ATTACHMENT A

THE PROPOSED DECISION

BEFORE THE
BORARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Disability Retirement of:	Case No. 2016-0300
THOMAS W. BARKLEY, JR., Respondent, and CALIFORNIA STATE UIVERSITY, LOS ANGELES, Respondent.	OAH No. 2016070775

PROPOSED DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, heard this matter in Los Angeles, California on December 19, 2016. Kevin Kreutz, Senior Staff Attorney, represented petitioner California Public Employees' Retirement System (CalPERS). Respondent Thomas W. Barkley, Jr. did not appear and was not represented at the hearing. No appearance was made on behalf of respondent California State University, Los Angeles.

The matter proceeded by default. The record was closed and the matter was submitted for decision at the conclusion of the hearing. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

FACTUAL FINDINGS

1. Anthony Suine signed the Statement of Issues in his official capacity as Chief, Benefit Services Division of CalPERS.

2. California State University, Los Angeles (CSULA) employed respondent Barkley as a member of its instructional faculty with the rank of Professor of Nursing. As such, Barkley is a state miscellaneous member of CalPERS pursuant to Government Code section 21150.

3. Barkley holds undergraduate, graduate, and doctorate degrees in nursing. His nursing career spans three decades, and he has served as an adult care nurse practitioner since 1998. Barkley's duties and responsibilities as a tenured Professor of Nursing at CSULA are set forth in the *Job Duty Statement/Job Description* as follows:

> Job duties of university nurse practitioner/registered nurse faculty (must be able to teach graduate and undergraduate courses including classroom and field/clinical experiences)
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> - Standing to teach lectures up to five hours each day
>   - Keyboard and mouse use to answer emails, prepare lectures, etc
> - Sitting for long period of teams [*sic*] to answer emails and prepare lectures
> - Walking, standing, and rounding with students up to 12 hours each day in the hospital
> - Bending and lifting patients when called upon
>   - Involving bending and twisting of the neck, knees, hips, waist, shoulder, etc.
>   - Involving pushing, pulling, grasping
> - Ability to participate in code blue CPR, including chest compressions
> - Carrying textbooks and materials for class and clinical up to 30 lbs occasionally

(Exh. 13.)

4. In September 2014, Barkley noticed numbness in his fifth fingers and that he was experiencing pain in his left hip and leg. After initially seeking chiropractic treatment, Barkley obtained an MRI, and he received a diagnosis of degenerative disc disease and a compressed spinal cord. A pain management physician treated Barkley with steroid injections, and a spinal surgeon, Terrence Kim, M.D., subsequently diagnosed Barkley with cervical spine cord compression and myelopathy.

5. On December 22, 2014, Dr. Kim performed spine surgery on Barkley. Dr. Kim's surgical discharge summary is reported[1] to document the following: "Diagnoses Cervical C4-C7 severe critical stenosis. C4-C7 myelomalacia with spinal cord signal changes. C4-C7 cervical myeloradiculopathy. Multilevel degenerative diseases at C2-C7. Underwent cervical C4-C7 complete microscopic laminectomy with bilateral medial facetectomy and foraminotomy decompression. Condition on discharge Stable. Given prescription for oxycodone (OxyContin), carisoprodol (Soma), Colace, Benadryl, Ambien, and ondansetron (ofran). Avoid excessive bending, lifting, or twisting." (Exh. 10 at pp. 4-5.)

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[1] Dr. Kim's surgical discharge summary was not produced at the administrative hearing. It is discussed in the Review of Medical Records section of an Orthopedic Independent Medical Examination, portions of which are set forth in Factual Finding 10.

6. After his surgery, Barkley did not return to work. On March 6, 2015, Barkley applied for and was granted a service retirement, which became effective March 26, 2015.

