

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:

JOSHUA N. RYAN, Respondent

and

**CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE
PROTECTION, Respondent**

Agency Case No. 2022-0740

OAH No. 2023010659

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on May 10, 2023, by videoconference from Sacramento, California.

Noelle Lamprecht, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Joshua N. Ryan represented himself.

No one appeared for or on behalf of respondent California Department of Forestry and Fire Protection (Department), its default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to the Department only.

Evidence was received, and the record was left open to allow Mr. Ryan to provide a complete copy of the shoulder surgery plan admitted at hearing as Exhibit D. CalPERS waived its right to respond to the revised exhibit. The revised exhibit was received, the record closed, and the matter submitted for decision on May 12, 2023.

FACTUAL FINDINGS

Jurisdictional Matters

EMPLOYMENT

1. Mr. Ryan began working for the Department as a Firefighter I on June 2, 2017. He is a state safety member of CalPERS by virtue of his employment. His last day on payroll was December 14, 2021, and he has not worked in any capacity since then. Mr. Ryan is below the minimum age for voluntary service retirement.

WORK INJURY

2. On June 2, 2020, Mr. Ryan was a rear passenger in a fire engine responding to a helicopter crash and resulting fire in a remote area of Solano County. The rear wheels of the fire engine went off the trail, and the engine rolled approximately 15 feet down an embankment before landing upside down on its roof.

3. Even though Mr. Ryan was wearing his seatbelt, he was pinned against the roof of the fire engine with his neck stretched to the left. His shoulders were also pinned. He had hit his head but did not lose consciousness. He was able to self-extricate and walk a half mile to the helicopter crash. Mr. Ryan was transported by ambulance to NorthBay Medical Center in Fairfield.

DISABILITY RETIREMENT ELECTION APPLICATION

4. Mr. Ryan signed an application seeking industrial disability retirement benefits on March 8, 2022, which CalPERS received the following day. He identified his specific disabilities as injuries to his thoracic, cervical, and lumbar spines and left shoulder sustained during the June 2, 2020 accident. He indicated his disabilities prevent him from lifting, pulling, pushing, or carrying anything weighing more than 20 pounds. They also affect his ability to hike, crawl, and use firefighting tools.

5. On July 21, 2022, CalPERS informed Mr. Ryan that it reviewed the medical evidence submitted in support of his application and “determined [his] orthopedic (thoracic, cervical, and lumbar spine and left shoulder) conditions are not disabling.” Therefore, CalPERS concluded he was “not substantially incapacitated for the performance of [his] job duties as a Firefighter I with the Department.” His application was denied.

6. Mr. Ryan timely appealed CalPERS’s decision. On January 18, 2023, Keith Riddle, Chief of CalPERS’s Disability and Survivor Benefits Division, signed the Statement of Issues solely in his official capacity. The sole issue on appeal is “whether at the time of the appeal, on the basis of orthopedic (thoracic, cervical, lumbar spine, and left shoulder) conditions, respondent Ryan was substantially incapacitated for the

performance of his usual and customary duties as a Firefighter I for respondent California Department of Forestry and Fire Protection.”

Job Description and Physical Requirements for Firefighter I

7. The Department’s Physical/Mental Stress Job Description for a Firefighter I describes a person in the position as a temporary employee who works under the close supervision of a fire captain or engineer. The typical fire season lasts nine months, and a Firefighter I performs no work during the other three months. He must maintain his physical fitness throughout the fire season so he can effectively fight fires at any time.

8. The primary duty of a Firefighter I is to fight fires as part of a fire crew using various tools and equipment, such as shovels, axes, back pumps, and hoses. When not fighting fires, a Firefighter I may clear brush and cut trails, clean and maintain the equipment and the firehouse, and perform kitchen duties.

