

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for Disability Retirement of:

**SAMUEL G. GONZALEZ-LOPEZ, and DEPARTMENT OF
VETERANS AFFAIRS, YOUNTVILLE VETERANS HOME,
Respondents**

Agency Case No. 2020-1169

OAH No. 2021020086

PROPOSED DECISION

Jessica Wall, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference and telephone on January 19, 2022, from Sacramento, California.

Nhung Dao, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Samuel G. Gonzalez-Lopez (respondent) was present and represented himself. Interpreter Laura Leon Hamm was sworn and provided English/Spanish and Spanish/English translation.

There was no appearance by or on behalf of respondent Department of Veterans Affairs (DVA), Yountville Veterans Home. The matter proceeded as a default against DVA under California Government Code¹ section 11520, subdivision (a).

Evidence was received and the record closed on January 19, 2022. On January 21, 2022, an Order Reopening Record was issued and on January 28, 2022 the matter was again submitted.²

ISSUE

Is respondent substantially incapacitated from the performance of his usual and customary duties as a Custodian at DVA, based on his orthopedic (back) condition?

¹ All further statutory references are to the Government Code unless otherwise specified.

² At hearing, CalPERS indicated it had not reviewed respondent's Exhibit E (Kaiser medical records) but objected to the same as administrative hearsay. Exhibit E was admitted as administrative hearsay. However, on January 21, 2022, an Order Reopening Record was issued, allowing CalPERS an opportunity to review and respond to the substance of Exhibit E. CalPERS again raised an administrative hearsay objection.

FACTUAL FINDINGS

Jurisdictional Matters

1. At all times relevant, respondent was employed by DVA as a Custodian. By virtue of his employment, respondent is a local miscellaneous member of CalPERS subject to section 21150.

2. On February 21, 2020, CalPERS received respondent's application for disability retirement (Application). On September 10, 2020, CalPERS denied respondent's Application. On January 29, 2021, Keith Riddle, Chief, Disability and Survivor Benefits Division, CalPERS, made and filed the Statement of Issues in his official capacity. Respondent filed an appeal on September 30, 2020. Thereafter, this matter was set for hearing before an administrative law judge under section 11505.

Application

3. On his Application, respondent stated that his disability was "lumbar disc herniation with radiculopathy," which began on July 24, 2019. He is no longer working, and his doctor put him on disability.

4. CalPERS reviewed respondent's medical documentation and sent respondent for an Independent Medical Examination (IME) with Robert Henrichsen, M.D., an orthopedic surgeon. Based upon the above, on September 10, 2020, CalPERS denied respondent's Application, finding respondent's conditions were not disabling, and respondent was not substantially incapacitated from the performance of his job duties as a Custodian with DVA. Respondent filed an appeal on September 30, 2020.

Job Duties

5. With his Application, respondent submitted a table of a Custodian's Essential Functions and a completed CalPERS Physical Requirements of Position/Occupational Title form for the classification of Custodian. The Essential Functions table, dated November 2018, lists physical and mental requirements of a Custodian's duties as follows:

- 75 percent or more: vision, hearing, speaking, walking, standing, concentrating, comprehension, working independently, handling.
- 50 to 74 percent: reaching, bending at waist, pushing or pulling.
- 25 to 49 percent: lifting up to 10 pounds, operating equipment.
- Less than 25 percent: lifting between 11 and 50 pounds, fingering, carrying, climbing, kneeling, driving.

6. The CalPERS Physical Requirements of Position/Occupational Title form provides the following relevant information about the physical requirements of the Custodian position:

- Occasional tasks, up to three hours of the shift, include: kneeling, climbing, squatting, lifting or carrying 11 to 50 pounds, driving, and working at heights.
- Frequent tasks, for three to six hours of the shift, include: lifting or carrying up to 10 pounds, and working with heavy equipment.

- Constant tasks, for over six hours of the shift, include: standing, walking, bending at the waist and neck, twisting at the waist and neck, reaching above and below shoulder level, pushing and pulling.
- Tasks involving distance and height include: standing, walking, repetitive use of hand(s), and walking on uneven ground.

IME by Robert Henrichsen, M.D.

7. On June 23, 2020, respondent attended an evaluation conducted by Dr. Henrichsen, a retired orthopedic surgeon of 38 years, licensed and Board Certified in Orthopedic Surgery. Dr. Henrichsen conducted an IME. Dr. Henrichsen interviewed respondent; took a medical history and an accounting of respondent's current complaints; reviewed respondent's medical records and essential functions table; and completed a physical, orthopedic examination of respondent's spine and extremities. On June 23, 2020, Dr. Henrichsen wrote a report. He testified at hearing consistent with his report.

8. During the physical examination, Dr. Henrichsen took respondent's measurements, assessed his range of motion, and tested his strength and maneuverability. Respondent's heel and toe walking was intact, and his legs were of equal length. Respondent was unable to squat and had difficulty standing on his heels and toes. Dr. Henrichsen could not determine respondent's muscle strength because respondent's extremity measurements did not support his reported muscle weakness. For example, respondent resisted flexion of the right hip while supine but had no difficulty with 90 degree flexion while seated. Respondent reported tenderness in his low back but denied muscle spasms. Additionally, he walked without leaning and showed no evidence of a Trendelenburg gait. Ultimately, Dr. Henrichsen found that

respondent either allowed pain to limit his reasonable function or was trying to be deceptive.

9. Dr. Henrichsen also reviewed chart notes by physicians and physical therapists from October 10, 2019, to February 7, 2020. The records indicate respondent's back pain started in 2016, then reoccurred around July 24, 2019. Respondent was diagnosed with chronic left lumbar radiculopathy. His physicians recommended medications, physical therapy, acupuncture, and chiropractic treatments. Respondent attended physical therapy. He tried acupuncture once but stopped because it made the pain worse. Respondent refused any significant treatment, including epidural steroid injection.

10. Following his physical examination and a medical records review, Dr. Henrichsen diagnosed respondent with a "[h]istory of lumbar displacement, [and] radicular syndrome left lower extremity." However, Dr. Henrichsen indicated a magnetic resonance imaging (MRI) scan would create a more accurate medical summary. In coming to his conclusion, Dr. Henrichsen noted that respondent moved differently when he left the treatment room than he did during the IME, supporting Dr. Henrichsen's opinion that respondent was being deceptive. In sum, Dr. Henrichsen concluded respondent was not substantially incapacitated from the performance of his duties and found no specific job duties respondent was unable to accomplish.

Supplemental IME Report by Dr. Henrichsen

11. On August 25, 2020, Dr. Henrichsen prepared a supplemental IME after he reviewed additional medical records and imaging. The records documented respondent's treatment by Steven Killpack, M.D., from August 9, 2019, to August 29, 2019. For Dr. Henrichsen, the records confirmed that respondent did not experience

radicular syndrome in August 2019. Indeed, respondent had reported feeling significantly better and no longer needed a cane by late August 2019. The MRI images showed a left-sided disc extrusion at his L4-5 spine. However, Dr. Henrichsen determined that this extrusion would not cause the limited range of motion respondent displayed in the IME. In addition, respondent's X-ray was normal.

12. After reviewing the supplemental records, Dr. Henrichsen concluded that respondent "put forth a very poor effort at the time of the examination" and exaggerated his symptoms, which did not match with the imaging and examination findings. Again, Dr. Henrichsen found respondent was not substantially incapacitated from performing his usual duties as a Custodian at DVA.

Respondent's Evidence

13. Respondent is 54 years old, married, and lives with his wife. He is not currently working. Respondent recounted being happy at his workplace until his back injury. Since then, he has not been able to sleep through the night because of the pain. Respondent reports his pain is constantly at "9/10" and it never goes down. Respondent believes that "life dealt [him] a very difficult situation" that prevents him from fulfilling his duties to his family.

14. Respondent recalled his visit with Dr. Henrichsen felt rushed. During the physical examination, Dr. Henrichsen applied a lot of pressure to respondent's body, causing him to yell out in pain. Also, when respondent left the treatment room, Dr. Henrichsen watched him walk down the hallway and out of the office. Respondent feels Dr. Henrichsen was "spying" on him after the IME. Respondent believes Dr. Henrichsen should not have done so because no one mentioned that his conduct before and after the exam would be watched.

15. Finally, respondent offered medical records from 2020 and 2021 for treatment for his back. However, the physicians and treatment occurred in Mexico and most of the records were written in Spanish.

Analysis

16. Respondent did not call any medical experts to testify. His testimony regarding his inability to work and his substantial incapacity alone is insufficient to make a finding. (*Peter Kiewitt Sons v. Industrial Accident Commission* (1965) 234 Cal.App.2d 831, 838. [“Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a commission finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence”].) In addition, the 2020 and 2021 medical records respondent offered were in Spanish and were not part of the medical records that Dr. Henrichsen received and reviewed. In sum, respondent’s admissible evidence does not support his incapacity.

17. Dr. Henrichsen’s opinions are supported by the admissible medical records. He offered a persuasive opinion, based upon a review of respondent’s essential functions, the physical requirements of the job, medical records, and a physical examination. Dr. Henrichsen has experience conducting medical evaluations and providing opinions using the CalPERS standard. His conclusion is based on objective medical findings and not on respondent’s subjective complaints. For the above reasons, respondent did not establish, through competent medical evidence, he was substantially incapacitated from performing the usual job duties of a Custodian at DVA based on his orthopedic (back) condition.

LEGAL CONCLUSIONS

Applicable Laws and Statutes

1. Disability as a basis of retirement means disability of permanent or extended and uncertain duration. (Gov. Code, § 20026.) According to section 21156, subdivision (a)(1), “[i]f 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 his duties and is eligible to retire for disability, the board shall immediately retire him or her for disability.”

2. An applicant for disability retirement must offer competent, objective medical evidence to establish that, at the time of the application, he was permanently disabled or incapacitated from performing the usual duties of his position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697.) In *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 887, the court interpreted the term “incapacity for performance of duty” to mean “the substantial inability of the applicant to perform his usual duties.” Difficulty or discomfort in performing job duties is not enough to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.)

3. Respondent did not supply competent medical evidence sufficient to demonstrate that he was substantially incapacitated from performing his normal and usual employment duties as a Custodian for DVA at the time he filed his disability retirement application. Accordingly, his Application must be denied.

ORDER

The Application of Samuel G. Gonzalez-Lopez for CalPERS Disability Retirement is DENIED.

DATE: February 18, 2022

Jessica Wall
Jessica Wall (Feb 18, 2022 15:23 PST)

JESSICA WALL

Administrative Law Judge

Office of Administrative Hearings