

**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 Industrial Disability**

**Retirement of:**

**BRIAN ALAN VAN IDERSTINE, Respondent**

**and**

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

**Case No. 2019-0056**

**OAH No. 2019030036**

**PROPOSED DECISION**

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on January 23, 2020, in Sacramento, California.

Rory J. Coffey, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Attorney Richard E. Elder, Jr., of the law firm Elder and Berg represented respondent Brian Alan Van Iderstine, who was present throughout the hearing.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

*February 20 20*  
*[Signature]*

No one appeared for or on behalf of respondent Department of Forestry and Fire Protection (Department), its default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to the Department only.

## **SUMMARY**

The sole issue on appeal is whether Mr. Van Iderstine was substantially incapacitated for the performance of his usual and customary duties as a Fire Apparatus Engineer with the Department on the basis of an orthopedic (low back) condition at the time he applied for industrial disability retirement. Competent medical evidence introduced at hearing established Mr. Van Iderstine was physically incapable of performing several of the essential functions of a Fire Apparatus Engineer due to an injury he sustained to his lower back in August 17, 2016, when he applied for industrial disability retirement. Therefore, his application is granted.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. Mr. Van Iderstine signed, and CalPERS received, a Disability Retirement Election Application on December 22, 2017. The application seeks industrial disability retirement due to a "Lower Back Injury" Mr. Van Iderstine sustained after falling approximately five feet out of a fire engine and landing on his buttocks and back on August 17, 2016.

2. Mr. Van Iderstine did not identify any limitations or preclusions caused by his injury on his application. Nor did he describe how his injury affected his ability to perform his job.

3. CalPERS denied the application, and Mr. Van Iderstine timely appealed the denial. Anthony Suine, Chief of CalPERS's Benefit Services Division, signed the Statement of Issues on February 20, 2019, solely in his official capacity.

### **Employment History**

4. Mr. Van Iderstine started working in fire service in approximately 2001 when he joined the Department as a volunteer firefighter. Approximately one year later, he joined the Paradise Fire Department as a volunteer firefighter. Four years later, he accepted a paid firefighter position with the Paradise Fire Department. He accepted a position as a Fire Apparatus Engineer with the Department on November 1, 2012.

5. After the August 17, 2016 injury, Mr. Van Iderstine served three 30-day periods of "light duty," and never returned to full duty. He last performed work for the Department sometime in 2018, and he stopped receiving wages around March or April 2019. He is considered a "nonpaid employee" of the Department as of the date of hearing.

### **Physical Requirements of a Fire Apparatus Engineer**

6. Cindy Wilson, an employee in the Department's human resources unit, completed a document entitled "Physical Requirements of Position/Occupational Title" for the position of Fire Apparatus Engineer. Mr. Van Iderstine reviewed the completed form and signed his name indicating his agreement with the information Ms. Wilson

provided. She identified the following physical requirements as being performed by a Fire Apparatus Engineer with the following frequencies:

Constantly: Standing, walking, bending (neck), twisting (neck), reaching (below shoulder), pushing and pulling, power grasping, repetitive use of hand(s), lifting/carrying up to 100 pounds, walking on uneven ground, driving, working with heavy equipment, exposure to excessive noise, exposure to extreme temperature humidity wetness, exposure to dust gas fumes or chemicals, working at heights, operation of foot controls or repetitive movement, use of special visual or auditory protective equipment, and working with bio hazards.

Frequently: Sitting, kneeling, squatting, bending (waist), twisting (waist), and simple grasping.

Occasionally: Running, crawling, climbing, reaching (above shoulder), fine manipulation, keyboard use, mouse use, and lifting/carrying more than 100 pounds.<sup>1</sup>

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<sup>1</sup> "Constantly" is more than six hours, "frequently" is three to six hours, and "occasionally" is three hours or less.

## **Medical Evidence**

### **LARRY FISH, D.O.**

7. Dr. Fish is a physician with Lassen Medical Clinic in Red Bluff, California, who completed a Physician's Report on Disability in support of Mr. Van Iderstine's application on April 2, 2018. Dr. Fish reviewed the Physical Requirements of Position/Occupational Title completed by Ms. Wilson, and opined that Mr. Van Iderstine is substantially incapacitated for the performance of the usual duties of his position as a Fire Apparatus Engineer as a result of a fall he suffered on August 17, 2016. Specifically, Dr. Fish concluded Mr. Van Iderstine could not lift or carry more than five pounds, and could bend, stoop, stand, and walk only occasionally.

### **ANDREW K. BURT, M.D.**

8. Dr. Burt is an orthopedic surgeon. He obtained his bachelor of arts degree from Chadron State College, and his medical degree from the University of Nebraska. He completed his internship at Queen's Medical Center in Honolulu, Hawaii. He completed a residency in general surgery at the Emmanuel Medical Center in Portland, Oregon, and a residency in orthopedics at the University of Nebraska in Omaha. He is "board-eligible" with the American Board of Orthopedics.

9. Dr. Burt performed an orthopedic Independent Medical Evaluation (IME) of Mr. Van Iderstine on September 19, 2019. He documented his IME in a report, which was admitted into evidence at hearing.

10. At the time of the IME, Mr. Van Iderstine complained of constant pain in his lower back, and explained that bending and lifting increased his pain. The pain radiated to the buttocks, bilaterally, and down both legs, but more so on the left. He

experienced numbness and tingling in the posterior thigh on the left, and sometimes in the bottom of his left foot. Sitting and standing increased his symptoms.

11. Dr. Burt's physical examination of Mr. Van Iderstine was limited to the area of his injury; specifically, the thoracolumbar spine. Visual inspection of Mr. Van Iderstine's back revealed no obvious abnormalities, but he complained of tenderness upon palpation of the lower lumbar region in the midline and to the coccygeal region left. He had a reduced range of motion upon flexion, extension, and lateral bending to the left. Range of motion upon lateral bending to the right was normal. Circumferential calf measurements revealed 1.5 cm atrophy of the left calf muscles.

12. Dr. Burt opined that Mr. Van Iderstine is substantially incapacitated from performing his usual duties as a Fire Apparatus Engineer as a result of injuries to his lower back he sustained when he fell on August 17, 2016. The specific job duties Dr. Burt concluded Mr. Van Iderstine could not perform with the frequency required by his position are crawling, bending, squatting, kneeling, climbing, and heavy lifting and carrying. He further concluded the incapacity is permanent, and has existed since the fall.

13. Dr. Burt testified at hearing in a manner consistent with his report. Additionally, he explained that Mr. Van Iderstine's limited range of motion upon examination and the atrophy to his left calf muscles were objective findings which supported the opinion of substantial incapacity. He further explained that atrophy in the left calf muscles supported Mr. Van Iderstine's statements that his back pain radiated more into his left leg because the atrophy was caused by a lack of blood flow to the left leg due to nerve damage.

14. Dr. Burt also explained that he reviewed the IME report authored by CalPERS's medical expert, Dr. Auerbach, and agreed with Dr. Auerbach's opinion that Mr. Van Iderstine is substantially incapacitated. He further agreed with Dr. Auerbach's conclusion about the job duties Mr. Van Iderstine is unable to perform with the frequency required by his position, and the permanent nature of his incapacity.

**ARTHUR M. AUERBACH, M.D.**

15. Dr. Auerbach is an orthopedic surgeon. He received his bachelor of science degree from Cornell University, and his medical degree from the University of Chicago. He performed a general surgical internship and a general surgical residency at Cornell University, New York Hospital. He is board-certified by the American Board of Orthopedic Surgery.

16. Dr. Auerbach performed an IME of Mr. Van Iderstine on August 8, 2018, at CalPERS's request. He prepared a report of his IME, which was admitted into evidence at hearing as administrative hearsay and considered to the extent it supplemented or explained Dr. Burt's testimony and report. Dr. Auerbach did not testify at hearing.

17. At the time of the IME, Mr. Van Iderstine complained of pain across the lower back, and weakness in his lower extremities, more so in the left than the right. At times he experienced numbness in the bottom of his left foot. Pain limited his ability to sit more than four hours and to walk more than three hours in an eight-hour day. He was also limited in the amount he could lift to no more than 10 or 15 pounds.

18. Mr. Van Iderstine had reduced range of motion upon flexion, extension, and lateral bending, bilaterally. He was able to perform straight leg raising while

sitting, but noted “a little pulling” and pain in his back that radiated into both buttocks and down to both knees when doing so.

19. Dr. Auerbach opined that Mr. Van Iderstine is substantially incapacitated from the performance of his usual and customary duties as a Fire Apparatus Engineer due to the injuries he sustained during the August 17, 2016 fall. Specifically, he concluded Mr. Van Iderstine cannot walk, walk on uneven ground, lift/carry more than 10 pounds, or drive constantly, and he cannot sit frequently. Instead, he can perform those tasks only occasionally. He is precluded from running, crawling, lifting/carrying greater than 10 pounds, working with heavy equipment, and working at heights. Dr. Auerbach further concluded that Mr. Van Iderstine’s incapacity began after he fell on August 17, 2016, and is permanent.

20. On August 29, 2018, Dr. Auerbach prepared a Supplemental IME Report addressing additional records he was provided after completing his IME. He concluded that none of the additional records changed his opinion about Mr. Van Iderstine’s incapacity.

## **Discussion**

21. Mr. Van Iderstine has the burden of establishing through competent medical evidence that he was substantially incapacitated for the performance of his usual and customary duties as a Fire Apparatus Engineer for the Department due to an orthopedic (low back) condition at the time he applied for disability retirement (December 22, 2017). He met his burden. Dr. Burt opined that Mr. Van Iderstine has been substantially incapacitated since sustaining injuries to his low back when he fell on August 17, 2016. His opinion was well-reasoned and supported by evidence of his objective findings after physically examining Mr. Van Iderstine. He persuasively

explained the significance of the atrophy of his left calf muscles. Additionally, Dr. Burt's opinion was consistent with Dr. Fish's and Dr. Auerbach's, CalPERS's retained expert.

## **LEGAL CONCLUSIONS**

### **Applicable Burden/Standard of Proof**

1. Mr. Van Iderstine has the burden of proving he qualifies for disability retirement, and he must do so by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5 ["As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of evidence"].) This evidentiary standard requires Mr. Van Iderstine to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, he need only prove it is more likely than not that he was substantially incapacitated for the performance of the usual and customary duties of a Fire Apparatus Engineer with the Department when he applied for disability retirement benefits. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

### **Applicable Law**

2. Mr. Van Iderstine is a state safety member of CalPERS subject to Government Code section 21151, subdivision (a), by virtue of his employment with the Department. That statute specifies that "any ... state 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." When the

issue of causation is relevant to determining the disability retirement allowance to which a member is entitled, "the Workers' Compensation Appeals Board ... shall determine whether the disability is industrial." (Gov. Code, § 21166.)

3. To qualify for disability retirement, Mr. Van Iderstine must prove that, at the time he applied for disability retirement, he was "incapacitated physically or mentally for the performance of his ... duties." (Gov. Code, § 21156, subd. (a).) Government Code section 20026 defines "disability" and "incapacity for performance of duty" as a "disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion."

4. The courts have interpreted the phrase "incapacitated for the performance of duty" to mean "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) It is not necessary that the person be able to perform any and all duties since public policy supports employment and utilization of the disabled. (*Schrier v. San Mateo County Employees' Retirement Association* (1983) 142 Cal.App.3d 957, 961.) Instead, the frequency with which the duties he cannot perform are usually performed as well as the general composition of duties he can perform must be considered. (*Mansperger v. Public Employees' Retirement System, supra*, 6 Cal.App.3d at pp. 876-877 [while applicant was unable to lift or carry heavy objects due to his disability, "the necessity that a fish and game warden carry a heavy object alone is a remote occurrence"].)

## **Conclusion**

5. Mr. Van Iderstine demonstrated through persuasive medical evidence that he was substantially incapacitated for the performance of his usual duties as a Fire

Apparatus Engineer with the District due to an orthopedic (low back) condition when he applied for industrial disability retirement. Therefore, his Disability Retirement Election Application is granted.

**ORDER**

Respondent Brian Alan Van Iderstine's Disability Retirement Election Application dated December 22, 2017, is GRANTED.

DATE: February 20, 2020

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*Coren D. Wong*  
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COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings