

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**

ROSANNE VALEK, Respondent

and

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

Agency Case No. 2020-0508

OAH No. 2020090448

PROPOSED DECISION

Marion J. Vomhof, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by video and teleconference on November 3, 2021, due to the ongoing COVID-19 pandemic.

John Shipley, Senior Attorney, represented petitioner, Keith Riddle, Chief, Disability and Survivor Benefits Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Beth Williams, Attorney at Law, represented respondent Roseanne Valek.

No appearance was made by or on behalf of respondent California Department of Forestry and Fire Protection (CalFire). Upon proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default against CalFire pursuant to Government Code section 11520.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on November 3, 2021.

PROTECTIVE ORDER SEALING CONFIDENTIAL RECORDS

Petitioner's Exhibit 9 and Ms. Valek's Exhibits A-3 through A-29 were received and contained confidential medical information and records. It is impractical to redact the information from these exhibits. To protect Ms. Valek's privacy and the confidential personal information from inappropriate disclosure, those exhibits are ordered sealed. This sealing order governs the release of documents to the public. 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 the documents are protected from release to the public.

ISSUE

Was Ms. Valek permanently disabled or incapacitated from performing her usual and customary duties as a Fire Apparatus Engineer (FAE) for CalFire due to orthopedic (lower back, right hip, right shoulder, wrists) conditions when she filed her application for disability retirement?

SUMMARY OF DECISION

The sole issue on appeal is whether Ms. Valek was substantially incapacitated for the performance of her usual and customary duties as an FAE with CalFire on the basis of orthopedic (lower back, right hip, right shoulder, wrists) conditions at the time she applied for industrial disability retirement. Competent medical evidence introduced at hearing established Ms. Valek was physically incapable of performing several of the essential functions of an FAE due to an injury she sustained on April 4, 2016, and which had not improved at the time she applied for industrial disability retirement. Therefore, her application is granted.

FACTUAL FINDINGS

Jurisdictional Matters

1. Ms. Valek was employed by CalFire as an FAE. By virtue of her employment, she was a state safety member of CalPERS subject to Government Code section 21151.

2. On May 2, 2019, Ms. Valek filed a Disability Retirement Election Application with CalPERS. In the "Application Type" section she checked the box marked "Industrial Disability Retirement." Ms. Valek identified her disability as orthopedic (lower back, right hip, right shoulder, wrists) conditions. Her disability occurred on April 4, 2016, during a training accident at the CalFire Academy.

3. CalPERS obtained medical records and documents related to Ms. Valek's conditions and selected Neil T. Katz, M.D., an orthopedic surgeon, to perform a disability evaluation. Dr. Katz provided CalPERS with an initial report, plus three

supplemental reports, containing his findings and conclusions. After reviewing all of the information received, CalPERS determined that when Ms. Valek filed her application for industrial disability retirement, she was not permanently disabled or incapacitated from performing the usual and customary duties of an FAE.

4. On February 21, 2020, CalPERS notified Ms. Valek that her application for disability retirement was denied. CalPERS advised her of her right to appeal.

5. On March 7, 2020, CalPERS received Ms. Valek's letter addressed to CalPERS appealing its decision.

6. On April 15, 2020, petitioner filed the statement of issues in his official capacity. The statement of issues and jurisdictional documents were served on respondents and this hearing ensued.

CalPERS's Job Description and Physical Requirements for a Fire Apparatus Engineer

PHYSICAL/MENTAL STRESS JOB DESCRIPTION

7. The Cal Fire Physical/Mental Stress Job Description for a Fire Apparatus Engineer outlined the tasks and physical/mental stresses to which a fire apparatus engineer is subjected. Dr. Katz relied upon those records in formulating his opinions in this matter. The following are pertinent excerpts from this job description:

A Fire Apparatus Engineer (FAE) is primarily concerned with the care and operation of fire apparatus, such as a pumper water tank, or rescue vehicles in connection with extinguishing wildland, structural, and other fires, and in fire prevention and rescue work, . . .

When assigned to an emergency incident, the FAE is expected to have the endurance to perform arduous physical task [sic] on emergency situations throughout the state. . . . the FAE must be capable of responding to the above demanding stressful situations at all times.

A paragraph entitled "Category 1 - Arduous Physical Work", states:

Duties involve field work requiring physical performance calling for above-average ability, endurance, and superior condition, including occasional demand for extraordinarily strenuous activities in emergencies, under adverse environmental conditions, and other extended periods of time, requires running, walking, difficult climbing, jumping, twisting, bending and lifting over 25 pounds, and the pace of work is typically set by the emergency situation.

The job description also provided:

Psychological demands incumbent upon a Fire Apparatus Engineer include ability to perform psychologically stressful and/or physically demanding duties consistent with firefighting, disaster response, and emergency medical response including working in isolated areas, walking or running on uneven, rough terrain, and remaining on duty 24 hours or longer without a break while performing these duties.

PHYSICAL REQUIREMENTS OF POSITION - OCCUPATIONAL TITLE

8. This document listed various physical tasks and the frequency with which an FAE is required to complete these tasks. Tasks required to be performed "frequently/3-6 hours" per day are sitting, standing, repetitive use of hands, and operation of foot controls or repetitive movement. Tasks required to be performed "occasionally/up to 3 hours" per day include walking, crawling, kneeling, climbing, squatting, bending at neck and waist, twisting at neck and waist, reaching above and below shoulder, pushing and pulling, fine manipulation, power and simple grasping, lifting/carrying from less than 10 pounds to more than 100 pounds, walking on uneven ground, and working with heavy equipment. Running is required up to three hours per day, with a distance of greater than two miles. This document was signed by a CalPERS's Division Chief (signature not legible) and Ms. Valek on March 20, 2019.

Testimony of CalPERS's Investigator Nelson Cooper

9. Nelson Cooper has been an investigator for CalPERS for five years. His duties include conducting surveillance of day-to-day activities and social media on members who have applied for disability. Mr. Cooper obtained 60.5 hours of video surveillance regarding Ms. Valek during four days in August 2019 and four days in September 2019. He provided 2 hours of that video surveillance which were received as evidence at this hearing. Mr. Cooper did not provide surveillance videos where Ms. Valek was not present. The videos showed Ms. Valek engaging in various activities, including entering and exiting her vehicle, bending, lifting a garage door, pulling a large unidentified item in her garage; sweeping her driveway, moving trash cans from the curb to the side of the house, lifting a backpack and large dog crate from her vehicle, placing a child's car seat in her vehicle and placing a child in the car seat; and

carrying/lifting four cans of paint. Mr. Cooper testified at hearing; his testimony was substantially consistent with his report.

CalPERS's Medical Evaluation Conducted by Dr. Katz

10. Neil T. Katz, M.D., is an orthopedic surgeon with a sub-specialty in sports medicine. He is board certified in orthopedic surgery. At the request of CalPERS, Dr. Katz performed an independent medical examination of Ms. Valek on January 16, 2020. The examination included an interview during which Dr. Katz asked Ms. Valek about her chief complaints, work history, and relevant medical history. Dr. Katz reviewed documents received from CalPERS, including Ms. Valek's medical records, evaluations by two physicians, and the physical requirements and job description for an FAE prepared by CalFire. Dr. Katz prepared an initial written report dated January 16, 2020, and three supplemental written reports, and testified at this hearing. His testimony was consistent with his reports.

11. Ms. Valek started working as a "fire person" in 2007 and was promoted to an FAE in 2014. Her job involved driving fire engines and fighting fires. She is currently working as a licensed real estate agent.

12. Ms. Valek has had problems with her lower back dating back to approximately 2011, and since that time she has had occasional flare-ups due to a herniated disc. Regarding her lower back she did receive an epidural, and then steroid injections which helped. She continues to have back pain running from her right buttock to her thigh.

She started having problems with her left knee when she hyperextended it around 2013. At that time, she was found to have a small fracture of the tibial tubercle; she recovered from that injury and continued working full-time, full duty. Because of a

cyst that has formed in her left knee, she has issues from time to time. Currently there is some popping in the left knee, but no swelling, clicking, locking, or giving way. Around 2013, she "rolled" her right ankle while at the Helitack Academy. She sometimes experiences achy pain in this ankle.

Despite the back pain and issues with her left knee and right ankle, she continued to work full-time, full duty. She has had no pre-existing injuries to her neck, right upper extremity, left wrist, or right hip.

13. On April 4, 2016, Ms. Valek and two coworkers were carrying an extension ladder. She was in the middle, with a coworker on each end. One of the coworkers dropped their end of the ladder, and then the second coworker did so, as well. Ms. Valek was left carrying all the weight of the extension ladder by herself. She reported that she immediately felt something pop in the front of her right shoulder and in her right groin. She had an increase in her lower back pain. Later in 2016, she began experiencing increased neck pain. Ms. Valek believed the neck pain was secondary to the right shoulder pain going up towards her neck. Similarly, she developed right elbow pain and right wrist/hand pain and numbness, which she believes was also due to the shoulder injury.

14. Ms. Valek's current complaints are her right hip, right shoulder, and neck pain, plus bilateral wrist pain, low back, right elbow, right ankle, and left knee pain. She stated that her right hip is her "biggest complaint." She has constant pain in her groin. She has been advised to undergo a total hip replacement but to try to wait until she is at least 40. She said her hip clicks, pops, and even locks. The hip does not give way on its own, but she feels back pain going around the hip that sometimes is so intense that she feels like the hip is going to give way. She is getting to the point where she wants to move forward with a hip replacement.

