ATTACHMENT E

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:

MICHAEL T. HENDRIX,
Respondent,

and

CALIFORNIA HIGHWAY PATROL,
Respondent.

Case No. 2018-0723
OAH No. 2018090074

PROPOSED DECISION

This matter was heard before Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, in Sacramento, California, on February 6, 2019.

Senior Attorney Cynthia Rodriguez represented the California Public Employees’ Retirement System (CalPERS).

Michael Hendrix (respondent) represented himself.

CalPERS properly served California Highway Patrol (CHP) with the Statement of Issues and Notice of Hearing. CHP made no appearance. This matter proceeded as a default against CHP pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on February 6, 2019.

ISSUE

Was respondent permanently disabled and substantially incapacitated from performing his usual and customary duties as a Custodian for CHP based on an orthopedic (low back) condition when he applied for disability retirement?
FACTUAL FINDINGS

1. Respondent is 57 years old and worked for CHP as a Custodian. According to the Statement of Issues, respondent is a local miscellaneous member of CalPERS subject to Government Code section 21151.

Respondent's Application

2. On August 25, 2018, CHP submitted an employer-originated Disability Retirement Application to CalPERS on respondent's behalf. By way of a letter dated December 19, 2017, CalPERS contacted respondent and requested that he submit to CalPERS, a Disability Retirement Election Application and Authorization to Disclose Protected Health Information form to allow CalPERS to determine whether he was “incapacitated for the duties of [his] position.”

3. On January 19, 2018, respondent signed a Disability Retirement Election Application (application), and thereafter filed the application with CalPERS. On the application, respondent checked the box which indicated “Disability Retirement” as the Application Type. Respondent identified his disability as “Cannot stand, sit, walk or lift for extended periods,” and indicated that his disability occurred May 18, 2012, as the result of a car accident. Respondent described his limitations and preclusions due to his condition as follows: “Unable to perform normal functions and activities.” In response to the question on the application that asks how respondent’s condition affects his ability to perform his job, respondent specified the following: “My job requires me to stoop, bend, [and] lift.”

4. On June 20, 2018, CalPERS notified respondent in writing that his application had been denied, and informed him of his right to appeal. Respondent appealed and requested an evidentiary hearing. On September 5, 2018, complainant, Anthony Suine, Chief, CalPERS Benefit Services Division, made and filed the Statement of Issues in his official capacity.

Duties of Custodian

5. According to the California State Personnel Board Job Specification for Custodian, a Custodian works under supervision to perform janitorial duties in keeping an assigned office, building, or area, clean and orderly. In performing the typical tasks of the position, a Custodian does the following:

- Sweeps, scrubs, mops, and waxes floors; vacuums rugs and carpets; cleans, dusts, and polishes cabinets, furniture, and woodwork; empties and cleans waste receptacles; cleans stairways, escalators, elevators, hallways, restrooms, offices and lobbies; cleans ceilings, walls, window shades, light fixtures, interior glass partitions, and venetian blinds; assists in moving and arranging furniture and equipment as required; polishes
metalwork; turns out lights and locks doors and windows; refills lavatory supply dispensers; replaces light globes and tubes; operates scrubbers, buffers, waxes, and other equipment and machinery; and, as required, operates a freight or passenger elevator.

As incidental assignments, washes windows, washes automotive equipment, and maintains ornamental plantings in and around buildings and parking areas.

6. As set forth in the Physical Requirements of Position/Occupational Title submitted with respondent’s application, a Custodian must occasionally (up to three hours a day) crawl; kneel; climb; squat; twist at the neck; engage in fine manipulation; use a computer keyboard and mouse; lift or carry from 11 to 50 pounds; walk on uneven ground; drive; work with heavy equipment; be exposed to excessive noise; be exposed to dust, gas fumes, or chemicals; work at heights; and work with biohazards. A Custodian must frequently (from three to six hours a day) bend at the neck and waist; twist at the waist; reach above and below shoulder level; push and pull; and lift up to 10 pounds. A Custodian must also constantly (over six hours a day) stand; walk; power grasp; simple grasp; and repetitively use hands. A Custodian is never required to sit; run; lift over 50 pounds; or be exposed to extreme temperature, humidity, or wetness.

