

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Reinstatement from Industrial Disability

Retirement of:

DANIEL F. THOMPSON, Respondent

**CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE
PROTECTION, Respondent**

Agency Case No. 2019-0444

OAH No. 2019080516

PROPOSED DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on January 13, 2020, in Glendale, California.

John Shipley, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS) (Petitioner). Danny T. Polhamus, Attorney at Law, represented Daniel F. Thompson (Respondent), who was present.

No appearance was made by or on behalf of Respondent, California Department of Forestry and Fire Protection (CDFFP), despite it having been properly served with notice of the date, time, and location of the hearing.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED Feb 11 20 20
LEA

Oral and documentary evidence was received. The record was closed on the hearing date, and the matter was submitted for decision on January 13, 2020.

Petitioner seeks to rescind Respondent's disability retirement allowance on grounds that the medical evidence no longer supports his psychological disability. Respondent claims he is still disabled for the performance of his duties as a Fire Fighter II.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on January 13, 2020.

Following submission of the matter and upon review of the exhibits, the ALJ noted that some exhibits contained Respondent's confidential information such as his social security number and date of birth. In order to prevent disclosure of Respondent's confidential information, the ALJ redacted this information from the exhibit.

FACTUAL FINDINGS

1. Respondent was employed by the CDFFP as a Firefighter II. Respondent began employment with CSFFP on a part-time basis in 1998, and became a full-time employee on October 7, 2002. By virtue of his employment, Respondent was a state safety member of CalPERS.

2. According to "Cal Fire Physical/Mental Stress Job Description," Respondent's duties as a Firefighter II included responding to alarms, entering burning areas and structures, operating and climbing ladders, making forcible entry into buildings, assisting in Emergency Medical Services response rescue, and other duties.

Respondent's duties also included performing psychologically stressful and/or physically demanding duties consistent with firefighting, disaster response, and emergency medical response.

3. From 2002, Respondent began experiencing significant stress on the job, stemming from long hours, including significant overtime hours, witnessing numerous deaths and tragic events, such as children burned to death and people killed in automobile accidents, and enduring a hostile work environment in which perceived weaknesses elicited taunts and jeers from his coworkers. Respondent also developed significant symptoms of depression and anxiety.

4. Respondent attempted to manage his stress with alcohol, and began drinking alcohol in excess in 2012 to "numb some pain," including sadness and anxiety. Respondent testified that he drank five to six beers per night. Respondent did not seek treatment for his alcohol use because he did not recognize his drinking as a problem.

5. On June 28, 2016, while out on a call, Respondent's captain reportedly yelled and cursed at Respondent in front of his coworkers, which Respondent described as "the last straw." While driving home after his shift, Respondent cried profusely. He detoured to an urgent care facility, specifically, U.S. HealthWorks, and requested medication to address his depression and anxiety. U.S. HealthWorks took Respondent off work. Respondent has not returned to work since.

6. On July 15, 2016, Respondent presented to the emergency department with a week's history of symptoms stemming from anxiety and depression. Specifically, Respondent reported feeling depressed, listless, and lacking in energy. Respondent also reported experiencing anxiety and using alcohol daily. The physicians found him

medically stable and recommended Respondent follow up with his primary care physician to address his depression and anxiety.

Dr. Raymond J. Friedman's Reports

7. On September 21, 2016, Respondent underwent a Panel Qualified Medical Examination at Barrington Psychiatric Center performed by Supervising Psychiatrist Raymond J. Friedman, M.D., Ph.D., QME, Diplomate of the American Board of Psychiatry and Neurology. Dr. Friedman prepared a written report dated October 14, 2016. At the time of the evaluation, Respondent had already undergone approximately seven to eight sessions of psychotherapy with Thomas Runyan, L.C.S.W., and had received a prescription for Cymbalta (60 mg) from Dr. Roy Germano of U.S. HealthWorks. Dr. Friedman's evaluation included a mental status evaluation and psychological testing. Dr. Friedman diagnosed Respondent with a Major Depressive Disorder, Single Episode, Moderate; and a Post-Traumatic Stress Disorder, Chronic. Dr. Friedman identified the predominant cause of Respondent's psychiatric injury as industrial stress Respondent had experienced from the time that he began full-time employment with the CDFFP, and continuing until he was placed off work on June 28, 2016.

8. Dr. Friedman recommended Respondent undergo weekly psychotherapy sessions, preferably with a mental health professional experienced in working with first-responders. He also recommended that Respondent undergo a psychiatric consultation and receive monthly psychotropic medication management sessions. Dr. Friedman further recommended that Respondent undergo a re-evaluation of his psychiatric condition prior to his estimated return to work date, January 21, 2017, or extended until he is able to be re-evaluated.

9. On December 5, 2016, Dr. Friedman prepared a Panel Qualified Medical Supplemental Report after reviewing additional records. Specifically, he reviewed two additional reports from U.S. HealthWorks, work records, and a list of hypothetical questions posed by the State Compensation Insurance Fund. Dr. Friedman stated that the review of the additional information did not change his conclusions and recommendations presented in his September 21, 2016 report.

10. On April 12, 2017, after conducting a Panel Qualified Medical Re-Examination of Respondent, Dr. Friedman advised the State Compensation Insurance Fund on April 17, 2017 that Respondent should be provided with lifetime mental health coverage for his industrial psychiatric injury, to include psychotherapy and psychiatric medication management.

11. On May 10, 2017, Dr. Friedman prepared a written report regarding his Panel Qualified Medical Re-Examination of Respondent. Dr. Friedman diagnosed Respondent with Major Depressive Disorder, Single Episode, Moderate, Improved; and Post-Traumatic Stress Disorder, Chronic, Improved. Dr. Friedman concluded that 100 percent of Respondent's permanent psychiatric status was apportioned to the work stress Respondent experienced during the course of his employment with the CDFFP.

12. On July 21, 2017, Respondent submitted an application for industrial disability retirement, citing Post Traumatic Stress Disorder due to cumulative trauma, and severe depression, anxiety, and hypertension.

13. On September 14, 2017, CalPERS approved Respondent's application for industrial disability retirement, and found Respondent substantially incapacitated from the performance of his usual duties as a Firefighter II with CDFFP due to his psychological condition. Respondent's industrial disability retirement became effective

on August 28, 2017, on the basis of a psychiatric condition (i.e., PTSD). Dr. Friedman did not testify at hearing.

Dr. Lisa Meneshian's Report

14. On September 18, 2018, Respondent underwent a Primary Treating Physician's Initial Comprehensive Psychological Evaluation conducted by Lisa Meneshian, Ph.D. of the Western Pacific Psychological Network, Inc., and prepared a written report of the same, dated September 30, 2018. Dr. Meneshian administered a series of tests, including a comprehensive clinical interview, a mental status evaluation, and the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), Brief Battery for Health Improvement (BBHI 2), Beck Depression Inventory II (BDI-II), Beck Anxiety Inventory (BAI), Symptom Checklist-90-Revised (SCL-90-R), Impact of Event Scale – Revised (IES-R), PTSD Symptom Scale-Self Report Version (PDS), PTSD Checklist-Specific Version (PCL-S), General Sleep Disturbance Scale (GSDS), and the Coping Inventory for Stressful Situations (CISS).

15. Dr. Meneshian diagnosed Respondent with Major Depressive Disorder, Single Episode, Moderate and Post Traumatic Stress Disorder, Chronic. Dr. Meneshian recommended that Respondent participate in brief psychotherapy to address his current anxiety and depressive symptoms impairing his daily functioning; participate in cognitive behavioral therapy to address his PTSD; receive continued consultations with a psychiatrist for treatment of his depression and his anxiety symptoms with psychotropic medication; engage in relaxation and stress management techniques to manage headaches; and participate in psychotherapy and cognitive behavioral therapy to address his sleep problems related to his onset of insomnia. Dr. Meneshian did not testify at hearing.

Dr. Ara Darakjian's Report

16. On November 5, 2018, Respondent underwent an Initial Psychiatric Evaluation conducted by Ara Darakjian, M.D. of Western Pacific Psychological Network, Inc. Dr. Darakjian prepared a written report on November 6, 2018. Dr. Darakjian conducted psychological testing and diagnosed Respondent with Major Depressive Disorder, Single Episode, Moderate. Dr. Darakjian prescribed Zoloft 50 mg to address Respondent's depression, and recommended that Respondent receive psychological treatment, specifically, cognitive behavioral therapy, to address his depressive and anxious symptoms. Dr. Darakjian also recommended that Respondent be seen for psychiatric medication follow-up for four weeks or medication adjustment and/or management. Respondent treated with Dr. Darakjian through August 7, 2019. Dr. Darakjian did not testify at hearing.

Dr. Alan L. Schneider's Report

17. On December 3, 2018, CalPERS informed Respondent that it was reviewing his industrial disability retirement benefits, and requiring him to undergo an Independent Medical Examination.

18. On January 24, 2019, Alan L. Schneider, M.D., DFAPA, DABAM, performed an Independent Medical Examination of Respondent and prepared a written report. Dr. Schneider found Respondent to be a "hostile historian" and noted that Respondent used alcohol to modulate his stress of working on the job, "drinking 7-8 beers at a time then falling asleep" on most nights. (Ex. 10, p. 1.) Dr. Schneider reviewed Respondent's prior medical records, but conducted no testing. Dr. Schneider diagnosed Respondent with Alcohol Use Disorder; Depression Not Otherwise Specified; and Status Post-Acute Stress Reaction. Dr. Schneider concluded Respondent

was not substantially incapacitated for the performance of his job duties, and concluded Respondent did not meet the criteria for the diagnosis of PTSD. He noted that Respondent's stressors on the job could not be addressed without first examining Respondent's alcohol use disorder, and whether it was the prominent feature resulting in Respondent's inability to handle problems on the job. Dr. Schneider also concluded that there were no specific duties that Respondent was unable to perform.

19. Dr. Schneider failed to appear at hearing, even though he was subpoenaed to do so.

20. On March 1, 2019, CalPERS sent Respondent a letter stating that it determined that Respondent was no longer substantially incapacitated from his job duties as a Firefighter II with the CDFFP due to a psychological experience. CalPERS advised Respondent that it would be reinstating Respondent to his former position.

21. On March 18, 2019, Respondent appealed CalPERS' decision, based on recommendations from his current treating physicians, stating that Respondent had not recovered from his psychological condition, and, as such, was unable to return to his former position of Firefighter II with the CDFFP.

Testimony of Dr. Andrew Jeremiah Levine

22. After Respondent submitted his appeal of CalPERS' decision, Andrew Jeremiah Levine, Ph.D., ABPP-CN, interviewed Respondent, and reviewed Respondent's medical records, including the reports described in Factual Findings 7 through 18, as well as the "Cal Fire Physical/Mental Stress Job Description." Dr. Levine testified at hearing.

23. Dr. Levine is a licensed clinical psychologist and is board-certified by the American Board of Professional Psychology in the area of Clinical Neuropsychology. He graduated Cum Laude from Binghamton University in May 1995, where he majored in psychobiology, and earned his doctorate from the California School of Professional Psychology in September 2002, where he completed the clinical neuropsychology track. Dr. Levine serves as a qualified medical evaluator for the California Department of Workers' Compensation, an Associate Clinical Professor in the Department of Neurology at the University of California at Los Angeles (UCLA), a Clinical Neuropsychology Consultant, and has an independent Medico-Legal Neuropsychology practice. Dr. Levine has published more than 80 articles in the area of neuropsychology, including neuropsychological issues addressing HIV-infected individuals. Dr. Levine has also written more than 80 conference abstracts, written chapters in four books, and have given at least 18 presentations.

24. Dr. Levine testified that after his interview of Respondent and his review of Respondent's medical records, he agreed with Dr. Friedman's and Dr. Meneshian's diagnosis of Post-Traumatic Stress Disorder. He disagreed with Dr. Schneider's conclusion that Respondent suffered from Post-Traumatic Stress Reaction. Dr. Levine explained that Post-Traumatic Stress Reaction is a stress reaction to a traumatic event, the effects of which last fewer than 30 days. Dr. Levine further explained that Post-Traumatic Stress Reaction is less severe than Post-Traumatic Stress Disorder, as Post Traumatic Stress Disorder, as described by the Diagnostic and Statistical Manual, Fifth Edition (DSM-V), involves witnessing or undergoing a traumatic event which results in a number of psychological conditions, such as flashbacks, intrusive thoughts, anxiety, insomnia, avoidance, hyper-arousal, depression, and a negative outlook on life, all lasting more than 30 days. These factors result in great fear.

25. Dr. Levine testified that the traumatic event that Respondent suffered was an accumulation of events, such as witnessing the outcomes of severe motor vehicle accidents, burn victims, particularly children, and other victims of trauma. This accumulation of events resulted in a decline of Respondent's psychological status. Specifically, Respondent experienced sleep difficulties, intrusive thoughts during idle hours, depressed mood, and a negative outlook, which, Dr. Levine explained, met the criteria for major depressive disorder. Dr. Levine's review of Respondent's medical records also showed that Respondent was committed to a psychiatric facility in April 2019 on a 72-hour hold due to suicidal thoughts, but explained to Dr. Levine that he was no longer interested in committing suicide because his relationship with his son has served as incentive for him not to.

26. Dr. Levine testified that Respondent had been suffering from PTSD since his evaluation with Dr. Friedman. Despite seeing Dr. Meneshian on a regular basis, Respondent's symptoms persisted, as he still suffered intrusive thoughts, avoidances, depression, chronic sleeping difficulties, and extreme arousal.

27. Dr. Levine explained that while symptoms can wax and wane, re-experiencing a traumatic event could reignite PTSD symptoms. He agreed with Dr. Friedman and Dr. Meneshian that Respondent should not go back to firefighting, because Respondent does not need to see things that could retrigger his severe symptoms. Retriggering the symptoms could interfere with Respondent's ability to do his job, due to his fear of witnessing such traumatic events.

28. Respondent has expressed that he wishes to work, which Dr. Levine conceded was a good idea, because Respondent's idleness "makes things worse" for Respondent, such as his alcohol usage and anxiety. However, Dr. Levine explained that

returning to work as a first responder would not be good for Respondent, as it would cause Respondent to decompensate.

29. With respect to Dr. Schneider's conclusion that alcohol was the reason for Respondent's issues, Dr. Levine disagreed and explained that Respondent started drinking more heavily after starting with CDFFP to help numb or self-medicate his PTSD symptoms. Dr. Levine explained that anywhere between five and twenty percent of first responders will suffer PTSD. Dr. Levine explained that Respondent was suffering from PTSD before the "last straw" incident involving Respondent's captain, and testified that people who suffer from PTSD will self-medicate as much as they can and will "put up with the symptoms," but eventually, "things will fall apart."

Respondent's Testimony

30. Respondent testified at hearing and explained that he is still treating with Dr. Meneshian and Dr. Darakjian. Dr. Darakjian has been prescribing medication to Respondent since 2018, and he currently takes Zoloft and Wellbutrin.

31. Prior to going to work as a firefighter, Respondent did not abuse alcohol; but after he starting working as a firefighter in 2002, Respondent began using alcohol in excess "to numb some pain and sadness and anxiety." He typically drank five to six beers per night.

32. Respondent still experiences symptoms today, such as severe depression, anxiety, and sadness, and he relives the traumatic events that he witnessed as a firefighter, such as burned children, gruesome scenes, suicides, and severe traffic accidents.

33. Respondent did not get any psychological help while experiencing PTSD while working as a firefighter, because the firefighter culture is a stoic one; therefore, firefighters were expected to "suck it up."

34. Respondent wishes to return to the workforce, but not as a firefighter, because Respondent does not believe he would be able to "deal with any medical emergency calls." Rather, Respondent wants to work in a profession in which he can utilize his Class B license, such as a tow truck operator, and water tender operator, or a cement truck operator. He has applied for such jobs, but has not received any "callbacks."

LEGAL CONCLUSIONS

1. The standard of proof in this matter is a "preponderance of the evidence." Petitioner bore the burden of proof. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

2. "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that one is unable to say that the evidence on either side of an issue preponderates, the finding on that issue must be against the party who had the burden of proving it. (*People v. Mabini* (2000) 92 Cal.App.4th 654, 663.) "Preponderance of the evidence means evidence that has more convincing force than that opposed to it." (Citations omitted) The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the quality of the evidence. The quantity of evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325; italics in text.) To meet the burden of proof by a

preponderance of the evidence, the party with the burden of proof "must produce substantial evidence, contradicted or uncontradicted, which supports the finding." (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 329.) Preponderance of the evidence means that "the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325.)

3. Government Code section 20026 defines the following terms:

'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.

4. Government Code section 21151, subdivision (a), provides the following:

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

5. Government Code section 21156, subdivision (a)(1), provides, in pertinent part, the following:

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. . . .

6. Government Code section 21192 provides, in pertinent part, the following:

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

7. Government Code section 21193 provides, in pertinent part, the following:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or

she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

8. The term "incapacitated for the performance of duty" has been interpreted to mean that the employee is substantially unable to perform the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876-877.) The disability or incapacity must presently exist; a risk or possibility of future injury, which might then cause disability or incapacity, is insufficient. (*Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 863.)

9. Cause exists to grant the appeal of Respondent Daniel F. Thompson and to deny the California Public Employees' Retirement System's Reinstatement from Industrial Disability Retirement of Daniel F. Thompson, pursuant to Government Code sections 20026, 21151, 21156, 21192, and 21193, as set forth in Findings 1 through 34. Petitioner failed to establish by a preponderance of the evidence that Respondent is not currently substantially incapacitated from performing his job duties as a Firefighter II. While Dr. Schneider concluded in his report that Respondent was no longer incapacitated, which resulted in Petitioner declaring Respondent ineligible for continued industrial disability benefits, Dr. Schneider did not appear at hearing to defend his findings, despite a subpoena requiring him to do so. Instead, Dr. Levine appeared at hearing, and credibly testified that Dr. Schneider's conclusions were faulty. For example, Dr. Levine, who has a wealth of knowledge and experience as a licensed clinical psychologist for the last 18 years, disagreed with Dr. Schneider's conclusion

that Respondent suffered from Post-Traumatic Stress Reaction, and debunked Dr. Schneider's theory that Respondent did not suffer from Post-Traumatic Stress Disorder. Specifically, Dr. Levine successfully established that Claimant's stress symptoms extended far beyond the time period specified for Post-Traumatic Stress Reaction, which is 30 days or fewer. Rather, Dr. Levine demonstrated that Respondent has suffered the symptoms of Post-Traumatic Stress Disorder for years, as early as 2002, and continues to suffer from its effects. Additionally, Dr. Levine credibly testified that he agreed with the findings of Dr. Friedman and Dr. Meneshian that Respondent should not go back to firefighting, because Respondent does not need to witness or experience things that could retrigger his severe symptoms, such as seeing fire and accident victims.

10. Given the above factors, Petitioner failed to meet its burden of proof.

ORDER

1. The appeal of Respondent Daniel F. Thompson is granted.
2. CalPERS' Reinstatement from Industrial Disability Retirement of Daniel F. Thompson is reversed.

DATE: February 11, 2020

DocuSigned by:
Carla L. Garrett
40D88C3B895043D...

CARLA L. GARRETT

Administrative Law Judge

Office of Administrative Hearings