9. An Assistant Chief with the Department completed a document entitled “Physical Requirements of Position/Occupation Title” describing the physical requirements for a Firefighter I. Mr. Ryan signed the document indicating his agreement with the Assistant Chief’s assessment, with the additional comments that he worked three consecutive 24-hour shifts, with the following four days off. He described his duties as “mainly physical” when fighting fires and “not so physical” when waiting for calls at the station.

10. The Assistant Chief described a Firefighter I as performing the following physical duties with the following frequencies during a typical shift:

Constantly (more than 5 hours): standing and walking.

Frequently (2.5 to 5 hours): interacting/communicating with coworkers, lifting/carrying 11 to 50 pounds, operating hazardous machinery, exposure to excessive noise, exposure to extreme temperature, and exposure to dust, gas, fumes, or chemicals.

Occasionally (31 minutes to 2.5 hours): lifting/carrying 10 pounds or less, sitting, crawling, kneeling, climbing, bending/twisting neck, bending/twisting waist, holding and light grasping, pinching and picking, using a keyboard and mouse, and walking on uneven ground.

Infrequently (5 to 30 minutes): interacting/communicating face-to-face and by telephone with the public, lifting/carrying more than 50 pounds, squatting, running, reaching above and below shoulder, pushing and pulling, power grasping, and working at heights.

Rarely/Never (less than 5 minutes): interacting/communicating with inmates, patients, or clients.

Medical Evidence

HARRY J. KHASIGIAN, M.D.

11. Dr. Khasigian is a board-certified orthopedic surgeon with a subspecialty in orthopedic sports medicine. He has practiced orthopedic surgery for 44 years. He estimated that 80 percent of his practice involves actively treating patients. The

remaining 20 percent involves providing consulting services on workers' compensation claims and applications for disability retirement.

12. CalPERS asked Dr. Khasigian to perform an Independent Medical Evaluation (IME) of Mr. Ryan's orthopedic injuries and determine if any of those injuries rendered him substantially incapacitated for the performance of his usual duties as a Firefighter I with the Department. Dr. Khasigian performed an IME on June 24, 2022, which included obtaining a general history, performing a physical examination, and reviewing medical records CalPERS provided. He documented his findings and conclusions in a written report, which was admitted into evidence at hearing.

IME Report

13. Mr. Ryan described the circumstances of the June 2, 2020 accident. He did not work for the first four months following the accident and then returned to light-duty at a wildfire base camp for one month. He returned to full duty fighting fires for a few months in 2021 but has not worked in any capacity since then.

14. Mr. Ryan was not receiving medical treatment for his injuries at the time of the IME. He had most recently treated with a physician assistant at a pain management clinic. He completed 24 sessions of physical therapy in 2020, which he said provided no relief. He visited a chiropractor three times before stopping because of pain. He was taking nonsteroidal anti-inflammatories for pain management.

15. Mr. Ryan presented at the IME with complaints of stiffness and pinching in his upper back, sharp pain and numbness down the left side of his mid-back, sharp pain in his lower back that caused numbness in his left leg, and burning, sharp pain in his left shoulder. On a scale from 1 to 10, with 10 being the worst pain possible, Mr.

Ryan rated the pain in his upper back a 2, in his mid-back a 7 to 8, and his low back a 6 to 7. He said he usually did not experience pain in his left shoulder, but the pain in his low back sometimes radiated to his left shoulder. He rated that pain an 8.

16. Physical examination of Mr. Ryan's cervical spine revealed nothing of significance. His tissues were soft and supple, the trapezii were normal without spasm or tenderness, and shoulder shrug and cervical compression were negative. Range of motion upon flexion, extension, rotation, and lateral bending was normal.

17. Physical examination of the thoracic spine was equally unremarkable. Mr. Ryan had normal curvature to his thoracic spine, his tissues were soft and supple, and he had no winging scapula or scraping of the scapula.

18. Mr. Ryan described pain from T10 to L4–5 during examination of his lumbar spine. However, he had no signs of guarding or spasm, his tissues were soft and supple, and there was no spasm, swelling, redness, bruising, or tenderness upon palpation. Range of motion upon flexion, extension, rotation, and lateral bending was normal.

19. Physical examination of the shoulders was insignificant. His shoulders were level, the acromioclavicular joints were not prominent, there was no atrophy in his deltoids, and there was no deviation in the normal resting or active position of either scapula. Range of motion upon abduction, flexion, internal rotation, and external rotation was normal.

20. During physical examination of the lower extremities, Mr. Ryan reported a slight limp when walking. However, it disappeared when he was distracted. He had no swelling, masses, or redness, and there were no signs of asymmetry or muscle atrophy. He had a normal heel-walk and toe-walk, and he squatted to 110 degrees.

21. After Dr. Khasigian completed Mr. Ryan's physical examination, he reviewed several documents CalPERS provided in advance of the IME. Those documents included the Department's job description for Firefighter I and the document identifying the physical requirements of the position and the frequency with which they are performed. Based on those documents and his conversation with Mr. Ryan, Dr. Khasigian formed an understanding of the usual duties of a Firefighter I with the Department.

22. The documents also included diagnostic test reports for Mr. Ryan's left shoulder and cervical, thoracic, and lumbar spine. X-rays of the left shoulder taken on the day of the accident showed no evidence of an acute injury. An MRI taken of the cervical spine the following week showed normal disc spacing, vertebral height, and cervical alignment. It showed a "normal" cervical spine. A repeat MRI taken two months post-accident was the same.

23. An MRI of Mr. Ryan's thoracic spine taken at the same time as the second MRI of his cervical spine showed small disc protrusions at T4-5, T7-8, and T8-9. However, vertebral bodies and disc space heights were maintained and in good alignment. There was normal cord signal, and there was no abnormality in the facet joints.

24. Mr. Ryan underwent an MRI of his lumbar spine on April 22, 2021. It showed small diffuse disc bulges at L3-4 and L4-5 and a larger disc bulge with an annular fissure at L5-S1. Congenitally short pedicles were noted. The radiologist who reviewed the MRI included a note in his report explaining that the findings of disc protrusions, disc bulges, or annular fissures alone "are less likely to be clinically significant."

25. The remaining records Dr. Khasigian reviewed indicated Mr. Ryan was transported by ambulance from the accident to NorthBay Medical Center. He was examined and x-rays were taken of his left shoulder. He showed no signs of acute injury. He was released the same day.

26. Mr. Ryan continued to receive conservative medical treatment through workers' compensation insurance from a week post-accident through March 8, 2022. Treatment included examination, diagnostic imaging, nonsteroidal anti-inflammatory, physical therapy, and chiropractic care. Thoracic epidurals were prescribed twice but denied both times by workers' compensation insurance.

27. Mr. Ryan underwent a Panel Qualified Medical Evaluation (PQME) on December 10, 2021. He was found to have no impairment in his left shoulder and only slight impairment in his cervical, thoracic, and lumbar spines. His injuries were determined to be permanent and stationary as of the date of the evaluation.

28. Based on Mr. Ryan's oral history, a physical examination, and a review of Mr. Ryan's usual duties as a Firefighter I and medical records, Dr. Khasigian concluded Mr. Ryan was not substantially incapacitated for the performance of his usual job duties due to injuries to his left shoulder or cervical, thoracic, or lumbar spines. Dr. Khasigian explained in his report:

He does not have clinical abnormality in the cervical spine, left shoulder, or lumbar spine. He does have three degenerative discs in the thoracic spine[,] but these would appear to be preexisting based upon the absence of bone edema, prevertebral swelling, or any other evidence of acute trauma. There also is no deviation in the spinal cord

as the MRIs all state that there is no abnormal signal within the cord. Therefore, there is no objective abnormality which correlates with the subjective complaints, which have been prolonged and unchanged for the last two years.

Testimony

29. Dr. Khasigian testified consistently with his IME report. Additionally, he explained that most people can tolerate level 8 pain for only a few seconds. Throughout the IME, however, Mr. Ryan appeared to be sitting comfortably. Also, Dr. Khasigian explained he would expect a person experiencing level 8 pain to be sweating, have dilated pupils, be agitated, and constantly shift his posture so he can be comfortable. Mr. Ryan did not show any of these signs. Dr. Khasigian also opined that level 8 pain is an "extremely high" level of pain to have two years post-injury. Lastly, he explained there is no anatomical connection between the lumbar spine and the shoulder that would support Mr. Ryan's report of pain in his lumbar spine radiating to his left shoulder.

30. Dr. Khasigian concluded that the findings of disc protrusions and disc bulges on Mr. Ryan's MRIs were insignificant for two reasons. First, there were no findings that the protrusions or bulges were impinging on the corresponding nerves. He noted that studies have shown that 90 percent of MRIs of "normal" spines show degenerative changes, narrowing of discs, and/or disc protrusions/bulges. But those patients have no pain. Therefore, Dr. Khasigian opined that MRI findings are "meaningless" without corresponding deficits upon physical examination. He found no such deficits in Mr. Ryan.

31. Second, the MRI of the thoracic spine was performed on August 11, 2020 (two months post-accident), and the MRI of the lumbar spine was performed on April 22, 2021 (10 months post-accident). Dr. Khasigian explained that a disc protrusion or a disc bulge takes a long time to develop. Those found on Mr. Ryan's thoracic and lumbar spines could not have been caused by an injury within the past 10 months and were more likely due to normal, degenerative changes to the spines.

32. Dr. Khasigian reiterated his opinion that Mr. Ryan was not substantially incapacitated for the performance of the usual duties of a Firefighter I with the Department when he applied for industrial disability benefits. There were no objective findings in the medical records to support the level of pain Mr. Ryan complained of, and Dr. Khasigian found no permanent structural abnormality caused by the injuries sustained during the June 2, 2020 accident.

FRANK MINOR, M.D.

33. Dr. Minor is a board-certified orthopedic surgeon. He performed the PQME of Mr. Ryan on December 10, 2021. Mr. Ryan introduced Dr. Minor's written report, which was admitted as administrative hearsay. Dr. Minor did not testify.

PQME Report

34. Dr. Minor's report included a description of Mr. Ryan's usual duties as a Firefighter I and of the June 2, 2020 accident. Mr. Ryan was placed on modified duties the week following the accident. However, he was effectively on temporary total disability because no modified duties that could accommodate his injuries were available.

35. Mr. Ryan believed his injuries had improved such that he could return to full duty as of August 13, 2020, and he was released to full duty. However, he returned to his fire station after his fire crew had left for the last wildfire of the 2020 fire season. Therefore, he worked at the base camp for the wildfire for the remainder of the season. He returned to his firefighting duties for the 2021 fire season.

36. Dr. Minor's report included a discussion of diagnostic imaging reports and medical records similar to Dr. Khasigian's. He described the same MRI findings and conservative medical treatment as Dr. Khasigian.

37. Dr. Minor physically examined Mr. Ryan. Mr. Ryan's cervical spine had no scarring and had normal curvature. There was no tenderness over the cervical spine or the paracervical musculature. There was slight grinding of joints upon range of motion of the neck. Range of motion was normal upon flexion and rotation and lateral bending to the right. There was a slight reduction in range of motion upon extension and rotation and lateral bending to the left.

38. Examination of Mr. Ryan's thoracic and lumbar spines revealed no evidence of scoliosis or scarring on either. Both had normal curvature. Neither had spasms or tenderness over the paraspinal muscles. Range of motion of the thoracic spine was significantly reduced on flexion and rotation to the left, slightly reduced on rotation to the right, and normal on extension. Range of motion of the lumbar spine was significantly reduced on flexion, extension, and left lateral bending. Right lateral bending range of motion was slightly reduced. Seated and supine straight leg raising was negative, bilaterally, but supine straight leg raising on the left caused low back pain.

39. The range of motion in Mr. Ryan's shoulders was normal upon flexion, extension, and abduction, bilaterally. There was significant reduction in internal rotation, bilaterally, and external rotation to the left. There was slight reduction in external rotation to the right and adduction, bilaterally. Impingement test, painful arc, and adduction test were negative, bilaterally.

40. Based on Mr. Ryan's history, a physical examination, and a review of the duties and physical requirements of a Firefighter I and Mr. Ryan's medical records, Dr. Minor concluded Mr. Ryan's injuries were permanent and stationary as of the date of evaluation. Regarding subjective factors of impairment, Dr. Minor noted that Mr. Ryan reported occasional pain in his left shoulder that ranged from 0 to 6, which increased when reaching overhead. Mr. Ryan reported having no pain in his neck for eight months but also described having numbness and tingling in his three left ulnar digits. Dr. Minor noted a disconnect between his objective findings and Mr. Ryan's subjective complaints.

41. Mr. Ryan reported continuing pain in his thoracic and lumbar spines, which he described as between a level 8 to 10. The lower back pain radiated into the left buttock, down the thigh and calf, and into the lateral three toes. Additionally, he described having increased back and leg pain and numbness when carrying all his firefighting gear.

42. Dr. Minor described the following objective factors of impairment:

Objectively, [Mr. Ryan] has a return of full range of motion of his left shoulder with no impingement signs.

The cervical spine demonstrates mild loss of extension and asymmetry of rotation and lateral bending. There is

weakness of the left thumb extension and numbness of the left thumb with spotty loss of sharp/dull discernment in the left C6 nerve root distribution.

In the thoracic spine, he has asymmetric loss of range of motion with multiple levels of 1–3 mm disc bulges at T4–5, T7–8, and T8–9.

In the lumbar spine, he has asymmetric loss of range of motion (Lateral bending and extension.) with the exception of lumbar flexion which is normal.

In the lumbar spine, the MRI demonstrates 1–3 mm disc protrusions at L3–4, L4–5, and L5–S1.

At L3–4, the disc bulge extends laterally to the neural foramina with narrowing on the left side.

At L4–5, there was flattening [of] the thecal sac resulting in bilateral left more than right narrowing of the lateral recess and neural foramina.

At L5–S1, there is an annular fissure extending dorsally to S1 compressing the thecal sac with central canal stenosis noted. There was moderate bilateral left slightly greater than right foraminal narrowing at L5–S1.

Additionally, there is weakness of the left knee flexion and extension without significant atrophy of the musculature.

He has spotty loss of sensation in the left leg in the L5 nerve root distribution.

43. Dr. Minor opined that Mr. Ryan had no permanent impairment of his left shoulder. He had a five percent impairment in his cervical spine, thoracic spine, and lumbar spine. Therefore, he had a 15 percent whole person impairment.

44. Dr. Minor attributed the impairment of Mr. Ryan's cervical spine entirely to the June 2, 2020 accident. However, he attributed only one-half of the impairment of Mr. Ryan's thoracic spine and lumbar spine to the accident, and he attributed the other one-half to "pre-existing degeneration."

45. Dr. Minor opined that Mr. Ryan's impairments rendered him "unable to lift, push, pull or carry greater than 20 pounds, given his ongoing symptomology when carrying his web gear and hose pack and developing symptomology in the leg." He offered no opinion whether the impairments also rendered Mr. Ryan substantially incapacitated for performing his usual duties as a Firefighter I.

Additional Documentation

46. In addition to drafting a PQME report, Dr. Minor completed a Physician's Return-to-Work & Voucher Report releasing Mr. Ryan to return to work as a Firefighter I, with restrictions on lifting, pushing, pulling, or carrying "greater than 20 pounds." He also completed a Qualified Medical Evaluator's Findings Summary Form on which he indicated Mr. Ryan could not return to work as a Firefighter I.

HENRY CHOU, D.O.

47. Dr. Chou is board-certified in physical medicine and rehabilitation. Mr. Ryan was referred to Dr. Chou for consultation on February 18, 2023. Mr. Ryan

introduced a transcript Dr. Chou prepared of the consultation, which was admitted as administrative hearsay. Dr. Chou did not testify.

48. Dr. Chou reviewed Mr. Ryan's medical history and performed a physical examination. He concluded Mr. Ryan was not a good candidate for surgical or injection intervention. He recommended that Mr. Ryan continue home exercises to stabilize his core and strengthen his shoulder muscles.

49. Dr. Chou agreed with Dr. Minor's findings and conclusions. He did not opine that Mr. Ryan was substantially incapacitated for performing the usual duties of a Firefighter I. Dr. Chou released Mr. Ryan to return to work with the same restrictions imposed by Dr. Minor.

Additional Evidence at Hearing

MR. RYAN'S TESTIMONY

50. Mr. Ryan explained that he would "love" to return to firefighting. He went to school to become a firefighter, and his plans were to work until old enough for service retirement. His "heart broke" when he was told he could no longer perform the arduous duties of a Firefighter I.

51. Mr. Ryan opined that he cannot return to work as a Firefighter I without putting others in grave danger. He does not believe he could pull a civilian out of a house or a car, and he explained he cannot hike while carrying the equipment and gear he was required to as a Firefighter I.

52. Mr. Ryan underwent surgery on his left shoulder on May 8, 2023. Workers' compensation insurance documentation approving the surgery indicated the surgery was for labral repair and debridement.

JESSE CAMPBELL'S TESTIMONY

53. Captain Campbell is a Fire Captain with the Department. He met Mr. Ryan when the latter joined the Department as a Firefighter I, and he was Mr. Ryan's fire captain.

54. Captain Campbell described Mr. Ryan as having a strong work ethic, which did not change after the June 2, 2020 accident. However, Captain Campbell noticed that "sick days started coming into play" after the accident because Mr. Ryan was not getting sufficient sleep. He described Mr. Ryan as a "middle-of-the-road hiker" prior to the accident, but at the "back of the pack" afterward.

Analysis

55. Mr. Ryan has the burden of presenting sufficient competent medical evidence that he was substantially incapacitated for the performance of his usual duties as a Firefighter I with the Department due to orthopedic (left shoulder and cervical, thoracic, and lumbar spine) conditions when he applied for industrial disability retirement benefits. He did not meet his burden. He relied on Dr. Minor's December 10, 2021 PQME report and Dr. Chou's transcript of a February 16, 2023 consultation. Both documents were admitted as administrative hearsay, and neither physician testified. (See Gov. Code, § 11513, subd. (d) [administrative hearsay may be used to supplement or explain other nonhearsay evidence, but it cannot be the sole evidentiary support for a factual finding].) There was no nonhearsay medical evidence of Mr. Ryan's substantial incapacity that either report supplemented or explained.

56. Additionally, Drs. Minor and Chou evaluated Mr. Ryan using workers' compensation insurance standards, which are different than the Public Employees' Retirement Law's (Gov. Code, § 20000 et seq.) standard for disability retirement.

(Compare *Coca-Cola Bottling Company v. Superior Court* (1991) 233 Cal.App.3d 1273, 1284 [“[A] compensable injury [under workers’ compensation] is one which causes disability or need for medical treatments”] with *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877 [“We hold that to be ‘incapacitated for the performance of duty’ within section 21022 means the substantial inability of the applicant to perform his usual duties”].)

57. Furthermore, Dr. Minor expressed conflicting opinions about Mr. Ryan’s ability to work as a Firefighter I. On the one hand, Dr. Minor completed a Physician’s Return-to-Work & Voucher Report releasing Mr. Ryan to return to work with restrictions on lifting, pushing, pulling, lifting, or carrying greater than 20 pounds. On the other hand, Dr. Minor signed a Qualified Medical Evaluator’s Findings Summary Form stating Mr. Ryan could not return to his “usual job.” Dr. Chou did not form his own opinion about Mr. Ryan’s ability to work and simply adopted Dr. Minor’s recommendations.

58. Also, Dr. Minor imposed restrictions against pushing, pulling, carrying, or lifting greater than 20 pounds due to “ongoing symptomology . . . in the left leg.” It is unclear whether those restrictions were due to physical limitations caused by Mr. Ryan’s injuries or were prophylactic measures to avoid exacerbating those injuries or causing new ones. Neither Dr. Minor nor Dr. Chou expressly opined that Mr. Ryan was physically incapable of performing his usual duties as a Firefighter I.

59. Finally, even if Dr. Minor’s opinions could be interpreted as implicitly including the opinion that Mr. Ryan was physically incapable of performing his duties, such an opinion is of questionable value. Dr. Minor concluded Mr. Ryan has no left shoulder impairment. He found cervical spine impairment despite concluding “there is

discordance of the subjective complaints and objective findings,” and he attributed 50 percent of the thoracic and lumbar spine impairments to “pre-existing degeneration.”

60. CalPERS, on the other hand, produced persuasive, competent medical evidence that Mr. Ryan was not substantially incapacitated. Dr. Khasigian is a board-certified orthopedic surgeon familiar with the proper standard for determining whether a CalPERS member qualifies for disability retirement. He testified credibly and persuasively at hearing. His conclusion that Mr. Ryan was not substantially incapacitated was well-reasoned and supported by his physical examination and review of prior medical records, including Dr. Minor’s in which he attributed disc protrusions and disc bulges on the thoracic and lumbar spines to pre-existing degenerative changes.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Mr. Ryan has the burden of proving he qualifies for disability retirement by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051–1052, fn. 5 [“As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of evidence”].) This evidentiary standard requires Mr. Ryan to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, he must prove it is more likely than not that he was substantially incapacitated for the performance of the usual duties of a Firefighter I with the

Department when he applied for industrial disability retirement benefits. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

Applicable Law

2. “Any . . . state safety . . . member incapacitated for the performance of duty as a result of an industrial disability” is entitled to disability retirement, regardless of his age or years of service. (Gov. Code, § 21151, subd. (a).) He must be immediately retired for disability “if the medical examination and other available information show” he “is incapacitated physically or mentally for the performance of his . . . duties and is eligible to retire for disability.” (Gov. Code, § 21156, subd. (a)(1).) Eligibility for disability retirement shall be made “on the basis of competent medical opinion.” (*Id.*, subd. (a)(2).)

3. “Incapacity for performance of duty” refers to a “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 [of administration], . . . on the basis of competent medical opinion.” (Gov. Code, § 20026.) An appellate court interpreted the phrase “incapacitated for the performance of duty” as meaning “the [s]ubstantial inability of the applicant to perform his usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876 [interpreting former Gov. Code, § 21022, which was repealed by Stats.1995, c. 379 (S.B. 541), § 1 and reenacted as Gov. Code, § 21151, subd. (a), by Stats.1995, c. 379 (S.B. 541), § 2].)

4. Pain or discomfort which merely makes it more difficult for one to perform his duties does not constitute a substantial incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.) Neither does the risk of further injury. (*Hosford v.*

Board of Administration of the Public Employees' Retirement System (1978) 77 Cal.App.3d 854, 863.)

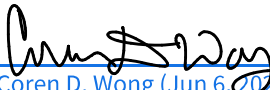
Conclusion

5. Mr. Ryan did not meet his burden of producing sufficient competent medical evidence that he was substantially incapacitated for the performance of his usual duties as a Firefighter I with the Department due to orthopedic (left shoulder and cervical, thoracic, and lumbar spine) conditions when he applied for industrial disability retirement benefits. Therefore, his application for disability retirement should be denied.

ORDER

Respondent Joshua N. Ryan's application for industrial disability retirement is DENIED.

DATE: June 6, 2023


Coren D. Wong (Jun 6, 2023 12:11 PDT)

COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings