

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Application for Industrial Disability
Retirement of:**

NICHOLAS M. ABARCA,

and

**CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE
PROTECTION, Respondents.**

Agency Case No. 2022-0742

OAH No. 2023010728

PROPOSED DECISION

Administrative Law Judge Karen Reichmann, Office of Administrative Hearings, State of California, heard this matter on August 28, 2023, by videoconference.

Senior Attorney Noelle Lamprecht represented the California Public Employees' Retirement System (CalPERS).

Attorney Brittany C. Toth represented respondent Nicholas M. Abarca, who was present.

There was no appearance by or on behalf of the California Department of Forestry and Fire Protection.

The record remained open for CalPERS to re-upload two exhibits into Case Center which had not been displaying properly. The exhibits were timely uploaded. The record closed and the matter was submitted for decision on September 1, 2023.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent Nicholas M. Abarca (respondent) was employed as a Firefighter 1 at the California Department of Forestry and Fire Protection (CAL FIRE or employer). By virtue of this employment, respondent was a state safety member of CalPERS subject to Government Code section 21151.

2. On February 14, 2022, respondent signed an application for industrial disability retirement. Respondent described his disabling condition as "3 bulged discs – lower back," with a date of injury of June 25, 2020.

3. On July 21, 2022, CalPERS notified respondent that his application was denied, based on its determination that his back condition is not disabling.

4. Respondent appealed the denial on August 9, 2022. Respondent submitted additional evidence in support of his application.

5. On May 22, 2023, CalPERS notified respondent that the additional information had been considered and that its decision denying the application was unchanged.

Physical Requirements of a CAL FIRE Firefighter

6. Respondent's employer filled out a CalPERS form describing the usual duties of a CAL FIRE firefighter. Respondent signed the form indicating that he agreed with the employer's assessment of the job duties. This form reflects that a firefighter is required to lift 0-10 pounds frequently (2.5 to 5 hours); 11-25 pounds occasionally (31 minutes to 2.5 hours); and 26-50 pounds and more than 50 pounds infrequently (5 to 30 minutes). Firefighters are required to run occasionally (31 minutes to 2.5 hours) and sit, kneel, climb, and bend at the neck infrequently (5 to 30 minutes). They are required to bend at the waist and twist at the neck and at the waist frequently (2.5 to 5 hours). They are required to walk on uneven ground frequently (2.5 hours to 5 hours). They are required to walk, interact with co-workers, and be exposed to extreme temperatures constantly (more than 5 hours). They are required to squat and crawl rarely (less than 5 minutes).

7. A CAL FIRE document titled "CAL FIRE PHYSICAL/MENTAL STRESS JOB DESCRIPTION" sets forth additional details regarding the duties of a Firefighter 1. This document states that when assigned to an emergency incident, a Firefighter 1 "is expected to have the endurance to perform arduous physical tasks" and "must have the necessary strength and agility required for extensive bending, stooping, and squatting." Firefighter 1 employees are required to wear breathing apparatus that may place a physiological burden on them. They are required to perform physically demanding duties including "working in isolated areas, running or walking on uneven, rough terrain, and remaining on duty 24 hours or longer without a break." The document further states that the position requires:

above-average ability, endurance, and superior condition
including occasional demand for extraordinarily strenuous

activities in emergencies, under adverse environmental conditions and over extended periods of time, requiring running, walking, difficult climbing, jumping, twisting, bending, and lifting over 25 pounds.

Respondent's Evidence

RESPONDENT'S TESTIMONY

8. Respondent worked for CAL FIRE for about 15 years. He is 36 years old.
9. Respondent grew up around CAL FIRE, where his father worked, and felt that firefighting was a good fit for his personality.
10. Respondent testified that he worked 72-hour shifts and was required to carry a gear pack weighing 35 pounds, a 40-pound hose pack, and tools weighing 5 pounds when responding to a fire, for up to 16 hours straight.
11. In June 2020, respondent was part of a crew that cleared a downed oak tree off a highway. He described working quickly with a chainsaw that was dying, and moving large pieces of the tree in order to clear the road for traffic. His back felt tight and he had difficulty sleeping that night. Respondent did not seek medical attention or report the injury at the time. He thought it was a minor injury, and there was a culture at CAL FIRE of not complaining about pain.
12. Over the following four weeks, respondent's pain increased, and he had increasing difficulty sleeping. Respondent reported the injury on July 22, 2020. An MRI of respondent's spine on that date was normal and showed no significant disc disease.

13. Respondent was taken off work for three weeks. He returned to full duty work in August 2020, with the restriction that he was to stay "in county." Respondent reports that he was miserable at work for the next five to six months and worked through intense pain. He reported traveling about two hours to check a road and suffering back pain throughout the bumpy ride. He was treated conservatively with physical therapy, chiropractic treatments, core strengthening exercises, and massage therapy.

14. Respondent explained that he is able to perform his duties as a CAL FIRE Firefighter 1 for "a day or two" but is not able to work for "days on end." He described bending over, carrying heavy items on his back, laying/pulling hose, and riding off-road as particularly painful aspects of the job.

15. Respondent reported wearing back support belts, using his computer in bed, and using an inversion table and heating pads to manage his back pain.

16. Respondent produces art and music events. He acknowledged traveling to event locations, transporting art to the events in trailers, and installing large, interactive art pieces and lights. Respondent explained that he always has others helping him set up and take down the events and that everyone he works with is aware of his back condition and helps with the heavy lifting. Respondent reported that he goes out to events and shows much less frequently than he did before his injury, that he will rest for a whole week after attending an event, and that he had not gone out for four months prior to the hearing. Respondent stated that he is still figuring out how to live his life with his injury. Respondent insisted that installing and looking at art at these events is not at all equivalent to the work of a firefighter. Respondent stated that he does not dance much at the music events, but only dances briefly to make silly videos for social media.

RESPONDENT'S MEDICAL EVIDENCE

17. Alan Moelleken, M.D., has been treating respondent through workers' compensation since December 2020. He is board certified in orthopedic surgery. Dr. Moelleken has more than 30 years of experience and specializes in the spine.

18. Dr. Moelleken wrote a report dated August 14, 2023, in support of respondent's application, and testified at the hearing.

19. A CT scan of respondent's lumbar spine in January 2021 contained the following findings:

Broad-based disc bulge/protrusion at L4-5 which appears to result in mild canal narrowing and mild bilateral neural foraminal narrowing.

Broad-based disc bulge/protrusion, slightly asymmetric to the left at L5-S1 resulting in mild central canal compromise and mild bilateral foraminal stenosis.

Small posterior disc bulge at L3-4 without significant central canal or neural foraminal stenosis.

Dr. Moelleken described the CT scan as portraying "eight areas of pinched nerves in two disc areas." He described the finding as mild rather than severe, but noted that "it adds up."

20. In October 2021, Dr. Moelleken reported to workers' compensation that respondent's back condition was permanent and stationary and that he could not return to his usual occupation. Dr. Moelleken reported that during his October 2021

examination of respondent, respondent's range of motion in the lumbar spine was somewhat limited compared to normal. He had a positive facet challenge when extending back, which is a subjective test of back pain. Dr. Moelleken testified that at this time, he determined that respondent's condition had not responded to treatment and was chronic. Dr. Molleken has not recommended any surgery to treat respondent's condition.

21. Dr. Moelleken disagrees with the radiologist's interpretation of the 2020 MRI as normal. He has reviewed it himself and believes it shows protrusions at L4-5 and L5-S1, consistent with the CT scan.

22. Dr. Moelleken testified patients can have mild findings and be unable to return to work and others can have more significant findings and are able to return to work. Patients with the same objective findings can experience different levels of pain. Dr. Moelleken testified that there are patients with the same clinical findings as respondent who have no limitations, and that most people with these findings can do most things, including lifting, bending, stooping, sitting, and walking. Dr. Moelleken does not believe respondent can do "super rigorous activity." He testified that respondent can lift 40 pounds, but cannot lift over 50 pounds for 24 hours. He speculated that if respondent returned to work, he might "get lucky" and be able to do his job, but that he might not be able to do his job due to pain and that this would be a risk to himself and others.

23. On January 11, 2022, Dr. Moelleken signed a CalPERS Physician's Report on Disability form. He wrote that respondent cannot return to his usual occupation as a CAL FIRE Firefighter due to lumbar stenosis, and that his condition was permanent and stationary as of October 27, 2021.

24. Dr. Moelleken watched the video of respondent's social media postings prior to the hearing described below. He did not think these images undermined respondent's reports of disabling back pain.

CalPERS's Evidence

RESPONDENT'S SOCIAL MEDIA

25. After CalPERS received an anonymous tip regarding respondent, CalPERS investigator Pravneel Sharma conducted an investigation. Sharma listened to a 2022 podcast episode sent by the anonymous source featuring respondent as a guest discussing the topic, "Sex is a Part of the Rave Culture." Respondent mentioned in the podcast his event company, Sensory Overload Empire. Sharma researched respondent's presence in social media, prepared a report of his findings, and compiled a DVD of many of respondent's posts from June 25, 2020, through June 1, 2022.

These posts establish that respondent operates Sensory Overload Empire, which produces art and music events. Respondent's social media accounts contain numerous videos depicting respondent at events energetically dancing and marching in platform boots, carrying objects over his head, gyrating, and squatting, all while moving freely and without apparent pain. Respondent does not appear to be wearing a back support belt in any of the social media posts.

INDEPENDENT MEDICAL EVALUATION OF DR. WILLIAMS

26. On June 24, 2022, respondent was evaluated by board-certified orthopedic surgeon Don T. Williams, M.D., at the request of CalPERS. Dr. Williams has been in private practice for 30 years. He treats many patients with lower back conditions, but does not perform back surgery. Dr. Williams interviewed respondent,

reviewed his medical records, reviewed the duties and essential functions of his position, reviewed the video evidence of respondent's social media posts, and performed an orthopedic examination. He wrote a report with his findings, and a supplemental report dated April 27, 2023, after receiving additional information. Dr. Williams concluded that respondent is not substantially incapacitated from performing his usual duties as a Firefighter 1 for CAL FIRE.

27. Dr. Williams testified at hearing, consistent with his report. Respondent reported to Dr. Williams at the June 2022 examination that he performs lawn maintenance and fire defense landscaping work. He did not report his work producing art and music events. Respondent reported that he could run for 30 minutes and could lift 40 pounds without pain. He reported some pain with driving more than four hours and some problems sleeping. He reported that earlier that week, he had driven to Los Angeles and back (eight hours round trip) and had built a custom wood bed.

28. Dr. Williams reported that his physical examination of respondent produced no significant findings. Respondent was able to touch his toes and had excellent grip strength. The muscles and reflexes of the lumbar spine were normal. Respondent did not report pain during the examination.

29. Dr. Williams noted that the July 2020 MRI findings were normal per the radiologist and did not reflect disc disease. He saw no evidence of stenosis or pinching of the nerve. He credits the interpretation of the radiologist over Dr. Moelleken. The December 2021 CT scan showed a bulge, which Dr. Williams described as a "mild change." He disagrees with Dr. Moellken's diagnosis of stenosis. Dr Williams explained that respondent has a mild pathology and that 95% of the population will at some point have a small bulge similar to what appears in respondent's CT scan, and will recover. He does not believe respondent is precluded from lifting.

30. Dr. Williams was provided with reports from the workers' compensation Qualified Medical Evaluation (QME).¹ Dr. Williams characterized the reports as imposing a preclusion against lifting more than 25 pounds, but he views the recommendation as prophylactic in nature and does not believe respondent needs any work restrictions. He acknowledges that there is a potential that respondent's condition could worsen. Dr. Williams reported that the QME report noted that an MRI from May 11, 2022, was normal, with no evidence of degenerative disc disease.

31. Dr. Williams noted that respondent's social media postings show him active, moving normally and without pain.

32. In reaching his conclusion that respondent is not substantially incapacitated from performing his duties as a Firefighter 1, Dr. Williams noted that he is able to perform all activities of daily living. He believes respondent can perform all the duties of his position as reported by CAL FIRE, and that no restrictions are warranted.

Ultimate Findings

33. The opinion of Dr. Williams that respondent is not substantially incapacitated from the duties of a Firefighter 1 is more persuasive than that of Dr. Moelleken and is consistent with the evidence.

34. Dr. Moelleken acknowledged that respondent could do the duties of his position for "a day or two" and based his opinion that respondent is incapacitated on an understanding that respondent would be required to lift 50 pounds for 24 hours straight. This view is contradicted by the documents from CAL FIRE reflecting the

¹ The QME reports were not offered into evidence at the hearing.

position requires infrequent lifting of 50 pounds and occasional prolonged lifting of over 25 pounds for an extended period. Dr. Moelleken did not address the 2022 MRI findings in his 2023 report. He substituted his judgment for the judgment of the radiologist in interpreting the 2020 MRI. His opinion that respondent's social media postings do not undermine his reports of back pain is not credible. For these reasons, his opinions were given less weight than Dr. Williams's opinions.

35. It was not established by a preponderance of the evidence that respondent is substantially incapacitated from performing the usual and customary duties of a Firefighter 1 for CAL FIRE.

LEGAL CONCLUSIONS

1. Pursuant to Government Code section 21151, subdivision (a), a state safety member who becomes incapacitated from the performance of his or her usual duties as the result of an industrial disability shall be retired for disability. The burden of proving disability is on the employee to establish, by competent medical evidence, that he or she is incapacitated. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691.)

2. It was not established by competent medical evidence that respondent is substantially incapacitated from the performance of his usual and customary duties as a Firefighter 1 for CAL FIRE. (Factual Findings 33-35).

3. Respondent has not met his burden of proving that he is entitled to an industrial disability retirement.

ORDER

The application of Nicholas M. Abarca for industrial disability retirement is denied.

DATE: 09/28/2023

Karen Reichmann

KAREN REICHMANN

Administrative Law Judge

Office of Administrative Hearings