ATTACHMENT A

THE PROPOSED DECISION
In the Matter of the Reinstatement from Industrial Disability Retirement of:

TYSON J. MROSEK,

Respondent

and

DEPARTMENT OF FORESTRY AND FIRE PROTECTION,

Respondent.

Case No. 2018-0741

OAH No. 2018081193

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on March 20, 2019, in Riverside, California.

John Shipley, Senior Attorney, represented complainant, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Robert G. Johnson, Attorney at Law, represented respondent, Tyson J. Mrosek, who was present.

No appearance was made on behalf of respondent, the Department of Forestry and Fire Protection (Cal Fire). The matter proceeded as a default against this respondent pursuant to Government Code section 11520, subdivision (a).

The matter was submitted on March 20, 2019.
ISSUE

Is Mr. Mrosek, who was granted a disability retirement in 2013, no longer permanently disabled or incapacitated from performing the usual and customary duties of a Firefighter II-Paramedic?

FACTUAL FINDINGS

Background

1. Respondent¹ was employed by Cal Fire as a Firefighter II-Paramedic. On April 16, 2013, CalPERS received his application for industrial disability retirement based upon an orthopedic (back) condition. On May 29, 2013, CalPERS notified respondent that it had approved his application, and he was retired for disability effective immediately.

2. Provisions of the Government Code authorize CalPERS to re-evaluate members who are under the minimum age for voluntary retirement to determine if they remain eligible for a disability retirement. If CalPERS determines that the member is no longer incapacitated or permanently disabled, it may cancel the disability retirement allowance and seek to have the member reinstated.

3. On August 11, 2015, CalPERS notified respondent that it was reviewing his disability retirement status. On December 5, 2015, respondent underwent an Independent Medical Examination (IME) conducted by Stephen P. Suzuki, M.D., an orthopaedic surgeon. Dr. Suzuki concluded that respondent remained permanently incapacitated from the performance of his usual and customary job duties. On December 17, 2015, CalPERS notified respondent that his industrial disability allowance would be continued.

4. On November 20, 2017, CalPERS notified respondent that his industrial disability retirement benefits were again under review. CalPERS requested information from respondent's treating physician and scheduled him for an IME with orthopaedic surgeon James M. Fait, M.D.

5. On June 11, 2018, CalPERS notified respondent that after reevaluation, it concluded that respondent is no longer substantially incapacitated from the performance of the job duties of a Firefighter II-Paramedic with Cal Fire and he was being reinstated to his former position.

6. Respondent timely appealed that determination.

7. On August 13, 2018, complainant signed an accusation seeking to reinstate respondent to his former position as a Firefighter II-Paramedic with Cal Fire. The sole issue

¹ All future references to “respondent” are to Mr. Mrosek.
on appeal is whether respondent remains disabled or substantially incapacitated from performance of the duties of a Firefighter II-Paramedic. This hearing ensued.

Duties of a Firefighter II-Paramedic

8. According to Cal Fire’s Position Essential Functions Duties Statement, a Firefighter II-Paramedic within Cal Fire’s Southern Region, Riverside Unit, performs the full range of firefighting, rescue, and emergency medical duties under the supervision of a Fire Apparatus Engineer or a Fire Captain. The position also assists in general fire station duties including maintenance of the station and equipment.

Physical Demands

9. According to Cal Fire’s Physical/Mental Stress Job description, a Firefighter II-Paramedic is a member of a fire apparatus crew and works under the supervision of a Fire Apparatus Engineer or Fire Captain to perform the full range of firefighting duties. Such duties are responding to alarms; connecting, laying, and operating hose lines; entering burning areas and structures with hose lines; operating and climbing ladders; making forcible entry into buildings; and using hand-tools to suppress fires. The Firefighter II-Paramedic also assists in emergency medical response; assists in equipment, building, and grounds maintenance; and operates vehicles. There is a requirement of wearing respiratory protection equipment, including self-contained breathing apparatus (SCBA). The duties are classified as a “Category I - Arduous Physical Work.”

Duties involve field work requiring physical performance calling for above-average ability, endurance, and superior conditions. The position requires the occasional demand of extraordinarily strenuous activities in emergencies, under adverse environmental conditions, and over extended periods of time. Requirements include running, walking, difficult climbing, jumping, twisting, bending and lifting over 25 pounds, with the pace of work typically set by the emergency situation.

10. The CalPERS Physical Requirements of Position/Occupational title worksheet, completed by a Cal Fire Assistant Chief and signed by respondent on April 12, 2013, identifies physical activities performed by a Firefighter-Paramedic. Constant activities are those that occur over six hours per day. They are identified as twisting at the neck; reaching below the shoulder; pushing and pulling; lifting/carrying 0 to 10 pounds; walking on uneven ground; exposure to excessive noise, extreme temperature, and chemicals; use of protective equipment; and working with biohazards. Frequent activities are identified as activities that occur between three and six hours a day. They are identified as standing; walking; bending at the neck and waist; twisting at the waist; fine manipulation; lifting 11 to 25 pounds; and working with heavy equipment and walking on uneven ground. Occasional activities are those that occur up to three hours a day. They are identified as sitting, running, crawling, kneeling, climbing, reaching above the shoulder, power grasping, keyboard/mouse use, lifting/carrying 26 to 100 pounds, driving, working at heights, and operation of foot controls. A checked box indicates the position never requires lifting greater than 100 pounds.
11. Respondent testified about the typical duties and physical requirements of a Firefighter II-Paramedic. He was assigned to a fire engine in the City of Jurupa Valley, where Cal Fire provided contract municipal fire protection. He worked 72 hour shifts with 96 hours off; however, because there were a limited number of paramedics, he was often forced to work overtime. In responding to any call, he was expected to wear turnout gear, which weighs approximately 30 pounds. For any call involving the potential for fire, he was required to wear SCBA equipment, which increased the weight by another 25 pounds. Adding a pressurized fire extinguisher increased the weight by another 30 pounds, and adding the full complement of fire suppression tools could be an additional 50 pounds or more. He disagreed with the form that indicated he was never required to lift more than 100 pounds. He testified that he was expected to be able to pick up and raise a standard 25-foot ladder, which weighs approximately 125 pounds. No evidence refuted this claim.

Testimony of Nelson Cooper

12. Nelson Cooper is a sworn investigator employed by CalPERS. Part of his duties are to conduct surveillance and social media research of individuals receiving disability retirement benefits. Mr. Cooper conducted internet research, including respondent’s publicly available Facebook page, and discovered several photos and posts of respondent engaged in, or referring to, his participation in, multiple physical activities to include competitive bicycling events. Mr. Cooper obtained respondent’s latest driver’s license photo from the Department of Motor Vehicles in order to identify respondent. The information Mr. Nelson obtained is summarized as follows:

Photographs and posts on respondent’s personal Facebook page:

- A post dated April 24, 2016 stating: “I got something in my eye at the track last night and I thought it came out but it felt like a scratch all day[,] Tonight I pulled a rock out of my eye! How does that stay in there all day?”

- Photographs dated November 20, 2015, showing what appears to be respondent on a wakeboard being towed by a boat.

- Photographs dated November 20, 2015, captioned, “Whitewater training center was so fun!” One photo showed what appears to be respondent wearing a harness and helmet.

- Photograph dated November 1, 2015, showing respondent at what appears to be a dirt track sitting stationary on a BMX bike with two young children.

- Photograph dated January 3, 2015, showing respondent with a group of adults sitting on a mountain bike on rugged terrain.
• Photograph dated June 7, 2014, showing respondent on a bike riding on an angled track.

• Photograph dated June 1, 2014, showing respondent and a young child floating in an open body of water.

Photographs from respondent’s personal Instagram page:
• Photograph dated March 13, 2015, showing respondent, wearing a full-face helmet, kneeling with a young child who is holding a BMX bike.

• Photographs in 2015\(^2\) captioned, “Enjoying some 2 wheel time with [redacted] can’t wait for him to get a mtn bike even found yodas swamp.” One photo showed respondent wearing a bicycle helmet with a young child wearing a BMX helmet. Other photos were of a child riding a bike.

• Photographs dated November 2015, at Lake Norman, North Carolina. The photos show what appears to be respondent standing on a wakeboard being pulled by a boat.

Photographs from respondent’s wife’s Facebook profile:
• Photograph dated May 11, 2016, showing respondent and what appears to be his family next to a ski lift.

• Photograph dated August 20, 2013, showing respondent and what appears to be his family wearing winter attire.

• Photographs from July 5, 2018, with what appears to be respondent riding a bike on a residential street with family and friends.

Facebook Photos and posts from Precision BMX Racing Team:
• Photographs dated January 15, 2017,\(^3\) showing respondent wearing BMX attire sitting with two children.

• Photograph dated November 5, 2016, showing respondent kneeling with a group of children holding BMX bikes.

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\(^2\) The month was not clear in the copy.

\(^3\) The posts did not contain a year, but since Mr. Cooper accessed them in 2017, the posts correspond to that time.
• Photograph dated October 22, 2016, with the caption, “Congrats Tyson on first place finish at the Nationals Pre-race last night. Good luck today team!” The picture showed respondent in BMX attire holding a trophy and helmet.

• Photograph dated in October 2016 with respondent in a group photo wearing BMX attire.

• Photograph dated September 26, 2016, showing respondent in BMX attire holding a racing number.

• Post from June 4, 2016, with the caption, “Wanted to give an update on how our team is doing. After a great day at the state race in Perris a couple weeks ago here is where the team stands in state points. Cruisers Dave Smitley #1. Tyson Mrosek #3.”

• Photograph dated March 16, 2016, captioned, “Tyson keeping the pressure on the rider in front of him.” The photo showed respondent on a BMX bike on a dirt race course. Respondent is reaching the peak of a small hill and the front tire is in the air. Another photo showed respondent riding on the dirt course.

Posts from respondent’s BMX rider profile and various race results:

• Grand Prix BMX Race Results from July 17, 2017, showing a fourth place finish for respondent in the 41 to 45 “cruiser” category.

• Grand Prix BMX Race Results from July 1, 2017, showing a fourth place finish for respondent in the 41 to 45 “cruiser” category.

• Grand Prix BMX Race Results from April 15, 2017, showing a fourth place finish for respondent in the 41 to 45 “cruiser” category.

• PS BMX Race Results from April 8, 2017, showing a fourth place finish for respondent in the “cruiser” category.

• PS BMX Race Results from April 7, 2017, showing a fourth place finish for respondent in the “cruiser” category.

• Bellflower USA BMX District 22 Race Results from March 18, 2017, showing a second place finish for respondent in the 41 to 45 “cruiser” category.

• Chula Vista BMX Race Results from November 5, 2016, showing a first place finish (out of two) for respondent in the 36 to 40 “cruiser” category.
• Unknown Race Results from August 20, 2016, showing a first place finish for respondent in the 41 to 45 “cruiser” category.

• Chula Vista BMX Race Results from June 5, 2016, showing a fourth place finish for respondent in the 41 to 45 “cruiser” category.

• Grand Prix BMX Race Results from October 14, 2015, showing a second place finish for respondent in the 36 to 40 “cruiser” category.

Information regarding the Kamikaze Bike Games:

• An article about the 2015 Kamikaze Bike Games to take place at Mammoth Lakes from September 24 through 27, 2015. Photographs depict mountain bikers on mountain terrain. Respondent is listed as a participant in the “Legends” category. The race consisted of two segments: the first 3.2 miles with a 1,932 feet loss and the second 2.0 miles with 1,169 feet loss. The race results showed respondent came in 19th place with a total time of 9 minutes, 48 seconds.

• Race results from the 2013 Kamikaze Games indicating respondent came in 17th place with a total time of 10 minutes, 9 seconds. A picture shows respondent riding a mountain bike.

13. Mr. Nelson testified that he conducted surveillance at one BMX race respondent was scheduled to attend. However, Mr. Nelson did not observe respondent at the event.

Testimony of James Fait, M.D.

14. CalPERS referred respondent to Dr. Fait for an IME, which was conducted on May 3, 2018. Dr. Fait is a board-certified orthopedic surgeon. He obtained his medical degree in 1996 from the University of California, Davis. Following medical school, he completed his internship in surgery and his residency in orthopaedic surgery. Dr. Fait also completed post-doctoral training in hip and knee reconstruction. He is a Fellow of the American Academy of Orthopedic Surgeons and a Diplomate of the American Board of Orthopaedic Surgery. After completing his residency, Dr. Fait worked at Kaiser Permanente for approximately 11 years in the Department of Orthopaedic Surgery. Since leaving Kaiser, Dr. Fait has worked in private practice for the past seven years performing orthopedic surgery. The following is a summary of his report and testimony at hearing.

15. Dr. Fait reviewed the following documents as part of his examination: IME report by Dr. Suzuki dated December 14, 2015; numerous medical records from orthopedic surgeon Darren Bergey, M.D., numerous medical records from chiropractor Nicholas Crabill, D.C.; medical records from pain specialist Vance Johnson, M.D.; Agreed Medical
Respondent described the circumstances surrounding the injury to his back. In 2009, respondent and his fire crew responded to a medical call where the patient was over 700 pounds. Respondent was standing on the patient’s bed attempting to get into position to shift and move the patient when he lost his footing. He initially had low back pain but the symptoms persisted. He received medical treatment and began taking 3,000 to 4,000 mg of ibuprofen per day when he worked. He later reinjured his back while moving heavy boxes from the firetruck. He received a course of physical therapy and returned to work. In 2010 or 2011, he responded to a motor vehicle crash and was attempting to remove a victim from the car. The victim panicked and pulled him backwards, again causing acute onset of low back pain. This was the last day he worked as a firefighter. He underwent an extensive course of treatment, including physical therapy, chiropractic treatment, acupuncture, and epidural injections. On March 7, 2012, he underwent a total disc replacement performed by Dr. Bergey, which resulted in improvement but not resolution of the pain. He continues to see Dr. Bergey.

Respondent reported having constant low back pain he described as aching. The pain radiates to the mid back and up to the base of the neck, as well as radiating to the outer side of both buttocks, thighs, and knees. Respondent reported he is independent with activities of daily living such as walking, bathing, eating, dressing, grooming, driving, and he performs yard work rarely. He reported difficulty in the bathroom reaching behind himself in order to clean. He also has difficulty putting on his shoes.

Respondent reported that he used to be a professional mountain biker but retired before taking up firefighting. Respondent reported that he has not ridden a bike in over a year. When he last rode a bike, he rode for one-half to one hour. This was a light ride that resulted in significant pain. Respondent reported, “I do nothing now. I used to be very active. Now, I only do radio-controlled cars with my kids. I have literally done nothing in a year, it sucks.” Respondent also indicated he went wakeboarding once over the past few years, but this resulted in “terrible pain” and he has not been wakeboarding since.

Dr. Fait examined respondent’s lumbar spine. No deformity was noted. Forward flexion of the lumbar spine was 40 degrees, extension 4 degrees, and lateral bending 20 degrees on either side. Respondent’s range of motion in the back was restricted, but Dr. Fait was unable to determine if respondent was making a full effort. There was mild to moderate tenderness on palpation with no paraspinal spasm with palpation. There was no evidence of atrophy or radiculopathy in the lower extremities. Respondent was able to walk on heels and toes and squat.
Dr. Fait reviewed the essential duty statement and physical requirements for a Firefighter II-Paramedic with Cal Fire. He also considered his own experience with treating firefighters; he sees approximately two or three firefighters in his clinic every day. He admitted that he did not consider the weight of gear a firefighter is required to carry and received no information on the necessity of a Cal Fire firefighter to carry ladders weighing more than 100 pounds. His consideration of the physical job requirements was limited to the documents CalPERS provided him. If he knew that respondent was required to lift more than 100 pounds, Dr. Fait would want to know the frequency that this task occurred.

Dr. Fait testified that he did not know much about mountain biking or BMX riding. However, before medical school, Dr. Fait was trained as a biomechanical engineer. He believes that these bikes have advanced shock absorbers and there are many complexities and factors needed to determine how much stress on the body is actually involved. His concern with respondent was not that respondent participated in these activities, but whether during the examination respondent demonstrated a complete effort, especially as related to flexion of the spine.

Dr. Fait noted some concerns with respondent’s credibility in accurately reporting his symptoms. Dr. Fait found no physical exam abnormalities that correlate with the level of symptomatology reported by respondent. Thus, it is primarily respondent’s subjective complaints of pain and reports of numbness or tingling that would significantly impair his activities. While respondent reported these complaints, the social media posts suggest that respondent is much more active than he indicated in the examination. Dr. Fait noted respondent was engaged in mountain biking riding and race results were reported on the internet throughout 2015, 2016, until July 2017. Finally, the photos of respondent wakeboarding without apparent distress or pain demonstrate movements of the lower spine that are much more unrestricted than what was presented during evaluation.

Dr. Fait also reviewed an article in the Journal of Neurosurgical Focus from November 2012 on the military rehabilitation guidelines for postoperative lumbar total disc replacements. Individuals undergoing total disc replacements had a reasonable expectation of returning to active-duty responsibilities, including parachute jumping and diving. Approximately 20 percent of those surveyed could not return to full duty.

16. Dr. Fait concluded that respondent is not substantially incapacitated from performing the duties of a Firefighter II-Paramedic with Cal Fire. Since respondent underwent a total disc replacement at L5-S1, he experienced residual pain and underwent at least two medial branch blocks on the right side at L4-L5 and L5-S1 as well as a selective right L5 nerve block. Respondent works in golf cart sales and reports periodic flare-ups on an intermittent basis. On examination, respondent demonstrated restricted movements of the lower lumbar spine and diminished sensation to light touch on the right leg roughly in the L4-L5 nerve root distribution. However, he had full motor strength in all lower extremity muscle groups and reflexes were intact and symmetric. There was no measurable atrophy or significant leg difference.
Dr. Fait believed respondent was capable of engaging in competitive mountain biking activities to the extent that he has been able to win on a number of occasions when competing against others in his age group. Based on Dr. Fait’s review of the Firefighter II-Paramedic job functions, he did not find any of the essential functions respondent could not perform. Although respondent reported flare-ups and pain, there was no evidence in any diagnostic study of any failure of the total disc arthroplasty or progression of degenerative disc disease, spinal canal stenosis, or neural foraminal narrowing that would correlate with such complaints.

Dr. Fait reviewed the most recent MRI and report by Dr. Bergey. The report indicated that respondent has facet disease, which is a degenerative disc disease. However, the additional information did not change Dr. Fait’s opinion that respondent is not substantially incapacitated.

**Testimony of Darren Bergey, M.D.**

17. Dr. Bergey graduated from medical school at Loma Linda University in 1996. He completed an internship in general surgery at the Mayo Clinic and returned to Loma Linda University to complete his residency in orthopaedic surgery. He then completed a fellowship in spinal disorders at Cedars-Sinai Institute of Spinal Disorders. He worked at Loma Linda as a clinical instructor in orthopaedic surgery and in 2005 went into private practice, specializing in disorders of the spine. He is a member of the North American Spine Society and the International Society for the Advancement of Spine Surgery.

18. Dr. Bergey performed respondent’s L5-S1 total disc arthroplasty in March 2012. This involved total replacement of the disc. Prior to the surgery, respondent’s chronic back pain had not improved for over six months with conservative treatments. Dr. Bergey has performed artificial disc replacements since they were approved by the Food and Drug Administration. He has performed over 100 disc replacements and 3,000 spine surgeries. The intention at the time was that respondent would be able to return to work.

Dr. Bergey testified that the result of the surgery was “fair.” An “excellent” result would have been rapid improvement with minimal symptoms. Although respondent’s symptoms were better than what they had been before the surgery, he continued to have ongoing symptoms. Respondent underwent further imaging studies and diagnostic pain management. Respondent received several facet blocks; but despite the treatment, his symptoms did not resolve. Respondent is no longer on anti-inflammatories and was treated with narcotic pain medication. Respondent now takes medication to help control muscle spasms. Dr. Bergey treated respondent through Workers’ Compensation until 2013, when Dr. Bergey concluded that respondent had reached his maximum medical improvement. He has since seen respondent for purposes of re-evaluation.