Respondent's Testimony

7. Respondent works at the CHP Academy in West Sacramento, where the buildings and grounds must be maintained at all times for use by cadets and instructors. He testified that his custodial duties are “very physical” and require him to stoop, bend, kneel and stand throughout an eight-hour work shift.

8. On May 18, 2012, respondent was involved in a motor vehicle accident. He was hit by a drunk driver which resulted in injuries that affect his ability to perform his job duties. Respondent has experienced significant pain since the accident, which has increased over time. On a few unspecified occasions while working, respondent’s reported pain became so severe that he could not walk for approximately “15 minutes to two to three hours.”

9. On an undetermined date in 2016, respondent began to experience numbness in his right hip and lower right leg. He saw Christie Romo, M.D., his primary treating physician, regarding the numbness. Dr. Romo examined respondent and referred him for x-rays to help identify the source of respondent’s discomfort. Respondent testified that his right hip and leg numbness quickly progressed into immobilizing lower right-side back pain and right leg pain. Respondent testified that he was in so much pain that he could not walk and could not properly position his body to allow the x-rays to be completed. Respondent eventually completed the x-ray on a different date. Respondent then consulted with an orthopedic surgeon regarding surgical intervention. Respondent testified that the orthopedic
surgeon told him that he had a “crushed nerve” and that performing surgery to relieve respondent’s pain “would be too risky.”

10. On an undetermined date in or around June 2016, while performing his custodial duties in one of the CHP Academy dormitories, respondent was carrying equipment down a flight of stairs. While proceeding down the stairs, respondent’s right leg “gave out.” He felt significant pain in his right leg and had to stop working and kneel on the floor for several minutes until the pain subsided. He left work and saw Dr. Romo again. Dr. Romo took respondent off work and prescribed Norco and Baclofen, a muscle relaxer, to relieve respondent’s pain. Respondent was also prescribed eight sessions of physical therapy. However, he only attended physical therapy “once or twice” due to difficulty securing childcare. Respondent performed physical therapy exercises periodically, but eventually stopped performing those exercises due to pain.

11. Respondent returned to work on light duty assignment in August 2016. The parameters of respondent’s light duty assignment or any work restrictions recommended by his physician when he returned to work were not established at hearing. Eventually, Dr. Romo encouraged respondent to stop taking the Norco she prescribed him. She felt ingesting Norco over an extended period of time may be detrimental to respondent’s health and was also concerned that respondent may become addicted to the medication. Respondent has been reluctant to reduce or eliminate his use of Norco. He testified that he cannot perform basic functions, such as walking and lying down, due to the pain he experiences when he takes no pain medication.

12. After being assigned to light duty for approximately one year, CHP informed respondent that his light duty restrictions could no longer be accommodated and referred respondent to the return to work coordinator to discuss his employment option. When respondent met with the return to work coordinator, he was encouraged to apply for disability retirement due to his reported difficulties performing his duties.

13. Respondent testified that he can perform sweeping, scrubbing and mopping, but this produces numbness in his lower back after approximately five minutes, that eventually escalates to “agitation, irritation, and immobility.” On at least one accession while cleaning a toilet at work, respondent’s pain was so severe that he had to wait near the toilet for approximately five minutes to allow the pain to subside before standing up and leaving the bathroom stall. He took Norco after this occurred, and after a brief period “felt no pain.” When respondent takes Norco and Baclofen he “[doesn’t] feel any pain . . . [he] can move and can do [his] job.” He testified that if he is allowed to take pain medication, he has no problem performing his job duties.

14. Respondent testified that he can move and arrange furniture, but will experience pain on his lower right side if he does this for an extended period. He can turn out lights and lock doors without issue. Respondent can refill lavatory supplies but may have to use the toilet or other object for support while doing so. He can clean window shades and light fixtures, but repeatedly raising his arms and reaching overhead causes discomfort to the
right side of his back. He can empty waste baskets, but emptying multiple waste baskets in succession causes discomfort due to the repeated bending and reaching. He can polish metalwork and woodwork. He can vacuum rugs and polish floors for approximately five minutes before experiencing lower back numbness and irritation.

**Expert Opinion**

15. Harry A. Khasigian, M.D., testified at hearing. Dr. Khasigian is a board-certified orthopedic surgeon and certified Fellow of the American Academy of Orthopedic Surgeons with training and experience in the diagnosis and treatment of orthopedic conditions. On June 8, 2018, he performed an Independent Medical Evaluation (IME) on respondent and prepared an eight-page report reflecting his findings and opinions. Dr. Khasigian’s evaluation included an interview of the respondent, a physical examination and a review of respondent’s medical records and history. There were no x-rays or digital copies of diagnostic tests available or reviewed as part of Dr. Khasigian’s evaluation. Dr. Khasigian’s physical examination of respondent included an examination of his lumbar and thoracic spine, and lower extremities, in addition to a neurological examination.

16. During the evaluation, respondent told Dr. Khasigian that he suffered from “extreme pain” in the lower back and right side leg pain. Respondent reported that his pain occasionally radiated down his right leg to his feet and at times his pain would cross over his lower back to the left side of his lumbar spine. Respondent told Dr. Khasigian that his pain mainly occurs with twisting, rotating, standing and walking. Respondent told Dr. Khasigian that he cannot vacuum because of difficulty he has rotating his body to perform that function, while simultaneously performing the bending and rotating movements six to eight times with fluidity. Respondent reported that he has pain with bending, stooping, squatting and kneeling and that he can neither sit nor stand without experiencing pain. He also reported that he experiences pain when coughing or sneezing, sitting at a table, while riding in an automobile, before going to bed, and when lying on his stomach or lying on his side.

17. As of the date of the IME, respondent’s treatment plan included Norco, Baclofen, occasional physical therapy at home, and stretching. Respondent also has a history of diabetes and obesity. He weighed 380 pounds, at six feet four inches tall, as of the date of the evaluation. Respondent’s available records reflect that he weighed 406 pounds in December 2017.

18. During the physical examination, Dr. Khasigian observed that respondent’s lumbar spine had no pain to light touch. Respondent had increased lumbar lordosis, or inward lumbar curvature, but had normal gait, no scoliosis, or spasm. Respondent’s movements were “smooth, coordinated and without restriction.” Respondent’s thoracic spine had normal kyphosis, or rounded curvature, and there was no winging scapula to indicate nerve damage.

19. The examination of respondent’s lower extremities revealed normal longitudinal alignment with no abnormalities other than “some unusual callouses on the
anterior tibial tendons." Sensation to the left and right legs was equal and symmetrical. Motor testing and movement, including extension and dorsiflexion were equal and symmetrical. While lying supine, respondent complained of pain when the examiner placed his hand underneath respondent’s right heel without lifting respondent’s leg from the table. Respondent also reported pain with any meaningful movement of the leg during this portion of the evaluation. Respondent’s thighs and calves were also perfectly symmetrical when measured. After conducting the physical examination and reviewing respondent’s medical records, Dr. Khasigian reached the following diagnostic impressions:

1. Subjective and chronic low back pain.
2. No clinical evidence of sciatica.
3. Non-verifiable radiculopathy right lower extremity based upon subjective complaints without correlated physical findings.
4. Morbid obesity.
5. Diabetes mellitus type II.
6. Hypertension.
8. History of depression.

20. In the summary section of Dr. Khasigian’s report, he noted that although the records indicated that respondent suffered from sciatica there were no clinical findings of sciatica during Dr. Khasigian’s evaluation. Dr. Khasigian noted that respondent demonstrated “significant range of motion, particularly for his body type,” and added that there was “insufficient diagnostic evidence and objective documentation to correlate with [respondent’s] subjective complaints.”

21. Dr. Khasigian also noted that there were remarkable inconsistencies when respondent performed sciatic stretch testing and straight leg raises, which caused him to question the legitimacy of respondents reported pain. Dr. Khasigian found that his review of the available medical records and examination of respondent did not support a diagnosis of radiculopathy.

22. Dr. Khasigian opined that, with respect to respondent’s lower back, his review of the available records and examination of respondent did not demonstrate that respondent is precluded from performing any of his job requirements. He explained that respondent’s duties as a custodian largely involve standing, walking, lifting up to 50 pounds, and rotational activities, and that respondent demonstrated significant rotational activities during the examination. Based on all the information available to him during his evaluation Dr. Khasigian concluded that respondent is not substantially incapacitated from performing his duties as a custodian for CHP.
Discussion

23. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, when he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Custodian for the CHP. Dr. Khasigian's opinion that respondent was not substantially incapacitated from performing his usual job duties was persuasive. His IME report was detailed and thorough, and his testimony at hearing was clear and comprehensive. The results of his physical examination and his review of respondent's medical records supported his opinion.

24. The burden was on respondent to offer sufficient competent medical evidence at hearing to support his disability retirement application. He failed to do so. Respondent did not call a medical expert to testify at hearing. He produced no medical records. His testimony was largely a recitation of subjective pain symptoms he experienced while performing his job. By respondent's own admission, he can perform all of his job duties while taking pain medication and muscle relaxers. Respondent also testified that he can perform the majority of his job duties without pain medication or muscle relaxers, although he will experience discomfort when some duties are performed for prolonged periods of time. Discomfort when performing one's job duties does not constitute an inability to perform those duties. (See, Smith v. County of Napa (2004) 120 Cal.App.4th 194, 207.) There was no competent medical evidence that respondent's low back pain precluded him from performing any of his job duties.

25. Because respondent failed to offer sufficient competent medical evidence at hearing to establish that, when he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Custodian for CHP, his disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By reason of his employment, respondent is a member of CalPERS and eligible to apply for disability retirement pursuant to Government Code section 21151. Government Code section 21151, in relevant part, provides:

(a) Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

(b) This section also applies to local miscellaneous members if the contracting agency employing those members elects to be subject to this section by amendment to its contract.
2. To qualify for disability retirement, respondent has the burden of proving that he is “incapacitated physically or mentally for the performance of ... his duties.” (Gov. Code, § 21156.) Government Code section 20026, defines “Disability” and “incapacity for performance of duty” as a basis of retirement, to mean “disability of permanent or extended and uncertain duration, as determined by the board, ... on the basis of competent medical opinion.” (Underlining added.)

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.) The court in Hosford v. Board of Administration (1978) 77 Cal.App.3d 855, 863, explained that prophylactic restrictions imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. In Smith v. City of Napa (2004) 120 Cal.App.4th 194, 207, the court found that discomfort, which may make it difficult for an employee to perform his duties, is not sufficient in itself to establish permanent incapacity. (See also, In re Keck (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.)

4. When all the evidence is considered in light of the courts' holdings in Mansperger, Hosford, and Smith, respondent did not establish that his disability retirement application should be granted. He failed to submit sufficient evidence based upon competent medical opinion that, when he applied for disability retirement, he was permanently and substantially incapacitated from performing the usual duties of a Custodian for the CHP. Consequently, his disability retirement application must be denied.

ORDER

The application of respondent Michael T. Hendrix for disability retirement is DENIED.

DATED: March 8, 2019

[Signature]

ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings