

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for Disability Retirement of:

CHRISTOPHER J. WALL

and

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

Agency Case No. 2023-0852

OAH No. 2024010309

PROPOSED DECISION

Patrice De Guzman Huber, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on May 15, 2024, from Sacramento, California.

Bryan R. Delgado, Attorney, represented the California Public Employees' Retirement System (CalPERS).

Christopher J. Wall (respondent) represented himself.

There was no appearance on behalf of respondent California Department of Forestry and Fire Protection (CAL FIRE). A default as to CAL FIRE was taken pursuant to Government Code section 11520.

Evidence was received, the record closed, and the matter submitted for decision on May 15, 2024.

ISSUE

At the time of his application, was respondent substantially incapacitated from performing his usual and customary duties as a Fire Apparatus Engineer for respondent CAL FIRE on the basis of an orthopedic condition in his left knee?

FACTUAL FINDINGS

Respondent's Application and CalPERS's Denial

1. Respondent was a Fire Apparatus Engineer for CAL FIRE. On October 31, 2022, respondent signed and thereafter filed with CalPERS an application for disability retirement (application). By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151.

2. In his application, respondent described his disability as "knee injury pain." He stated his disability occurred on July 30, 2016, when he "slipped on steep terrain while [responding to] a fire." As a result, he is unable to run, hike, or handle heavy or continual impact. Regarding how his condition affected his ability to perform his job, respondent wrote: "Pain & symptoms became worse over last few years until

surgery which did not fix issues.” Respondent is not currently working in any capacity for CAL FIRE, having last worked sometime in May 2021.

3. CalPERS retained Harry A. Khasigian, M.D., to conduct an Independent Medical Evaluation (IME) of respondent concerning his orthopedic condition and to issue an IME report. There is no evidence respondent submitted medical evidence to CalPERS. Upon review of Dr. Khasigian’s IME report, CalPERS determined respondent was not substantially incapacitated from the performance of his duties as a Fire Apparatus Engineer for CAL FIRE. On July 21, 2023, CalPERS notified respondent his application was denied and advised him of his appeal rights.

4. By letter on August 21, 2023, respondent appealed and requested a hearing. He explained he “destroyed his knee” and had “broken [his] body in service to Cal Fire.” He described feeling “excruciating pain” when hiking with heavy weight or performing high impact movements. Respondent asserted “[d]octors agree [he] cannot do” the physical requirements of the position.

5. On January 8, 2024, Sharon Hobbs, Chief of CalPERS’s Disability and Survivor Benefits Services Division, in her official capacity, signed and thereafter filed a Statement of Issues alleging respondent, at the time he filed his application, was not substantially incapacitated from performing his usual and customary duties as a Fire Apparatus Engineer for CAL FIRE on the basis of an orthopedic condition in his left knee. The matter was set for an evidentiary hearing before an ALJ of the OAH, pursuant to Government Code section 11500 et seq.

Fire Apparatus Engineer Duties

6. As set forth in the CAL FIRE Physical/Mental Stress Job Description, a Fire Apparatus Engineer is primarily concerned with the care and operation of fire

apparatus and assists the Fire Captain in supervising the crew on job assignments and fire control work. Physically, a Fire Apparatus Engineer's duties call for:

above-average ability, endurance, and superior condition, including occasional demand for extraordinarily strenuous activities in emergencies, under adverse environmental conditions, and other extended periods of time[.] [Physical duties include] running, walking, difficult climbing, jumping, twisting, bending and lifting over 25 pounds[.] [T]he pace of work is typically set by the emergency situation.

Dr. Khasigian's Independent Medical Evaluation

7. On June 23, 2023, at CalPERS's request, Dr. Khasigian conducted an IME of respondent and thereafter prepared a report. He has been performing IMEs for CalPERS for 10 to 12 years. Dr. Khasigian is board-certified in orthopedic medicine. In 1974, he earned his medical degree and, in 1979, completed an orthopedic residency. Since 1979, he has operated a private practice on orthopedic surgery.

8. As part of the IME, Dr. Khasigian interviewed respondent, obtained a medical history, and conducted a physical examination. He reviewed respondent's job description and his medical records. Dr. Khasigian then assessed whether respondent suffered from an actual and present orthopedic condition which rose to the level of substantial incapacity to perform his job duties. Dr. Khasigian testified at hearing consistently with this IME report.

HISTORY OF INJURY AND RESPONDENT'S COMPLAINTS

9. Respondent told Dr. Khasigian he was injured on July 31, 2016, while on duty. He was on a hillside responding to a fire, and he began sliding, injuring his left knee. A few days later, he was unable to run, but he continued to work. There is no medical documentation of respondent's injury. Over the next two years, respondent's pain increased. In 2021, respondent underwent arthroscopic knee surgery, but it did not significantly improve his symptoms. Respondent has also tried physical therapy, a cortisone injection, and a platelet-rich plasma (PRP) injection, none of which helped his symptoms. Respondent identified the pain's origin as under his left patella.

10. Respondent told Dr. Khasigian he cannot run or hike for a long period of time. After walking one or two miles, he experiences pain. Respondent's knee is not unstable, but he experiences pain from the impact of running. His pain level from running is 7 to 8 on a scale of 10. Riding a bike is mildly painful, and walking is manageable until the two-hour mark when he begins experiencing discomfort. Generally, respondent's pain level is at 3 to 4 on a scale of 10.

11. Respondent told Dr. Khasigian he does not currently receive any treatment for his knee pain. He is considering a nerve ablation in the future, but that procedure has not yet been planned or scheduled. Respondent told Dr. Khasigian his qualified medical evaluator under his Workers' Compensation claim opined he may need a total knee arthroplasty in the future.

12. Dr. Khasigian described respondent's duties as a Fire Apparatus Engineer as supervising two regular firefighters and performing maintenance on machines. As a Fire Apparatus Engineer, respondent bends and twists at the neck and waist constantly and crawls, kneels, climbs, and squats infrequently. He runs occasionally but frequently

walks on uneven ground. Respondent told Dr. Khasigian he occasionally lifts and carries 50 pounds or more and frequently carries a 20- to 30-pound fire pack backpack or a 50-pound backpack with 300 feet of hose.

PHYSICAL EXAMINATION

13. Dr. Khasigian conducted a physical examination of respondent. He observed respondent was "well-developed, well-nourished, [and] athletic-appearing." Respondent's movements were easy, smooth, and coordinated. His stride and stance were equal and symmetrical. Respondent did not have significant pronation of the feet or any torsion of the femur or tibia. His left knee was not swollen. Dr. Khasigian performed patella inhibition, apprehension, and grind tests, all with negative results. Respondent's patellae were stable, equal, and symmetrical. Dr. Khasigian heard some cracking and popping sounds, known as crepitus, in respondent's patellofemoral joint and observed slightly decreased muscle tone in respondent's left quadricep.

DIAGNOSIS

14. Dr. Khasigian diagnosed respondent with mild chondromalacia in the left knee, which is a softening of the kneecap cartilage and can cause pain. He based his diagnosis on his observations and upon review of respondent's medical records. Specifically, respondent's arthroscopic surgery report indicated his medial meniscus was normal. Although there was "some fraying" on his lateral meniscus, respondent's surgeon, Kyle Swanson, M.D., found "no significant defects." Overall, Dr. Swanson found no significant chondral wear on the patellofemoral joint.

15. Dr. Khasigian opined respondent's subjective complaints of pain appeared greater than would be indicated based on his medical records and physical examination. He ultimately opined respondent was not substantially incapacitated

from the performance of his usual duties as a Fire Apparatus Engineer. Respondent appeared able to perform all physical requirements described in the Fire Apparatus Engineer's job description.

Respondent's Evidence

16. Respondent testified. He believes the Fire Apparatus Engineer title is deceiving because it suggests the work is limited to fire apparatus. Respondent described a Fire Apparatus Engineer as a "full" firefighter with the additional duties of handling fire equipment and overseeing the crew in the Fire Captain's absence. As a firefighter, respondent's duties also include responding to fires, natural disasters, and other emergencies; walking, hiking, or running on challenging terrain; and carrying equipment, hose, or packs.

17. To show his work as a Fire Apparatus Engineer includes performing as a "full" firefighter, respondent provided an email by Isaac Thornton, CAL FIRE Battalion Chief, sent to the Lassen Modoc Unit (LMU) crew on September 20, 2020. LMU had just responded to the Sheep Fire, a 30,000-acre timber fire. In the email, Battalion Chief Thornton singled out respondent as "contribut[ing] to the success of the mission," but he did not describe what specific work respondent performed.

18. Physical training as a firefighter is rigorous. To illustrate, respondent provided a video summarizing one training regimen every CAL FIRE firefighter is required to complete, the "Brabo" workout. It requires wearing a 45-pound vest while performing the following exercises: 43 box step-ups and as many repetitions as possible within 19 minutes of striking a tire with a sledgehammer, dragging a 190-pound sled for 50 feet and then back, and one-handedly carrying a 50-pound sandbag and alternating hands.

19. Respondent testified he cannot perform the physical requirements of a Fire Apparatus Engineer because of significant pain in his left knee. He disagrees with Dr. Khasigian's conclusions and believes they were based on Dr. Khasigian's misunderstanding of his job duties.

20. At hearing, respondent provided physical therapy notes by his physical therapist, Chad A. Lipovsky, PT, DPT [Doctor of Physical Therapy]. In July 2021, respondent complained to Dr. Lipovsky of mild pain in his left knee. In physical therapy sessions, respondent was able to jog on the treadmill with no major pain and run outside with a little more pain than on the treadmill. In October 2021, respondent reported to Dr. Lipovsky the pain in his left knee was increasing, but he was still able to perform the physical therapy exercises without any complaints.

Analysis

21. Respondent seeks disability retirement based on an orthopedic condition in his left knee. He has the burden to offer evidence at hearing to support his application. Respondent's physical therapy notes were his only medical evidence. Dr. Lipovsky's notes did not address whether or how respondent's knee pain or condition incapacitated him from performing his duties as a Fire Apparatus Engineer. Although respondent testified credibly he experiences pain in his left knee, pain alone does not establish substantial incapacity.

22. In contrast, Dr. Khasigian testified in detail about his evaluation and review of respondent's medical history and records. He found respondent did not suffer from an incapacitating orthopedic condition. His IME report was detailed and thorough, and his testimony was clear, comprehensive, and well-supported by the evidence.

23. At hearing, respondent argued Dr. Khasigian did not understand the job duties of a Fire Apparatus Engineer. However, the CAL FIRE Physical/Mental Stress Job Description, which Dr. Khasigian reviewed, sufficiently captured, and was consistent with, the physical requirements respondent described at hearing. On the whole, Dr. Khasigian's opinion that respondent was not substantially incapacitated from the performance of his usual and customary duties as a Fire Apparatus Engineer was persuasive.

24. When all the evidence is considered, respondent failed to establish, upon competent medical evidence, at the time he filed his application he was substantially incapacitated from performing his usual and customary duties as a Fire Apparatus Engineer for CAL FIRE on the basis of an orthopedic condition in his left knee. Accordingly, respondent's application must be denied.

LEGAL CONCLUSIONS

1. Respondent seeks disability retirement pursuant to Government Code section 21151, subdivision (a), which provides, any state firefighter "incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability . . . regardless of age or amount of service."

2. To qualify for disability retirement, respondent must prove, at the time he applied, he was "incapacitated physically or mentally for the performance of his . . . duties." (Gov. Code, § 21156, subd. (a)(1).) 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 duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board, . . . on the basis of competent medical opinion.

3. Incapacity for the performance of duty "means the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Substantial inability to perform usual duties must be measured by considering an applicant's abilities. Discomfort, which makes it difficult to perform, is insufficient to establish permanent incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Bd. of Admin. of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 862.) A condition or injury that may increase the likelihood of further injury or a fear of future injury does not establish a present "substantial inability." (*Hosford, supra*, 77 Cal.App.3d at pp. 863-864.)

4. Respondent has the burden to demonstrate he is permanently and substantially unable to perform his usual duties such that he is permanently disabled. (*Harmon v. Bd. of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689; *Glover v. Bd. of Retirement* (1980) 214 Cal.App.3d 1327, 1332.) To meet this burden, respondent must provide competent, objective medical evidence to establish, at the time of his application, he was permanently disabled or incapacitated from performing the usual duties of his position. (*Harmon, supra*, 62 Cal.App.3d at p. 697.)

5. Respondent did not present competent, objective medical evidence to establish he was permanently disabled or substantially incapacitated from performance of his duties as a Fire Apparatus Engineer at CAL FIRE at the time he filed his disability retirement application. Therefore, respondent is not entitled to disability retirement pursuant to Government Code section 21151.

ORDER

Respondent Christopher J. Wall's application for disability retirement is DENIED.

DATE: June 7, 2024



PATRICE DE GUZMAN HUBER

Administrative Law Judge

Office of Administrative Hearings