both respondents pursuant to Government Code section 11520, subdivision (a).

Evidence was received and the matter was submitted on May 8, 2019.

ISSUE

On the basis of an orthopedic (neck, left shoulder) condition, is respondent substantially incapacitated from performing his usual and customary duties as a Transportation Engineering Technician?

FACTUAL FINDINGS

1. Respondent was employed as a Transportation Engineering Technician by Caltrans. On March 4, 2016, respondent signed and thereafter filed his Disability Retirement Election Application (application). By letter dated December 9, 2016, CalPERS denied respondent's application. He filed a timely appeal. This hearing followed.

Respondent's Application

2. In his application, respondent described his disability as: "pain in left shoulder and neck (cronic) [sic] (neck surgery)." He stated that his disabling condition occurred on July 13, 2003, "while pounding a post into the ground with a port driver." He described his symptoms as, "poor hand strength cronic [sic] pain in left shoulder," and the injury's effect on his ability to do his job as follows: "cannot carry equipment and set it up in a timely matter [sic], in pain all the time."

In his application, respondent stated that his last day on Caltrans's payroll was November 26, 2010, and he is not currently working in any capacity.

3. In its December 9, 2016 letter, CalPERS stated that its "review included the reports prepared by Norman Arai, M.D., Joseph Purcell, D.O., Sid Cormier, Ph.D., and Daniel D'Amico, M.D.," and that based on "the evidence in those reports, [CalPERS] . . . find[s] that you are not substantially incapacitated from the performance of your job duties as a Transportation Engineering Technician" The letter notified respondent that he had 30 days to file a written appeal from the denial.

4. By letter dated January 8, 2017, respondent appealed from CalPERS' denial of his application.

Duties of a Transportation Engineering Technician

5. CalPERS submitted two documents that describe the duties of a Transportation Engineering Technician: a list of physical requirements of a Transportation Engineering Technician, and a Duty Statement. In general, the position requires the incumbent to assist the Transportation Surveyor/Party Chief or lead worker in the reconnaissance planning and execution of assigned survey fieldwork. Based on these documents, the pertinent physical tasks required of a Transportation Engineering Technician are:

Occasionally (up to three hours): Sitting, kneeling, twisting (waist), reaching above and below shoulder, fine manipulation, power grasping, lifting 26 to 50 pounds, driving, and exposure to dust, gas fumes, or chemicals.

Frequently (three to six hours): standing, walking, climbing, squatting, bending (neck), bending (waist), twisting (neck),

simple grasping, repetitive use of hands, lifting up to 25 pounds, walking on uneven ground, exposure to excessive noise, exposure to extreme temperature, humidity, or wetness.

Expert Opinion

6. CalPERS retained Dr. Harry Khasigian, M.D., to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Khasigian is a board-certified orthopedic surgeon, with a subspecialty in orthopedic sports medicine. He examined respondent on August 10, 2018, took respondent's medical history, reviewed respondent's medical records, and prepared an IME report. He testified at hearing about the findings in his report.

7. As part of the IME of respondent, Dr. Khasigian interviewed respondent, obtained a medical history, and conducted a physical examination. He reviewed respondent's job description and the physical requirements of a Transportation Engineering Technician. Dr. Khasigian also reviewed limited medical records related to respondent's orthopedic condition.

8. Respondent explained to Dr. Khasigian that he injured his left shoulder while he was pounding a stake in the ground while working with surveyors. He had a sudden sharp pain and he subsequently had an operation on his neck. His operation was on January 5, 2004, and he was off work for one year. Respondent then returned to light duty with no lifting. He has had pain since the injury, and did not return to his previous job. He has not worked since 2010.

9. During the examination, respondent told Dr. Khasigian that his neck pain radiates to his left trapezius and scapula. He reported his pain level as a six on an every-day basis, increasing to seven out of ten. His activities included watching television and giving his dogs exercise. Respondent was previously prescribed fentanyl and Norco for his pain, but he no longer takes pain medications. His pain has increased since he stopped taking the medications.

10. Respondent's specific surgery was a microdiscectomy in his cervical spine for foraminotomy (i.e., a surgery to relieve pressure on nerves caused by spurs in the foramen, which are the passageways for spinal cord nerves). Respondent did not provide Dr. Khasigian with recent x-ray or MRI results. Dr. Khasigian reviewed respondent's medical records he was provided. Among these was a report from Dr. Daniel D'Amico, who evaluated respondent on CalPERS's request in October 2016. Dr. D'Amico reported that respondent had an opioid dependency, and was being treated for that dependency as well as a "psychiatric disability." Dr. Khasigian also noted that respondent was being treated by Sid Cormier, Ph.D., in 2011 for "prescription opioid dependence and major depressive disorder." At hearing, Dr. Khasigian stated that at the time of the IME, respondent reported he had ceased all use of opioids, and continued to receive treatment for depression.

11. Dr. Khasigian also performed range of motion and other physical tests. He found that respondent had no limitations in his lumbar or thoracic spine, and "a little" decreased range in his cervical spine, which is usually related to arthritis. Respondent showed no atrophy in his upper extremity muscles, no loss of grip strength, and no swelling or atrophy in his left shoulder. Respondent reported pain in the left scapula.

12. Based on his physical evaluation and review of respondent's records, Dr. Khasigian opined that respondent had arthritis, but no disabling condition. He reported that respondent had a "high level of subjective complaints," though he has not returned to his surgeon for reevaluation, and did not present with "diagnostic abnormalities." Dr. Khasigian concluded that respondent is not substantially incapacitated from performing the regular job duties of a Transportation Engineering Technician.

Respondent's Evidence

13. Respondent attached to his request for hearing clinic notes from an appointment he had with Dr. Norman Arai on January 9, 2017. The purpose of the appointment was: "follow up, use of pain medications." Respondent was taking fentanyl and Norco daily for pain. He stated that the pain medications "allow[ed] him to function." The clinic notes report that respondent was continuing to have daily pain in his neck and shoulder. Respondent did not appear at hearing and did not produce any further evidence.

Discussion

14. The burden was on respondent to offer sufficient competent medical evidence at hearing to support his disability retirement application. Respondent failed to do so. Based on the evidence presented, respondent failed to offer sufficient competent medical evidence to establish that, at the time he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Transportation Engineering Technician based on his orthopedic (neck, left shoulder) condition injury. Dr. Khasigian's report and testimony established that respondent was not substantially incapacitated from performing his usual job duties. There was no competent medical evidence to counter that opinion.

15. In sum, because respondent failed to offer sufficient competent medical evidence at the hearing to establish that, at the time he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Transportation Engineering Technician, his disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Transportation Engineering Technician, respondent is a member of CalPERS, subject to Government Code section 21150.

2. To qualify for disability retirement, respondent had to prove that, at the time he applied for disability retirement, he was "incapacitated physically or mentally for the performance of [his] duties. . . ." (Gov. Code, § 21156, subd. (a).) 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 . . . on the basis of competent medical opinion.

3. 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.)

4. When all the evidence in this matter is considered, respondent did not establish that his disability retirement application should be granted. He failed to submit sufficient evidence based upon competent medical opinion that, at the time he applied for disability retirement, he was permanently and substantially incapacitated from performing the usual duties of a Transportation Engineering Technician on the basis of his orthopedic (neck, left shoulder) condition. Consequently, his disability retirement application must be denied.

ORDER

The application of respondent Thomas J. DeWitt for disability retirement is DENIED.

DATED: May 9, 2019

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Heather M. Rowan
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HEATHER M. ROWAN
Administrative Law Judge
Office of Administrative Hearings