

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:

DENNIS HATFIELD,

Respondent,

and

MENLO PARK CITY SCHOOL DISTRICT,

Respondent.

Case No. 2014-0999

OAH No. 2016070894

PROPOSED DECISION

This matter was heard before Heather M. Rowan, Administrative Law Judge, Office of Administrative Hearings, State of California, on February 23, and April 27, 2017, in Fresno, California.

Charles Glauberman, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Dennis Hatfield (respondent) appeared and represented himself. During hearing on April 27, 2017, respondent was supported by Jim Niehaus.

There was no appearance by or on behalf of respondent Menlo Park City School District (District). CalPERS established that it duly served the District with a Notice of Hearing. Consequently, this matter proceeded as a default hearing against the District pursuant to Government Code section 11520, subdivision (a).

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED May 23 20 17

Evidence was received on February 23, and April 27, 2017.¹ The record was held open until May 3, 2017, to allow CalPERS to provide respondent's accurate "last day on pay" date. The record was closed and this matter was submitted for decision on May 3, 2017.

ISSUE

On the basis of orthopedic (multiple arthritis issues) and internal (massive pulmonary embolism) conditions, is respondent permanently disabled or substantially incapacitated from performing his usual and customary duties as a Supervisor of Maintenance, Operations and Transportation for the District?²

FACTUAL FINDINGS

1. Respondent was employed as a Supervisor of Maintenance, Operations and Transportation by the District. Respondent submitted a Disability Retirement Election Application (application) to CalPERS dated July 31, 2013.

Respondent's Disability Retirement Application

2. In his application, respondent described his disabilities as:

Multiple arthritis issues; massive pulmonary embolism.

Respondent stated that his disability occurred on April 18, 2012, which was the date he experienced a massive pulmonary embolism. In explaining how his disability occurred, he stated:

Arthritis issues occurred over course of employment; embolism cause is unknown.

¹ On February 23, 2017, the hearing was continued and an additional hearing day was added to allow CalPERS time to amend the Statement of Issues to include all the bases for disability retirement respondent listed on his application, and to send respondent to an orthopedic specialist for an Independent Medical Examination. On April 27, 2017, the second day of hearing, counsel for CalPERS stated that CalPERS elected not to send respondent to an orthopedic IME or to amend the Statement of Issues.

² The Statement of Issues originally included only the massive pulmonary embolism as respondent's condition. At the hearing, on respondent's motion, the Statement of Issues was amended on page four, paragraph IX, to include "multiple arthritis issues."

Respondent described his limitations/preclusions as: "Shortness of breath, unable to walk distance, and arthritis pain." Respondent stated that his disability has affected his ability to perform his job as follows: "unable to perform duties required as needed."

3. By letter dated March 7, 2014, CalPERS informed respondent that respondent's medical reports from Dr. Melissa Stenberg, Dr. Apurva Marfatia, and Dr. Samuel Rush had been reviewed and that his disability retirement application had been denied. Respondent was informed of his right to appeal, and he timely appealed from the denial of his application.

Duties of a Supervisor of Maintenance, Operations, and Transportation

4. CalPERS submitted two exhibits that described the duties of a Supervisor of Maintenance, Operations, and Transportation: (1) the District's job description; and (2) a completed Physical Requirements of Position/Occupational Title form.

5. As set forth in the position description, a Supervisor of Maintenance, Operations, and Transportation, under general direction and supervision of the Superintendent, serves as a member of the school and district management teams. The supervisor is responsible for planning and supervising the District's maintenance operations and transportation programs, inspecting and evaluating the performance of assigned personnel, and performs skilled or semi-skilled work in one or more maintenance trades. The position description described the typical physical requirements of the position as follows:

Inspect buildings; perform skilled and semi-skilled maintenance and repair work; use and operate power tools; drive vehicle to work sites; perform heavy manual labor; lift and carry up to 50 pounds.

6. As set forth in the completed Physical Requirements of Position/Occupational Title form, a Supervisor of Maintenance, Operations, and Transportation: (1) frequently (three to six hours a day) stands, walks, uses fine manipulation, simple grasping, repetitively uses hands, keyboard, and the computer mouse, and drives; (2) occasionally (up to three hours a day) crawls, kneels, climbs, squats, bends at the waist and neck, reaches above and below the shoulder, pushes and pulls, power grasps, lift and carries up to 75 pounds, walks on uneven ground, works with heavy equipment, is exposed to excessive noise, extreme temperature and humidity, dust, gas, fumes, or chemicals, works at heights, operates foot controls or repetitive movements, uses special visual or auditory equipment, and works with bio-hazards; and (3) never runs.

Independent Medical Evaluation

7. CalPERS retained Samuel Rush, M.D. to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Rush has been a licensed physician in California since

1972. He is Board-certified in Internal Medicine and a Fellow of the American Academy of Cardiology. Since 1974, Dr. Rush has operated a private practice in Fresno, California. On January 10, 2014, Dr. Rush prepared an IME report.

8. As part of the IME process, Dr. Rush reviewed respondent's duty statement, job description, physical requirements, and relevant medical records. He also interviewed and examined respondent. In his IME report, Dr. Rush concluded that respondent was not substantially incapacitated from the performance of his job. At hearing, Dr. Rush testified that he did not have a specific memory of the examination, but that he documented his findings accurately in his IME report.

9. At the time of the IME, respondent was 56 years old. During the evaluation, respondent reported to Dr. Rush that his main problem was orthopedic. He reported to Dr. Rush that he had degenerative arthritis in his back, both hips, right knee, left ankle, and right wrist, and that he had a left ankle injury. Respondent also reported a bilateral hip replacement in 2005. Dr. Rush's report states that respondent reported "no specific joint swelling . . . or limitations" at the time of the IME. Respondent also informed Dr. Rush that he had not worked since April of 2012, when he had a massive pulmonary embolism.

10. Dr. Rush reviewed respondent's medical records he received from CalPERS. He described the records as "voluminous," and included a long history of degenerative discs, arthritis, and spinal stenosis. Dr. Rush did not specifically refer to respondent's avascular necrosis of the talus, which is a loss of blood to the ankle bone, causing that bone to essentially die. The records describe respondent's 2012 pulmonary embolism, state that he continues to take Coumadin, a blood thinner, and that he "was thought to be hemodynamically stable." Respondent confirmed that he continues to take Coumadin, and that he has "recovered fairly well" from the pulmonary embolism.

11. During his physical exam, Dr. Rush noted a normal range of motion in respondent's spine, shoulders, arms and wrists, hips, knees, and ankles. To determine whether respondent had recovered from his pulmonary embolism, Dr. Rush listened to respondent's lungs. Dr. Rush testified that if he had a patient with a history of a pulmonary embolism, he would run blood tests, determine the patient's oxygen function, determine whether and when the patient is out of breath, run heart tests, and listen to his lungs.

12. At hearing, Dr. Rush testified regarding his examination, respondent's medical history, and current complaints. Dr. Rush specifically noted throughout his report that respondent suffered from various orthopedic and arthritis issues. He testified that he watched respondent walk about 10 feet in the exam room and noted no obvious abnormalities. Finally, when asked whether a person with all of respondent's conditions could supervise the maintenance of five schools, Dr. Rush testified that respondent could perform the job duties with his conditions, except that respondent's avascular necrosis of the talus would not allow him to perform his job duties. He found that respondent was not substantially incapacitated from performing his usual job duties, and that he "is able to lift and carry up to 50 pounds."

CalPERS's Retirement Specialist

13. Mari Cobbler is a Retirement Program Specialist II, and her job duties focus primarily on appeals. She monitors cases related to disability retirement and reviews the appeals. When she receives an appeal, she reviews the medical information she receives from the member, the appeal letter, and the basis for appeal. She was assigned to review respondent's disability application.

14. Ms. Cobbler testified that she reviewed respondent's application, and noted that the bases for appeal were a massive pulmonary embolism and arthritis conditions. Because respondent did not have a record of being seen by a specialist for his arthritis conditions, nor did CalPERS have a record of respondent providing medical records to support his orthopedic conditions, CalPERS did not consider those conditions as a basis for disability retirement. CalPERS received a physician's report from respondent's primary care physician that referred to respondent's pulmonary embolism and his avascular necrosis of the talus bone, finding that respondent was substantially incapacitated from performing his job duties. On request, respondent submitted further information from a specialist regarding his pulmonary embolism, and because there was a specialist's report and medical records, CalPERS reviewed the application on the basis of the pulmonary embolism alone and sent him to an IME for evaluation of that condition.

15. About ten months after respondent submitted his application for disability retirement, he sent CalPERS an IME report from Dr. Anthony Bellomo, a board certified orthopedic surgeon. Dr. Bellomo opined that respondent was substantially incapacitated from performing the usual duties of his job. He could not determine when the disability began, but on questioning by CalPERS, Dr. Bellomo responded that respondent was certainly substantially incapacitated as of April 18, 2012, which was the date of respondent's massive pulmonary embolism. Because Dr. Bellomo was not able to determine the specific date of disability based on the orthopedic conditions, and CalPERS did not have related medical reports to corroborate the findings, CalPERS did not send respondent to an IME based on his orthopedic conditions.

16. Ms. Cobbler testified that CalPERS did not receive medical reports regarding respondent's orthopedic conditions. While respondent did sign an "Authorization to Release Protected Health Information," Ms. Cobbler stated that the burden is on the member to produce medical records, and even though CalPERS has the medical release form, it does not request medical documents from anyone but the member. Additionally, Ms. Cobbler testified that the information CalPERS received did not support that respondent was disabled from his last day on pay due to the orthopedic conditions. Respondent's records support that he was disabled as of the date of his pulmonary embolism.

Respondent's Evidence

17. Respondent testified regarding the pain he experienced in his back, ankle, wrist, and knee. He also described the impact of his massive pulmonary embolism. He

stated that, because he takes blood-thinners, he has frequent minor injuries that can become infected or worsen and extend several months. He was unable to perform the duties of his job because he cannot walk throughout five school campuses, sit or stand for long periods, or perform manual labor.

18. Respondent did not call an expert witness to testify on his behalf. He submitted a sampling of his medical records that cover several years with many doctors. Because no medical doctor testified on respondent's behalf, the records were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).³ Of note in the records are a diagnosis of avascular necrosis of the talus bone starting in September of 2004, a genetic test in 2012 that shows respondent is at an elevated risk for venous thrombosis, and a 2012 report from his primary care physician stating that stress aggravates the possibility of another embolism. In addition to the medical records that respondent presented at hearing, respondent testified that when he saw Dr. Rush for the IME, Dr. Rush had in his possession "voluminous records" regarding respondent's various conditions. Respondent assumed that when he signed the "Authorization to Release Protected Health Information,"⁴ and when he saw the records that Dr. Rush had in his possession, CalPERS had requested his medical records and provided them to Dr. Rush.

19. When respondent learned that CalPERS had denied his disability retirement application, he took it upon himself to get his own IME from an orthopedic surgeon. That surgeon, Dr. Bellomo, provided CalPERS an IME report based on his review of respondent's job description, respondent's subjective history, a review of medical records, including x-rays and a CT scan, and a physical examination. In his physical examination, Dr. Bellomo found decreased range of motion in respondent's right wrist, both hips, right knee, and a "significant loss of range of motion" in the left ankle. He also noted significant spinal stenosis and multi-level degenerative disc disease, based on his review of a CT scan on respondent's lumbar spine.

20. Dr. Bellomo concluded that respondent would not be able to perform many of the job duties of a Supervisor of Maintenance, Operations, and Transportation. In particular, respondent would not be able to lift up to 50 pounds, walk or stand for extended periods, bend or stoop repeatedly, or perform heavy manual labor. He concluded that the incapacity was permanent, but was not able to determine an onset date. He found that as of the date of the report, respondent was substantially incapacitated from performing his usual job duties. When PERS asked Dr. Bellomo to supplement his report to identify a date of incapacity, he

³ "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." (Gov. Code § 11513, subd. (d).)

⁴ The authorization states that the signor authorizes the disclosure of health information and records "to [CalPERS] or its representative, for the sole purpose of determining [the] physical or mental condition, illness, or disability" of the signor.

stated that respondent was incapacitated as of the date of respondent's pulmonary embolism on April 18, 2012. He added that respondent modified his work activities up to the date of his embolism to avoid further injury to his back.

21. Respondent testified that his avascular necrosis of the talus began in 2004 and was due to a work injury. His arthritis issues have been worsening for many years and have caused enough pain to prevent him from working for days at a time since at least 2011. He had a bilateral hip replacement in 2004. His spinal stenosis and lumbar degeneration have also been worsening over the years, and began prior to 2011.

22. Respondent testified that after his pulmonary embolism in April 2012, he attempted to return to work, against the advice of his doctor. In August of 2012, he worked for a few hours per day, but was unable to continue regularly due to shortness of breath and pain. Respondent's primary care physician, Dr. Melissa Stenberg, wrote a letter on behalf of respondent on December 4, 2012, stating that she advised respondent to "extend his medical leave indefinitely" due to his "medical condition." On April 5, 2013, Dr. Stenberg submitted a letter on respondent's behalf stating that she advised that he is unable to return to work due to "ongoing medical issues." Neither letter specifies the precise medical issues to which Dr. Stenberg was referring. She also submitted an undated "Physician's Report on Disability" to CalPERS, which noted that respondent was permanently and substantially incapacitated from performing his job duties.

23. Respondent told Dr. Rush that his disability began on April 18, 2012, the date of his pulmonary embolism. Respondent's application for disability retirement reports his last day of paid work was May 9, 2013. PERS's records show respondent's "last day on pay" was June 1, 2013.

Discussion

24. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, at the time he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Supervisor of Maintenance, Operations and Transportation for the District. The medical evidence that respondent submitted was admitted as administrative hearsay and is not considered as direct evidence. The burden was on respondent to offer sufficient competent medical evidence at hearing to support his disability retirement application. He failed to do so. He did not call an expert witness to testify.

25. Dr. Rush is board certified in internal medicine. He is not an orthopedic surgeon, nor does he specialize in orthopedics. To the extent he opined on respondent's health and abilities regarding his range of motion, spine, or other musculoskeletal functioning, his opinion cannot be considered. Dr. Rush testified that respondent could perform the usual duties of his job, but for his avascular necrosis of the talus. This opinion is also not within Dr. Rush's expertise. Dr. Rush's examination of respondent related to respondent's claimed condition of "massive pulmonary embolism" is within Dr. Rush's

expertise. He testified that he listened to respondent's lungs, took an oral history, reviewed medical records, and determined that respondent had recovered from his pulmonary embolism. He admitted at hearing that if had a patient who had a similar condition, he would perform much more extensive testing to determine whether the patient had recovered or was still at risk. His testimony was therefore not persuasive.

26. CalPERS did not offer a satisfactory explanation regarding why respondent's claimed disability on the basis of his orthopedic conditions was canceled, and not investigated. Ms. Cobbler testified that respondent did not submit the report of a specialist, along with medical records, to support his disability based on his arthritis issues. Based on the evidence, respondent was justified in assuming that CalPERS requested the Authorization for Release of Medical Records because it intended to request respondent's medical records. Additionally, respondent was justified in assuming that CalPERS had access to his medical records regarding his arthritis issues because he saw them at Dr. Rush's office, and because Dr. Rush clearly reviewed them in his medical record review. While the focus at hearing was respondent's disability as of April 18, 2012, the date of his pulmonary embolism, respondent was on the District's payroll until either May 9, 2013 (per respondent's application) or June 1, 2013 (per CalPERS's assertion). Dr. Rush's records review referred to years of orthopedic issues in respondent's medical records. It is unclear why CalPERS did not investigate this claim.

27. In sum, because respondent failed to offer sufficient competent medical evidence at the hearing to establish that, at the time he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Supervisor of Maintenance, Operations and Transportation for the District, his disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Supervisor of Maintenance, Operations and Transportation for the District, he is a local miscellaneous member of CalPERS, subject to Government Code section 21150.

2. To qualify for disability retirement, respondent had to prove that, at the time he applied, he was "incapacitated physically or mentally for the performance of [his] duties." (Gov. Code, § 21156.) As defined in Government Code section 20026,

"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.

3. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.) The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, 863, explained that prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, the court found that discomfort, which may make it difficult for an employee to perform his duties, is not sufficient in itself to establish permanent incapacity. (See also, *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.)

The burden of proof is on respondent to demonstrate that he is substantially incapacitated from the performance of his usual and customary duties such that he is permanently disabled. (*Harmon v. Board of Retirement of San Mateo County*, supra, 62 Cal. App. 3d 689; *Glover v. Board of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) To meet this burden, respondent must submit competent, objective medical evidence to establish that, at the time of his application he was permanently disabled or incapacitated from performing the usual duties of her position as a Supervisor of Maintenance, Operations and Transportation for the District. (See *Harmon v. Board of Retirement*, supra, 62 Cal.App.3d at 697.)

4. When all the evidence in this matter is considered in light of the analyses in *Mansperger*, *Hosford*, *Smith*, and *Keck*, respondent did not establish that his disability retirement application should be granted. He failed to submit sufficient evidence based upon competent medical opinion that, at the time he applied for disability retirement, he was permanently and substantially incapacitated from performing the usual duties of a Supervisor of Maintenance, Operations and Transportation for the District. Consequently, his disability retirement application must be denied.

ORDER

The application of respondent Dennis Hatfield for disability retirement is DENIED.

DATED: May 19, 2017

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Heather M. Rowan
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HEATHER M. ROWAN
Administrative Law Judge
Office of Administrative Hearings