

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:**

DANILO B. MANLAPAZ, Respondent

and

**CALIFORNIA REHABILITATION CENTER, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent**

Agency Case No. 2021-0424

OAH No. 2021090798

PROPOSED DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference and telephonically on April 4, 2022.

Helen L. Louie, Staff Attorney, represented complainant, Keith Riddle, Chief, Disability and Survivor Benefits Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Respondent Danilo B. Manlapaz represented himself.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on April 4, 2022.

ISSUE

When he filed his disability application, was Mr. Manlapaz substantially incapacitated from performing the regular and customary duties of a Supervising Correctional Cook due to peripheral artery disease and venous insufficiency?

FACTUAL FINDINGS

Jurisdictional Matters

1. Mr. Manlapaz was employed by the California Rehabilitation Center, California Department of Corrections and Rehabilitation, as a Supervising Correctional Cook. By virtue of his employment, respondent was a state safety member of CalPERS subject to Government Code section 21151.

2. On November 3, 2016, respondent filed an application for service pending disability retirement. On November 23, 2016, respondent amended his disability retirement application to an industrial disability retirement application and

claimed disability on the basis of "peripheral artery disease, weak legs, neck strain, and cervical disk displacement" conditions.

3. Respondent retired from service effective December 1, 2016, and he has been receiving his retirement allowance from that date.

4. On May 15, 2017, CalPERS sent a letter to respondent denying his application for industrial disability retirement on the basis of peripheral artery disease, venous insufficiency, because the medical evidence submitted did not support a finding that this condition was substantially incapacitating him from the performance of his job duties as a Supervising Correctional Cook. The May 15, 2017, letter further provided:

Since medical evidence submitted by you does not support a disabling orthopedic condition, your allegations of disability due to neck strain and cervical disc displacement were not considered in your evaluation of your industrial disability retirement application.

5. On June 12, 2017, respondent submitted his request for appeal of CalPERS's determination.

6. On May 6, 2021, CalPERS sent a letter to respondent providing, in part, as follows:

This letter is to advise you that your request for an appeal of our determination dated May 15, 2017 was received but not processed. Per our conversation on April 28, 2021, you wish to pursue your request for an appeal of the denial of

your industrial disability retirement based on your internal (peripheral artery disease, venous insufficiency) that was received in June of 2017. Regarding your allegation of an orthopedic (neck) condition, the medical information received did not support a disabling orthopedic condition as you were released to full duty in July 2016. You stated that you have not [*sic*] any issues with this condition until recently this year and are now seeking treatment. As there continues to be insufficient medical information to support continuous disability for this condition back to November 30, 2016, you stated that that [*sic*] you are not including the orthopedic (neck) condition in your request for an appeal. You also indicated that you will be providing additional medical information from 2017 to present regarding your internal condition. . . .

7. On August 24, 2021, complainant filed the Statement of Issues in this matter seeking affirmation of its determination that as of the time he filed his application for industrial disability respondent was not substantially incapacitated to perform his duties as a Supervision Correctional Cook based upon his peripheral artery disease and venous insufficiency. Complainant noted in the Statement of Issues that the issue on appeal is limited only to the issue of peripheral artery disease and venous insufficiency conditions, and not issues related to neck strain and cervical disc displacement conditions. Respondent previously and timely filed a notice of appeal and, this hearing followed.

The Usual and Customary Duties of a Supervising Correctional Cook

8. Two documents describing the usual duties required of a Supervising Correctional Cook were received in evidence. One of those documents, entitled "Supervising Correctional Cook Essential Functions," described the nature and requirements of the position, which generally provided that the person with this position is responsible for planning, organizing, and supervising the preparation, cooking, distribution and serving of food to residents (inmates). The second document titled "Physical Requirements of Position/Occupational Title" provided the physical requirements for the position of supervising correctional cook.

9. A supervising correctional cook must be able to perform all the critical physical and mental tasks listed in the two documents. The required tasks include: sitting up to three hours; standing constantly over six hours; walking for three to six hours; repetitive use of hands frequently from three to six hours; exposure to extreme temperature humidity or wetness frequently from three to six hours; and all of the following tasks on an occasional basis for up to three hours: climbing, squatting, bending at the neck, waist and back, twisting at the neck and waist, reaching, pushing and pulling, fine manipulation, grasping, keyboard use, mouse use, lifting up to 50 pounds, walking on uneven ground, driving, working with heavy equipment, exposure to excessive noise, exposure to dust, gas, or chemicals, repetitive movement, and working with bio hazards.

Testimony of Mari Cobbler

10. Mari Cobbler is employed by CalPERS in the Disability and Survivor Benefits Division, Disability Retirement Section, as an Associate Government Program Analyst. She has held that position since November 2011, and she has worked for

CalPERS in the Disability and Survivor Benefits Division, Disability Retirement Section, since 2006. Her responsibilities in her current position include review of applications of any member who applies for industrial disability, review of the member's file with CalPERS, as well as review of any appeal of CalPERS determinations regarding decisions on whether the member qualifies for industrial disability retirement. Ms. Cobbler was assigned to this matter to review respondent's appeal of CalPERS's determination that he did not qualify for industrial disability. Ms. Cobbler testified at the hearing and the following factual findings are based on her testimony and supporting documents received in evidence.

11. Ms. Cobbler reviewed respondent's CalPERS file after receiving his appeal. She reviewed the May 15, 2017, letter from CalPERS to respondent denying his application as discussed above and noting that the denial was with regard to the peripheral artery disease and vascular insufficiency only, and that the conditions of neck strain and cervical disc displacement were not considered because of insufficient medical evidence submitted. Ms. Cobbler then reviewed respondent's June 12, 2017, appeal of CalPERS's decision wherein he wrote, in part:

I object to the statement in the letter that my orthopedic disabling condition was not considered in my industrial disability retirement application.

Regarding my orthopedic disability I submit and attach hereto the Panel QMF workers compensation reporting of Alex Etemad, M.D. dated April 19, 2017 to substantiate my allegation that my orthopedic disability has substantially incapacitated me from my usual and customary duties. Request is made for reconsideration of my IDR application.

It is on this that this appeal is based. Further evidence to substantiate the appeal will be forthcoming. . . .

12. After her review of the above letter of appeal by respondent, Ms. Cobbler contacted respondent by telephone on April 28, 2021, to get clarification regarding his request for appeal. During the telephone call Ms. Cobbler explained to respondent that in order for CalPERS to make a determination on respondent's application for industrial disability based upon the orthopedic (neck) conditions, CalPERS must have a physician's report on that disability and CalPERS did not. According to Ms. Cobbler, during the phone call respondent indicated that he has not received any treatment for his neck condition since he filed his application for industrial disability, and that his neck did not start bothering him again until 2021. He also indicated to her that he wanted to pursue the appeal based only on the peripheral artery disease and vascular insufficiency basis because he had not been continuously disabled by the neck condition from 2016 to 2021. He also indicated he would be providing additional medical information regarding the peripheral artery disease and vascular insufficiency. Ms. Cobbler wrote a letter dated May 6, 2021, to respondent summarizing their conversation during that phone conversation, which is partially reproduced above.

13. Ms. Cobbler explained that the April 19, 2017, physician's report provided by respondent with his appeal dated June 12, 2017, was insufficient to institute a further review of respondent's orthopedic (neck) condition for industrial disability because the report indicated that respondent was released to full-duty work in July 2016 with no problems. CalPERS had no further medical records regarding any treatment for respondent's orthopedic (neck) issues. She further explained that respondent's last day of pay in his position was November 30, 2016, and he would

have to establish a continuous disability from his last day of pay to the present in order to be eligible for industrial disability.

14. On July 26, 2021, Ms. Cobbler wrote another letter to respondent following their April 2021 telephone conversation. In the letter Ms. Cobbler wrote, in part, as follows:

This letter is regarding your appeal of our determination. Per our conversation of April 28, 2021, you indicated that you would be submitting additional medical information regarding your alleged internal (peripheral artery disease, venous insufficiency) condition. To date, we have not received any additional medical information.

We also discussed the need for medical information that establishes continuous disability for your alleged orthopedic (cervical spine) condition, to evaluate this condition for a determination. The last information we received was releasing you to full duty on July 21, 2016. You stated that you did not further treat for this condition and haven't had any issues with this condition until recently, so you did not wish to pursue this condition. We did receive the April 19, 2017 orthopedic QME report regarding your neck condition with your appeal. If you do wish to pursue this condition, you will need to have your treating orthopedic specialist or treating physician complete a Physician's Report on Disability. You will also need to

provide medical records after July 21, 2016 to the present,
to establish continuous disability for this condition. . . .

15. Ms. Cobbler testified that CalPERS never received a Physician's Report on Disability for respondent regarding his orthopedic (neck) condition, and CalPERS has never received any medical information regarding his orthopedic condition from a physician indicating that respondent can't perform his regular job duties as a result of his orthopedic (neck) condition. Accordingly, CalPERS did not make any determination on whether respondent qualifies for industrial disability based upon his orthopedic (neck) condition. Ms. Cobbler further explained that CalPERS never sent respondent for an IME for the orthopedic (neck) conditions because CalPERS never received any medical records indicating that respondent was disabled by the orthopedic (neck) conditions to justify having an IME on that issue.

16. With regard to the peripheral artery disease and vascular insufficiency issue and in response to the July 26, 2021, letter, respondent provided CalPERS with some additional documents. However, those documents were missing pages, did not include medical information, and included duplicate information previously provided. On October 21, 2021, Ms. Cobbler wrote another letter to respondent wherein she informed him of this problem, as well as set a deadline for respondent to provide the medical information regarding his industrial disability application prior to hearing. In the letter she wrote, in part, as follows:

On July 26, 2021, I sent you the enclosed letter requesting additional medical information. The additional information received from you is missing pages, are duplicates of medical records previously provided, and insufficient. To

date, we have not received the information requested in the enclosed letter dated July 26, 2021.

If you wish for consideration of your orthopedic (cervical spine) condition and/or wish to amend your application to include additional conditions, you will need to provide the requested information in the letter dated July 26, 2021 by November 11, 2021. It is your responsibility to ensure the requested medical records are submitted to CalPERS by November 11, 2021. If the requested information is not received within the timeframe, we will assume you no longer wish to pursue these conditions and will go forward with the administrative hearing process for the denied internal (peripheral artery disease, venous insufficiency) conditions. . . .

17. Ms. Cobbler testified that in response to the October 21, 2021, letter to respondent, CalPERS did not receive any further documents of any kind, and CalPERS did not receive any phone calls or other correspondence from respondent.

Testimony of Robert Weber, M.D.

18. Complainant called Robert Weber, M.D. to testify at the hearing. Dr. Robert Weber has been a licensed physician in California since 1975. He has been board certified in internal medicine since 1978 and has been board certified in cardiovascular disease since 1983. Dr. Weber obtained his medical degree in 1974 from the Medical College of Wisconsin. He completed a residency in internal medicine in 1978 at both St. Mary Medical Center in Long Beach, California, and The Hospital of

the Good Samaritan in Los Angeles, California. Dr. Weber completed a clinical fellowship in cardiology in 1982 at Huntington Memorial Hospital in Pasadena, California. Dr. Weber has worked in private practice since 1989 focusing on cardiology and cardiovascular disease. Additionally, for the past ten years Dr. Weber has performed Independent Medical Evaluations (IMEs) for CalPERS, various insurance companies, and has worked as a Qualified Medical Evaluator (QME) for California's Division of Workers' Compensation. Dr. Weber performed an IME of respondent on behalf of CalPERS for this matter and summarized his findings in a report. Dr. Weber testified at the hearing and the following factual findings are based on his testimony and his report received in evidence.

19. Dr. Weber examined respondent on March 27, 2017, spent one and a quarter hours face-to-face with respondent, spent one and a half hours reviewing medical records of respondent, and three-quarters of an hour writing his report summarizing his findings. His IME of respondent consisted of obtaining a medical history from respondent including a review of systems, then performing a physical examination of respondent, and then a review of respondent's medical records. With regard to respondent's medical history, Dr. Weber testified that respondent had venous laser treatments in 2011 in both legs to treat varicose veins. Dr. Weber explained that varicose veins can be an indication that the person is suffering from a venous insufficiency. Specifically, he stated that varicose veins indicate a disease or abnormality involving the valves in the deep veins of the legs. Dr. Weber explained that the laser treatments respondent received in 2011 was simply a cosmetic procedure to get rid of the varicose veins but did not treat or otherwise affect the underlying function of the valves in the deep veins.

Dr. Weber's physical examination of respondent showed that respondent's legs both had areas of darker skin, which he explained is a physical finding of venous insufficiency and varicose veins. However, Dr. Weber did not see any edema in respondent's legs, which was significant. He explained that not having edema in his legs indicated that respondent's venous insufficiency was not severe. If a patient has severe venous insufficiency, then fluid collects in the tissues as a result causing edema. Because respondent did not have edema or any indication of fluid in the tissues of his legs, this indicates that respondent's venous insufficiency was mild. Furthermore, Dr. Weber examined respondent's pulses in his groin and feet and those were normal. Because respondent had normal pulses in those areas, this indicates that respondent does not suffer from peripheral arterial disease. Dr. Weber explained that peripheral artery disease causes blockages in the arteries that will result in abnormal pulses. Based on his physical examination of respondent, Dr. Weber concluded that respondent suffered from mild lower extremity venous disease with no peripheral artery disease.

Dr. Weber's review of medical records for respondent further supported his diagnoses. Specifically, ultrasound studies of both of respondent's lower extremities taken on November 10, 2016, show no significant focal stenosis or arterial occlusion in the right or left lower extremity, which indicates that respondent did not have peripheral artery disease at that time. Dr. Weber stated that this finding corresponds with his finding of perfectly normal pulses in respondent's lower extremities. The October 21, 2016, QME report for respondent's workers' compensation case reviewed by Dr. Weber also showed that respondent had no edema or swelling in his lower legs, which indicates that respondent does not have severe venous insufficiency. Dr. Weber's review of all the medical records provided corresponded with his diagnosis of mild lower extremity venous disease for respondent.

20. Dr. Weber testified that he reviewed all of the job duties and descriptions from the same documents admitted into evidence in this matter for a supervising correctional cook. Dr. Weber stated that respondent's diagnosis of mild lower extremity venous disease does not impact respondent's ability to perform the essential job duties of a supervising correctional cook. Respondent's venous insufficiency does not impact his abilities to perform any of the physical requirements of his job. Dr. Weber opined that respondent is not substantially incapacitated from performing the duties of a supervising correctional cook, and that respondent can stand and walk and do all other physical tasks as required with no difficulty.

21. Dr. Weber stated that he did not evaluate respondent for any orthopedic conditions, and that respondent's condition regarding his venous and arterial capacities could have changed since Dr. Weber's 2017 evaluation of respondent. However, Dr. Weber has no idea if respondent's condition has changed since 2017 because he has not evaluated respondent since that time.

Respondent's Testimony

22. Respondent is 71 years of age and his last day at work as a supervising correctional cook was December 1, 2016. He retired from this position after 22 years, with his first day on that job in May 1994. Respondent testified that he believes he deserves industrial disability retirement because he is getting older and won't be able to walk soon and because his "work kept denying [him] treatment."

23. Respondent stated that with regard to his peripheral artery disease and vascular insufficiency, he continues to have problems including heavy legs, fatigue, and itching. Respondent stated that he sustained several leg injuries while working as a supervising correctional cook. Specifically, in 2005 his leg was pierced by a wooden

pallet and he was incapacitated for a month, in July 2006 he had a contusion to the right leg, in 2007 he had varicose vein treatment, in 2010 he got a bruise on his right knee, in 2015 he received a contusion to his right knee, in 2015 he had a muscle strain to his right thigh, and in 2016 he got another contusion to the right knee.

24. Respondent also testified that his neck "started hurting him again" in November 2021, and he has had pain for almost two months with problems sleeping as a result. Respondent stated that with regard to obtaining a physician's report regarding the neck injury, he attempted to get his private physician to complete the report, but she refused to do so because it was a work-related injury and he needed to have a physician from his work to complete the document. Respondent stated that his private physician sent him to physical therapy for his neck, which helped.

25. Respondent provided four documents in support of his application for industrial disability, which were received in evidence. The first document is a disabled person placard identification from the Department of Motor Vehicles allowing respondent to park in disabled parking spots. Respondent obtained this placard because his leg bothers him, and he can't walk far. The second document is a letter dated October 9, 2018, from the State Compensation Insurance Fund informing respondent that he is entitled to workers' compensation benefits. The third document is a letter dated April 18, 2016, from the State Compensation Insurance Fund requesting information regarding treating physicians for respondent and wherein respondent handwrote the names of seven physicians, approximate date of treatment from each, and type of treatment provided. The fourth and final document is a letter dated November 22, 2017, from the State Compensation Insurance Fund informing respondent that he is entitled to workers' compensation benefits.

LEGAL CONCLUSIONS

Burden of Proof

1. Respondent has the burden of proof to establish that CalPERS's determination that he is not eligible for industrial disability retirement is incorrect and that he is substantially incapacitated from performance of his duties as a Supervising Correctional Cook. (Evid. Code, § 500.) Respondent did not meet his burden to show that he was substantially incapacitated from the performance of his job duties at the time he filed his application on November 23, 2016.

2. The Public Employees' Retirement Law (Retirement Law) governs disability retirement and reinstatements and grants sole jurisdiction to CalPERS to make such determinations. (See Gov. Code, §§ 20026, 20125, 21154, 21156, 21190, 21192 and 21193.)

Applicable Statutes

3. Government Code section 20026 provides in part:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

4. Government Code section 20128 provides:

Notwithstanding any other provision of law, the board may require a member or beneficiary to provide information it deems necessary to determine this system's liability with

respect to, and an individual's entitlement to, benefits prescribed by this part.

5. Government Code section 20223 provides:

Each employee shall file with the board information affecting his or her status as a member as the board may require.

6. Government Code section 21151 provides in part:

(a) 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. . . .

7. Government Code section 21152 provides in pertinent part:

Application to the board for retirement of a member for disability may be made by:

[¶] . . . [¶]

(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

[¶] . . . [¶]

(d) The member or any person in his or her behalf.

8. Government Code section 21154 provides in part:

The application shall be made only (a) while the member is in state serviceor (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 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. . . .

9. Government Code section 21156 provides in part:

(a)(1) If the medical examination and other available information show.....that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability

(2) In determining whether a member is eligible to retire for disability, the board.....shall make a determination on the basis of competent medical opinion

Case Law Defining Disability Retirement

10. "Incapacitated for the performance of duty," means the "substantial inability of the applicant to perform [his] usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.)

Evaluation

11. Respondent failed to meet his burden to prove that he was substantially incapacitated to perform his usual job duties at the time he filed his industrial disability application, and he failed to prove that he is eligible for an industrial disability retirement. This conclusion is based upon Dr. Weber's opinion after performing an independent examination of respondent and reviewing medical records provided to him. Dr. Weber's testimony was credible and forthright. Dr. Weber's objective findings that respondent suffers from mild lower extremity venous disease and that respondent does not have peripheral artery disease were credible and supported by the medical evidence. Furthermore, respondent failed to provide direct medical evidence to contradict Dr. Weber's findings that there is no medical evidence to establish that respondent was incapable of performing his required job duties on the date he filed his industrial disability retirement application.

12. Notably, Dr. Weber made no evaluation or findings regarding respondent's orthopedic (neck) condition, and CalPERS made no decision regarding respondent's application for industrial disability based on the orthopedic (neck) condition based upon respondent's own previous representation that he is appealing only the determination based upon his claim of peripheral artery disease and venous insufficiency. Furthermore, respondent provided no medical evidence regarding his orthopedic (neck) injury to establish disability on that basis, and respondent admitted

that he did not have the orthopedic (neck) issue at the time he filed his industrial disability application and it only began hurting in November 2021. Accordingly, no determination is made regarding the orthopedic (neck) condition.

Cause Exists to Deny Respondent's Application

13. Cause exists to conclude that respondent is not permanently disabled or substantially incapacitated from the performance of his usual and customary duties as a Supervising Correctional Cook on the basis of peripheral artery disease and vascular insufficiency. No determination is made with regard to respondent's orthopedic (neck) conditions because CalPERS made no determination regarding that alleged basis for industrial disability retirement. As such, he does not qualify for an industrial disability retirement and his application is denied.

ORDER

CalPERS's determination that respondent Danilo B. Manlapaz, was not permanently disabled or substantially incapacitated from the performance of his usual and customary duties as a Supervising Correctional Cook on the basis of peripheral artery disease and vascular insufficiency as of the date of his application for industrial disability is affirmed.

DATE: May 2, 2022

Debra D. Nye-Perkins

DEBRA D. NYE-PERKINS

Administrative Law Judge

Office of Administrative Hearings