Dr. Bergey saw respondent in March 2018 for a complaint of thoracic pain at T8-T10. Dr. Bergey recommended chiropractic treatment. Respondent’s pain specialist, Dr. Johnson, ordered an MRI that was performed in November 2018. The MRI revealed a small disc.
protrusion at T11-T12 and small right paracentral disc protrusion at T12-L1, with mild central canal stenosis, but no significant neural foraminal narrowing. Dr. Bergey agreed with Dr. Fait that the complaint of pain is a subjective symptom. However, if there are objective findings that correlate with the location of the pain, the complaint of pain could become objective. Here, the MRI results correlate with respondent’s subjective complaint of thoracic back pain. The MRI findings indicate that respondent may require surgery at some time, but it is not probable to a reasonable medical certainty. However, with regard to respondent’s lumbar spine, the complaints of pain have been consistent since surgery. Six months after respondent had surgery, he received facet injections. Respondent’s symptoms are consistent with a facet origin. Respondent has facet loading, which is pain associated with extension but can be improved with forward flexion. X-rays also indicated that the source of the pain is the facet joints, where there is evidence of ossification.

Dr. Bergey testified that he has not performed a full functional capacity exam, which is needed to determine respondent’s true capacity to lift heavy objects. Dr. Bergey recommended prophylactic restrictions on lifting. Respondent probably could lift a 100-pound object if required. However, he does not believe that respondent could reliably or predictably do so. In addition to the requirement that firefighters wear heavy protective equipment, Dr. Bergey does not believe that respondent could lift heavy objects on any consistent basis. Dr. Bergey has concern about the safety to the public in that respondent could drop a person. Dr. Bergey believes that there is more than respondent’s claim of pain to support his conclusions — he found objective signs radiographically and guarding on examination.

Dr. Bergey testified that he did not specifically discuss mountain biking or BMX riding with respondent. However, he had instructed respondent to try and return to his daily activities as much as possible. He is aware that respondent has competed in BMX races of short duration (two to three minutes) as well as mountain biking. Upon learning that respondent was competing in these races, Dr. Bergey initially shared Dr. Fait’s concerns. However, on further evaluation, the activities were consistent with Dr. Bergey’s clinical evaluation. Dr. Bergey noted that respondent’s forward flexion in 2015 was measured at 40 degrees, with 60 degrees being normal. Respondent’s pain on examination was worse on lateral bend and extension, in which the range of motion was 15 degrees. Sitting on a bike with legs on the pedals, there is a decrease of the load on the lumbar spine. Riding a bike would actually be better than other activities because it would open up the facet joints. Dr. Bergey would be concerned about respondent’s ability to twist laterally, ability to run, and repeated bending, stooping, and extending.

Dr. Bergey was familiar with the CalPERS definition of disability for purposes of disability retirement. Dr. Bergey’s opinion that respondent could not return to work is based on respondent’s inability to engage in these repetitive activities. He does not believe that the restrictions are simply prophylactic. Although he believes respondent could perform certain tasks under an emergency situation, it is the repetitive nature of these tasks required by a firefighter that compels his conclusion that respondent could not perform reliably or safely.
In conclusion, Dr. Bergey believed that respondent remains substantially incapacitated from performing the usual and customary duties of a Cal Fire firefighter.

Respondent’s Testimony

19. Respondent is 43 years old. As a teenager, he began riding mountain bikes professionally. He competed in national and international events, such as the X-Games, and was national champion at age 18. He then went to firefighting school and began his firefighting career in Big Bear. He then put himself through paramedic school. He joined Cal Fire as a Firefighter II-Paramedic in 2007 or 2008.

His initial back injury occurred while attempting to lift a bed-ridden 700-pound patient. After receiving treatment, he was able to return to work, but was taking very high doses of ibuprofen, 3,000 to 4,000 mg per day. This resulted in him having gastric issues. In 2010 or 2011, he responded to a motor vehicle crash. When he was attempting to remove the victim from the car, she panicked and pulled him over. This strained his back and he never returned to work. His hope was that after receiving a disc replacement, he would be able to return. Dr. Bergey instructed him to avoid repetitive lifting and bending and to avoid lifting more than 35 pounds. Respondent, who had always been active, found that pretty much all activity caused discomfort. If an activity caused him too much pain, he stopped doing it. Respondent admitted that he rode a mountain bike in the Mammoth Kamikaze Bike Games. The race he competed in were former professionals who were invited back to compete in an exhibition event. The course was purely downhill on a fire road and consisted of two heats of approximately five minutes in duration. There were no moguls, rocks, or other obstacles. It was a “fun” event and not a professional competition or involving prize money. Respondent competed in 2013 and 2015. After the events, he felt some tightness and pain, but nothing during the race. He used his old mountain bike, which had shocks in the front and rear allowing for seven inches of travel.

Respondent began riding BMX bikes in 2015 until mid-2017. The bikes themselves are lightweight, approximately 13 to 16 pounds. The BMX races only lasted from 35 to 55 seconds. There would be long breaks in between and, at most, three races during a competition. The races occurred on a smooth short course that did contain small hills. However, the focus is to keep the bike on the track as a racer will lose time if going airborne. Respondent competed approximately once a month. This would be the only time he rode. Sometimes he would go to the track and not ride. His children competed in BMX events, as well. He stopped riding in 2017 because of the pain. He will occasionally do some leisurely bike riding with his family on paved streets.

Respondent addressed some of the other photographs contained in the CalPERS investigation report. He clarified that one of the photographs was of him wakesurfing, not wakeboarding. The difference is that in wakesurfing, the board is being towed in the boat’s wake at a slow speed. This caused him pain and he stopped doing it. The photograph at the whitewater center was when he did a zip-line. This was a one-time occurrence. The
photograph of him on a mountain bike was with some friends on a fire road. He only did this a couple times a year.

Respondent testified that he accurately reported his symptoms to Dr. Fait. He said that during the examination, Dr. Fait never palpated his spine. Respondent still has difficulty dressing. The hardest tasks are wiping his backside, getting dressed, and putting shoes on. In contrast, sitting on a bike is in a neutral position. However, he stopped the BMX riding in mid-2017 because it ultimately was too painful for him.

Respondent became emotional when testifying about what being a firefighter meant to him and his desire to return to it. He said that he would absolutely return to it if he were physically able. He said he worked very hard to become a firefighter and paramedic. He loved firefighting and to this day has a scanner to monitor fire calls. However, his fear is that he would not be able to perform the job safely and would one day "let someone down." He testified that there was an instance where he needed to intubate a patient but was physically not able to do so because of the position he needed to get in to visualize the vocal cords. He had to hand the task over to the ambulance paramedic who had just arrived. This was a sobering moment for him. He worked in a busy station that responded to multiple alarm, emergency medical, and collision calls. He also noted that paramedics are required to properly administer medications and calculate dosages. He is concerned that he would not be able to devote his attention to such tasks if he is in a great deal of pain.

20. Respondent's testimony was sincere, heartfelt, and credible.

Additional Relevant Medical Records

21. Dr. Suzuki performed the IME for CalPERS on December 5, 2015. Dr. Suzuki tested the range of motion of respondent's lumbar spine. Flexion was 35 degrees, extension was 10 degrees, and lateral bend was 15 degrees on each side. Dr. Suzuki concluded that respondent was permanently incapacitated to perform his usual and customary job duties. Dr. Suzuki agreed with Dr. Bergey's post-operative permanent restrictions of no repetitive pushing, pulling, or lifting over 35 pounds, and limited bending and stooping. Dr. Suzuki believed these were reasonable restrictions based on the arthroplasty at L5-S1 and the degenerative changes at the facet joints at L4-L5 and L5-S1. Dr. Suzuki stated that respondent could not perform the duties of a Firefighter II-Paramedic, respondent fully cooperated during the examination, and did not appear to exaggerate any of his symptoms or complaints.

22. Dr. Bergey examined respondent on January 19, 2016, and prepared a progress report for continued treatment under Workers' Compensation. Dr. Bergey tested the range of motion of respondent's lumbar spine. Flexion was 30 degrees, extension was 8 degrees, left lateral bend was 18 degrees, and right lateral bend was 25 degrees.4

4 The report indicated normal values of 60 degrees for flexion, 25 degrees for extension, and 25 degrees for lateral bend.
23. Dr. Bergey examined respondent on December 19, 2017, and prepared a progress report for continued treatment under Workers' Compensation. Dr. Bergey tested the range of motion of respondent's lumbar spine. Flexion was 25 degrees, extension was 4 degrees, left lateral bend was 18 degrees, and right lateral bend was 16 degrees.

LEGAL CONCLUSIONS

Purpose of the Retirement Law

1. The legislative purpose of public employee pension programs is well-established. They serve two objectives: to induce persons to enter and continue in public service, and to provide subsistence for disabled or retired employees and their dependents. Disability pension laws are intended to alleviate the harshness that would accompany the termination of an employee who has become medically unable to perform his duties. (Haywood v. American River Fire Protection Dist. (1998) 67 Cal.App.4th 1292, 1304.)

Burden and Standard of Proof

2. CalPERS had the burden of proving by a preponderance of the evidence that respondent is no longer incapacitated from performing the duties of a Firefighter II-Paramedic. (Evid. Code, §§ 500, 115.)

Applicable Statutes

3. Government Code section 20026 defines the terms “disability” and “incapacity for performance of duty,” when used as a basis for retirement, to mean a “disability of permanent or extended and uncertain duration” that is based on “competent medical opinion.”

4. Government Code section 21151, subdivision (a), provides that a state safety or state peace officer who is “incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability... regardless of age or amount of service.”

5. Government Code section 21156 provides that if the evidence demonstrates that the member 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. The determination of incapacitation shall be based on competent medical opinion.

6. Government Code section 21192 provides:

   The board... may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class
to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. . . . The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

7. Government Code section 21193 provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position. However, in that case, acceptance of any other position shall immediately terminate any right to reinstatement. A recipient who is found to continue to be incapacitated for duty in his or her former position and class, but not incapacitated for duty in another position for which he or she has applied for reinstatement and who accepts employment in the other position, shall upon subsequent discontinuance of incapacity for service in his or her former position or a position in the same class, as determined by the board under Section 21192, be reinstated at his or her option to that position.
Appellate Authority

8. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his customary duties, even though doing so may be difficult or painful, the employee is not incapacitated and does not qualify for a disability retirement. (Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 886-887.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (Hosford v. Bd. of Administration (1978) 77 Cal.App.3d 854.) Further, an applicant for disability retirement must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (Id. at p. 863.)

5 The applicant in Mansperger was a fish and game warden with peace officer status who had suffered work-related injuries to his right arm that prevented him from lifting and carrying heavy loads. (Id. at p. 875.) He remained able to perform most of his usual duties, including apprehending a prisoner, but could not lift heavy weights or carry the prisoner away. (Ibid.) In affirming CalPERS's decision that he was not physically incapacitated from performing his duties as a fish and game warden, the court noted that although the need for physical arrests did occur in Mansperger's job, they were not a common occurrence for a fish and game warden. (Id. at p. 877.) Similarly, the need for him to lift a heavy object alone was determined to be a remote occurrence. (Ibid.) In holding Mansperger was not incapacitated for the performance of his duties, the court noted the activities 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." (Id. at p. 876.)

6 In Hosford, the court held that in determining whether an individual was substantially incapacitated from his usual duties, the courts must look to the duties actually performed by the individual, and not exclusively at job descriptions. Hosford, a California Highway Patrol (CHP) Sergeant, suffered several back injuries. As a result, he experienced continuing pain, and believed he was in danger of further injury when he had to overpower people who resisted arrest. (Id. at p. 857.) In determining eligibility for a disability retirement, the court evaluated Hosford's injuries according to the job duties required of his position as a sergeant, as well as the degree to which any physical problem might impair the performance of his duties. Thus, the actual and usual duties of the applicant must be the criteria upon which any impairment is judged. Generalized job descriptions and physical standards are not controlling, nor are actual but infrequently performed duties to be considered. The court noted that a sergeant's supervisory role meant both that he might need to make arrests and subdue prisoners and that he would be subjected to such physical demands less frequently than would traffic officers. (Id. at pp. 860-861.) The court found that although Hosford suffered some physical impairment, he could still substantially perform his usual duties. The court also rejected Hosford's contention that he was substantially incapacitated from performing his usual and customary duties because his medical conditions created an increased risk of future injury.
CalPERS Precedential Decisions

9. At CalPERS’s request, official notice was taken of three precedential decisions: Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes, Respondent and California Highway Patrol, Respondents, CalPERS Precedential Bd. Dec. No. 99-03 (Jan. 22, 2000); Matter of the Application for Disability Retirement of Theresa V. Hasan and Dept. of Corrections, Respondents, CalPERS Precedential Bd. Dec. No. 00-01 (April 21, 2000); and Matter of the Application for Disability Retirement of Ruth A. Keck and Los Angeles County Schools, Respondents, CalPERS Precedential Bd. Dec. No. 00-05 (Sept 29, 2000). All three decisions involved whether the member was disabled. Each of these decisions was considered in reaching a decision in this matter.

Evaluation

10. CalPERS has the burden of establishing that respondent is still incapacitated for duty as a Firefighter II-Paramedic with Cal Fire. (Gov. Code, § 21192.) Dr. Fait conducted an IME on May 3, 2018, and concluded that respondent was no longer incapacitated. Dr. Bergey, who has evaluated and treated respondent for the past eight years, disagreed with Dr. Fait’s determination that respondent is no longer incapacitated from performing the duties of a Firefighter II-Paramedic.

11. Both Dr. Fait and Dr. Bergey are experienced and qualified orthopaedic surgeons. They were both credible witnesses. In resolving any conflict in the testimony of expert witnesses, the opinion of one expert must be weighed against that of another. In doing so, consideration should be given to the qualifications and believability of each witness, the reasons for each opinion, and the matter upon which it is based. Relying on certain portions of an expert’s opinion is entirely appropriate. A trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted.” (Stevens v. Parke Davis & Co. (1973) 9 Cal. 3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (Id., at 67-68, quoting from Neverov v. Caldwell (1958) 161 Cal. App. 2d 762, 767.) The fact finder may also reject the...
testimony of a witness, even an expert, although it is not contradicted. (Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 890.)

12. Dr. Fait found no physical exam abnormalities that correlate with the level of symptomatology reported by respondent, and had concerns with respondent's credibility in accurately reporting his symptoms. Dr. Fait believed respondent was capable of engaging in competitive mountain biking activities to the extent that he has been able to win on a number of occasions when competing against others in his age group. In addition, the photos of respondent wakeboarding without apparent distress or pain demonstrate movements of the lower spine that are much more unrestricted than what was presented during evaluation. Although Dr. Fait observed respondent's range of motion in the lumbar spine to be extremely restricted, he questioned whether respondent gave full effort with respect to the range of motion of the lumbar spine.

In reviewing the Firefighter II-Paramedic job functions, Dr. Fait did not find any of the essential functions respondent could not perform. Although respondent reported flare-ups and pain, there was no evidence in any diagnostic study of any failure of the total disc arthroplasty or progression of degenerative disc disease, spinal canal stenosis, or neural foramenal narrowing that would correlate with such complaints. In essence, Dr. Fait believed that respondent exaggerated his pain and did not put forth full effort. Thus, it is clear that Dr. Fait relied heavily on the evidence he received about respondent's mountain biking and BMX activities.

Courts have repeatedly underscored that an expert's opinion is only as good as the facts and reason upon which that opinion is based. (Kennemur v. State of California (1982) 133 Cal.App.3d 907, 924.) In providing Mr. Nelson's investigative report and photographs to Dr. Fait, CalPERS specifically requested that Dr. Fait not discuss the information with respondent. On its face, the photographs and internet information suggest respondent was engaged in strenuous physical activity — activity which would not reasonably be performed by someone on a disability retirement.

Respondent's testimony about his love of firefighting was heartfelt. It is clear that he would return to this job if he believed he was physically able to do so. His explanation about his involvement with mountain biking and BMX races was likewise credible. He explained that the events were of short duration, down-hill, on smooth dirt, and did not require him to perform the most difficult movements such as extending or twisting. Dr. Bergey corroborated respondent's testimony with regard to the biomechanics of riding a bike. He also testified that he instructed respondent to engage in physical activity to the extent that respondent could tolerate it. Dr. Fait also testified that there was no way of determining the actual strain on the body as a result of the bike riding activities, and advanced shock-absorbers reduce the force on the body.

Likewise, the fact that respondent participated in competitions is not dispositive. The BMX competitions involved less than one minute of riding time and the two mountain bike exhibition races consisted of two heats totaling less than 10 minutes. Respondent credibly
testified that these activities caused him pain, which caused him to stop doing them. He ceased these activities approximately six months before CalPERS notified him that it was reviewing his disability determination. In addition, respondent was candid with Dr. Fait about his physical activity. Although respondent did not volunteer that he had been involved in these races, he reported he last rode a bicycle a year before, which caused him pain. He also admitted to wakeboarding or wakesurfing. In sum, respondent’s explanation about his physical activities was credible. However, because of CalPERS’s instruction that Dr. Fait not discuss this information with respondent, Dr. Fait did not have the ability to ascertain a complete picture of respondent’s physical activities. Dr. Fait’s determination that respondent was not putting forth full effort or credibly relating his pain was based on an assumption that respondent was engaging in much more strenuous activity than what was actually established.

13. Dr. Bergey, on the other hand, was able to discuss with respondent the extent of his physical activities. He performed surgery on respondent and evaluated him for a number of years. He is familiar with respondent’s condition and concluded that respondent could not safely perform the sometimes strenuous duties of a firefighter. It is also noteworthy that the physical examination findings regarding respondent’s lumbar mobility have been relatively constant over the years. The physical findings by Dr. Suzuki during his 2015 IME were similar to the physical findings by Dr. Fait, and consistent with Dr. Bergey’s observations over the years. The fact that Dr. Fait did not believe that respondent’s subjective complaints of pain matched the objective symptoms is less persuasive due to the fact that respondent has had objectively verifiable sources for pain and similar measurements reflecting very reduced mobility.

14. The ultimate issue is whether respondent is presently substantially able to perform the usual duties of a Firefighter II-Paramedic. Dr. Bergey testified that there are tasks, such as lifting 100 pounds, that respondent probably could perform under an emergency situation. However, it is the repetitive nature of these tasks that underpin his conclusion that respondent is substantially incapacitated.

The requirements of a Firefighter II-Paramedic are physically demanding. Unlike in Mansberger and Hosford, performing strenuous activity is not an infrequent occurrence for a line firefighter. With the exception of having to lift more than 100 pounds, respondent’s description of his job were similar to the physical requirement job description. A Firefighter II-Paramedic is expected to perform the full range of firefighting duties. According to Cal Fire’s physical/mental stress job description, the position is classified as “arduous physical work” requiring physical performance of above-average ability and endurance, with the occasional demand for extraordinary strenuous activity in emergencies, under adverse conditions, and over an extended period of time. In a routine shift, at a minimum, respondent would be expected to don protective clothing, walk on uneven surfaces, climb stairs, lift objects, bend at the waist, squat, and stoop. As a paramedic, he would be expected to assess

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8 One would expect that on occasion a firefighter would be required to lift a body weighing more than 100 pounds.
patients who are on the ground and assist in lifting patients and transferring them to a gurney. In emergency situations, such as a structure fire or extricating a trapped individual in a vehicle, the physical demands could be much greater, and include tasks such as carrying charged fire hoses and heavy equipment.

The physical demands of a firefighter are repetitive and frequent. The fact that respondent could perform a difficult task in an emergency does not establish that he is substantially able to perform all of the job functions. Unlike in Hosford, respondent was not a supervisor who would only be expected to perform arduous physical tasks in rare occasions. Instead, as a line firefighter, respondent would face physical demands throughout each shift. If returned as a line firefighter, respondent would pose a risk to himself, other firefighters, and the public. Respondent has more than “mere pain” referenced in Mansperger and Hosford, he has limited mobility that renders him unable to do most of the essential functions of his job in a reliable and consistent manner. Finally, his limited mobility is not significantly different than when CalPERS granted respondent his disability retirement application in 2013. For these reasons, CalPERS failed to establish that respondent is no longer substantially incapacitated from the performance of his usual duties as a Firefighter II-Paramedic.

ORDER

Tyson J. Mrosek’s appeal from CalPERS’s determination that he be reinstated to his former position as a Firefighter II-Paramedic with the Department of Forestry and Fire Protection is GRANTED.

DATED: April 17, 2019

[Signature]
ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings