

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:

RAYMOND C. LEBLANC, Respondent

and

EASTERN MUNICIPAL WATER DISTRICT, Respondent

Agency Case No. 2018-0783

OAH No. 2018090286.1

PROPOSED DECISION AFTER REMAND

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 30 and December 11, 2019, in San Bernardino, California.

Charles Glauber, Senior Attorney, represented complainant, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System, State of California (CalPERS).

Raymond R. LeBlanc, respondent, represented himself at the January 30, 2019, hearing. Danny T. Polhamus, Attorney at Law, represented respondent at the December 11, 2019, hearing.

There was no appearance by or on behalf of respondent Eastern Municipal Water District (District).¹

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on January 30, 2019. At its meeting on May 15, 2019, the Board of Administration (board) declined to adopt the Proposed Decision and remanded the matter to the Office of Administrative Hearings for additional evidence. On December 11, 2019, additional oral and documentary evidence was received, the record was closed, and the matter submitted for decision.

ISSUE

Is Mr. LeBlanc substantially incapacitated from performing the usual and customary duties of a Construction and Safety Inspector III (safety inspector)?

¹ On proof of compliance with Government Code sections 11505 and 11509, this matter proceeded as a default against the District pursuant to Section 11520.

FACTUAL FINDINGS

Background

1. Mr. LeBlanc is 68 years old. Until his service retirement effective March 6, 2018, he worked as a safety inspector for the District. By virtue of such employment, Mr. LeBlanc is a local miscellaneous member of CalPERS.

2. On January 19, 2018, CalPERS received Mr. LeBlanc's application for disability retirement.² The application contained the following response describing Mr. LeBlanc's specific disability:

The specific disability is multifactorial including acute or chronic anemia related to gastrointestinal hemorrhage, sepsis, parotid gland infection leading to protein calorie malnutrition acute on chronic back pain related to compression fractures of the T11 T12 L1 L3 exacerbated by syncopal event and deconditioning related to prolonged bed rest.

In addition, Mr. LeBlanc stated that he had a blood disorder called "monoclonal gammopathy of undetermined significance." Mr. LeBlanc wrote that he is unable to

² A box on the application was checked indicating that it was an employer-originated application. However, it appears that Mr. LeBlanc completed the application.

walk more than 50 yards without fatigue and cannot tolerate seated positioning for long periods of time. He is unable to drive related to pain and pain medications.

3. On February 8, 2018, CalPERS appointed Juan Realyvasquez, M.D., as an orthopedic Independent Medical Examiner (IME). Dr. Realyvasquez conducted his examination on February 22, 2018.

4. By letter dated May 10, 2018, CalPERS notified Mr. LeBlanc that based on a review of his medical records, CalPERS determined that his orthopedic condition was not disabling and his application for disability retirement was denied. The letter also stated that CalPERS considered the additional allegation on the application relating to his other medical conditions, and based on a review of his medical records, determined that the medical evidence was insufficient to make a determination on these conditions.

5. Mr. LeBlanc timely appealed the decision; this hearing ensued.

Duties of a Construction and Safety Inspector III

ESSENTIAL FUNCTIONS

6. The main purpose of a safety inspector, as identified in the District's job description is to perform a range of quality-control and safety inspections of public works, waterworks, and utility construction projects.

PHYSICAL DEMANDS

7. According to the District's job description, a safety inspector is regularly required to "use hands to finger, handle, feel or operate objects, tools or controls, perform repetitive movements with hands, wrists or feet, and reach with hands and

arms." Safety inspectors are frequently required to "walk and stand, talk or hear, sit, climb or balance, stoop, kneel, crouch or crawl, and drive a vehicle." They are required to frequently lift and or move up to 25 pounds and occasionally up to 50 pounds. Safety inspectors frequently work outside in a wide range of weather conditions, near moving mechanical parts, and on slippery and uneven surfaces. They regularly work on ladders/scaffolding, in precarious places, and in confined spaces.

8. The CalPERS Physical Requirements of Position/Occupational title worksheet also identifies physical activities that a safety inspector must perform, and classifies the frequency of the activities as never, occasionally, frequently, and constantly. Occasional activities are those that occur up to three hours a day. Frequent activities are identified as activities that occur between three and six hours a day. Constant activities are those that occur over six hours per day. Constant physical activities that a safety inspector must perform are identified as sitting, squatting, bending at the neck and waist, twisting at the neck, fine manipulation, power grasping, driving, and operation of foot controls. Frequent activities are identified as standing, walking, fine manipulation, and walking on uneven ground. Occasional activities are identified as, crawling, kneeling, twisting at the waist, reaching above the shoulder, pushing and pulling, repetitive use of hands, keyboard use, lifting up to 25 pounds, exposure to extreme temperatures, exposure to dust, gas or fumes, and use of special protective equipment.

9. Mr. LeBlanc testified about a typical day on the job as a safety inspector. He would spend the morning in the office completing reports before driving out into the field. He would frequently have to enter and exit his vehicle, and drive over non-graded roads. His frequent inspection duties required him to inspect piping. This required him to enter trenches between 5 and 30 feet deep, which required him to

descend and ascend a ladder. Safety inspectors were also required to climb ladders in order to inspect equipment above ground.

Dr. Realyvasquez's Independent Medical Examination

10. Dr. Realyvasquez, is a board-certified orthopedic surgeon. He completed his residency in orthopedic surgery in 1972, following which he completed a fellowship in pediatric orthopedic surgery. In addition to pediatric orthopedics, he specialized in foot and ankle surgery. He also received specialized training in the treatment of scoliosis. Despite his areas of specialization, he has performed surgeries on all areas of the musculoskeletal system. He has held academic appointments at several universities, served as an attending physician at multiple hospitals, and worked in private practice. Although Mr. LeBlanc argued that Dr. Realyvasquez was not a spine specialist, his education and experience qualified him to render an expert medical opinion in this matter.

11. Prior to commencing the examination, Dr. Realyvasquez reviewed the applicable legal standards for a disability retirement and Mr. LeBlanc's job duties. Dr. Realyvasquez, examined Mr. LeBlanc on February 22, 2018. Dr. Realyvasquez, testified at the hearing regarding his examination of Mr. LeBlanc and the report he completed documenting the examination. The following is a summary of Dr. Realyvasquez's testimony and report.

12. Mr. LeBlanc reported that he injured his back in 2015 after falling backwards at home while trimming a tree. He was initially evaluated by a chiropractor, but was then referred to Vance Johnson, M.D., a physiatrist and pain specialist. An x-ray reviewed he had a compression fracture of the eleventh thoracic vertebrae (T11). Mr. LeBlanc continued to perform his duties as a safety inspector until September

2017, when he was hospitalized for a syncopal episode secondary to a gastrointestinal bleed. He was diagnosed with a bleeding gastric ulcer and remained in the hospital for some time. He was also found to have multiple other medical problems, including a large abscess on his neck and severe anemia.

Mr. LeBlanc reported being under the care of Dr. Johnson for his spinal problems. His pain was localized to the thoracolumbar junction, where he had an obvious kyphosis (acute forward bend). Mr. LeBlanc reported 10 out of 10 pain throughout the day, despite the use of Norco (an opioid pain medication). The pain was non-radiating, but aggravated by sneezing, coughing, strenuous activity, and any motion of his thoracic and lumbar spine.

13. Dr. Realyvasquez conducted a head-to-toe physical examination of respondent. With regard to the thoracic spine, he measured flexion (forward movement) at 35 degrees with pain, which was within normal limits. Extension (backward movement) was measured at 10 degrees, with 10 to 20 degrees being normal. Rotation was measured at 5 degrees on both sides, with 60 to 90 degrees being normal. Dr. Realyvasquez measured a kyphosis of the thoracolumbar spine at 35 degrees. There was tenderness on palpation and mild spasms on both sides of the thoracic spine. When Dr. Realyvasquez evaluated sensitivity with a pin, Mr. LeBlanc had increased sensitivity from T11 to L4. Dr. Realyvasquez's impression of the thoracic spine was that Mr. LeBlanc had mild pain when he moved, but it did not appear to interfere with his activities.

Examination of the hip was remarkable for zero degrees internal rotation (normal greater than 45 degrees). External rotation was 35 degrees on each side (normal greater than 40 degrees). There was a positive Trendelenburg on his right

side, which meant when Mr. LeBlanc stood on one leg his pelvis dropped down, an indicator of muscle loss on that side.

As for the lumbar spine, flexion was limited to 20 degrees (at least 90 degrees normal). Extension was zero degrees (at least 40 degrees normal). Lateral flexion was 15 degrees on both sides (30 to 45 degrees normal). Rotation was 10 degrees on both sides (70 to 90 degrees normal). Dr. Realyvasquez believed Mr. LeBlanc did not have full range of motion of his lumbar spine.

14. Dr. Realyvasquez reviewed Mr. LeBlanc's medical records from September 2017 through November 2017. Most of the records related to Mr. LeBlanc's hospitalization for other medical conditions and not because of his spine. An MRI on September 17, 2017, revealed compression fractures at T11, T12, and L1. There was evidence of vertebroplasty³ at L1 with cement spilling over into the intervertebral disc and laterally to the right side. A Schmorl's node (condition of softening of the end-plate of the vertebrae) was noted at L3, which was interpreted as a possible new fracture. Dr. Realyvasquez testified that there are a number of records he would have liked to have reviewed relating to Mr. LeBlanc's vertebroplasty in addition to the treatment records from Dr. Johnson. He stated that these records could have made a difference in his conclusions, for example, whether the fractures resulted from disease process or trauma. This testimony suggested that Dr. Johnson may have determined that Mr. LeBlanc was substantially incapacitated if he had reviewed those records.

³ Vertebroplasty and kyphoplasty are procedures used to stabilize spinal compression fractures where bone cement is injected into the vertebrae.

15. Dr. Realyvasquez diagnosed Mr. LeBlanc with compression fractures at T11, T12, and L1; a Schmorl's node at L3; and traumatic kyphosis at the thoracolumbar junction secondary to the compression fractures. However, he determined that Mr. LeBlanc was able to perform all functions of his job. He noted that Mr. LeBlanc had been performing his duties since 2015, at the time of his compression fractures, up until his gastrointestinal bleed. Dr. Realyvasquez also believed that Mr. LeBlanc was exaggerating his symptoms, specifically by reporting a 10 out of 10 pain threshold when he did not appear to be in any pain during the examination. Dr. Realyvasquez said he requested Mr. LeBlanc provide records from Dr. Johnson, but none were ever submitted. Dr. Realyvasquez felt Mr. LeBlanc exaggerated his pain, such as when performing the straight leg raising test. Dr. Realyvasquez noted that Mr. LeBlanc performed essentially the same movement when he lifted his leg to remove his pants, which he did without any apparent difficulty.

DR. REALYVASQUEZ'S SUPPLEMENTAL REPORT

16. On July 9, 2018, after CalPERS notified Mr. LeBlanc that it had denied his application, CalPERS sent Dr. Realyvasquez additional medical records from February 2017 through June 2018, and requested that he provide a supplemental opinion. The following summarizes the supplemental report and Dr. Realyvasquez's testimony.

17. Dr. Realyvasquez reviewed a number of medical records, including those from Dr. Johnson beginning in February 2017. On February 14, 2017, Dr. Johnson performed a lateral facet block at L3, L4, and L5. At a follow-up visit, Mr. LeBlanc reported as having an 80 percent reduction in the back pain. Mr. LeBlanc reported being able to work on his wife's car. Dr. Johnson noted improved tolerance with daily activities. On a subsequent visit, Dr. Johnson performed a lumbar facet radiofrequency ablation. Dr. Johnson continued to perform medial branch blocks that resulted in the

reduction of pain. In February and March 2018, Dr. Johnson performed intercostal nerve injection, which resulted in the reduction of pain.

An MRI of Mr. LeBlanc's lumbar and thoracic spine was performed on June 13, 2018. The MRI revealed edematous compression fractures at T12, L1, and L2, with 90 percent loss of height anteriorly at L1 without retropulsion (vertebral displacement into the spinal canal). There was degenerative disc desiccation throughout the lumbar spine with moderate disc narrowing at L5 through S1. There was a 50 percent chronic appearing L3 compression fracture without retropulsion. There was a hyperintense edematous compression fracture at T8 with 50 percent loss of height anteriorly and 2mm of inferior retropulsion into the spinal canal. There was a superior T11 compression fracture with 70 percent loss of height anteriorly and no retropulsion. There was an edematous T12 compression fracture with 50 percent loss of height and no retropulsion.

Finally, Dr. Realyvasquez reviewed a report from Dr. Johnson.⁴ Dr. Johnson noted that Mr. LeBlanc had lifetime spine impairment and had limitations on heavy lifting, prolonged static procedures such as sitting, driving, or standing; crawling, climbing, pushing, pulling, and repeated activities. Although treatment had helped him cope with the pain, he cannot work due to the work-restrictions. On physical exam, Dr. Johnson noted that Mr. LeBlanc used a four-legged walker, had poor balance, and multiple tender points.

⁴ Dr. Realyvasquez did not notate the date of Dr. Johnson's report; however, Mr. LeBlanc submitted the report as evidence and it was dated May 31, 2018.

18. Dr. Realyvasquez believed there was a stark contrast between the records from 2017 and Dr. Johnson's last report. Dr. Realyvasquez noted that during his initial visits to Dr. Johnson, Mr. LeBlanc responded well to the pain management treatments and was able to perform tasks that involved bending of the spine. He proceeded to do well with repeat injections on his thoracic spine, resulting in 70 percent improvement. Dr. Realyvasquez noted that in his own examination of Mr. LeBlanc in February 2018, Mr. LeBlanc did not use a walker, did not have an obvious limp, and appeared to walk quite well. Dr. Realyvasquez observed Mr. LeBlanc leave the office and get into his pickup truck without any obvious difficulty.

Dr. Realyvasquez believed the description of Mr. LeBlanc in May 2018 sounded like a completely different patient than what Dr. Realyvasquez observed in February 2018. Based on the final report, Mr. LeBlanc had seriously deteriorated since February 2018.

In conclusion, Dr. Realyvasquez believed that Mr. LeBlanc was not substantially incapacitated from performing his job functions. He noted that Mr. LeBlanc had been performing the job for several years, albeit with pain. However, based on his physical exam, and his belief that Mr. LeBlanc had exaggerated some of his pain, his opinion remained the same. Again, Dr. Realyvasquez noted that he had not been given the records from 2015, when Mr. LeBlanc suffered his initial injury. Dr. Realyvasquez testified that he might have revised his decision had he viewed these records. However, because there was no retropulsion, he did not think Mr. LeBlanc was substantially incapacitated.

Mr. LeBlanc's Testimony

19. Mr. LeBlanc testified that his back problems started in 2015, he fractured his L1 vertebrae. He initially went to his family doctor, who prescribed large doses of ibuprofen. He had his first kyphoplasty in 2017. In September 2017, he was hospitalized for a gastric bleed that resulted from the high doses of ibuprofen. He never returned to work after the hospitalization. He spent six weeks in the hospital and had lost 30 pounds when he was finally discharged.

Since Dr. Realyvasquez examined Mr. LeBlanc, he has suffered new fractures. In March or April 2018, Mr. LeBlanc experienced horrendous pain. An MRI revealed four new vertebral fractures. In June 2018, additional kyphoplasties were performed. An MRI in September 2018 revealed two new fractures. He now has seven different fractures, the origin of which are unknown. However, disease (cancer) has been ruled-out. Mr. LeBlanc was most recently seen by Leonel Hunt, M.D., an orthopedic surgeon at the Cedars-Sinai Spine Center in Los Angeles. He is also being seen at the Southern California Spine and Joint Institute in Murrieta.

Mr. LeBlanc testified that various doctors have told him he cannot do certain things, such as kneeling or taking the stairs. He can squat with the assistance of a chair. He has difficulty twisting, which impacts driving. He had a back-brace, but could not wear it because it impeded his ability to turn his body. Some days he cannot make it through the day without having to lie down. He is unable to pick up his grandchildren.

Mr. LeBlanc worked as a safety inspector for 15 years. He expressed pride in his job and had no desire to retire. He believed that his employer would not permit him to take narcotic pain medication while working, which is essential for helping to control

the pain. Mr. LeBlanc believes that his condition has deteriorated significantly since Dr. Realyvasquez examined him - notably the appearance of six additional fractures in a subsequent MRI.

20. Mr. Leblanc's testimony was credible and genuine. He did not appear to exaggerate or equivocate when answering questions. His testimony demonstrated a sincerely held belief that his medical condition compromised his ability to perform the essential duties of a safety inspector, and, he simply could not perform the essential daily functions of conducting site inspections.

Testimony of Darlene LeBlanc

21. Darlene LeBlanc is Mr. LeBlanc's wife. She provided more specific details about Mr. Leblanc's condition as she had been the primary person to prepare for the administrative hearing. Her testimony was credible.

Other Medical Records

22. Mr. LeBlanc submitted several of the medical records that Dr. Realyvasquez reviewed including the September 17, 2017, MRI report; a May 31, 2018, medical report by Dr. Johnson; and a June 13, 2018, MRI report.⁵

⁵ Complainant objected to the medical records on the grounds of hearsay, and they were received as "administrative hearsay" pursuant to Government Code section 11513, subdivision (d). As such, they could supplement or explain other evidence, but cannot serve as a basis for a factual finding unless it would be admissible over objection in civil actions.

23. Mr. LeBlanc submitted additional medical records that were not provided to Dr. Realyvasquez for his review. They are summarized as follows:

An MRI report from July 17, 2015, revealed an acute fracture at L1 with 70 percent compression deformity.

A medical record from July 3, 2018, from Jonathan Grossman, M.D., who performed kyphoplasties at the T11, T12, L2, and L3 levels as well as bone biopsies.⁶

An initial consultation by Karmin Nissan, M.D., at Southern California Joint and Spine Institute, dated September 18, 2018.⁷ Mr. LeBlanc reported additional pain following the four kyphoplasties.

A progress note from Dr. Nissan on October 9, 2018. Mr. LeBlanc reported having had trigger point injections but with no long-term relief. He rated the pain at 8 out of 10, which was worse with lying on his back or with movement.

A progress note from Dr. Nissan dated October 16, 2018. Dr. Nissan performed a thoracic kyphoplasty for two wedge compression fractures at T7-T8 and T9-T10.

⁶ Mr. LeBlanc submitted a brief biography of Dr. Grossman, which indicates he is board-certified in physical medicine and rehabilitation with a sub-specialty board-certification in interventional pain management.

⁷ Mr. LeBlanc submitted a brief biography of Dr. Nissan, which indicates Dr. Nissan is board-certified in anesthesiology and pain medicine.

A progress note from Dr. Nissan dated October 22, 2018, in which Mr. LeBlanc reported no change in the pain following thy kyphoplasty. Dr. Nissan requested a new thoracolumbar MRI due to the post-kyphoplasty pain Mr. LeBlanc experienced.

A progress note from Dr. Nissan dated October 29, 2018, in which Mr. LeBlanc reported some decrease in pain since the last visit, however, he continued to have significant pain in the low and middle back. The new MRI showed that the cement appeared to be stable, there were no new fractures, and no major spinal narrowing.

An initial consultation by Leonel Hunt, M.D., an orthopedic spine surgeon at Cedars-Sinai Spine Center, dated January 3, 2019.⁸ Dr. Hunt noted the MRI from October 24, 2018, showed a T6 compression fracture. He diagnosed Mr. LeBlanc with Kyphosis, compression fracture, lumbar and thoracic degenerative disc disease, and lumbar spondylolisthesis. Dr. Hunt advised that Mr. LeBlanc should continue with pain management and noted:

Due to the nature of th [sic] kyphosis and extensive amount of compression fractures as well as significant degenerative disease in this thoracic and lumbar spine, he should have the following permanent restrictions: No bending or twisting, No prolonged sitting or standing for more than an hour at a time, no lifting more than 5 lbs, No climbing, No

⁸ Mr. LeBlanc submitted a resume for Dr. Hunt, which indicates he is a board-certified orthopedic spine surgeon, who is an attending physician at Cedars-Sinai Hospital.

squatting, no stooping, no overhead activity, no pushing or pulling.

A progress note from Dr. Nissan, dated January 8, 2018. Mr. LeBlanc reported moderate to severe pain and expressed concern about another fracture. He previously had an injection from an endocrinologist to promote bone growth and prevent osteoporosis. He visited an oncologist to rule out cancerous lymphomas in the back. Dr. Nissan noted that the etiology of the multiple vertebral fractures was unclear. He ordered an x-ray to rule out any new fractures. Dr. Nissan noted that Mr. LeBlanc has restricted range of motion, limited bending and extension, and given the number of fractures, he should limit time standing/walking and avoid lifting objects over 10 pounds.

Finally, Dr. Johnson completed a CalPERS Physician's Report on Disability on January 2, 2018. He indicated that Mr. LeBlanc was limited from prolonged walking, standing, sitting, and driving, and should not bend, lift, stoop, or crouch.

Evidence After Remand

TESTIMONY AND REPORT BY KARMIN NISSAN, M.D.

24. Dr. Nissan prepared a report dated October 25, 2019, and testified at the hearing. The following is a summary of his testimony and report: Dr. Nissan is board-certified in anesthesiology and pain medicine. After completing a residency in anesthesiology in 2015 at the University of Illinois, he completed a fellowship in interventional pain management. Since then he has been employed as a pain management specialist at two spine specialty practices in Southern California.

25. Mr. LeBlanc began treating with Dr. Nissan a little more than a year ago. Mr. LeBlanc has multiple compression fractures in his thoracic and lumbar vertebrae. Mr. LeBlanc initially presented complaining of lower back pain and worsening thoracic pain. Subsequent imaging found a new fracture at T10 and edema at T8, suggestive of ongoing fracture. Respondent underwent a kyphoplasty of T8 and T10 in an attempt to stabilize the sites. He was referred to aquatic physical therapy and received multiple radiofrequency ablation treatments, which cauterizes nerve endings in an attempt to reduce pain. He also received multiple trigger point injection treatments. Dr. Nissan last saw respondent in October 2019. Respondent continued to exhibit kyphosis of the mid to lower thoracic spine and severely restricted motion with extension of his spine. Although he is able to ambulate without assistance, he has difficulty in the upright standing position.

26. Dr. Nissan reviewed the job description for safety inspector and disagreed with Dr. Realyvasquez's assessment that respondent is able to perform all the functions required by the district. Dr. Nissan believed that Mr. LeBlanc's spine condition prevents him from performing his job functions. Dr. Nissan noted respondent has received multiple compression fractures without any evidence of trauma or osteoporosis. Dr. Nissan is familiar with the CalPERS standard for disability retirement and understands the difference between actual and prophylactic work restrictions. Dr. Nissan does not believe that Mr. LeBlanc is able to stand for any extended period of time because of the severe kyphotic deformities that have altered the spine mechanics. Mr. LeBlanc is unable to bend his spine in certain directions and physically unable to crawl as a result of the pathology. Additionally, there is risk of future injury to his already compromised spine.

27. Dr. Nissan was clear that he believes Mr. LeBlanc cannot perform his job duties and the restrictions are not merely prophylactic. He believes Mr. LeBlanc is only able to stand 5 to 10 minutes before he would be unable to do so because of pain. He would only be able to sit for approximately an hour and has difficulty holding a single position because of the mechanics of the fracture. Dr. Nissan does not believe Mr. LeBlanc is physically able to kneel, crouch, or crawl and has severely restricted mobility due to the physical alterations to his spine. Dr. Nissan does not think Mr. LeBlanc's condition will improve. He noted that there is 90 percent height loss at L1, which is very severe and in itself can be disabling. Dr. Nissan was not treating Mr. LeBlanc at the time he filed his disability retirement application, but based on the history of his complaint, he does not believe respondent's condition has significantly deteriorated. Dr. Nissan has treated numerous patients with spine complaints but has never seen a patient with a greater number and degree of vertebral fractures. Dr. Nissan believes Mr. LeBlanc is permanently incapacitated and unable to perform the specific job duties of a safety inspector.

DR. REALYVASQUEZ'S SUPPLEMENTAL REPORT

28. Complainant submitted a supplemental report by Dr. Realyvasquez dated November 5, 2019. The following is a summary of his report. Dr. Realyvasquez reviewed Dr. Nissan's report, which did not change Dr. Realyvasquez's conclusion. Dr. Realyvasquez again expressed his belief that Mr. LeBlanc has been exaggerating his pain and motion, and the symptoms expressed by Dr. Nissan do not correlate with Dr. Realyvasquez's IME. Dr. Realyvasquez again noted that Mr. LeBlanc's gait was brisk when he left the office. His pain appeared less when he started to undress and he could stand on one leg. He did not have an exaggerated anterior bend and did not use an aid for walking. Mr. LeBlanc got into his pickup truck without problems and drove.

Dr. Realyvasquez did not see placement of any pillows, but this could be done out of sight. In conclusion, he believed that Mr. LeBlanc has exaggerated his back problems.

29. Dr. Realyvasquez noted that the MRI report did not provide any mention of osteoporosis. There was no evidence that Mr. LeBlanc was being treated by a spine surgeon, as Dr. Nissan is an anesthesiologist. In conclusion, Dr. Realyvasquez maintained that Mr. LeBlanc is not substantially incapacitated.

LEGAL CONCLUSIONS

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving that he or she is entitled to it by a preponderance of the evidence. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332; Evid. Code, § 115.) In this matter, Mr. LeBlanc is seeking a disability retirement. For that reason, Mr. LeBlanc has the burden of establishing that he is substantially incapacitated from performing the usual and customary duties of a safety inspector.

Applicable Statutes

2. Government Code section 20026 provides in part:

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of competent medical opinion.

3. On receipt of an application for disability retirement of a member, the board must order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. (Gov. Code, § 21152.)

4. Government Code section 21156, subdivision (a), provides in part:

(1) If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service 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 . . .

(2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process. . . .

Appellate Authority

5. "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.)⁹ 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.)¹⁰ Further, respondent

⁹ The applicant in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations and to apprehend violators; issuing warnings and serving citations; and serving warrants and making arrests. He suffered injury to his right arm while arresting a suspect. There was evidence that Mr. Mansperger could shoot a gun, drive a car, swim, row a boat (but with some difficulty), pick up a bucket of clams, pilot a boat, and apprehend a prisoner (with some difficulty). He could not lift heavy weights or carry the prisoner away. The court noted that although the need for physical arrests did occur in Mr. Mansperger's job, they were not common occurrences 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 the applicant 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.)

¹⁰ 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. Mr. Hosford, a California Highway Patrol Officer, suffered a back injury lifting an unconscious victim. In determining eligibility for a disability retirement, the court evaluated Mr. 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

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.)

Precedential Authority

6. Official Notice was taken of *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Ruth A. Keck* (OAH No. L-1999120097). The case involved an injured school district clerk typist. At the hearing, the IME physician testified that the applicant was able to perform her usual and customary duties. Although the applicant submitted numerous medical records, none of the records indicated that those physicians evaluated the applicant under the CalPERS disability standard. Thus, the IME was the only competent medical opinion

Law Relating to the Evaluation of Expert Testimony

7. California 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.) 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

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 *Hosford* 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.

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 pp. 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, even though it is not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal. 3d 875, 890.)

Cause Exists to Grant Mr. LeBlanc's Application

8. The competent medical evidence established by a preponderance of the evidence that Mr. LeBlanc is substantially incapacitated from performance of the job duties of a safety inspector.

Dr. Realyvasquez's conclusion that Mr. LeBlanc is not substantially incapacitated from performing the duties of a safety inspector was primarily based on the fact that Mr. LeBlanc performed his job after his 2015 lumbar fracture up until he was hospitalized for gastric ulcers in September 2018. In addition, Dr. Realyvasquez believed that Mr. LeBlanc exaggerated some of his pain, and although the physical exam revealed some limitations in movement, it was otherwise unremarkable. Dr. Realyvasquez was clear in his report and testimony that he would have liked to have reviewed the medical records relating to the 2015, which could have changed his opinion. Dr. Realyvasquez did review additional records subsequent to his February 2018 examination, which included an assessment by pain specialist Dr. Johnson and the report by Dr. Nissan. However, Dr. Realyvasquez noted that Dr. Johnson's description of Mr. LeBlanc was in such stark contrast to Dr. Realyvasquez's own observations, that either it was a different patient, or Mr. LeBlanc's condition drastically deteriorated. Implicit in this statement was that Dr. Realyvasquez believed that Dr.

Johnson exaggerated Mr. LeBlanc's symptoms, since Dr. Realyvasquez did not see any objective reason for such deterioration. Dr. Realyvasquez also noted that the initial pain intervention (medial branch blocks) Dr. Johnson performed, significantly reduced Mr. LeBlanc's pain.

However, it was quite clear that Mr. LeBlanc's condition drastically worsened following his hospitalization. Clearly, the six-week hospitalization weakened Mr. LeBlanc, and to opine that because Mr. LeBlanc was able to work after his initial compression fracture, that he could continue to perform his usual and customary job duties, failed to account for the change in his condition. Moreover, the objective evidence, namely the MRI reports and progress notes from multiple physicians, demonstrated that Mr. LeBlanc's condition has deteriorated since his February 2018 evaluation by Dr. Realyvasquez. Indeed, he has had multiple compression fractures, resulting in additional kyphoplasties.

Mr. LeBlanc's testimony regarding the usual and customary duties of a safety inspector for the District was credible and unembellished. His testimony that he has severe pain and a significantly limited range of motion that would prevent him from climbing ladders in order to inspect water lines was also credible and not refuted. Furthermore, his condition is appearing to worsen, as he has since incurred additional compression fractures of unknown origin. Although he was able to perform his job for two years following his initial injury, he was also taking high doses of ibuprofen, which eventually led to his other medical issues. Mr. LeBlanc relies on prescription opioids to control his pain. Regardless of whether the District permits an employee to take prescribed narcotics, Mr. LeBlanc's job involved driving a motor vehicle and inspecting active construction sites - tasks Mr. LeBlanc would rightly be concerned with performing while on a narcotic pain-killer.

Dr. Nissan, on the other hand, has treated Mr. LeBlanc for the past year for pain. While Dr. Nissan is not an orthopedic surgeon, he is in the position of evaluating Mr. LeBlanc's condition as it relates to his ability to perform certain tasks. Dr. Nissan did not believe that Mr. LeBlanc has been exaggerating his pain. Indeed, Mr. LeBlanc's pain is associated with a multitude of objective findings that established he suffered multiple compression fractures from unknown origin, including a 90 percent loss of height at L1. In his second supplemental report, Dr. Realyvasquez reiterated his belief that Mr. LeBlanc exaggerated his pain, and cited his observations of Mr. LeBlanc walking to his car with a steady gait and no apparent pain. Thus, Dr. Realyvasquez believed that Dr. Nissan was also exaggerating Mr. LeBlanc's pain symptoms.

Mr. LeBlanc was a credible witness. His testimony about his pain and physical limitations were supported by *objective* medical evidence that his condition has worsened and he has incurred new injuries. While Mr. LeBlanc's physical condition must be evaluated at the time he filed his application, his worsening condition bolsters his credibility and diminishes Dr. Realyvasquez's opinion that Mr. LeBlanc was exaggerating his symptoms. Dr. Nissan credibly testified that the mechanics of Mr. LeBlanc's injuries prevent him from performing key duties of a safety inspector. In sum, Dr. Nissan's competent medical opinion was sufficiently persuasive to establish that Mr. LeBlanc is unable to perform the usual and customary duties of a safety inspector.

ORDER

The application for disability retirement filed by respondent, Raymond C. LeBlanc, is granted.

DATE: January 8, 2020

DocuSigned by:



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ADAM L. BERG

Administrative Law Judge

Office of Administrative Hearings