7. Post-operatively, Barkley is reported to have experienced "decreased numbness and tingling in his hands and legs. His balance and instability with walking improved. He had a postoperative MRI and he was not told of any type of cord compression. Follow up x-rays apparently showed stability. He is scheduled for continued follow up x-rays to check stability of the cervical spine. Due to some continued lumbar spine complaints, in April of 2015 he had an epidural steroid injection of the lumbar spine, which gave him good relief and brought the pain down to 1-2/10. However, since that time gradually the pain has increased in severity." (Exh. 10 at p. 2.)

8. In a March 18, 2015 Physician's Report on Disability, Dr. Kim checked the "Yes" box in response to the query, "Is the member currently substantially incapacitated from performance of the usual duties of the position for their current employer." (Exh. 14.) Dr. Kim additionally wrote "attached + checklist" in response to instructions that he "describe specific job duties/work activities that the member is unable to perform due to incapacity." (*Ibid.*) CalPERS wrote Dr. Kim requesting, among other things, that, as the treating medical specialist, he "list the **specific job duties** the member is unable to perform based on the job description and physical requirements (i.e. unable to bend, twist, lift over 10 pounds, walk on uneven ground, etc.)." (Exh. 15.) No evidence of Dr. Kim's response, if any, to CalPERS request for additional information was offered at the administrative hearing.

9. On April 7, 2015, Barkley applied for a disability retirement and identified his disability in a Disability Retirement Election Application as "Degenerative joint disease, spinal cord compression requiring accommodations, L5 1s, disk herniation also numbness in fingers and [left] hip and leg pain [leading to] MRI's [leading to] surgery." (Exh. 3 at. p. 2.)

10. In order to determine whether Barkley was "substantially incapacitated from the performance of his job duties." CalPERS arranged for Barkley to attend an Orthopedic Independent Medical Examination (IME) by Thomas. W. Fell, M.D. (Exhs. 6 and 7.) On October 6, 2015, Dr. Fell interviewed and examined Barkley, and Dr. Fell prepared an October 6, 2015 IME report documenting Barkley's complaints, medical history, and diagnosis and addressing Barkley's ability to perform his essential duties as a teacher. In pertinent part, the October 6, 2015 IME report provides the following:

> PRESENT COMPLAINTS
>
> Cervical spine and upper extremities. There is sore spot in the right cervical spine. He feels a pulling sensation. He says deep manipulation hurts, but then he gets relief. There is occasional pain if he does not touch, but it is tolerable. He states he has to rest in the afternoon because of the cervical spine pain. He states that since the myelopathy and even the surgery, his writing has been worse. His arms are more sensitive to increased temperature. He has constant right greater than left feeling of numbness in the 4th and 5th fingers.

Lumbar spine and lower extremities. The lumbar spine has left superior buttocks pain that goes from the posterior thigh to the lateral thigh. There are good and bad days. He gets numbness in the mid plantar aspect of the left foot. This comes and goes. Coughing and sneezing does not cause pain.

Prolonged sitting and standing causes increased cervical spine pain, as well as pain in the left leg.

[¶ . . . ¶]]

PHYSICAL EXAMINATION

GAIT

He walks without a limp

STANCE

On stance, the pelvis is level, the back is straight and the head is balanced over the midline

CERVICAL SPINE

There is a well healed "7" cervical spine scar that is slightly tender. There is slight tenderness over the paraspinal muscles

There are no fascial nodules

Trapezii are nontender without spasms

Range of motion of the cervical spine reveals rotation to 60/60 degrees, lateral tilt to 30/30 degrees, extension to 30 degrees, and forward flexion-chin to the chest. All ranges of motion are without pain. Foraminal compression test is negative.

SHOULDERS

Examination of the shoulder girdles reveals no tenderness to palpation. There is no evidence of atrophy or swelling

Range of motion of the shoulders reveals abduction to 180/180 degrees, adduction to 50/50 degrees. Forward flexion to 180/180 degrees, external rotation to 90/90 degrees, internal rotation to 70/70 degrees, and extension to 50/50 degrees.

Shoulder motor strength in flexion, extension, abduction, adduction internal rotation, and external rotation are all 5/5

UPPER EXTREMITIES

Reflexes Biceps 2+/2+, triceps 2+/2+

Pinprick sensation in the upper extremities is intact

Abduction strength is strong

There is no evidence of thenar or hypothenar atrophy

UPPER EXTEMITY MEASUREMENTS

	RIGHT	LEFT
Forearms	25 cm	25 cm
Biceps	27 cm	27cm

LUMBAR SPINE

There is left posterior superior iliac spine tenderness. On palpation of the left posterior superior iliac spine it can increase some of the pain in the left leg

There are no spasms. There are no fascial nodules

Range of motion of the lumbar spine reveals the patient bends forward to the level of -3" above the ankles. Lateral tilt is to 20/20 degrees. Extension is to 10 degrees.

LOWER EXTREMITIES

Reflexes Knees 2+/2+, ankles 2+/2+

Babinski's are downward bilaterally

Pinprick sensation in the lower extremities is intact

The extensor halluces longus is strong

The motor examination, including extensor halluces longus, hamstrings, quadriceps and hip flexors, are all 5/5

Straight leg raising to 70/70 degrees

Sciatic tension test is negative

There is slight numbness over the plantar aspect of the left foot with a positive Tinel's at the posterior tibial tender and also the tarsal tunnel on the left, reproducing the feeling of numbness in the left foot

DIAGNOSIS

1. Multilevel degenerative disc disease with cervical myelopathy, status post decompression laminotomy

2. Lumbosacral sprain/strain with Grad I anterolisthesis at L5-S1 and disc protrusion of 3mm abutting the existing L5 nerve root, per the MRI Mr. Barkley brought in

DISCUSSION

Mr. Barkley had to stop working due to the necessity of surgery due to a significant cervical myelopathy. The surgery was very successful in reversing the myelopathy. He is left only with a subjective feeling of numbness in the 4th and 5th fingers, even though pinprick sensation is grossly intact.

He also has coincidental problems of some lumbar pain with fasciitis of the left posterior superior iliac spine. He is constantly going to therapy for this.

I have been asked to address specific issues.

In his job he . . . works as a nursing student teacher, mainly in a hospital setting. The physical requirements for the job were reviewed. He is able to stand and teach the lectures and do the keyboard. He is able to sit for prolonged periods of time and stand and walk with the students. I would not allow him to work 12-hours continually, but he would be able to work an 8-hour day, with occasionally working a 12-hour day. I would not allow him to do the lifting of patients. I would have him only allow the student to do the lifting of the patients. He would be able to instruct chest compression and he could take part in the CPR on [*sic*] an extreme emergency, but not on routine basis. I would allow him to repeatedly lift up to 20-pounds. I would not allow him to lift greater than 30-pounds.

Overall, I feel Mr. Barkley is able to perform his essential duties as a teacher as he described and as described in the job descriptions, with the modifications as mentioned above. I do not feel that he is substantially incapacitated at this time.

> Mr. Barkley was able to work even with his myelopathy and his lower back pain, doing all the substantial duties of the job up until the time he had the surgery. He was substantially incapacitated temporarily for six to seven months after his surgery. He has actually improved from the time he last worked in December of 2014. Therefore, if he was able to work up until 12/21/14, he would certainly be able to perform the substantial duties at this point, since his condition has improved, particularly in regard to the myelopathy.

(Exh. 10 at pp. 8-9.)

