

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Reinstatement from Disability

Retirement of:

**THANH N. LY and MARIN COUNTY SCHOOLS – SAN RAFAEL
CITY HIGH SCHOOL DISTRICT, Respondents**

Agency Case No. 2021-0325

OAH No. 2021080446

PROPOSED DECISION

Jessica Wall, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference and telephone on August 24, 2022, and January 4, 2023, from Sacramento, California.

Helen Louie, Attorney, represented the California Public Employees' Retirement System (CalPERS).

Richard E. Elder, Jr., Attorney at Law, represented respondent Thanh N. Ly, who was present.

Respondent Marin County Schools – San Rafael City High School District (the District) did not appear at the hearing. The District was duly served with a Notice of

Hearing. The matter proceeded as a default against the District pursuant to Government Code section 11520, subdivision (a).

The record remained open after the conclusion of the hearing for the parties to lodge closing and reply briefs. All briefs were timely filed. On April 3, 2023, the record closed and the matter submitted.

ISSUE

Did CalPERS establish that respondent is no longer substantially incapacitated from performing his usual and customary duties as a Food Service Assistant II with the District based on his orthopedic (low back) condition?

FACTUAL FINDINGS

Disability Retirement Application

1. On May 23, 2018, respondent applied for industrial disability retirement (IDR) with CalPERS. At the time, the District employed respondent as a Food Service Assistant II. By virtue of his employment, respondent was a school miscellaneous member of CalPERS.

2. In filing the IDR application, respondent claimed that his disability was "lower back." Respondent wrote that he injured his lower back lifting boxes. He also wrote that his limitations were "85% of work duties/pain lower back."

3. On September 5, 2018, Victoria L. Barber, M.D., conducted a retirement evaluation at CalPERS's request. Dr. Barber subsequently issued a report about the

evaluation and her findings. She physically examined respondent and observed his limp during heel-toe walking and reduced motor strength in his lower extremities (3+/5 left, 4+/5 right). She diagnosed him with "L4-L5 disc protrusion in the setting of foraminal stenosis" and "Left lower extremity radiculopathy." Dr. Barber opined that respondent was substantially incapacitated from the performance of his duties as a Food Service Assistant II because he needed to change positions every 30 minutes and could only lift 15 pounds, while his job required him to lift 50 pounds.

4. On October 4, 2018, CalPERS approved respondent's IDR application. CalPERS found respondent to be substantially incapacitated from the performance of his usual duties as a Food Service Assistant II for the District, based upon his orthopedic (low back) condition. Respondent was 48 years old, under the minimum age for service retirement, and subject to periodic reexamination and possible reinstatement.

Reevaluation of Disability Retirement Benefits

5. On October 12, 2020, CalPERS notified respondent that it would reevaluate his disability retirement benefits. The reevaluation included an examination by Independent Medical Examiner (IME) Harry A. Khasigian, M.D.

6. On February 24, 2021, CalPERS notified respondent about its determination that he was no longer substantially incapacitated from performing the job duties of a Food Service Assistant II for the District. The letter informed respondent that he would be reinstated to his former position. Respondent timely appealed.

7. On July 21, 2021, Keith Riddle, Chief of CalPERS's Disability and Survivor Benefits Division, signed and later filed the Accusation. The matter was set for an evidentiary hearing before an ALJ of the OAH. This hearing followed.

Respondent's Employment History and Work Injury

8. Respondent worked for the District in food service since 1995. On January 20, 2016, respondent slipped in a walk-in freezer while reaching overhead to grab a 50-pound box. He fell on his buttock and experienced low back pain.

9. Respondent immediately sought medical attention with his primary care physician at Kaiser Permanente (Kaiser). Because his injury occurred at work, he received treatment from the Kaiser Occupational Clinic for two years before transitioning to a pain management center in June 2018. His last day on payroll was June 30, 2016.

Duties of a Food Service Assistant II

10. CalPERS provided a May 2018 Job Description form for respondent's position with the District, which lists the essential functions of a Food Service Assistant II. Those functions include: overseeing the assembly of student meals; maintaining records, standards of health, and cleanliness; overseeing the ordering, receipt, and storage of food and supplies; ensuring meals preparation and delivery to school sites, if required; overseeing cash handling and daily deposits; assisting his supervisor with evaluating and utilizing staff; performing basic clerical work as required; maintaining a safe work environment; and assisting in the prompt processing of student meal program applications.

11. Additionally, CalPERS provided a Physical Requirements of Position/Occupational Title form for the Food Service Assistant II position, which respondent completed in May 2018. The physical requirements include:

- Constantly (over six hours) standing, using his hands, and carrying up to 10 pounds;
- Frequently (three to six hours) walking, bending at the waist, twisting at the waist and neck, reaching above and below his shoulders, pushing and pulling, and grasping; and
- Occasionally (up to three hours) kneeling, climbing, squatting, bending his neck, using fine manipulation skills, power grasping, using a keyboard and mouse, and lifting 11 to 50 pounds.

Independent Medical Evaluation by Harry A. Khasigian, M.D.

12. On January 29, 2021, Dr. Khasigian evaluated respondent at CalPERS' request. Dr. Khasigian obtained his medical degree from the University of Southern California in 1974 and completed an orthopedics residency at the University of California, Irvine Medical Center, from 1975 through 1979. He received board certification by the American Board of Orthopedic Surgery in September 1980, with a subspecialty certification in orthopedic sports medicine since November 2011. Since 1979, Dr. Khasigian has maintained an orthopedic surgery private practice in Sacramento, California. He still sees patients and performs orthopedic surgeries on a full-time basis. He has been a Qualified Medical Evaluator (QME) for the State of California since December 1992. Dr. Khasigian has performed many independent medical evaluations for CalPERS.

13. Dr. Khasigian reviewed respondent's medical records and the physical requirements of his position; interviewed respondent with the help of a Vietnamese language interpreter; and performed a physical examination. Dr. Khasigian prepared a January 29, 2021 initial report following his evaluation. Additionally, he submitted

supplemental reports dated March 30, 2022, and April 11, 2022. Dr. Khasigian testified at hearing consistent with his examination and reports.

RESPONDENT'S COMPLAINTS AND HISTORY OF TREATMENT

14. Dr. Khasigian questioned respondent about his occupational duties, orthopedic condition, treatment, and complaints. Respondent explained his work injury, his unemployment since the injury date, and his previous treatment.

15. Respondent reported pain in his lumbar spine, the left side of his lower back, and into his left buttock. He also reported pain with low back bending, squatting, kneeling, crawling, lifting, and climbing. After five years of rest and treatment, his pain was still 5-to-7 on a 1-to-10 scale. He could sit for 20 minutes or stand for 25 minutes without pain and could lift 10 pounds. He had treated with physical therapy, acupuncture, cupping therapy, and chiropractic care. His medications included ibuprofen and gabapentin.

PHYSICAL EXAMINATION AND REVIEW OF MEDICAL RECORDS

16. Dr. Khasigian conducted a physical examination of respondent. During that examination, respondent had a normal gait and moved smoothly, slowly, and carefully. He did not use any orthopedic appliances like a walker or cane to maintain balance. He performed heel and toe walking normally and could complete a 70 percent squat. His motor examination was normal, with Grade 5 results. Respondent did not exhibit muscle guarding and did not have spasms. He had no muscle atrophy, and his measurements were approximately equal on both sides.

17. During the neurological examination, respondent exhibited abnormal sensation on the left side of his body. He reported global decreased sensation from his

hip to his toes on the left side. Dr. Khasigian found that this was not physiologically possible. Because sensation test results rely on an examinee's subjective reports, Dr. Khasigian could not confirm the result.

18. Dr. Khasigian asked respondent to do a sciatic stretch test (SST). He then had him do a supine straight leg raise (SLR) to confirm the consistency of respondent's reported pain. The SLR and the SST both impact the sciatic nerves and should result in similar pain limitation. Yet respondent's results were markedly different. For the SST, respondent achieved 90 degrees with both legs and experienced no pain. Meanwhile, for the SLR, he could only raise his left leg to 40 degrees with a pronounced reaction of pain in his low back. Similarly, respondent complained of low back pain during the hip rotation part of the exam. This movement is physiologically unable to cause back pain. Dr. Khasigian opined that respondent had overreacted during these portions of the exam and tried to stress his back pain to support his disability claim.

19. Dr. Khasigian reviewed respondent's March 2016 magnetic resonance imaging (MRI) test. The test was normal for most of the spine but showed mild degenerative disc disease and protrusion in L4-5 and L5-S1 of the spine. Dr. Khasigian found respondent's MRI findings to be "not uncommon" for his age. He did not find evidence of an acute abnormality.

DIAGNOSIS AND OPINION

20. Dr. Khasigian diagnosed respondent with a "[d]egenerative disc disease L4-5 and L5-S1" and "[n]o evidence of radiculopathy on a clinical basis." He opined that respondent's subjective symptoms were not substantiated by examination findings. His examination showed no loss of motion, dysfunction, or neurological deficit. Dr. Khasigian also noted that respondent had not sought treatment in the past

year. He said the inconsistencies in respondent's SST test related to "non-physiological behavior." Further, he found the 2016 MRI did not show an acute abnormality. The lack of changes in respondent's findings, behavior, and pain over the past five years was "not consistent with a physiologic injury."

21. Dr. Khasigian explained that respondent did not have a clinical impairment or diagnostic tests showing a neurological impairment. There were no job duties or physical requirements that respondent was unable to perform. Thus, respondent was not substantially incapacitated from performing his usual job duties.

SUPPLEMENTAL REPORTS

22. Dr. Khasigian drafted a first supplemental report on March 30, 2022, after reviewing a January 2022 report from Andrew K. Burt, M.D. Dr. Khasigian's opinion remained unchanged. Dr. Khasigian disagreed with Dr. Burt that respondent's MRI showed disc injuries because he believed that the MRI showed only degenerative changes and lacked clinical significance.

23. On April 11, 2022, Dr. Khasigian received 143 more pages of medical records and a second report from Dr. Burt. After reviewing the records, he drafted a second supplemental report. The new documents included a January 2019 MRI report and records a December 9, 2021, office visit with Maria Rhodora Espinas Chan, M.D. Dr. Khasigian concluded that the 2019 MRI lacked clinical significance because its findings of disc bulging, ligamentum flavum thickening, and facet arthropathy were consistent with normal, asymptomatic individuals. He testified that a disc bulge is less serious than a disc protrusion, so respondent's back condition had improved.

The new medical records stated respondent slipped while walking his dog in 2021. This incident increased his reported pain in his lower back. Additionally,

Dr. Khasigian noted that on respondent's December 2021 visit with Dr. Chan, he had a normal neurologic examination, motor function, reflexes, and SRL. The very next day, respondent visited Dr. Burt and reported multiple abnormalities not exhibited during his visit with Dr. Chan. Dr. Khasigian observed the same pattern during respondent's 2017 through 2018 examinations. In that period, he had 17 consecutive normal examinations with Ilya Sabsovich, M.D., then a single abnormal examination with Dr. Barber.

24. Based on the new records, Dr. Khasigian concluded "[t]here are obviously significant inconsistencies regarding the various examinations. Multiple separate examiners have had normal examinations." Dr. Khasigian's opinion remained unchanged. He concluded respondent did not have objective evidence of a medical condition that rendered him substantially incapacitated from performing the usual and customary duties of a Food Service Assistant II.

Respondent's Evidence

25. Respondent submitted medical records from his Kaiser physicians and physical therapists; his 2016 and 2019 MRI reports; the report from Dr. Barber's evaluation; and a January 2022 IME report issued by Dr. Burt. The records from respondent's treating providers do not offer any opinions about whether respondent is substantially incapacitated. The Kaiser records were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).

INDEPENDENT MEDICAL EXAMINATION BY ANDREW K. BURT, M.D.

26. Dr. Burt obtained his medical degree from the University of Nebraska in 1969. He completed an orthopedics residency there from 1974 through 1977. He was

previously eligible for certification from the American Board of Orthopedic Surgery and currently serves as a QME for the State of California. He has practiced medicine in California since 1978 and sees several patients a month. His treatment includes ordering imaging studies and prescribing conservative treatment. If a patient requires surgery, he refers them to another physician. He has not performed surgery since 1985.

27. On December 10, 2021, Dr. Burt evaluated respondent, at respondent's request, for purposes of his CalPERS continued disability review. As part of that evaluation, Dr. Burt reviewed respondent's medical records and the physical requirements of his position; interviewed him; and performed a physical examination. Dr. Burt prepared a report dated January 10, 2022. Dr. Burt testified at hearing about his report and opinions about respondent's substantial incapacity.

28. During the physical examination, respondent told Dr. Burt about his constant low back pain, as well as radiating pain into both legs. He told Dr. Burt that he was able to lift 200 pounds before his injury and could only lift 15 pounds now. He took pain medications including gabapentin, acetaminophen with codeine, and tramadol.

29. Dr. Burt described his objective findings as the bruising on respondent's lower back from cupping therapy, respondent's decreased range of motion, and respondent's muscle spasms during extension and lateral bending. Respondent's range of motion in the lumbar spine was 60 degrees (normal is 90 degrees). During extension, it was 10 degrees (normal is 25 degrees). During lateral bending, it was 15 degrees on the left and 20 degrees on the right (normal is 25 degrees). Dr. Burt also cited the following as objective evidence: respondent's lack of Achilles tendon reflexes, inability to heel-toe walk without complaining of pain, numbness to stimulation in the

left lower extremity, reports of tenderness in the left hip, and complaints of pain during hip rotation and the SLR maneuver.

30. Dr. Burt also reviewed respondent's medical records and 2016 MRI findings. Dr. Burt diagnosed respondent with (1) "Chronic discogenic low back pain, right sciatica," (2) "Radiographic evidence of lumbar disc injuries L4-5 and L5-S1 with annular disc protrusions, central and foraminal compromise by MRI scan," and (3) "Chronic trochanteric bursitis with altered gait." He opined that respondent was substantially incapacitated from performing the usual duties of a Food Service Assistant II "because of the constant prolonged standing, bending at the waist, twisting at the waist, pushing, pulling, and lifting," as well as respondent's reported inability to lift 26 to 50 pounds.

31. Dr. Burt testified that he believes respondent to be more disabled than he was at the time he was in 2018. He relied on respondent's stated ability to lift because he believed respondent was being truthful. Dr. Burt stated that physical findings can vary day to day. To him, this explained why respondent's gait was normal the day before his examination and abnormal that day. He believed respondent's account that his condition was progressively worsening.

RESPONDENT'S TESTIMONY

32. Respondent was born in Vietnam and moved to the United States in 1992. In 1995, he began working for the District as a Food Service Assistant I. He continued working for the District as a Food Service Assistant II for eight to 10 years until his injury in 2016. As a Food Service Assistant II, respondent supervised two employees. He loved his job and only left because of his injury.

33. In his job, respondent regularly received deliveries, served students' meals, cooked, and handled cash. He worked in the high school cafeteria kitchen. That kitchen connected to an elementary school cafeteria's kitchen. Each day, he served about 200 breakfasts and 400 lunches to high school students. Most of his day consisted of walking around, moving boxes, and cooking.

34. Respondent would move boxes every day. For instance, on Mondays, the school received fruit deliveries in the morning. This consisted of about 40 to 50 pounds of apples and 35 to 40 pounds of oranges. Other heavy foods were canned goods and dairy products, which weighed up to 60 pounds. When a truck dropped off a pallet, respondent would cut the plastic wrap, bend down to pick up the box, then twist as he lifted it up onto a cart. He would then roll the cart to the kitchen and put the food away. For perishable foods, it was particularly important that he worked quickly. Respondent would also assist with the elementary school's food deliveries, even though the elementary school had 12 workers of its own.

35. Respondent cannot do his job now because he cannot bend, lift, or twist. Before his injury, respondent recalled being able to lift 140 to 150 pounds, rather than the 200 pounds he told Dr. Burt. Now he cannot lift 20 pounds. He also needs to be able to sit down about every 10 minutes. In his job, he only got to sit when serving food. When he worked on a computer at the end of each day, he usually stood. To help with the pain, respondent regularly takes 300 milligrams of gabapentin. He takes two pills at a time, twice a day.

36. Respondent believes the condition of his back is worse now than it was in 2018. Moreover, he is now also experiencing pain on his right side, as well as his left.

Analysis

37. Dr. Khasigian's opinion that respondent is no longer substantially incapacitated due to his orthopedic (low back) condition is persuasive. He supported his opinion with a thorough review of respondent's medical records and a detailed physical examination. Although Dr. Burt performed a similar review and examination, Dr. Khasigian more persuasively explained the factual bases for his conclusions and opinion. Dr. Khasigian's findings aligned with the clinical notes from Dr. Chan the day before respondent's appointment with Dr. Burt. Further, Dr. Burt drafted his report a month after examining respondent, while Dr. Khasigian drafted his report the same day as his examination. Moreover, Dr. Khasigian is a board-certified orthopedic surgeon who still maintains an active, full-time orthopedic surgery practice. As such, his opinion receives greater weight.

38. Respondent's reliance on Dr. Barber's report is unavailing. Her report relied on respondent's condition in 2018, rather than at the time of reevaluation. Additionally, Dr. Barber did not testify about her examination at hearing. The evidence in Dr. Khasigian's reports and testimony shows that respondent's subjective complaints are not matched by objective findings that verify his substantial incapacity to perform the usual duties of his position.

LEGAL CONCLUSIONS

1. CalPERS has the burden of proving by a preponderance of the evidence that respondent is no longer substantially incapacitated from the performance of his usual job duties as a Food Service Assistant II and should therefore be reinstated in his former position at the District. (*In the Matter of the Application for Reinstatement*

from Industrial Disability Retirement of Willie Starnes (January 22, 2000) CalPERS Precedential Dec. 99-03, <https://www.calpers.ca.gov/docs/99-03-starnes-chp.pdf>.)

2. Once respondent retired for disability, CalPERS' Board of Administration had authority to require him to undergo medical evaluation at any time prior to his reaching the minimum age for voluntary retirement for service. (Gov. Code, § 21192.) If a Section 21192 medical evaluation determines that respondent is "not so incapacitated for duty in the position held when retired for disability," and his "employer offers to reinstate that employee," his disability retirement allowance shall be canceled immediately. (Gov. Code, § 21193.) Here, respondent had not reached the minimum age for voluntary retirement for service at the time of Dr. Khasigian's evaluation. (Gov. Code, § 21060, subd. (a).)

3. The analysis of whether a disability retirement recipient is "still incapacitated" from the performance of his usual job duties under Government Code section 21192 "is limited to determining whether the conditions for which disability retirement was granted continue to exist." (*Cal. Dept. of J. v. Bd. of Admin. of Cal. Public Employees' Retirement System* (2015) 242 Cal.App.4th 133, 141 [the analysis of "still incapacitated" is limited to consideration of the disability for which disability retirement was originally granted].) The outcome of that analysis must be based on competent medical evidence. (Gov. Code, § 21192.)

4. Courts have interpreted the phrase "incapacitated for the performance of duty" to mean "the substantial inability of the applicant to perform [his] usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) It is not necessary that the person be able to perform all duties. (*Schrier v. San Mateo County Employees' Retirement Assn.* (1983) 142 Cal.App.3d 957, 961.) Mere

discomfort, which may make it difficult for one to perform his duties, is insufficient to establish incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

5. Based on the Factual Findings as a whole, and specifically, Factual Findings 37 and 38, CalPERS established by competent and persuasive medical evidence that respondent is no longer substantially incapacitated from the performance of his usual job duties as a Food Service Assistant II due to orthopedic (low back) condition. Therefore, his appeal must be denied.

ORDER

1. The appeal of respondent Thanh N. Ly is DENIED.

2. CalPERS' determination that respondent is no longer substantially incapacitated from the performance of his usual job duties as a Food Service Assistant II due to orthopedic (low back) condition, and that he should be reinstated to his former position at the District, is AFFIRMED.

DATE: April 24, 2023


[Jessica Wall \(Apr 24, 2023 08:34 PDT\)](#)

JESSICA WALL

Administrative Law Judge

Office of Administrative Hearings