Currently she is not having any symptoms in her right elbow. With respect to her wrist, she feels some weakness and soreness, and occasional numbness about the right thumb. Her right shoulder has been found to have a torn labrum; one doctor recommended surgery but a second doctor recommended against surgery. She did go to physical therapy and received a platelet rich plasma (PRP) injection, both of which helped. Nevertheless, she continues to have pain, particularly with overhead activities and heavy lifting.

Ms. Valek provided information to Dr. Katz by filling out a questionnaire regarding what effect, if any, her complaints have on her activities of daily living. She reported that she can lift and carry heavy to medium objects if they are conveniently positioned; her injury and discomfort prevents her from walking more than one mile. She estimated the amount of time she spends each day on various activities, such as repetitive motions, sitting, walking, bending, or standing. She estimated she spends from six to eight hours per day walking and bending.

15. As a firefighter, Ms. Valek was required to respond to 911 calls. Her job required repetitive bending, squatting, and lifting. She reported that she cannot do heavy lifting and does not believe she can crawl or bend. She does not believe she would be able to save herself and another person. When her back goes out, she has extreme pain from her back down her leg, which lasts a few weeks. She cannot grasp due to her wrist and hand, and she feels numbness in her fingers. With respect to her shoulder, she can barely lift her 45-pound daughter. She cannot lift overhead objects.

16. Dr. Katz reviewed a July 31, 2018, Orthopedic Agreed Medical Evaluation¹ (AME) conducted by Dr. David L. Wood in connection with M. Valek's workers' compensation claim. Dr. Wood found bulges in her lower back and advanced bilateral hip osteoarthritis. He found her to be permanent and stationary and placed her on work restrictions precluding activities including heavy lifting, overhead lifting, prolonged weightbearing, and squatting. He found she was unable to return to her regular work duties, and stated that she may eventually need a total hip replacement. He found Ms. Valek to be at "maximum medical improvement." On January 15, 2019, and again on February 14, 2019, Dr. Woods conducted evaluations of Ms. Valek. He found similar diagnoses to those in his previous report, and both times precluded her from full time, full duty work.

17. At the conclusion of his report, Dr. Katz responded to these questions:

Question #1: Does the member have an actual and present orthopedic hip, low back, right shoulder and bilateral wrists impairment that arises to the level of substantial incapacity to perform their usual job duties.

Answer #1: Based on the information available . . . the member does have impairment that rises to the level of substantial incapacity to perform her usual job duties.

¹ Dr. Katz explained that an AME is conducted when both sides agree on a neutral party to conduct a medical evaluation.

Question #2: If you find the member to be substantially incapacitated, is the incapacity permanent or temporary? If temporary, what [sic] the incapacity lasts longer than 12 months?

Answer #2: The member is presently, substantially incapacitated for the performance of her usual duties. Based on the information available, . . . it appears that, she is currently incapable of continuing the performance of her duties due to the inability to safely and adequately protect herself and others given the injuries to multiple body parts. Given her type of employment as a firefighter, she would potentially be a danger to herself or others. Based on the information available, and barring any information to the contrary, given her current state, her incapacity should be considered to be permanent.

Question #3: What objective findings (or lack thereof) lead you to the conclusion that the member is or is not, substantially incapacitated?

Answer #3: Based on the medical records provided, and even in the absence of other problems, the findings with respect to her right hip, particularly including documentation in the AME report from July 31, 2018, in which Dr. Wood describes the right hip MRI as revealing "advanced degenerative changes". Such pathology, which is expected to worsen over time, would certainly be

worrisome with respect to her ability to work safely as a firefighter. This is particularly true given the strenuous nature of that occupation, and the need to be able to respond and emergencies.

Question #4: Please list the specific Job Duties and/or Physical Requirements of Position member is unable to perform for each substantially incapacitated body part/condition.

Answer #4: Running, Walking, Crawling, Climbing, Squatting, Lifting, and carrying up to and over 100 pounds, Walking on uneven ground.

Question #5: As of what date did the member's condition become "substantially incapacitating"? What objective medical evidence led you to your conclusion the member substantially incapacitated based on the date you are providing.

Answer #5: As of July 31, 2018, Dr. Wood found her to be permanent and stationary and placed her on multiple work restrictions, which prevented her from being able to return to her job as a firefighter.

Question #6 How did you factor in the investigative report & surveillance video provided to make your medical opinion?

Answer #6: The surveillance video/investigative summary report was reviewed and taken into consideration. The actual video will be reviewed at a later date.

Question #7: Is the member cooperating with the examination and putting forth their best effort, or do you feel there is an exaggeration of complaints?

Answer #7: The member did cooperate with the examination. She did appear to put forth her best effort during her examination in the office today. There did not appear to be an exaggeration of complaints to any degree.

18. On January 29, 2020, Dr. Katz issued his first supplemental report. He stated that after actually reviewing the surveillance videos, he no longer believed Ms. Valek was substantially incapacitated and he "questioned her credibility" based on the videos. In the surveillance videos he observed Ms. Valek lifting a large dog cage, moving or dragging a large object in the garage, pulling trash cans from the curb to the side of her house, sweeping her driveway, lifting children, putting a child's car seat into a vehicle, and "using a lot of force" pulling a dog on a leash. In one video he observed Ms. Valek lifting two gallons of paint in each hand into the back of her vehicle. Dr. Katz estimated that one gallon of paint weighs about 12 pounds, so she was lifting approximately 48 pounds. He stated that each pound of weight carried is equivalent to three extra pounds of stress to the carrier's back and knees.

He said that the video "shows capabilities beyond what she said she could do." Dr. Katz insisted that Ms. Valek told him she could not lift more than 10 pounds, but he was unable to confirm or find this statement in his report. He acknowledged that

Ms. Valek did tell him that she was barely able to lift her 45-pound daughter. He “did not observe any difficulty in her movements” which he said was atypical if she was in need of a hip replacement.

19. On February 11, 2020, in response to a request by CalPERS to readdress several questions based on his review of the surveillance videos, Dr. Katz issued a second supplemental report. He restated his new opinion that Ms. Valek was not substantially incapacitated from performing her usual duties.

20. On March 26, 2020, CalPERS asked Dr. Katz to review a March 13, 2020, work status summary and work restrictions provided by Ms. Valek’s treating physician, Shail Vyas, M.D. On April 8, 2020, Dr. Katz issued a third supplemental report, stating that a review of these documents had not changed his opinions.

21. Dr. Katz testified that most of his findings in the physical examination were subjective as they were based on Ms. Valek’s responses to his questions. Objective findings were limited to situations where she may have “winced” when he asked if she was in pain.

22. On cross-examination, Dr. Katz acknowledged that Ms. Valek told him she was able to lift and carry heavy to medium objects “if they are conveniently positioned.” Ms. Valek provided a “range” in her responses as to her ability to engage in various activities, including walking, depending on the day and her pain level. He acknowledged that Dr. Wood’s findings were consistent with Ms. Valek’s explanation of her good and bad days.

Dr. Katz acknowledged that he did not know the actual weight of the items he viewed Ms. Valek lifting or moving. Dr. Katz opined that sweeping a driveway or carrying two bags of groceries is strenuous, as is pulling a fire hose up a hill. He

acknowledged that the videos reflected Ms. Valek's activities in a controlled setting, where she was able to stop at any time, unlike an emergency situation where she would be unable to stop the activity without the possibility of injury to herself or others.

Ms. Valek's Evidence

TESTIMONY OF MARK LOPEZ, RETIRED CALFIRE FIRE CAPTAIN

23. Mark Lopez retired after more than 30 years with CalFire. He worked as a seasonal firefighter for four years, an engineer for four years, and then as a fire captain where he supervised firefighters.

A large portion of calls are for medical emergencies (EMS). Physical demands of responding include going into private homes, where a person is usually on a bed or floor, and lifting the person for transport to the hospital.

For vehicle fires, firefighters may use the "jaws of life," which weighs from 20 to 30 pounds. Using the jaws of life requires leverage while at the same time moving the equipment around to gain access to the person in the vehicle.

Physical requirements for a structure fire include supporting and carrying a breathing apparatus (BA), weighing about 20 pounds, while pulling hose, or crawling while holding the BA and pulling hose. Sledge hammers or other tools are carried on a belt. The work "is very strenuous." When a structure fire is out, firefighters "mop up" by using tools to open up the ceiling and make holes in the walls to ensure that the fire is completely out. Using these tools requires overhead leverage and upper body strength.

For a wildland fire, firefighters wear web gear, which can become an emergency fire shelter, and may include several canteens of water. They carry tools and a hose pack weighing about 60 pounds, for a total of about 70 pounds. Physical requirements for fighting a wildland fire include strength and "stamina." Most wildland fires require climbing steep slopes to gain access to the fire, while carrying a hose pack, hand tools, and extending the hose lay. The hose can extend for 1,000 feet and may require several trips back to the vehicle to pull more hose. This is strenuous work and uses cardio and lower body strength. There is also a mental aspect of knowing that you are going to fight a fire and must rely on your training. Workers must continue working until the fire is out or is no longer a threat. If the wildland fire is small, the entire area is hosed down and vegetation is dug up using a hoe or shovel. If the fire is large, as much of the area as possible is hosed down. The hose, which is water logged and very heavy, must be dismantled and carried back to the truck on a firefighter's shoulders.

Ms. Valek worked for Mr. Lopez as a firefighter for two seasons. He described her as competent and "a very capable firefighter." He reviewed the surveillance videos and stated that they reflected "ordinary" activities in life. Sometimes a firefighter's work is ordinary, but many times it is not and it is rarely conducted on flat ground. The activities he observed in the videos are different than fighting a wildland fire in a smoke-filled area on uneven ground.

TESTIMONY OF JULIE HUTCHINSON, RETIRED CALFIRE BATTALION CHIEF

24. Julie Hutchinson worked for CalFire for 32 years. She began as a seasonal firefighter, then worked as a firefighter II, as an engineer on a helicopter and as a fire captain for 20 years, where she ran a fire station and was responsible for a crew of firefighters. She retired as a battalion chief facilitating state wide public information.

Equipment for fighting a wildland fire consists of a basic uniform, and special boots and safety gear. This is in addition to BA, hand tools, and medical aid equipment. Firefighters are required to climb uphill on uneven ground, carrying a hose pack. This work is physically demanding. Firefighters usually work for 24 hours, followed by a few hours off to sleep, get supplies, and sharpen tools.

In a structure fire, the firefighter is often required to crawl on his or her stomach, while wearing their BA, carrying tools, and pulling a hose. This requires upper and lower body strength. If the firefighter is required to rescue someone who is trapped or rescue a fellow firefighter, they may need to crawl while pulling another person's "dead" body weight, and possibly that person's equipment, as well as the firefighter's own equipment and BA. If they encounter a locked door, they may need to use a saw or sledge hammer.

A seasonal firefighter is a "work horse." In a seasonal fire station, firefighters work all day, in the station or at training. They pull hose off the engines, lay the hose, and reload it. The fire engines used in wildland fires are higher than regular engines, and workers are continually climbing off and on the engines. During a fire, these firefighters prepare a "hand line," which requires removing rocks, brush and vegetation to make a line or set perimeters to prevent the fire from spreading. This is arduous work and "very physically demanding every day." If someone "doesn't relieve you, you keep working."

She observed "mundane tasks" that many people could do. Ms. Hutchison said, "just because she can do day-to-day mundane tasks doesn't mean she could do the work required of a firefighter." Ms. Hutchison did notice that Ms. Valek's gait was unique and that "everything was at one speed." She did not see a lot of lifting in the videos so Ms. Valek may have been "cautious" of lifting.

TESTIMONY OF DR. SHAIL VYAS - MS. VALEK'S TREATING PHYSICIAN

25. Dr. Shail Vyas went to medical school at University of California at Los Angeles (UCLA). He completed a residency in orthopedic surgery at UCLA with a specialty in sports medicine and arthroscopic surgery. He has been in private practice since 2010.

He initially saw Ms. Valek on April 26, 2019, and has been her treating physician since that time. Her initial complaint was pain in her right hip, her right shoulder, and her lower back. He requested and received copies of her medical records and previous tests.

An MRI of her shoulder showed a tear in the labrum. The labrum is a "ring" around the socket which helps to stabilize the shoulder. He did not perform surgery on her shoulder as the main focus of her pain was her right hip and lower back.

An MRI of her right hip showed arthritis, a labrum tear, and a cam lesion, which he described as a "misshapen" femoral head. Ms. Valek had previously been treated with physical therapy so he recommended that she receive a corticosteroid injection in her hip. She was seeing Dr. Paul Kim for pain management at the time, and on May 10, 2019, Dr. Kim gave her the injection which gave her temporary relief. While she was seeing Dr. Kim, she had a total of four epidurals for her lower back. Although epidurals can provide minimal relief to months of relief, repetitive injections would not enable her to work as a firefighter because repeated injections can have a diminishing return.

In August 2020, Dr. Vyas performed a hip arthroscopy on Ms. Valek. This did not resolve her issues. The two main issues with her hip were arthritis and the torn labrum. He did a labrum repair which heals over the course of time. Arthritis means that there is a loss of cartilage in the hip; this was visible on the MRI and also confirmed by the

arthroscopy. This condition does not improve, and results in pain in the hip itself and pain with movement, which results in loss of ability to participate in daily living. The most definitive treatment for arthritis is a hip replacement. Ms. Valek would not be a good candidate for hip replacement at this time "because she is too young." Once the hip is replaced it will wear out over time and need to be replaced again.

He reviewed the surveillance videos and said it was possible that at the time of the surveillance in August and September 2019, Ms. Valek was still receiving some relief from the May 2019 corticosteroid injection. Dr. Vyas agreed with Dr. Wood's findings "to a large extent."

Dr. Vyas originally said that Ms. Valek should not return to work as a firefighter. His determination was based on her subjective complaints and his objective findings. His objective findings included the labrum tear and the arthritis in the hip, which he said can make it difficult for Ms. Valek to do what she does as a firefighter, and a herniated disc, degenerative changes in her back, and chronic pain that could also preclude her from performing the duties of a firefighter. Her shoulder, although not her main complaint, was still an issue as the labrum tear could make it difficult for her to work as a firefighter. His objective findings were consistent with her subjective complaints.

Dr. Vyas said that Ms. Valek should not lift more than ten pounds. This was not an "absolute" requirement. He is aware of the general duties of a firefighter and that those duties are physically demanding and involve "strenuous" work. Dr. Vyas reviewed the surveillance videos and saw nothing that concerned him or any activity that he considered "strenuous." Reviewing the videos did not change his opinion. The videos showed Ms. Valek doing activities "of daily living on her own terms," and not on the requirements of being a firefighter. He explained that when she is feeling good, she

can do some of these activities and at other times her injuries may flare and she may spend the day resting and recovering on the couch. She is not able to do this as a firefighter. Due to the repetitive and sustained nature of her job, doing any of these activities when she is able "is vastly different than being a firefighter."

Dr. Vyas reviewed Dr. Katz's report and said that Ms. Valek's complaints were consistent with his understanding of her condition. There were no activities that she indicated she could not do. She can lift heavy items if they are conveniently placed. The fact that she is otherwise in good health enables her to do other activities of daily living. Nothing he heard has changed his opinion about her ability to work as a firefighter.

On a form entitled "Physician's Report on Disability," Dr. Vyas checked the box for "Yes," confirming that Ms. Valek is currently "substantially incapacitated from performance of the usual duties of the position" of her employment. He stated that she is unable to lift over 10 pounds; she is unable to do repetitive bending, stooping, or squatting. He explained that in response to the question as to whether the incapacity was permanent, he incorrectly checked the box for "No," but he meant to mark "Yes."

Dr. Vyas's understanding of substantial disability is that the patient cannot do the activities required of the job and that his or her condition will not improve. He was asked whether it would be painful for Ms. Valek to do the work or could she do it, and he responded, "Both." Her hip injury – could become difficult; her lower back – could preclude her from doing the job. He explained that her pain would prohibit her from doing what is required as a firefighter. She is not capable of performing some duties of a firefighter as she cannot perform the duties for a sustained period of time or in a

repetitive manner as required. Her medical condition is such that she may be able to do a task one day and the next day she cannot.

TESTIMONY OF MS. VALEK

26. Ms. Valek became an Emergency Medical Technician (EMT) and attended the fire academy. She completed one hour of physical fitness before academy training each day. Physical fitness included cross-fit training, running, hiking, squats, push-ups, and sit-ups. She had no trouble completing the academy. She began as a seasonal firefighter. She worked 72-hour shifts. She agreed with the testimony regarding her duties as a firefighter. She participated in ongoing training once she became a seasonal firefighter.

On April 4, 2020, she was participating in a ladder drill with two co-workers. Ms. Valek was in the middle. One coworker dropped his portion, then the second coworker dropped his portion. She saw Dr. Kim, a pain management specialist, and then began seeing Dr. Vyas. She had arthroscopic hip surgery in August 2020. The surgery helped but she "had no range of motion."

Her right hip and her back are her biggest issue. She is still receiving medical care. Ms. Valek practices yoga three days a week. She has degeneration and a herniated disc in her back. She cannot do her regular duties as a firefighter. She cannot save someone by dragging another person and his or her equipment (about 300 pounds), along with her own body and equipment. Her back is "always sore." The pain is unpredictable, as she may bend, squat, or turn the wrong way and suddenly she has pain and needs to rest. This happens once every few months. Her hip is always sore and feels like "bone on bone."

The physical requirements of her current job as a real estate salesperson are sitting and standing. She does pick up her children when necessary. She never told Dr. Katz that she could not lift more than 10 pounds; she told him she could lift her 45-pound daughter with difficulty.

When she was originally told not to go back to work, she had "an identity crisis." Being a firefighter was her "dream job." Regarding the video surveillance, she explained that the large object she was moving near her garage was a rolled up floatie from the lake; the trash cans she was moving were plastic, empty and had wheels; and she now has a housekeeper to do "heavy work." There is no comparison between her duties as a firefighter and her "current" home duties as reflected in the surveillance videos.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

2. "Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' [Citations.] . . . 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 the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the

party who had the burden of proving it [citation]." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

Purpose of CalPERS's Laws

3. The court in *Lazan v. County of Riverside* (2006) 140 Cal App 4th 453, examined the purpose of CalPERS's legislation, noting it serves two objectives: inducing persons to enter and continue in public service, and providing subsistence for disabled or retired employees and their dependents. A disability pension is intended to alleviate the harshness that would accompany termination of an employee who became medically unable to perform his or her duties. Generally, CalPERS's legislation is to be construed liberally in favor of the employee to achieve these objectives. Moreover, eligibility for retirement benefits does not turn upon whether the employer dismissed the employee for disability or whether the employee voluntarily ceased work because of disability. (*Id.* at p. 459.)

Applicable Code Sections

4. Government Code section 20021 defines "Board" as "the Board of Administration of the Public Employees' Retirement System" (CalPERS).

5. Government Code section 20026 provides:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board, or in the case of a local safety member by the

governing body of the contracting agency employing the member, on the basis of competent medical opinion.

6. Government Code section 21150, subdivision (a), provides that a member who is "incapacitated for the performance of duty shall be retired for disability . . ."

7. Government Code section 21151 provides that a state safety member, such as respondent, who is "incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability . . ."

8. Government Code section 21152 sets forth who may make the disability retirement application.

9. Government Code section 21154 states:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997 is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, 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. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

10. Government Code section 21156 provides that if the medical evaluation or other evidence demonstrates that an eligible member is incapacitated physically or mentally, then CalPERS shall immediately retire the member for disability. The determination of incapacitation shall be based on competent medical opinion.

Appellate Authority

11. "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 or her customary duties, even though doing so may be difficult or painful, the public employee is not "incapacitated" and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873; *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1057.)

Interplay between CalPERS's Disability Retirement and Workers' Compensation

12. Government Code section 21166 provides:

If a member is entitled to a different disability retirement allowance according to whether the disability is industrial or nonindustrial and the member claims that the disability as found by the board, or in the case of a local safety member

by the governing body of his or her employer, is industrial and the claim is disputed by the board, or in case of a local safety member by the governing body, the Workers' Compensation Appeals Board, using the same procedure as in workers' compensation hearings, shall determine whether the disability is industrial.

The jurisdiction of the Workers' Compensation Appeals Board shall be limited solely to the issue of industrial causation, and this section shall not be construed to authorize the Workers' Compensation Appeals Board to award costs against this system pursuant to Section 4600, 5811, or any other provision of the Labor Code.

13. Although the Public Employees' Retirement Law and the Workers' Compensation law are aimed at the same general goals with regard to the welfare of employees and their dependents, they represent distinct legislative schemes. Courts may not assume that the provisions of one apply to the other absent a clear indication from the Legislature. (*Pearl v. W.C.A.B.* (2001) 26 Cal.4th 189, 197.)

14. Receipt of any type of disability in a related workers' compensation proceeding does not establish qualification for a disability retirement. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) Nor does the issuance of prophylactic work restrictions or a reasonable fear of injury justify granting an industrial disability retirement. (*Hosford, supra, at p. 863-864.*) Workers' compensation appeal board determinations do not apply to industrial disability retirement proceedings. (*English v. Board of*

Administration of the Los Angeles City Employees' Retirement System (1983) 148 Cal. App. 3d 839, 844-845; *Hawpe v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

15. Generally, a Workers' Compensation Appeals Board proceeding concerns whether the employee suffered *any* job-related injury, and if that injury resulted in some permanent residual loss, the Workers' Compensation Appeals Board awards the employee a permanent disability rating. Retirement boards, on the other hand, focus on a different issue: whether an employee has suffered an injury or disease of such magnitude and nature that he is incapacitated from substantially performing his job responsibilities. Because of the differences in the issues, "[a] finding by the [Workers' Compensation Appeals Board] of permanent disability, which may be partial for the purposes of workers' compensation, does not bind the retirement board on the issue of the employee's incapacity to perform his duties." (*Bianchi v. City of San Diego* (1989) 214 Cal App 3d 563, 567, citations omitted.)

16. A Workers' Compensation Appeals Board's finding that an injury is work related is res judicata in a later application for benefits made to a City Employees' Retirement Fund. (*Greatorex v Board of Admin* (1979) 91 Cal.App.3d 54.)

17. Although the schemes of the retirement boards and the Workers' Compensation Appeals Board are independent and serve different functions, their purposes are in harmony rather than in conflict and applying workers' compensation laws by analogy to retirement board cases may be appropriate as it seems clear that the tendency is to view the two bodies of law as compatible rather than the opposite. (*Heaton v. Marin County Employees' Retirement Bd.* (1976) 63 Cal.App.3d 421,428.)

18. Workers' Compensation laws and the Public Employees' Retirement Act are not coordinated in all respects, are administered by independent boards, but do

supplement each other. The jurisdiction of each is exclusive only in relation to its own objectives and purposes but overlaps on a single issue of fact only - whether an injury or disability is service-connected. The retirement board does not lose its inherent power to retire a city employee who "is physically or mentally incapacitated for the performance of duty" simply because the employee may also be eligible for workers' compensation benefits. (*Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, 213.) There, although the court agreed that the injured employee had correctly pointed out that only workers' compensation laws prohibited an award if the employee unreasonably refused surgery, and that the Public Employees' Retirement Act contained no such provision, the *Reynolds* court held that neither the California Constitution nor the Labor Code restricted a retirement board from exercising its authority to determine eligibility and the board could apply workers' compensation laws by analogy when making its finding of eligibility or non-eligibility. (*Ibid.*)

Competent Medical Opinion

19. CalPERS makes its determination whether a member is disabled for retirement purposes based upon "competent medical opinion." That determination is based on 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.)

20. 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.

21. 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.)

22. 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.)

23. 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.”

24. Unless admissible over objection in civil actions, hearsay evidence shall not be 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.)

25. Hearsay evidence is not competent evidence that can independently support a finding. (*McNary v Department of Motor Vehicles* (1996) 45 Cal.App.4th 688.)

26. Determining both the nature of Ms. Valek’s medical condition, and whether that condition incapacitated her physically for the performance of her duties, is sufficiently beyond common experience that expert testimony is required.

Evaluation

27. After reviewing Ms. Valek’s medical records, including Dr. Wood’s reports, reviewing the summary of the video surveillance, and interviewing and examining Ms. Valek, Dr. Katz opined that Ms. Valek was substantially incapacitated. His IME report outlined in detail the basis for his opinions. He found Ms. Valek to be truthful. A few days later, Dr. Katz issued a supplemental report, stating that after reviewing the surveillance videos, his opinions had changed and he determined that Ms. Valek was not substantially incapacitated. Unlike his initial IME, neither his supplemental reports or his testimony provided a sound explanation as to the basis for his change of opinion, or how the activities Ms. Valek was engaging in related to her ability to carry out her job requirements at CalFire, and therefore his testimony in this regard was not credible.

28. Dr. Vyas's testimony is given more weight, as it was objective evidence based on his treatment of Ms. Valek over a period of more than two years. He testified that she could not perform the repetitive duties required of a firefighter. Dr. Vyas's opinion is fully consistent with the findings of Dr. Wood who also examined Ms. Valek on several occasions and determined that she was substantially incapacitated.

29. CalPERS's investigator obtained 60.5 hours of surveillance videos, and only two hours of these videos included Ms. Valek. The activities captured on video were activities of daily living such as Ms. Valek moving empty trash cans, picking up a child, putting a child's car seat into a vehicle and then putting the child into the car seat, and pulling on a dog leash. Dr. Katz acknowledged that he did not have information as to the weight of these items or even what some of the items were. The trash cans were plastic, on wheels and were empty. The large item Ms. Valek was moving in the garage was a "floatie." The videos did not reflect Ms. Valek lifting objects overhead, or engaging in any of these activities for an extended period of time. Dr. Katz was especially concerned about Ms. Valek carrying four cans of paint, which he estimated weighed about 48 pounds. While Dr. Katz said Ms. Valek told him she could not lift more than 10 pounds, this statement was not correct. Dr. Vyas limited Ms. Valek to lifting 10 pounds; she told Dr. Katz that she could lift her 45-pound daughter with difficulty. Her job requires her to lift more than 100 pounds.

30. The duties of an FAE require repetitive movements and the ability to respond in emergency situations and continue until the situation has been resolved or the firefighter has been relieved. The issue is whether Ms. Valek is able to do the work required of an FAE, as described in the job description. None of these activities observed on the surveillance videos resembled tasks required of a firefighter. Because Ms. Valek was able to carry 48 pounds of paint for a short period of time does not

equate to being able to drag a fire hose up a hill or rescue an individual by crawling on her stomach, dragging an additional 300 pounds. These are tasks conducted by an FAE.

Ms. Valek exercised regularly and had good and bad days with respect to her pain levels and her ability to carry out various activities. The *Mansperger* court looked to the duties of the claimant's position to assess whether the claimant, considering her disabilities, could perform the duties which are common and recurrent in the job or which are critical to the job. The general duties of an FAE include strenuous work that is physically demanding due to the repetitive and sustained nature of the job. Firefighting requires a unique set of skills and physical abilities that Ms. Valek can no longer perform.

ORDER

Respondent Rosanne Valek's Disability Retirement Election Application for Industrial Disability Retirement, dated May 2, 2019, is granted.

DATE: December 3, 2021

Marion Vomhof

MARION J. VOMHOF

Administrative Law Judge

Office of Administrative Hearings