11. CalPERS noted that, in the "Discussion" section of the October 6, 2015 IME report, Dr. Fell stated that Barkley "would certainly be able to perform the substantial duties at this point, since his condition has improved, particularly in regard to the myelopathy," but that Dr. Fell also appeared to have recommended work restrictions. (See Exh. 11.) CalPERS therefore requested Dr. Fell to clarify his opinion regarding Barkley's ability to perform his usual duties with or without restrictions. In an October 26, 2015 Orthopedic IME Supplemental Report, Dr. Fell opined, "Mr. Barkley can perform his usual duties without any formal job modifications as a teacher." (Exh. 12.) Dr. Fell elaborated as follows:

> On the open labor market due to his cervical and lumbar pathology as well as his surgery, he would have prophylactic restrictions from lifting, as outlined in my 10/06/15 report, however, this does not affect his job as a teacher. He was performing his usual duties without modification of any sort prior to his surgery when his myelopathy was severely affecting him. With the surgery, he has improved so that he is now better than he was prior to the surgery. Up until the time of his surgery he was working his usual and customary occupation without modification.
>
> Mr. Barkley is **not** substantially incapacitated from the performance of his work duties as a teacher and can perform them without modifications.

(Exh. 12; Bold emphasis in original.)

12. By letter dated November 16, 2015, CalPERS notified Barkley that his application for disability retirement was denied. (Exh. 4.) Barkley filed an appeal on December 14, 2016. (Exh. 5.)

13. In a December 18, 2016 memorandum containing 16 paragraphs labeled "Comment," Barkley responds to what he has identified as "numerous inaccuracies, contradictions, and omissions" in Dr. Fell's reports. (See Exh. A.) In general, Barkley maintains that Dr. Fell's understanding of his duties and responsibilities is inaccurate, that Dr. Fell's review of the medical issues in his case is superficial, and that Dr. Fell's discussion of the severity of his condition was shallow. In specific instances Barkley commented that "it is extremely taxing to use the keyboard for extended periods of time with little to no feeling in the 4th and 5th fingers, especially given the time to produce lectures and answer emails." (Exh. A at p. 4.) Barkley commented that "[i]t is both unreasonable and in some

cases unethical to imply that particular components of the job duties of a registered nurse, moreover a university nursing professor, can be modified." Barkley noted that "work shifts are 12 hours" and that he "cannot discover a patient requiring CPR and wait for students to arrive to 'instruct them' on chest compressions. Moving and lifting of patients is an expected requirement of nurses. In addition, nurses must also be able to evacuate patients from their beds and/or rooms in emergencies which require the ability to lift patients." (*Ibid.*)

14. Barkley provided the following summary of his objections to Dr. Fell's reports.

> In summary, it is objectively clear that Dr. Fell did a superficial appraisal of the Physical Requirements of Position/Occupational Title checklist form and the Job Duty Statement/Job Description submitted in the Disability Application. It is also apparent that he did not understand the job description of a university nursing professor teaching acute care NP students, nor did he adequately review the entire job requirement specifics.
>
> In the end, he judged that I was "not substantially incapacitated" from the performance of my work. In comparing the required Physical Requirements of Position/Occupational Title checklist form and Job Duty Statement/Job Description with physical assessment outcomes (even somewhat addressed by Dr. Fell), and taking into account my entire medical record, it should be clear that if one is (a) not able to feel the 4th and 5th fingers of the right hand and to some extent the left hand same fingers, experiences (b) numbness to left center portion of the foot, along with (c) severe sciatic pain in the buttocks and legs most days of the week, (d) has restrictions to their job such as lifting, CPR, and (e) work hours per day limitations for standing, among others, that one is substantially incapacitated with regard to their collective job duties.
>
> Equally disturbing is the ignoring and omission of future implications regarding the underlying disease pathologies in the discussion sections of both reports by Dr. Fell. Both reports fail to address the chronic nature of the underlying diagnoses. Specifically, "multilevel degenerative" (disk disease) and "L5-S1 spondylolisthesis" are significant findings with concerning future implications as these disorders progress, affecting overall prognosis, activities of daily living, and the ability to carry out future job requirements."

(Exh. A; Underlining in original.)

15. Dr. Fell was unavailable to expound upon his findings and medical conclusions regarding Barkley's condition. Dr. Fell is deceased.

16. No medical expert opinion or report contradicting Dr. Fell's findings and conclusions asserted in the October 6, 2015 IME report and the October 26, 2015 Orthopedic IME Supplemental Report was offered at the administrative hearing.

LEGAL CONCLUSIONS

1. "A member incapacitated for the performance of duty shall be retired for disability . . . if he or she is credited with five years of state service, regardless of age[.]" (Gov. Code, § 21150, subd. (a).)

2. "'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, 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." (Gov. Code, § 20026.)

3. Courts have long established that to be "incapacitated for the performance of duty" an applicant for a disability retirement must have a "substantial inability" to perform his or her "usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) "Substantial inability" means more than difficulty in performing the tasks common to one's profession. For example, *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, involved a California Highway Patrol sergeant who suffered a back injury lifting an unconscious motorcycle accident victim. This injury aggravated previous injuries suffered in two prior accidents. The sergeant established that he experienced pain from prolonged sitting. The court found the sergeant's physical impairments insufficient to support a finding of disability because he was substantially able to perform his usual duties as a highway patrol sergeant although he experienced back pain.

4. Whether an individual is substantially unable to perform his or her "usual duties" requires an examination of the duties actually performed by the individual. Generalized job descriptions and physical standards are not controlling. Infrequently performed duties are not controlling. Contentions that a task should be avoided as a prophylactic restriction are to be rejected as the court did in the *Hosford* case. The highway patrol sergeant in the *Hosford* case claimed that his back injuries created an increased risk for further injury. In rejecting that claim, the court stated that the sergeant's "assertion does little more than demonstrate his claimed disability is only prospective (and speculative), and not presently in existence." (*Id.* at 863.)

5. Barkley has the burden of proving by a preponderance of the evidence that he presents with a substantial inability to perform his usual duty that entitles him to a disability retirement. (See *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' (Citations.) . . . [T]he sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is 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.) (Emphasis in text.) To meet his burden of proof by a preponderance of the evidence, Barkley "must produce substantial evidence. contradicted or

un-contradicted, which supports the finding [of disability]." (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 339.) Barkley has failed to meet his burden.

6. Dr. Fell's October 6, 2015 IME report and October 26, 2015 Orthopedic IME Supplemental Report embody the only competent medical opinion on Barkley's condition that was offered at the administrative hearing. The reports contain findings establishing Barkley's physical impairments—left hip and leg pain and numbness in certain fingers—due to cervical myelopathy. The reports contain findings establishing that surgery "was very successful in reversing the myelopathy." (See Factual Finding 10.) Based on those findings, the reports articulate Dr. Fell's opinion that Barkley "is **not** substantially incapacitated from the performance of his work duties as a teacher and can perform them without modification." (See Factual Finding 11.) Dr. Fell opined that, in performing the duties of a "nursing student teacher, mainly in a hospital setting," Barkley "is able to stand and teach the lectures and do the keyboard. He is able to sit for prolonged periods of time and stand and walk with the students. . . . He would be able to instruct chest compression and he could take part in the CPR on [*sic*] an extreme emergency, but not on routine basis. I would allow him to repeatedly lift up to 20-pounds. I would not allow him to lift greater than 20-pounds." (Factual Finding 10.) The medical findings and opinion embodied in the October 6, 2015 IME report and October 26, 2015 Orthopedic IME Supplemental Report are thorough and un-contradicted. Barkley offered no competent medical opinion to support a finding that he is substantially unable to perform his usual duties as a Professor of Nursing as set forth in Factual Finding 3. Barkley's claims about "future implications regarding the underlying disease pathologies" amount to the kind of speculation about a prospective disability expressly rejected in the *Hosford* case. (See Legal Conclusion 4.)

ORDER

Respondent Thomas W. Barkley, Jr.'s appeal of the decision by the California Public Employees' Retirement System denying his application for disability retirement is denied.

DATED: January 18, 2017

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JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings