

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Reinstatement from Disability
Retirement of:

Case No. 2018-0806

JOSEPH A. BONOFIGLIO,

OAH No. 2018120448

Respondent,

and

DEPARTMENT OF DEVELOPMENTAL
SERVICES FAIRVIEW STATE HOSPITAL,

Respondent.

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 14, 2019, in Santa Ana, California.

Kevin Kreutz, Senior Attorney, represented petitioner, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System, State of California (CalPERS).

Joseph A. Bonofiglio, respondent, represented himself.

No appearance was made by or on behalf of employer respondent, Fairview Developmental Center¹ (Fairview). Having established satisfactory service, the matter proceeded against Fairview as a default pursuant to Government Code section 11520.

During the hearing, respondent advised that he disagreed with petitioner's expert's report. Petitioner's counsel proposed that those issues be addressed in writing and

¹ The Accusation alleged Mr. Bonofiglio was employed by "Department of Developmental Services Fairview State Hospital," but the employment documents and Mr. Bonofiglio's application for disability retirement identified his employer as Fairview Developmental Center.

respondent agreed. Respondent also requested that his treating physician be permitted to testify telephonically. That request was treated as a motion for continuance and an order was issued setting a briefing schedule for respondent's requests and for closing arguments. In addition to their respective positions, the parties were instructed to address whether respondent's treating physician had agreed to testify by telephone and petitioner's response thereto; respondent was instructed to provide any report the treating physician prepared to petitioner's counsel; and respondent was also instructed to identify those parts of the petitioner's expert's report with which respondent disagreed. The briefing schedule was extended when respondent advised that his treating physician had not yet received a response from his employer about testifying.

Thereafter, when the briefs were filed, respondent did not address the physician testimony issue. Instead, he merely provided a written closing argument, making no mention of that issue. Neither petitioner's closing argument nor respondent's rebuttal brief addressed the issue. Accordingly, respondent is presumed to have withdrawn both his continuance request and his request that his treating physician be permitted to testify by telephone and those issues shall not be addressed in this decision.

The parties' briefs were received as argument and were marked, respectively, as Exhibits A, B, and C. The record was closed and the matter was submitted on June 28, 2019.

ISSUE

Has Mr. Bonofiglio, who was granted a disability retirement in 2016, now recovered from his orthopedic (neck and back) condition to the extent that he is no longer permanently disabled or incapacitated from performing the usual and customary duties of an Adult Education Teacher?²

PROTECTIVE AND SEALING ORDER

Mr. Bonofiglio introduced unredacted medical records at this hearing that were marked collectively as Exhibit 16. The records are subject to a protective order and it is not practical to redact the information from the documents. Exhibit 16 is hereby sealed. A reviewing court, parties to this matter, their attorneys, and a government agency decision maker or designee under Government Code section 11517, may review the documents subject to this order, provided that such documents are protected from release to the public.

² The records introduced at hearing identified Mr. Bonofiglio's position by several different titles: Adult Education Teacher, Special Education Teacher, Teacher (Special Ed), and Special Education Teacher. For consistency, this decision shall refer to his job title as Adult Education Teacher.

FACTUAL FINDINGS

Preliminary Matters

1. Mr. Bonofiglio was employed as an Adult Education Teacher at Fairview. By reason of his employment, Mr. Bonofiglio was a state miscellaneous member of CalPERS.
2. On February 9, 2016, Mr. Bonofiglio submitted his application for an industrial disability retirement. In the disability information section, Mr. Bonofiglio identified his disability as “cervical spine deficiency, right foot pain, lower back pain.” The disability occurred when a “student/client kicked, pushed, attempted to bite, both fell to ground.” He identified the limitations/preclusions due to his injury as: “Limited standing walking/no running/limited lifting (20 lbs) probably can stand then sit for 30-60 min intervals but no quick reactive movements.” He claimed the injuries affected his ability to perform his job because: “I cannot perform my job running, sudden movements, self-defense techniques are necessary and out of the question.” He identified Max Matos, M.D., as his treating physician and provided his medical records to CalPERS.
3. Dr. Matos completed a Physician’s Report on Disability, diagnosing Mr. Bonofiglio with “cervical spine multilevel disc herniations, radiculitis” and “lumbar spine multilevel disc herniations.” Dr. Matos wrote “temporarily totally disabled” in response to the question asking him to provide Mr. Bonofiglio’s “Restrictions/Limitations.” Dr. Matos checked the box marked “No” asking if the incapacity was permanent and indicated the “probable duration” was “6 months - 1 year.” Dr. Matos checked the box marked “Yes” indicating that Mr. Bonofiglio was “currently substantially incapacitated from performance” of his usual job duties. Dr. Matos again wrote “temporarily totally disabled” in response to the question asking him to describe the duties/activities Mr. Bonofiglio could not perform due to his incapacity.
4. On March 14, 2016, CalPERS notified Mr. Bonofiglio that it approved his application for industrial disability retirement, finding him “substantially incapacitated from the performance of your usual duties as an Adult Education Teacher . . . based upon your orthopedic (neck, low back) condition.” CalPERS advised that his disability retirement was effective immediately, unless he remained on the payroll to the extent of any unused sick leave. Thereafter, Mr. Bonofiglio was retired for disability effective September 1, 2016.
5. Provisions of the Government Code authorize CalPERS to re-evaluate a member who is under the minimum age for voluntary retirement to determine whether the member remains 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.
6. On December 19, 2017, CalPERS notified Mr. Bonofiglio that his “disability retirement benefits are currently under review to determine if you continue to meet the

qualifications to receive industrial disability retirement benefits . . .” Mr. Bonofiglio was told that his “cooperation in the reevaluation of your benefits is required and appreciated.”

7. On April 23, 2018, CalPERS again notified Mr. Bonofiglio that his disability status was “under review to determine if you continue to be substantially incapacitated from the performance of your job duties.” The letter advised that an Independent Medical Examination (IME) had been set with Juan Realyvasquez, M.D., for May 8, 2018.

8. On July 10, 2018, CalPERS notified Mr. Bonofiglio that, after completing its reevaluation, it determined he was no longer substantially incapacitated from performing the usual and customary duties of an Adult Education Teacher. CalPERS directed Mr. Bonofiglio to contact the Fairview personnel office to arrange his return to employment. Mr. Bonofiglio timely appealed that determination and this hearing ensued.

CalPERS's Evidence

9. CalPERS retained Dr. Realyvasquez to perform an IME and provided him with Mr. Bonofiglio’s medical records for review. Dr. Realyvasquez obtained his Medical Degree in 1967 from Keck University of Southern California School of Medicine. He participated in an internship at Los Angeles County USC Medical Center in General Surgery from 1967-1968, residencies in Orthopaedic Surgery at three Los Angeles hospitals from 1968-1972, and a fellowship in Pediatric Orthopaedic Surgery at Alfred I. DuPont Institute in Delaware from 1974-1975. Dr. Realyvasquez is board-certified in Orthopedic Surgery. Dr. Realyvasquez testified that he has a “very limited” private practice and spends his time “mainly doing” CalPERS IMEs and Workers’ Compensation Quality Medical Evaluations.

10. Dr. Realyvasquez examined Mr. Bonofiglio and authored a report on May 8, 2018, setting forth his evaluation and review of the records. Dr. Realyvasquez obtained information regarding Mr. Bonofiglio’s job, chief complaints, history, history of the accident, past medical history, family history, social history, and performed a physical examination. Dr. Realyvasquez noted that Mr. Bonofiglio “appeared to be nervous and anxious to make sure he told his story well. He remained apprehensive throughout the examination and at times appeared to control the examination and exaggerate some of his symptoms.” On physical examination Dr. Realyvasquez noted mild tenderness along Mr. Bonofiglio’s entire cervical spine with limited range of motion, mild kyphosis in the mid thoracic spine without tenderness, no localized tenderness in the lumbar spine but tenderness to percussion of the entire lumbar spine, and some mild tenderness at the lumbosacral junction. There was spasm noted in both sides of the lumbar spine when standing on both legs, but this appeared to be “a controlled spasm” as the muscles showed no spasm when Mr. Bonofiglio stood on one leg. The straight leg test in the sitting position was negative. Mr. Bonofiglio’s gait was normal.

Following his examination and records review, Dr. Realyvasquez’s diagnoses were: cervicalgia, degenerative joint disease of the cervical spine without radiculopathy, chronic cervical spine sprain/strain, and degenerative joint disease of the lumbar spine without radiculopathy. Dr. Realyvasquez opined that Mr. Bonofiglio “should be able to perform all

the duties mentioned” in the job description and duty statement. Mr. Bonofiglio “did suffer significant trauma” during the 2014 Fairview incident and “received extensive treatment.” Mr. Bonofiglio had multiple consultations with physicians and surgery was mentioned only once as documented in the records but Dr. Realyvasquez opined that surgery was not required at this time. Dr. Realyvasquez opined: “The findings of his physical evaluation at this time show that he should be able to perform his duties.” Dr. Realyvasquez did not believe Mr. Bonofiglio was “substantially incapacitated to perform further performance of his duties [*sic*].” He believed that Mr. Bonofiglio was cooperative during the IME, “although at times he did exaggerate his symptoms and objective findings.”

11. Dr. Realyvasquez testified in a manner consistent with the opinions expressed in his report. However, while his report was extremely detailed and his opinions well explained, he made a fair to poor witness while testifying because at times his testimony was rambling and difficult to follow. Dr. Realyvasquez wears hearing aids and referenced his hearing difficulty when testifying, so his presentation at hearing may be explained by his trouble hearing questions posed to him. On balance, his opinions were supported by the records he reviewed and summarized in his report, by the physical examination he performed and documented, and no competent medical opinions were presented to refute his testimony.

Several of Mr. Bonofiglio’s past pain complaints appeared to have been resolved based on the records reviewed and/or the physical examination performed during the IME, so Dr. Realyvasquez could not find causes for the pain complaints Mr. Bonofiglio claimed he had at the IME. Further, Dr. Realyvasquez concluded that many of the tests performed during the IME were negative while others indicated Mr. Bonofiglio was voluntarily causing the areas to spasm which further supported Dr. Realyvasquez’s opinions. For example, when performing lumbar spine tests, at first there was spasm during the active testing that required Mr. Bonofiglio’s cooperation, but the spasm disappeared during passive testing, where his cooperation was not key, signifying that Mr. Bonofiglio was holding his back muscles tense while performing the testing.

Dr. Realyvasquez could not find any irritation of the nerve roots of the lumbar spine despite Mr. Bonofiglio’s limited ranges of motion on testing. Dr. Realyvasquez found no atrophy of the muscles which occurs with loss of use, suggesting there has been no loss of function in those muscles. Also, he could not find any pain complaints that would prevent Mr. Bonofiglio from using his muscles; the physical examination did not show any areas that Mr. Bonofiglio could not use. Dr. Realyvasquez did not find anything on the MRIs to explain the limited ranges of motion.

In addition to the records he reviewed and the physical examination findings, Dr. Realyvasquez considered his interview with Mr. Bonofiglio and the way Mr. Bonofiglio looked when discussing his injury, his whole interaction with Mr. Bonofiglio at the IME, the way Mr. Bonofiglio told his story, the way Mr. Bonofiglio explained how his injury affected his ability to perform his activities of daily living, and how it affected his ability to perform his work. Taking all of that into account, Dr. Realyvasquez concluded that Mr. Bonofiglio

was able to return to work and there were no limitations he would impose on any activities Mr. Bonofiglio was expected to perform.

On cross-examination Dr. Realyvasquez admitted he did not know what it meant to be a special education teacher at Fairview. He explained that the place where Mr. Bonofiglio performed his job was not important; the age of the clients Mr. Bonofiglio taught and helped was important. Dr. Realyvasquez testified, "I did not take into consideration your place of employment." However, as he explained, his understanding of Mr. Bonofiglio's job came from the records he reviewed and from what Mr. Bonofiglio told him at the IME. When asked whether he had an understanding of the special needs of the individuals Mr. Bonofiglio taught at Fairview, Dr. Realyvasquez testified that because he has a child with special needs who is now 45 years old, he has dealt with numerous facilities and special schools during his child's lifetime and is "quite familiar with special education." He also explained that he is a qualified pediatric orthopedist for mental health issues, including Down's syndrome, and he knows those conditions "quite well," although he acknowledged he was not aware of the specific behaviors of the clients at Fairview whom Mr. Bonofiglio taught. While the testimony regarding his own child did not establish that Dr. Realyvasquez was familiar with the needs of Fairview clients, Dr. Realyvasquez had reviewed the Essential Function and Duty Statement documents which listed the activities Mr. Bonofiglio was required to perform; Dr. Realyvasquez had sufficient information regarding Mr. Bonofiglio's job duties to render his opinions. Also, while his answers regarding Mr. Bonofiglio's "place of employment" suggested he did not consider the *location* where services were performed, he certainly did consider the *type* of services performed.

Mr. Bonofiglio then asked Dr. Realyvasquez a series of questions regarding obtaining second opinions and whether Mr. Bonofiglio should undergo additional MRIs. That line of questioning and the responses given were not relevant to the issues to be decided in this matter. At no point did Dr. Realyvasquez testify that he did not have enough information to form his opinions. Moreover, Dr. Realyvasquez explained how positive MRI findings can be found in patients who are asymptomatic so the MRIs did not prove that Mr. Bonofiglio felt pain. Nothing on the MRIs indicated Mr. Bonofiglio was unable to perform his job. Dr. Realyvasquez explained there must be objective physical findings of impairment to establish a disability, and he could "find none." He testified, "A CalPERS disability cannot be based solely on pain."³ Moreover, he noted that even Dr. Matos, in his CalPERS Physician's Report on Disability, diagnosed Mr. Bonofiglio as only having a "total temporary disability," indicating his condition would improve. Additionally, other treating physicians documented radiculopathy of the neck and lumbar spine which Mr. Bonofiglio no longer complained of at the IME, demonstrating that Mr. Bonofiglio's condition had improved.

³ Neither Dr. Realyvasquez nor petitioner cited to any law in support of that opinion, and indeed, there is none. The law requires "competent medical opinion," and nothing prohibits it from being based on pain complaints.

12. The Physical Requirements of Position/Occupational Title and the Fairview Adult Education Teacher Duty Statement were introduced and relied upon by Dr. Realyvasquez in rendering his opinions.

The Physical Requirements of Position/Occupational Title of a Special Education Teacher at Fairview completed by Mr. Bonofiglio and his employer outlined the various physical activities required for the position, including their frequency, which was listed as Never, Occasionally (up to three hours), Frequently (three to six hours), and Constantly (over six hours). According to that form, a Special Education Teacher at Fairview “never” works at heights; “occasionally” crawls, kneels, climbs, uses fine manipulation, uses power grasping, uses simple grasping, has repetitive use of the hands, lifts 25 to 100+ pounds, drives, works with heavy equipment, is exposed to excessive noise, extreme temperatures/humidity wetness, dust, gas, chemicals or fumes, operates foot controls/repetitive movement, and uses special visual or protective equipment; “frequently” sits, stands, runs, walks, squats, bends and twists at the neck and waist, reaches above and below the shoulder, pushes and pulls, uses a keyboard and mouse, lifts or carries zero to 25 pounds, walks on uneven ground, and works with biohazards. There were no activities identified in the “constantly” category.

The Duty Statement identified the “General Statement of Duties” as “Provides and directs individualized and group oriented and vocational training.” The “Typical Physical Demands” were identified as: “Must passes [*sic*] and maintain sufficient strength, agility, endurance and sensory ability to perform the duties contained within this duty statement.” The “Typical Working Conditions” were noted to be: “Ongoing contact with clients and staff in the provision of direct services and other conditions common to on and off residence environments [*sic*]. Potential exposure to communicable diseases, bloodborne pathogens and other conditions common to a clinical/nursing environment.”

The Duty Statement listed the “Essential Duties” of the position, identifying the percentage of time those duties are performed. As noted in Factual Finding 19 below, although Mr. Bonofiglio testified that Dr. Realyvasquez’s report was inaccurate regarding his job duties, the information in the IME report was the same as contained in the Duty Statement. Other Essential Duties identified by percentages in the Duty Statement were: “5%” of the time the position requires that the employee conduct appropriate educational and vocational assessments/evaluations of students, participate in the development of individual plans and assess students’ development, respond to emergencies, communicate pertinent information, escort students to activities, assess supply needs, and coordinate activities. “15%” of the job requires developing programs and coordinating activities. “20%” of the job requires the employee, as the primary person for a designated group, to be responsible for conducting vocation/educational services in coordination with the individual plans and ensure student and property safety when those services are being provided.

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Mr. Bonofiglio's Evidence

13. Michael Calderon, Mr. Bonofiglio's friend who works with him as a blackjack dealer testified about a New Year's Eve 2018-2019 event Mr. Bonofiglio tried to work. He said Mr. Bonofiglio was unable to do so because of his back pain which required him to take multiple breaks and sit down. Mr. Calderon testified that after that event, Mr. Bonofiglio stopped taking blackjack dealer jobs. On cross-examination Mr. Calderon testified that there were other jobs since that time that Mr. Bonofiglio had taken "sporadically," suggesting Mr. Bonofiglio may have worked additional events after New Year's Eve.

14. Mario Baca is Mr. Bonofiglio's former high school teacher who testified about the many social outings the two attended before the Fairview incident. Since Mr. Bonofiglio's injury, they have had to limit the distance to which they travel for events and Mr. Bonofiglio has often canceled travel plans. On one occasion when they went to see horses they had to leave early because of Mr. Bonofiglio's pain complaints.

15. Vicki Bonofiglio, Mr. Bonofiglio's mother, testified her son was very active before the Fairview injury, playing several sports. He never had pain complaints and was extremely social. Now he cancels plans quite often, explaining he does not feel well enough to participate in a planned activity or he will engage in the planned activity only for limited periods of time. She testified that when her son engages in physical activities, he has numerous pain complaints.

16. Andrea DiPietro, Mr. Bonofiglio's coworker at Fairview, testified that he has never thought Mr. Bonofiglio was exaggerating his complaints. He described the work he and Mr. Bonofiglio provided at Fairview, the aggressive, assaultive and unpredictable nature of the students who attend Fairview, and how employees are injured by students on a daily basis. He and Mr. Bonofiglio previously socialized outside of work, enjoying numerous activities. However, since the injury, Mr. Bonofiglio has not been as physically active; they do not get together as much, and when they go to restaurants, Mr. Bonofiglio often has to stand because of his pain.

17. Thomas Clawson Thomas, Mr. Bonofiglio's coworker at Fairview, testified that he and Mr. Bonofiglio worked closely together at Fairview, providing backup to each other during student assaults. He described the restrictive environment of Fairview, its lack of facilities, and how Fairview housed individuals who could not be placed elsewhere because of the risk of harm to themselves or others. Mr. Thomas explained that every teacher at Fairview had been injured by students despite precautions. In fact, the student who attacked Mr. Bonofiglio had "the highest restraint" plan in place because of that student's violent tendencies. Mr. Thomas testified the job description document was inaccurate because it did not state that employees must be able to effectively deal with aggressive and violent behavior, explaining that employees are hit and kicked as part of the job and teachers must be able to teach students who have these different types of behaviors. Mr. Thomas described the various tasks the Fairview teachers must perform and how Mr. Bonofiglio would be unable to do those tasks because of his injuries. Mr. Thomas described

the social outings that he and Mr. Bonofiglio used to attend and the many activities they previously shared. But since the injury, there have been none.

18. Mr. Bonofiglio introduced several medical records that were received as administrative hearsay pursuant to Government Code section 11513, subdivision (d), and that can only be used to supplement or explain other evidence; administrative hearsay, by itself, is insufficient to support a finding unless it is admissible on other grounds.

19. Mr. Bonofiglio testified about his injury and the limitations he now has because of it. He described the numerous modalities, medications, and therapies he has attempted, with little to no relief. He credibly explained how he is always trying to improve his condition and attempt activities, but he experiences tremendous pain afterwards and must abandon those activities.

Mr. Bonofiglio disputed Dr. Realyvasquez's opinions to the extent that he did not believe that Dr. Realyvasquez was given adequate and accurate information regarding Mr. Bonofiglio's job duties. He claimed that Dr. Realyvasquez's opinion that Mr. Bonofiglio "helped develop the educational and vocational programs for the clients at the school" was incorrect as that was not his job duty. However, that testimony was not persuasive because the Duty Statement offered in evidence clearly stated that 15 percent of the essential duties of an Adult Education Teacher at Fairview are "develops individualized educational or vocational program for all clients enrolled in his/her class."

Mr. Bonofiglio testified that Dr. Realyvasquez's work history timelines were incorrect because Mr. Bonofiglio did not begin working as an Adult Education Teacher until 2001. However, that error was not critical to the issues to be decided. Dr. Realyvasquez correctly noted Mr. Bonofiglio's position at the time of the injury and the position to which he would return if ordered to be reinstated.

Closing Arguments

20. Petitioner asserted that he met his burden of proof because Dr. Realyvasquez was the only witness who offered "competent medical opinion" that Mr. Bonofiglio was no longer substantially incapacitated from the performance of his duties. Petitioner argued no direct medical evidence controverted Dr. Realyvasquez's opinions and medical records introduced by Mr. Bonofiglio were administrative hearsay and could not support a finding that Mr. Bonofiglio possessed a substantial incapacitating disability. Petitioner requested that his decision to cancel Mr. Bonofiglio's disability retirement and reinstate him to his former position be affirmed.

21. Mr. Bonofiglio asserted that Dr. Realyvasquez made multiple errors in his report and did not understand Mr. Bonofiglio's job duties. Mr. Bonofiglio pointed out that Dr. Realyvasquez incorrectly believed Mr. Bonofiglio was separated with two children when he is actually divorced with one child; that he incorrectly thought Mr. Bonofiglio had undergone a prior arthroscopic knee surgery when that was not the case; and that Dr.

Realyvasquez got the job titles and job duties wrong. Mr. Bonofiglio asserted his witnesses accurately explained his job duties and their testimony, together with the medical records he introduced, supported his position that his disability retirement should not be canceled and he should not be reinstated.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. 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 the party is asserting.”

2. Evidence Code section 115 defines “burden of proof” as a party’s obligation “to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.” Unless otherwise specified, the standard of proof is by a preponderance of the evidence.

3. In this proceeding, CalPERS had the burden of proving by a preponderance of the evidence that circumstances had changed, that Mr. Bonofiglio was no longer substantially incapacitated from performing the duties of an Adult Education Teacher, that Mr. Bonofiglio was capable of returning to work, and that Bonofiglio should be reinstated to his former employment as an Adult Education Teacher.

Applicable Statutes

4. 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.”

5. Government Code section 21060, subdivision (a), provides that a member shall be retired for service upon his or her written application to the board if he or she has attained age 50 and is credited with five years of state service.

6. 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 must be based on competent medical opinion.

7. Government Code section 21192 provides that recipients of a disability retirement allowance under the minimum age for voluntary retirement for service may be required to undergo a medical examination. Based on the results of that examination,

CalPERS must determine whether the member is still incapacitated from performing his or her job duties.

8. Government Code section 21193 provides that if the member is determined to no longer be eligible for a disability retirement, it shall be canceled and the member shall be reinstated.

Eligibility for a Disability Retirement

9. "Incapacitated for the performance of duty" means the substantial inability of the applicant to perform his or her usual duties. An employee who is incapacitated only to a limited extent is not entitled to disability retirement. (*Mansperger v. Public Employees' Retirement System* (1979) 6 Cal.App.3d 873, 875-877.)

Competent Medical Opinion

10. CalPERS must make its determination on the issue of whether a member is disabled for retirement purposes based on "competent medical opinion." That determination requires the evidence offered to substantiate the member's disability. (*Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 461, distinguished on other grounds.)

11. Evidence Code section 801 provides:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

12. The determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the trier of fact in the search for the truth, and "no hard and fast rule can be laid down which would be applicable in every circumstance." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 37-38.)

13. A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact but the expert's opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 529-530.)

14. Government Code section 11513, subdivision (d), provides in part: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

15. Unless admissible over objection in civil actions, hearsay evidence is not sufficient in itself to support a finding in an administrative proceeding. (*Carl S. v. Commission for Teacher Preparation & Licensing* (1981) 126 Cal.App.3d 365, 371.)

16. Hearsay evidence is not competent evidence that can independently support a finding. (*McNary v. Department of Motor Vehicles* (1996) 45 Cal.App.4th 688, 696, citing to *Martin v. State Personnel Board* (1972) 26 Cal.App.3d 573.)

17. Determining both the nature of Mr. Bonofiglio's medical condition, and whether that condition incapacitated him physically or mentally for the performance of his duties, is a matter sufficiently beyond common experience and requires expert testimony. Mr. Bonofiglio's treating physicians did not testify in this hearing and the medical records he provided were received solely as administrative hearsay. Thus, they can only be considered to the extent they supplement and/or explain other non-hearsay evidence.

Conclusion

18. Petitioner established by a preponderance of the evidence, through the interdiction of competent medical evidence, that Mr. Bonofiglio is no longer substantially incapacitated from performing the usual and customary duties required of an Adult Education Teacher. While the testimony offered by Mr. Bonofiglio's witnesses regarding the work Fairview teachers perform, Mr. Bonofiglio's present inability to perform those duties, and his current inability to engage in the numerous activities he previously enjoyed was credible, such testimony did not constitute "competent medical opinion" as required by Government Code section 20026, and that evidence was insufficient to refute the competent medical opinion offered by petitioner.

Although Dr. Realyvasquez made several errors in his report, they were not central to the neck and back injuries at issue. Dr. Realyvasquez's mistaken belief that Mr. Bonofiglio was separated with two children had no bearing on the substantial incapacity issue. Also, while mistakenly believing that Mr. Bonofiglio had a prior arthroscopic knee surgery was concerning, because this case did not involve knees, that mistake was not central to the issues being decided. No persuasive evidence suggested that Dr. Realyvasquez incorrectly read the

medical records regarding Mr. Bonofiglio's neck and back complaints or that his reliance on those records to support his opinions was in error. There was no persuasive evidence that Dr. Realyvasquez did not understand the job duties at issue. Mr. Bonofiglio's argument that Dr. Realyvasquez did not order an MRI was irrelevant. Dr. Realyvasquez was retained to perform an IME; at no point did he state that he could not render meaningful opinions without a more recent MRI.

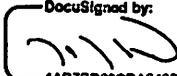
Finally, although Mr. Bonofiglio argued that Dr. Realyvasquez did not have a true appreciation of many of his job duties, and several of Dr. Realyvasquez's answers supported that argument, Dr. Realyvasquez relied on correct job descriptions and job duty documents, and it was not established that he failed to take relevant documentation into account. Further, the Physical Requirements of Position/Occupational Title document was completed by Mr. Bonofiglio, so he had input in the frequency calculations. Most importantly, Dr. Realyvasquez's opinions involved the only competent medical testimony offered; no competent medical testimony refuted his credible opinions. Accordingly, it is found Mr. Bonofiglio is no longer substantially incapacitated from performing his customary and usual duties, his disability retirement shall be cancelled, and he shall be reinstated.

ORDER

Joseph A. Bonofiglio's appeal from CalPERS's determination that he is no longer eligible for a disability retirement is denied. Mr. Bonofiglio is not substantially incapacitated from performing the usual and customary duties of an Adult Education Teacher. His disability retirement shall be cancelled, and he shall be reinstated to his former position.

DATED: July 15, 2019

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MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings