

**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:**

**DAVID L. VIGIL**

**and**

**R.J. Donovan Correctional Facility, California Department of  
Corrections and Rehabilitation, Respondents**

**Agency Case No. 2020-0854**

**OAH No. 2020120761**

**PROPOSED DECISION**

Robert Walker, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 16, 2021. The hearing was conducted by videoconference.

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

David L. Vigil, respondent, appeared and participated in the proceeding.

No appearance was made by or on behalf of R.J. Donovan Correctional Facility, California Department of Corrections and Rehabilitation, respondent (R.J. Donovan Correctional Facility).

Based on proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default regarding R.J. Donovan Correctional Facility pursuant to Government Code section 11520.

The matter was submitted for decision on June 16, 2021.

## **ISSUE**

At the time Mr. Vigil applied for industrial disability retirement, was he substantially incapacitated, on the basis of a lumbar spine orthopedic condition or chronic pain syndrome from performing his usual and customary duties as a Material and Stores Supervisor I?

## **SUMMARY**

CalPERS denied respondent's<sup>1</sup> application for industrial disability retirement. Respondent contends that, at the time he filed his application, he was substantially incapacitated from performing his usual and customary duties. The record contains no evidence of competent medical opinion that would support a finding that respondent

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<sup>1</sup> The term respondent will be used to refer to Mr. Vigil.

was substantially incapacitated from performing his usual and customary duties. Thus, respondent failed to sustain the burden of proof.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. Respondent was employed by R.J. Donovan Correctional Facility. By an application dated September 12, 2019, respondent applied for industrial disability retirement. Respondent claimed disability based on the following:

Sprain of ligaments of lumbar spine encounter. Other intervertebral disc degeneration in lumbar region. SI [sacroiliac] joint disfunction. Chronic pain syndrome.

2. Respondent submitted an application for service retirement pending a determination regarding his application for industrial disability retirement.

3. At the time respondent filed his application for retirement, he was employed as a Material and Stores Supervisor I. By virtue of his employment, he is a state safety member of CalPERS subject to Government Code section 21151.

4. Respondent retired from service effective July 10, 2019, and has been receiving his retirement allowance.

5. By a letter dated June 16, 2020, CalPERS notified respondent that his application for industrial disability retirement was denied. The letter provided, in part:

This letter is in response to your application for industrial disability retirement. We reviewed all the medical evidence

submitted. Our review included the reports prepared by Tiffany Shay Alexander, M.D., Blake Thompson, M.D., Ralph Steiger, M.D., and James Fait, M.D. Based on the evidence in those reports, we have determined your orthopedic (lumbar spine) condition is not disabling. As a result, we find you are not substantially incapacitated from the performance of your job duties as a Materials and Store Supervisor I with the Department of Corrections RJ Donovan Correctional Facility. Therefore, we regret to inform you that your application for industrial disability retirement is denied. We considered an additional allegation listed on your disability retirement application (chronic pain syndrome) to determine if you are disabled from any other condition. The medical evidence received is insufficient for us to make a determination on this condition.

6. CalPERS advised respondent that the denial of his application for industrial disability retirement had no effect on his service retirement.

7. By a letter dated June 29, 2020, respondent appealed the denial of his application for industrial disability retirement.

### **Respondent Testified but Called No Witnesses**

8. Respondent testified as follows: Mentally, he can do nothing. He has to get on with his life. He has pain 24 hours per day and cannot sleep. He is an alcoholic because of the pain. He cannot sit still to watch television. He cannot carry his phone in his pocket. He has not worked in any capacity since his service retirement in July

2019. He said that, if he stopped doing things that hurt, he would have to stop doing everything.

9. Respondent called no witnesses.

### **Respondent Offered Documentary Evidence**

10. Respondent offered Exhibit G, which included: A 22-page independent medical examiner's report dated May 14, 2020, by James. M. Fait, M.D., the physician CalPERS retained to examine respondent and opine as to whether he is incapacitated for the performance of his duties; CalPERS's June 16, 2020, letter notifying respondent that his application for industrial disability was denied; respondent's June 29, 2020, letter appealing the decision to deny his application; and CalPERS's July 8, 2020, letter acknowledging receipt of respondent's appeal. Complainant had already offered these documents in evidence, and all of them had been received.

11. Respondent's Exhibit G also included approximately 270 pages of records, including respondent's medical records. Complainant objected that there was a lack of authentication of the records, and that objection was sustained.

12. Respondent offered Exhibits A and H, reports by Blake Thompson, M.D., one of respondent's treating physicians. Complainant objected that there was a lack of authentication of Dr. Thompson's reports, and that objection was sustained.

13. Respondent offered Exhibit B, an online treatise regarding sacroiliac joint blocks; Exhibit C, an online advertisement for physicians who treat joint dysfunction; Exhibit D, an online abstract concerning magnetic resonance imaging; Exhibit E, an online report on a case study concerning low back pain and asymmetry in hip rotation; and Exhibit I, an online statement concerning sacroiliac joint pain. (No Exhibit was

marked F.) Complainant made a hearsay objection to Exhibits B, C, D, E, and I. That objection was sustained. Those exhibits were admitted pursuant to Government Code section 11513, subdivisions (c) and (d). The only evidence those exhibits could supplement or explain was the evidence presented in Dr. Fait's reports and testimony. And to the extent those exhibits supplemented or explained his reports and testimony, they were consistent with his reports and testimony.

### **Dr. Fait's Reports and Testimony**

14. As noted above, complainant submitted Dr. Fait's 22-page independent medical examiner's report dated May 14, 2020. Dr. Fait's March 26, 2021, supplemental orthopedic independent medical evaluation report also is in evidence. Doctor Fait testified.

15. Dr. Fait is a board-certified orthopedic surgeon, licensed to practice in California. He is a Fellow, American Academy of Orthopedic Surgeons, and a Diplomate, American Board of Orthopedic Surgery.

16. The following is a very brief summary of Dr. Fait's reports and testimony. This summary is brief because, as will be explained below, the burden of producing evidence never shifted from respondent to complainant. Thus, Dr. Fait's reports and testimony are not determinative of the outcome of the case. The outcome is determined by respondent's failure to sustain the burden of proof.

17. Dr. Fait examined respondent on May 14, 2020, reviewed medical and other records, and wrote a report. Dr. Fait's report contained discussions of the following: Respondent's complaints; a history of respondent's injury; a job description concerning the duties of a Materials and Stores Supervisor; occupational, medical, and social histories; a checklist of daily activities, the physical examination; diagnoses; and

Dr. Fait's discussion. Dr. Fait diagnosed lumbar spine degenerative disc disease with facet arthropathy at L4 – L5. He also diagnosed complaints of right hip pain. In his report, Dr. Fait wrote that he did not find respondent to be substantially incapacitated to perform his usual duties. Dr. Fait testified that respondent had subjective complaints of pain, but there was no objective evidence of anything that would preclude the performance of his duties.

18. Attached to the report was Dr. Fait's summary of records he reviewed, including medial records. Among the medical records were reports by respondent's treating physician, Dr. Thompson. In March 2021, Dr. Fait reviewed additional medical records and wrote his March 26, 2021, supplemental report. In that report, he wrote, "[M]y opinions as expressed in my prior report remain unchanged."

19. In connection with writing his first report, Dr. Fait reviewed an October 12, 2019, investigation summary regarding a surveillance of respondent on October 6, 2019, part of which was recorded by video. There is no evidence as to who wrote the investigation summary. According to Dr. Fait's report, the investigation summary is entitled "Investigation Summary at Frasco Investigative Services." Dr. Fait did not see the video; he testified that it was not provided to him. Complainant did not offer the video in evidence. Thus, the only evidence Dr. Fait had as to what the surveillance revealed is the investigation summary that someone wrote and that CalPERS provided to him. The following are excerpts from the investigation summary:

[V]ideo was obtained of patient as he exited the black Honda Pilot. He opened the rear hatch of the SUV, put on a pair of white gloves, and walked out of view behind his vehicle. 11.02 am - documentary video was obtained of EDCO Recycling. 11.03 am – 11.19 am - intermittent video

was obtained of patient as he walked around the exterior of the recycling center dumping cardboard boxes of Heineken beer into large containers. He carried numerous empty and filled plastic bins. He bent down and stood up numerous times. He pushed a large cart, stacked several plastic containers filled with bottles onto the cart, and showed no signs of difficulty performing these tasks.

[¶] . . . [¶]

[V]ideo was obtained of patient receiving food at a Taco Bell drive-thru window . . . . He reached out with his left hand to grab a cup of water and then a bag of food.

[¶] . . . [¶]

[V]ideo was obtained of patient as he exited the Rite Aid pushing a shopping cart to his vehicle. He opened the rear driver's side door, leaned over the shopping cart, and lifted a 24-pack of Heineken bottles with both arms. He leaned over the back seat of the vehicle and placed the case on the floor of the vehicle. Patient stood up and pushed the shopping cart back toward the front door of the Rite Aid.

[¶] . . . [¶]

Recommendations: Based on our investigative efforts, it appears that the patient is generally active out of doors, potentially engaging in activities that are contradictory to

the subject's alleged restrictions as such, if feel [*sic*] that video footage would be beneficial to your file, would recommend that another period of surveillance take place in the next 30 days.

20. In Dr. Fait's report, he responded to a question CalPERS asked him to answer as to what "objective findings" led him to his conclusion. As one "objective finding" he included a reference to the investigation summary. He said:

Finally, the surveillance investigative report would indicate that the member ambulates without an assistive device. He is able to bend, twist and reach without difficulty or impairment. He is able to perform rather vigorous day to day activities including attending a recycling center and lifting a case of beer weighting 35 pounds<sup>2</sup> and placing it in the back of his car without difficulty.

21. Dr. Fait testified that he based his opinion that respondent is not incapacitated to perform his usual duties on his examination of respondent, his review of the medical records, and the investigation summary.

22. Dr. Fait testified that respondent is not incapable of lifting, pushing, bending, pulling, or twisting. He testified that that was clear from the investigation

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<sup>2</sup> The weight, 35 pounds, that Dr. Fait assigned to a 12-pack of beer does not come from the investigation summary. Dr. Fait looked online to find what a 12-pack of beer weighs.

summary. He said the investigation summary shows that respondent's pain likely is psychosocial.

23. Dr. Fait testified that the investigation summary matched his findings. He said the investigation summary allowed him to strengthen his conclusion that the work restrictions respondent's treating physicians ordered were merely prophylactic. Dr. Fait testified that he relied on the report of the investigator, i.e., the investigation summary. He said that the primary reasons for his conclusions were the physical findings combined with the absence of abnormalities on the diagnostic studies.

## **LEGAL CONCLUSIONS**

### **Burden and Standard of Proof**

1. An applicant for disability retirement has the burden of establishing eligibility by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332; Evid. Code, § 500.)

2. Evidence Code section 110 provides:

"Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.

3. Evidence Code section 550 provides:

(a) The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence.

(b) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact.

## **Statutory Authority**

4. Government Code section 21151, subdivision (a), provides:

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.

5. Government Code section 21156, subdivision (a)(1), provides:

If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, 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, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account

of disability, in which event the board shall retire the member for service.

6. Code section 21156, subdivision (a)(2), provides:

In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination *on the basis of competent medical opinion* and shall not use disability retirement as a substitute for the disciplinary process.

(Italics added.)

7. Government Code section 20026 defines "disability" and "incapacity for performance of duty" as follows:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, 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*. (Italics added.)

### **Case Law Regarding Incapacity for Performance of Duty**

8. An employee is eligible for a disability retirement if he can demonstrate that he is incapacitated from performing the duties of his position. "Incapacitated" means the employee has a substantial inability to perform the usual duties of the

position. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876-877.)<sup>3</sup>

9. In *Mansperger, supra*, 6 Cal.App.3d 873, there was no dispute that Mansperger, who was a fish and game warden, had suffered an injury that caused him to be unable to engage in heavy lifting. The sole issue in dispute was whether his physical limitations amounted to "incapacity for the performance of duty." (*Mansperger, supra*, 6 Cal.App.3d at p. 876.) After concluding that "incapacity for the performance of duty" meant the substantial inability to perform an applicant's usual duties, the appellate court said:

While it is clear that petitioner's disability incapacitated him from lifting or carrying heavy objects, evidence shows that the petitioner could substantially carry out the normal duties of a fish and game warden. The necessity that a fish and game warden carry off a heavy object alone is a remote occurrence. Also, although the need for physical arrests do occur in petitioner's job, they are not a common occurrence for a fish and game warden. A fish and game warden generally supervises the hunting and fishing of ordinary citizens. Petitioner testified that, since his accident, he was

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<sup>3</sup> The *Mansperger* decision analyzed the language then contained in Government Code section 21022, the substance of which is now contained in Government Code section 20026. There have since been some amendments to section 20026.

able to perform all his required duties except lifting a deer or lifting a lobster trap out of kelp. (*Id.* at pp. 876-877.)

### **Dr. Fait's Reliance on the Investigation Summary**

10. Dr. Fait opined that respondent is not incapacitated to perform his usual duties. However, Dr. Fait relied on the investigation summary, and there is an issue as to whether the investigation summary is a matter that reasonably may be relied on by an expert in forming an opinion regarding an applicant's incapacity to perform his or her usual duties. Consequently, there are issues as to what weight Dr. Fait's opinion should be given.

11. Experts rely on things they have read, studied, and become familiar with. They rely on the work of other experts. They can rely on hearsay.

12. Evidence Code section 801, concerns expert testimony and provides:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in

forming an opinion upon the subject to which his testimony relates . . . .

13. Thus, subdivision (a) states when an expert may give opinion testimony, and subdivision (b) states the rule as to the permissible bases on which an expert's opinion may be founded. It is clear that an expert's opinion may be based, in part, on hearsay because subdivision (b) provides that an expert's opinion may be based on matter that is perceived or known "whether or not admissible."

14. The Law Revision Commission Comments to Evidence Code section 801 discuss three tests that subdivision (b) establishes regarding whether a matter is something on which an expert's opinion may be based.

Under subdivision (b), the matter upon which an expert's opinion is based must meet each of three separate but related tests. First, the matter must be perceived by or personally known to the witness or must be made known to him . . . . This requirement assures the expert's acquaintance with the facts . . . . *Second . . . the matter relied upon by the expert in forming his opinion must be of a type that reasonably may be relied upon by experts in forming an opinion upon the subject to which his testimony relates. In large measure, this assures the reliability and trustworthiness of the information used by experts in forming their opinions.* Third, an expert may not base his opinion upon any matter that is declared by the constitutional, statutory, or decisional law of this State to be an improper basis for an opinion. (Italics added.)

15. As noted above, Dr. Fait's opinion is based, in part, on an investigation summary regarding a surveillance of respondent that CalPERS commissioned. In the "discussion" section of Dr. Fait's report, he wrote:

An investigation summary was provided for my review, although the actual investigative films were not provided for my review. The investigation summary of August 2019 notes the examinee performing various day to day activities including taking empty cases of beer bottles to the Ed Co Recycling Center and stooping and bending numerous times. There is no documentation of any difficulty performing these tasks. There is no documentation of any use of an assistive device or brace. The examinee was then seen going to Rite Aid and retrieving a 24 pack of Heineken beer bottles. Research would suggest that this case of beer weighs approximately 35 pounds and the examinee was able to lean over the backseat of his vehicle and place the case on the floor. He was seen ambulating without an assistive device and bending and twisting without particular impediment of any activity. Investigators felt that the examinee was generally active out of doors and engaging in activities that are potentially contradictory to the alleged restrictions.

16. In Dr. Fait's report, in response to CalPERS's question about his "objective findings," he referred to the investigation summary as follows:

Finally, the surveillance investigative report would indicate that the member ambulates without an assistive device. He is able to bend, twist and reach without difficulty or impairment. He is able to perform rather vigorous day to day activities including attending a recycling center and lifting a case of beer weighting 35 pounds and placing it in the back of his car without difficulty. Therefore, I do not find objective evidence of abnormalities that would rise to a substantial incapacity in this case.

17. Dr. Fait testified that, in arriving at his opinion, he relied on his examination of respondent, his review of the medical records, and the report of the investigator. Dr. Fait testified that respondent is not incapable of lifting, pushing, bending, pulling, or twisting. He testified that that was clear from the investigation summary. He said the investigation summary shows that respondent's pain likely is psychosocial.

18. When asked about his use of the investigation summary, Dr. Fait said his opinion would have been the same if he had not seen the investigation summary. He said the investigation summary matched his findings. He testified that the investigation summary allowed him to strengthen his conclusion that the work restrictions imposed by respondent's treating physicians had been prophylactic. But his report and testimony leave no doubt that he relied on the investigation summary in arriving at his opinion.

## Evaluation

19. This is not a case in which an expert viewed a surveillance video and came to a conclusion based on what he or she saw. Here, Dr. Fait simply adopted the conclusions of an investigator hired by one party to surveil the opposing party. The investigator's conclusions are not objective. The investigator's conclusion that the subject did various things without difficulty is subjective. And here, Dr. Fait relied on a hearsay summary written by some person whose qualifications and experience are unknown. Further, as noted above, in Dr. Fait's report, in response to CalPERS's question about his "objective findings," he reported the investigator's subjective conclusions that respondent is able to bend, twist and reach without difficulty or impairment and is able to perform rather vigorous day to day activities without difficulty. Dr. Fait reported that as being part of his objective findings.

20. Moreover, there was video footage, but Dr. Fait did not ask to see it. The "Recommendations" in the investigation summary suggest that the video footage does not support CalPERS's position. The investigation summary says, in part, "If feel that video footage would be beneficial to your file, would recommend that another period of surveillance take place in the next 30 days." That suggests that the video footage that was obtained was not beneficial to CalPERS. It suggests that, if they wanted some beneficial footage, they would have to try again. And in spite of that, Dr. Fait relied on the investigation summary and did not ask to see the video.

21. Thus, as noted above, there is an issue as to whether Dr. Fait's opinion is reliable. There is an issue as to whether, within the terms of Evidence Code section 801, subdivision (b), the investigation summary is a matter "that is of a type that reasonably may be relied on by an expert in forming an opinion upon the subject to which his testimony relates."

22. Ultimately, however, it is not necessary to resolve these issues concerning Dr. Fait's opinion because, at no time did the burden to produce evidence shift to complainant. Respondent had the burden of proof with regard to his alleged incapacity for performance of his duties. And he was required to prove that by competent medical opinion. (Gov. Code §§ 20026, 21156, subd. (a)(2).) He failed to produce any competent medical evidence; therefore, the burden of producing evidence never shifted to complainant.

23. Respondent failed to prove that he was substantially incapacitated from performing the usual and customary duties of a Material and Stores Supervisor I.

## ORDER

Respondent, David L. Vigil's appeal from the denial of his application for industrial disability retirement is denied.

DATE: July 13, 2021

*Robert Walker*  
Robert Walker (Jul 13, 2021 15:22 PDT)

ROBERT WALKER

Administrative Law Judge

Office of Administrative Hearings