

**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:**

**OHANNES BEDROSSIAN, Respondent**

**Agency Case No. 2019-0044**

**OAH No. 2019021102**

**PROPOSED DECISION**

John E. DeCure, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on July 9, 2019, in Fresno, California.

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

Ohannes Bedrossian (respondent) was present and represented himself.

There was no appearance by or on behalf of the California Department of Transportation (Caltrans). CalPERS established that Caltrans was properly served with the Notice of Hearing. Consequently, this matter proceeded as a default hearing against Caltrans under Government Code section 11520.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on July 9, 2019.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED August 9 2019

LFA

## **ISSUE**

On the basis of a rheumatologic (body pain, tiredness, fatigue, fibromyalgia) condition, is respondent permanently incapacitated from the performance of his usual duties as a Transportation Engineer for Caltrans?

## **FACTUAL FINDINGS**

### **Summary of Dispute**

1. Respondent applied for service pending disability retirement in October 2014, claiming that he became disabled in approximately February 2012 due to body pain, tiredness, and fatigue, such that he could not work steady hours in his employment as a Transportation Engineer (TE) at Caltrans. He was treated by Dickran Gulesserian, M.D., who saw him for several office visits and diagnosed him with depression and severe fibromyalgia, opining that he was permanently incapacitated from performing his job duties as a TE. On May 4, 2015, Douglas M. Haselwood, M.D., performed an Independent Medical Examination (IME) upon respondent on behalf of CalPERS. Dr. Hazelwood concluded respondent is not substantially incapacitated from performing the essential functions of his position.

### **Disability Application**

2. On October 30, 2014, respondent submitted a Disability Retirement Election Application (Application) to CalPERS. The Application identified the application type as "Service Pending Disability Retirement." In the Application, respondent's disability was described as: "body pain – tiredness – fatigue." Respondent identified the date his disability occurred as February 2, 2012. In response to the

question asking how the disability occurred, respondent stated:

"cancer/lymphoma/bad general health – body pain." He described his limitations or preclusions due to his injury or illness as: "I get tired during my job, medications make me sleeping (*sic*) and sick, [and] I can not (*sic*) drive longer than 20 minutes to do my job." Respondent further stated, "I feel disoriented while driving. I fear for my (*sic*) while driving." Respondent indicated that he was not working in any capacity at the time of the filing of the Application.

3. On November 29, 2014, respondent retired for service. He has been receiving his retirement allowance since that date. On June 16, 2015, CalPERS notified respondent in writing that his Application for disability retirement had been denied, and informed him of his right to appeal. Respondent timely appealed from CalPERS' denial. All jurisdictional requirements have been met.

### **Duties of a Transportation Engineer**

4. As set forth in Caltrans' Physical Requirements of Position/Occupational Title information, the TE position never involves running, crawling, kneeling, climbing, twisting the neck and waist, and pushing and pulling; occasionally (up to three hours) involves standing, walking, squatting, bending the neck and waist, reaching above and below the shoulder, fine manipulation and power grasping; and constantly (over six hours) involves sitting, simple grasping, repetitive use of hands, keyboard and mouse use. The TE occasionally lifts from one to 25 pounds, but never over 25 pounds. The TE never works with heavy equipment, works at heights, uses special visual or auditory protective equipment, or works with biohazards; occasionally (up to three hours) walks on uneven ground, is exposed to excessive noise, extreme temperature, humidity, or wetness, dust, gas, fumes or chemicals, and operates foot controls; and frequently (up to six hours) drives a vehicle.

5. The Caltrans Duty Statement for the TE states that the TE performs activities requiring engineering knowledge and skills and management skills for "the preparation of plans, specifications, estimates, design drawings, written documents, presentations," and other work for transportation projects. The TE spends 30 percent of his or her time developing, reviewing, and recommending alternatives for projects using engineering knowledge and skills and applying appropriate design standards, and manages a project using techniques such as monitoring the project cost, scope, milestones, and schedules. The TE spends 25 percent of his or her time preparing technical and meeting documentation; 10 percent using complex mathematical skills for calculations, and preparing drawings; 10 percent performing computer-aided drafting and design; 10 percent collecting and recording project data and researching project information; five percent providing project and personnel reports; five percent attending and providing training and attending meetings; and five percent performing general office duties. The TE position does not involve supervision, but requires the exercise of "lead person" authority when a supervisor is absent. Physical requirements were similar to those described in Finding 4. Mental and emotional requirements involve maintaining a calm, respectful, cooperative manner while applying mental concentration and working within a noisy and occasionally distracting environment, on several work assignments and/or deadlines. The majority of work is performed in an indoor office environment, but outdoor work and one-day travel or overnight trips are occasionally required.

### **Expert Opinion**

6. CalPERS relied upon Douglas M. Haselwood, M.D., as its expert witness. Dr. Haselwood is board-certified in internal medicine and rheumatology and has been in private practice in Sacramento, California, since 1977. He specializes in treating

patients with rheumatological problems involving the musculoskeletal system, arthritis, rheumatoid arthritis, psoriatic arthritis, and lupus, and has performed evaluations as a qualified/agreed medical evaluator certified by the Division of Workers' Compensation since 1993. Dr. Haselwood examined respondent on May 4, 2015, took a history, reviewed his medical records and job duties, and issued an IME report. Dr. Haselwood also testified regarding his observations and findings.<sup>1</sup>

7. In his IME report, Dr. Haselwood reviewed the history of respondent's problems that led to his filing a disability claim. Respondent, who was 64 at the time of examination, agreed with the Caltrans job descriptions described above. He estimated he spent approximately 90 percent of his time doing office-based sedentary work, and 10 percent working in the field while supervising, inspecting, and measuring various engineering projects. He stopped working in November 2014 and has not continued working in any capacity since that time. He recalled experiencing persistent and bothersome hand and knee pain approximately ten years before, with more widespread musculoskeletal pain, fatigue, and dysfunction over the ensuing years. Approximately six years before, he underwent a consultation with a rheumatologist but could not recall the diagnosis. Approximately three years before the IME, he had left-knee arthroscopic surgery due to persistent knee pain and weight-bearing

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<sup>1</sup> Complainant also submitted the curriculum vitae and IME report of Samuel B. Rush, M.D., which were received in evidence as administrative hearsay only, as Dr. Rush did not testify at hearing. Complainant did not rely upon Dr. Rush's IME report or findings during complainant's case in chief; furthermore, in light of Dr. Haselwood's IME report and testimony, Dr. Rush's IME report was cumulative. For these reasons, although Dr. Rush's IME report was received in evidence, it was given little weight.

intolerance. He has had several Orthovisc (hyaluronic acid) injections in his left knee for pain. Respondent reported working without undue hardship until 2011, when he was found to have generalized lymphoma, requiring surgery and chemotherapy which led to increased fatigue and lack of stamina. He returned to work part-time until his retirement. Respondent also suffered from chronic depression and received periodic psychiatric treatment, but had difficulty tolerating associated medications and was no longer seeking mental health treatment. He described a longstanding history of daily headaches.

8. Respondent's current complaints involved fluctuating, mild-to-moderate widespread pain, most consistently in the knees and hands, daily and frequently severe headaches, and generalized fatigue. His primary care physician, Dr. Gulesserian, was treating him for fibromyalgia (a common syndrome characterized by widespread musculoskeletal pain accompanied by fatigue, sleep, memory and mood issues). He continued to see an oncologist for lymphoma surveillance and had no recurrence of the disease as yet. Dr. Haselwood noted that a rheumatologic review of systems revealed no consistent criteria for a true inflammatory arthritis, systemic lupus erythematosus, or any variant associated arthropathies, nor were there obvious non-articular systemic or inflammatory rheumatic symptoms.

9. Dr. Haselwood's medical records review noted that Dr. Gulesserian saw respondent for visits in late 2013 and early 2014, and did not initially describe any significant musculoskeletal impairments. In an office visit on July 7, 2014, Dr. Gulesserian noted no abnormalities and stated respondent was "doing well all over" and "[d]oes not have any issues." On August 29, 2014, he treated respondent for a presumptive viral syndrome, noting he was treating respondent "for weakness and fatigue health issues" and that respondent would "be off work starting [August 27] for

three months." A note from an October 15, 2014 office visit described increasing left knee pain involving swelling and decreased motion of the knee. Three office visits in December 2014 documented Orthovisc injections in the left knee.

10. In an October 28, 2014, Physician's Report on Disability for CalPERS, Dr. Gulesserian noted a primary diagnosis of depression due to respondent's "health not getting better," and a secondary diagnosis of "severe fibromyalgia," due to respondent's inability to "sit for long periods of time or walk due to the severe fibromyalgia and pain on [his] muscles." He also opined that respondent was permanently incapacitated from performing even a sedentary level of functionality. Dr. Gulesserian's most recent office note, dated January 14, 2015, noted primarily respondent's irritable bowel syndrome, described no musculoskeletal abnormalities, and further stated that since respondent's retirement, he "keeps himself busy all day long."

11. Respondent's past medical history revealed age-appropriate degenerative and mechanical musculoskeletal phenomenon, most notably in the left knee. However, Dr. Haselwood found nothing rheumatologically significant.

12. Dr. Haselwood's physical examination of respondent was primarily focused on respondent's musculoskeletal condition and range of motion. Respondent described diffuse tenderness over the lumbosacral and neck region with normal range of motion. The left knee had mild bony prominence and patellofemoral crepitus (cracking or popping sound) without redness, warmth, or effusion. The right knee had minor tenderness and patellofemoral crepitus with normal range of motion. Respondent described diffuse tenderness over both shoulders without swelling, redness, or warmth, and guarding which limited motion by 15 percent. Respondent described tenderness diffusely over the hands with approximately 15 percent

reduction in fist closure and grip strength. Throughout the examination, respondent could change posture, ambulate, and perform routine physical activities "without significant limitations." Neurological testing revealed no deficits.

13. After examining respondent, Dr. Haselwood diagnosed him as follows:

1. Chronic, complex, and, as yet, poorly defined widespread musculoskeletal pain, dysfunction, and fatigue syndrome, presumptively representing the cumulative effect of:

a. Age-appropriate generalized axial and appendicular degenerative and mechanical phenomenon most readily apparent as osteoarthritis in the hands and knees;

b. Left knee internal derangement, status post lateral meniscectomy in association with an osteochondral lesion in the anterior margin of the left femoral condyle;

c. Non-specific and poorly characterized widespread myofascial discomfort with an apparent hypervigilance for same, historically characterized as fibromyalgia;

d. Chronic obesity and physical deconditioning;

e. Possible significant element of nonorganic amplification associated with chronic depression in association with various life and health stressors.

2. Comorbidities to include diffuse B-cell lymphoma (2012) status post chemotherapy, prostatic hypertrophy, and irritable bowel syndrome and low testosterone.

14. In conclusion, Dr. Haselwood noted that although respondent has legitimate musculoskeletal discomfort and dysfunction subjectively correlating with degenerative and mechanical musculoskeletal phenomenon, respondent's perceived physical impairments are considerably based on self-reporting. Another complication is respondent's chronic mental health issues, which "may be significantly compromising his support and coping mechanisms" for dealing with his musculoskeletal pain in the context of his employment as a TE. Upon review of the medical records, respondent's history, and his physical examination, Dr. Haselwood could not confirm a diagnosis of fibromyalgia which would support a finding of permanent, profound physical impairments. While Dr. Gulesserian "dutifully" recorded respondent's musculoskeletal symptomology, fatigue, and dysfunction, his records do not document how a diagnosis of fibromyalgia could be reached, or how such a diagnosis could be distinguished from other causes of musculoskeletal discomfort. While Dr. Haselwood agreed respondent had some measurable evidence of musculoskeletal problems, he opined that none were related to fibromyalgia. Even if fibromyalgia could be documented, it is not a condition that would prevent a person performing sedentary work, such as the job duties expected of a TE. Dr. Haselwood concluded that there are no occupational functions respondent is incapable of performing as a TE, and he has no restrictions linked to his stated symptoms. Thus, respondent was not incapacitated for the performance of his duties.

## **Respondent's Evidence**

15. Respondent testified that CalPERS had been helpful to him at retirement seminars, but once he retired, CalPERS "wasn't really there" to help him. He found out later that CalPERS delayed processing his Application purely by mistake, and would not have processed it had he not phoned them a year after he submitted it and complained. Since then, its employees were nice when he would talk with them, but when he called for advice or assistance, it was a "boiler room operation." In general, CalPERS was either slow to respond or nonresponsive for approximately four to five years since he filed his Application. This led respondent to not trust CalPERS, and he was not prepared to formally present evidence at hearing because he believed he had little chance of prevailing. Until the day of hearing, he felt the entire CalPERS disability-application assessment process had been "a big hoax."

16. Respondent asserted that although he knew he was "not going to pass" Dr. Haselwood's examination, he did experience many symptoms. His cancer weakened him, and he lost half of his taste buds, experienced dry mouth, and had teeth fall out due to chemotherapy. He also experienced headaches, ringing in his ears, tiredness and fatigue at night, and sensitivity to light. By 2014 he was suffering from fibromyalgia. He also had a heart attack, and his health declined. He received a physician's note exempting him from work-related travel due to these conditions, which made driving hazardous. He tried working on a part-time basis, but found he could not do his job even part-time due to his conditions and retired at 63. He maintained that even his personal physician "can't help me the way I need help."

## **Discussion**

17. Respondent testified earnestly about the various symptoms, pain, and discomfort he experienced. Dr. Haselwood also noted respondent appeared to suffer from some legitimate discomfort and dysfunction. However, 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 TE. Respondent presented no medical evidence, records, or expert testimony to support his Application. Although his frustrations with CalPERS' slow handling of the Application – a delay for which complainant's counsel apologized in her closing argument – were justifiable, respondent offered nothing to bolster his original claim.

18. The medical evidence CalPERS presented established that respondent's claimed rheumatologic condition did not render him incapable of performing his TE functions and duties. Dr. Haselwood was persuasive in reaching his opinion that respondent was not substantially and permanently incapacitated from performing the usual duties of a TE, and he employed the standards applicable in these types of disability retirement proceedings. His opinion that respondent's rheumatological condition was not adequately supported by objective medical evidence was persuasive and consistent with the medical records he reviewed.

19. In sum, when all the evidence is considered, respondent failed to establish that, at the time he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Caltrans Transportation Engineer. Consequently, his industrial disability retirement application must be denied.

## **LEGAL CONCLUSIONS**

1. By virtue of his employment, respondent is a state miscellaneous member of CalPERS, pursuant to Government Code section 21150.

2. To qualify for disability retirement, respondent had to prove that, at the time he applied, he was "incapacitated physically or mentally for the performance of his duties in the state service." (Gov. Code, § 21156.) 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. Evidence Code section 500 provides:

Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

4. Evidence Code section 115 provides in relevant part, that "burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The party assuming the affirmative at an administrative hearing has the burden of proof, including the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) Respondent has not met his burden.

5. The determination of whether respondent is substantially incapacitated must be based on an evaluation of whether, at the time he applied for disability retirement, he was able to perform the usual duties of a TE, and not just the usual duties of his most recent position. (*California Department of Justice v. Board of Administration of California Public Employees' Retirement System (Resendez)* (2015) 242 Cal.App.4th 133, 139.)

6. 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.)

7. The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855 (*Hosford*), reached a similar conclusion with respect to a state traffic sergeant employed by the CHP. In *Hosford*, the sergeant argued that his condition increased his chances for further injury. The court rejected this argument, explaining that "this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently existing." (*Hosford, supra*, 77 Cal.App.3d at p. 863.) As the court explained, prophylactic restrictions that are 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. (*Ibid.*)

8. When all the evidence in this matter is considered in light of the courts' holdings in *Resendez*, *Mansperger*, and *Hosford*, respondent did not establish that his disability retirement application should be granted. There was not sufficient evidence based upon competent medical opinion that he is permanently and substantially incapacitated from performing the usual duties of a Transportation Engineer due to a

rheumatological condition. Consequently, his disability retirement application must be denied.

**ORDER**

The application of respondent Ohannes Bedrossian for Service Pending Disability Retirement is DENIED.

DATE: August 8, 2019

DocuSigned by:  
*John DeCure*  
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JOHN E. DeCURE

Administrative Law Judge

Office of Administrative Hearings