

**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:**

**ALAN J. SOARES, and FOLSOM STATE PRISON, CALIFORNIA  
DEPARTMENT OF CORRECTIONS AND REHABILITATION,  
Respondents.**

**Case No. 2019-1266**

**OAH No. 2020030113**

**PROPOSED DECISION**

Timothy J. Aspinwall, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on October 7, 2021, in Sacramento, California.

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

Alan J. Soares (respondent) appeared and represented himself.

There was no appearance by or on behalf of Folsom State Prison, California Department of Corrections and Rehabilitation (CDCR). CalPERS established that it duly

served the CDCR with a Notice of Hearing. Consequently, this matter proceeded as a default hearing against the CDCR pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on October 7, 2021.

## **ISSUE**

At the time of his application, was respondent substantially incapacitated from performing his usual and customary duties as a Maintenance Mechanic for the CDCR based on orthopedic conditions (knees, hips, right hand, right elbow, and neck)?

## **FACTUAL FINDINGS**

1. Respondent was employed by the CDCR as a Maintenance Mechanic. By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151.

### **Application by Respondent**

2. On May 16, 2013, respondent filed a Disability Retirement Election Application.<sup>1</sup> In his application, respondent described his disability as "right arm, right

---

<sup>1</sup> CalPERS filed a statement of issues asserting that respondent's application was properly cancelled because he failed to timely submit supporting documentation. On November 14, 2018, an administrative hearing was held before an ALJ at OAH, who issued a decision adopted by the CalPERS Board of Administration on February 21, 2019,

hand, neck, right hip, shoulder." He stated his disability occurred on April 18, 2012, and May 2, 2013, at work while he was "lifting a roll of wire and coming down off roof [*sic*] on a ladder." Respondent stated his condition affects his ability to perform his job because he "can't work."

## **Duties of a Maintenance Mechanic**

3. The Duty Statement for a Maintenance Mechanic states the essential functions include responsibility to inspect, maintain, and perform electrical, plumbing, welding, carpentry, glazing, painting, repairs, and to operate heavy equipment such as a backhoe and dump truck. The Maintenance Mechanic is assisted by and responsible for the conduct of inmate workers from the time they are received until the time they are returned. Other essential functions include, but are not limited to, maintenance of tools in safe working condition, maintenance of hazardous material inventory, and assisting with inmate searches.

4. The physical requirements for the position of a Maintenance Mechanic include over six hours per day of standing, repetitive use of hands, and lifting/carrying up to 50 pounds. The physical requirements also include frequent walking and up to three hours per day of crawling, kneeling, climbing, squatting, bending (neck and waist), twisting (neck and waist), reaching above and below shoulder, pushing and pulling, fine manipulation, power grasping, simple grasping, keyboard use, mouse use,

---

granting respondent the right to move forward with his application. In so holding, the decision stated: "All respondent Soares seeks is the right to pursue his application for industrial disability retirement. He still must present competent medical evidence to establish his incapacity to perform his usual duties to prevail."

lifting up to 100 plus pounds, walking on uneven ground, driving, working with heavy equipment, exposure to dust or fumes, working at heights, operation of foot controls or repetitive movement, use of special protective equipment, and working with bio hazards.

## **Respondent's Evidence**

5. Respondent worked most days at the Folsom State Prison facility, and occasionally at CDCR employee housing. His normal routine at Folsom State Prison included walking up five or fewer flights of stairs carrying his tool bag weighing approximately 25 to 30 pounds, in addition to any materials he needed to complete his work. There are no elevators in the buildings where he worked, and the stairs are old and worn. Respondent worked on a variety of tasks because of his range of skills, including plumbing, electrical, welding, and heating and air conditioning. One of his frequent tasks at Folsom State Prison was fixing cell doors. This would require that he remove a 100-pound door cover, and occasionally the entire 300-pound door with assistance. Respondent would also work to refurbish CDCR employee housing once every few months, which would often require that he climb ladders. Respondent feels that after 24 years of work with the CDCR, his body "broke down" and he could no longer do the work. He testified he is no longer able to climb ladders and can barely walk up one flight of stairs.

6. Respondent also introduced qualified medical examination (QME) reports dated 2014 and 2017, prepared by Gilbert Lang, M.D., who was an orthopedic surgeon and a fellow in the American Academy of Orthopedic Surgeons.<sup>2</sup> Dr. Lang is no longer

---

<sup>2</sup> Dr. Lang's QME reports were admitted in evidence pursuant to Government Code section 11513, subdivision (d), and as such were considered only insofar as they



living, and did not testify. Dr. Lang's 2014 QME report states that respondent was no longer "able to perform his very heavy job activities" based on his orthopedic condition. Dr. Lang's 2017 QME report states that respondent is "without question . . . not able to return to his prior work."

### **CalPERS's Evidence – Expert Opinion**

7. CalPERS retained Robert Henrichsen, M.D., to conduct an independent medical evaluation (IME). Dr. Henrichsen is an orthopedic surgeon and a fellow in the American Academy of Orthopedic Surgeons. He conducted an IME on July 23, 2019, and issued an IME report on that date. He testified at hearing regarding his findings.

8. On July 23, 2019, Dr. Henrichsen met with respondent and took his personal history, current symptoms, work history, past medical history, family history, social history, educational history, and conducted a review of symptoms with respondent. Dr. Henrichsen also reviewed respondent's medical records and physically examined respondent. Based on his examination of respondent and review of the information provided, Dr. Henrichsen diagnosed respondent as follows: (1) history of right shoulder arthroscopy the with suspicion of right biceps tendonitis; (2) right elbow pain; (3) right hand pain with unexplained functional reduction; (4) history of trigger finger release in right hand; (5) MRI evidence of right labral tear without hip muscle weakness; (6) meniscal tears in right and left knee with right knee pain; (7) no muscular atrophy in either upper or lower extremity, or pelvic or shoulder girdle; (8) symptoms poorly supported by examination findings; (9) excellent chest and upper extremity

---

might supplement or explain other admissible evidence, and are not sufficient standing alone to support a factual finding.

muscular development; (10) degenerative arthritis, degenerative disc disease of the cervical spine.

9. Dr. Henrichsen also reviewed the duties and physical requirements of a Maintenance Mechanic. Based on the information provided and his examination of respondent, Dr. Henrichsen concluded in his IME report that respondent's conditions were not occupationally limiting. Dr. Henrichsen further concluded that respondent was not substantially incapacitated from performing his duties as a Maintenance Mechanic.

## **Discussion**

10. CalPERS presented competent medical evidence through the testimony and IME report of Dr. Henrichsen, who found insufficient evidence to make a finding that respondent is substantially incapacitated from performing the duties of a Maintenance Mechanic. His opinion was persuasive.

11. Respondent did not submit persuasive competent medical evidence. Dr. Lang's QME reports were admitted to supplement or explain other evidence. However, the QME reports do not provide persuasive competent medical evidence sufficient to support a factual finding, even though they supplement and offer an explanation regarding respondent's testimony about his symptoms and inability to perform the tasks required of a Maintenance Mechanic. In sum, Dr. Henrichsen's IME report and testimony were more persuasive on the issue of substantial incapacity than respondent's evidence. Because respondent failed to offer persuasive 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 Maintenance Mechanic, his application must be denied.

## LEGAL CONCLUSIONS

1. To qualify for disability retirement, respondent had to prove that, at the time he applied for disability retirement, he was "incapacitated physically or mentally for the performance of his or her 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.

2. 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.) An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of the application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697.)

3. *Mansperger* and *Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date respondent applied for disability retirement, he was substantially unable to perform the usual duties of a Maintenance Mechanic due to an orthopedic condition. Based on the evidence as a whole, respondent failed to meet this burden. For this reason, respondent's disability retirement application must be denied.



**ORDER**

The application for disability retirement filed by respondent Alan J. Soares is  
DENIED.

DATE: November 8, 2021

*Timothy Aspinwall*

TIMOTHY J. ASPINWALL

Administrative Law Judge

Office of Administrative Hearings