

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of Appeal Regarding the Application for
Industrial Disability Retirement of:**

EUSEBIO M. MONTEJO, Respondent,

and

**CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION, CALIFORNIA MEDICAL FACILITY,**

Respondent.

Case No. 2021-0565

OAH No. 2021110530

PROPOSED DECISION

This matter was heard before Administrative Law Judge Ed Washington, Office of Administrative Hearings (OAH), State of California, on October 31 and November 1, 2022, by videoconference from Sacramento, California.

Senior Attorney Cristina Andrade represented the California Public Employees' Retirement System (CalPERS).

Eusebio M. Montejo (respondent) represented himself.

CalPERS properly served California Department of Corrections and Rehabilitation (CDCR), California Medical Facility (CMF), with the First Amended Statement of Issues and Notice of Hearing. CDCR made no appearance. This matter proceeded as a default against CDCR pursuant to Government Code section 11520, subdivision (a).

The hearing concluded on November 1, 2022.¹ However, the record remained open to allow the parties to submit written closing briefs. Both respondent and CalPERS timely submitted written closing briefs. The record closed and the matter was submitted for decision on November 7, 2022.

ISSUE

Is respondent precluded from applying for disability retirement because he was absent without leave (AWOL) for five or more consecutive working days and voluntarily resigned from employment with CDCR, effective at the close of business on November 28, 2021?

¹ On October 10, 2022, the two issues for determination in the First Amended Statement of Issues were bifurcated in the interest of judicial economy and to potentially avoid unnecessary costs. This hearing solely addressed the first issue.

FACTUAL FINDINGS

Background

1. Keith Riddle, Chief, Disability and Survivor Benefits Division, filed the First Amended Statement of Issues in his official capacity.

2. Respondent was employed by CDCR as a Physician and Surgeon at CMF. By virtue of his employment, respondent was a state safety member of CalPERS subject to Government Code section 21151.

Adverse Action/Letter of Reprimand

3. On October 14, 2020, CDCR served on respondent a Notice of Adverse Action (NOAA), with a penalty of an official reprimand (LOR). The LOR became effective October 28, 2020, and was based on the following causes for discipline under Government Code section 19572:

(d) Inexcusable neglect of duty;

(e) Insubordination;

(o) Willful disobedience;

(m) Discourteous treatment of the public or other employees; and

(t) Other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.

4. These causes for discipline were based on allegations that respondent failed to follow the lawful orders and directives of his supervisor and failed to follow the managerial chain of command despite receiving instruction and corrective action on utilizing the proper chain of command. The LOR identified related progressive discipline issued to respondent on March 6, 2018, and May 29, 2019. The LOR also advised respondent of his right to respond to the appointing authority as described in State Personnel Board Rule (SPB) 52.6 (*Skelly* Hearing) and to appeal the adverse action to the SPB.²

5. Respondent requested a *Skelly* Review. By letter dated October 28, 2020, Lori Austin, Chief Executive Officer, CMF, informed respondent that the decision was made to sustain the LOR after reviewing the *Skelly* Officer's recommendation and the materials upon which the action was based. Respondent also filed an appeal with SPB, pursuant to Government Code section 19575. The SPB sustained imposition of the LOR, on June 18, 2021.

Disability Retirement Application

6. On October 14, 2020, respondent signed a Disability Retirement Election Application, which he filed with CalPERS the following day. In the application,

² A *Skelly* hearing derives its name from *Skelly v. State Personnel Board* (1975) 15 Cal. 3d 194. In that case, Dr. Skelly was terminated from his employment with the State of California. The California Supreme Court determined, among other things, that he was deprived of his due process right to pre-disciplinary discovery that included the "materials upon which the action is based." A *Skelly* hearing allows an employee to respond to allegations prior to the imposition of any actual disciplinary action.

respondent indicated "Industrial Disability Retirement," with his last day on the payroll as July 1, 2020. He described the effective date of his retirement as "Expiration of Benefits."

7. Respondent described his disability as "Mobility and [Cumulative] trauma to psychiatric and nervous system." He indicated the disability occurred on "5/12/2020 and 07/01/2020," when he "[t]wisted [his] ankle at work when [he] stepped on uneven ground. The pavement was raised. [Also,] Stress from discrimination and retaliation > 2yrs." Respondent described his limitations or preclusions due to his orthopedic (ankle) condition, as:

Mobility restriction impairs my ability to perform many required duties as listed on my duty statement. Anxiety results in being distracted and can impact patient care [adversely], in diagnosis, treatment, and accuracy of documentation. Anxiety also results in decreased attention.

8. With the application, respondent submitted a Physician's Report on Disability completed by his treating physician, Pauline Perez, M.D. Within this document, Dr. Perez specified that respondent was disabled as of October 7, 2020, due to the following injury: "Severe stress with heart palpitations, chest pain, lightheaded, likely brought on panic attacks from work stress." She diagnosed respondent with:

Diagnosis 1: Atypical chest pain and palpitations representing panic attacks.

[¶] ... [¶]

Restrictions/Limitations: Needs low stress environment and no exertion until fully evaluated/results known.

Diagnosis 2: Palpitations

[¶] ... [¶]

Restrictions/Limitations: [Blank]

Comments: He was already disabled also due to a foot/ankle injury at work so could not do exercise stress test. So did myocardial perfusion study and [illegible] showed no significant abnormality. He complained of severe anxiety due to stress at work.

9. CalPERS requested and obtained medical reports regarding respondent's conditions from medical professionals. On June 7, 2021, CalPERS informed respondent that, after reviewing the information received, it determined respondent was not permanently disabled or incapacitated from the performance of his duties when he applied for industrial disability retirement. Respondent appealed from CalPERS' determination and requested an administrative hearing to challenge the decision.

10. On or about November 9, 2021, CalPERS filed the initial Statement of Issues. The sole issue for determination was whether respondent was substantially incapacitated from the performance of his usual and customary duties as a Physician and Surgeon for CDCR when he applied for disability retirement.

AWOL Separation

11. Today, respondent works full time as a physician in Texas. On February 3, 2021, he contracted to work for TMC Provider Group, PLLC, a Texas-based corporation that provides for the care and treatment of patients at clinics in San Antonio, Texas. Respondent was still employed by CDCR when he contracted with TMC Provider Group and did not seek approval from the State of California before accepting out of state employment. Respondent provides medical services including examining and diagnosing patients, prescribing and administering medical treatment, performing surgical procedures, treating diseases, and ordering laboratory tests and x-rays. These are also duties identified in the position description for his job with CDCR.

12. On or about April 21, 2021, Michelle DiTomas, Chief Medical Executive, CMF, contacted respondent by email and informed him she had learned that he had been working as a physician in Texas since February 2021. She informed respondent she could not continue to approve his leave of absence as leave may not be granted to permit an employee to obtain outside employment or to an employee who does not intend to return to state service when or before the leave expires. Dr. DiTomas directed respondent to return to work immediately or be considered absent without leave. Respondent did not return to work as directed.

13. Respondent's May 12, 2020 ankle injury limited his mobility. This injury is one of the bases for respondent's application for disability retirement and is also a component of respondent's workers compensation action. Physicians at CMF, including respondent, have office workspaces. During the COVID-19 Pandemic, physicians were required to walk to the patient-inmates' cells to provide medical consultation or related services rather than interacting with those patient-inmates in their offices. CDCR worked with respondent to find a reasonable accommodation that

would allow him to continue to work at the CMF. However, medical restrictions stemming from respondent's ankle injury prevented him from walking to patient-inmates' cells.

14. By email communication dated July 1, 2020, Nnenna Ikegbu, CMF Chief Physician and Surgeon, informed respondent CDCR it could not provide adequate accommodations for respondent at that time and informed respondent he was required to "go home immediately" due to this inability to accommodate his medical needs. As a result, respondent was approved by CDCR to take a medical leave of absence as a reasonable accommodation.

15. Respondent's ankle injury was treated with a cortisone injection. He also underwent peroneal tendon repair surgery in early 2021 and wore a restrictive boot for a month post-surgery. On or about November 17, 2021, respondent was evaluated by a Panel Qualified Medical Examiner (PQME) in his workers compensation case regarding his right ankle injury. The evaluator produced a four-page evaluation report detailing the assessment and concluded by specifying:

Patient has reached MMI³

Return to work: Now.

Work restrictions: Wear ankle brace on the right ankle at work.

³ "MMI" in the workers compensation context means maximum medical improvement.

16. Kelly Mack, Return to Work Coordinator, CMF, reviewed the report and, in consultation with her colleagues, determined respondent could return to work and be permitted to wear an ankle brace while working. She reached this determination because respondent's ankle had reached maximum medical improvement following surgery and treatment, because respondent's sole restriction was that he wear an ankle brace while working, and because physicians at CMF no longer had to travel to inmate-patient cells to provide medical services.

17. On November 23, 2021, Ms. Mack tried to contact respondent by phone to discuss the PQME report but could not reach him. On that same date, she contacted respondent by email and informed him of the following:

I received your PQME report from 11/17/2021 from your SCIF adjuster. Per the report you have reached maximum medical improvement on 11/17/2021 with a restriction to wear ankle brace on the right ankle at work. We are able to accommodate your restrictions and you are to report to work on Monday, November 29, 2021. Please give me a call ... if you have any questions or you would like to discuss your PQME report.

18. Respondent replied to Ms. Mack by requesting a copy of the PQME report, which had previously been provided to his attorney, and asking to "know about the accommodations in addition to [his] right ankle and if [his] restrictions were provided for ... [his] left ankle [and] right hip." Ms. Mack replied by stating that his accepted body parts were addressed in the PQME report and that he was required to report to work on November 29, 2021, because the report specified that he is able to return to work.

19. Respondent replied again to Ms. Mack by challenging the findings, conclusions, and validity of the PQME report. In response, Ms. Mack informed respondent she must rely on information provided and substantiated by the doctors assigned to his case. She reiterated in her response that the "PQME report states you have reached MMI with restrictions of wearing an ankle brace, CMF is able to accommodate that restriction; therefore, you are to report to work on Monday, November 29, 2021."

20. Respondent did not report to work as directed. On December 21, 2021, CDCR served respondent with a First Amended Notice of Automatic Resignation by Absence Without Leave (Notice of AWOL Resignation). The Notice of AWOL Resignation, in pertinent part, provided:

[E]ffective close of business January 12, 2022, [CDCR] intends to invoke the AWOL statute (Government Code section 19996.2) because you have been absent without leave for five or more consecutive working days. You have been absent from November 29, 2021, through December 3, 2021, and that absence was without approved leave.

[¶] ... [¶]

If the AWOL separation is finalized, you will be considered to have resigned at the close of business on November 28, 2021.

21. The Notice of AWOL Resignation also informed respondent of his right to request an informal "Coleman" hearing (*Coleman v. Department of Personnel Administration* (predecessor to the California Department of Human Resources

(CalHR)) (1991) 52 Cal.3d 1102) to explain why he disagrees with CDCR's intent to invoke the AWOL statute and his right to file a written appeal with the CalHR within 15 days. Respondent requested a *Coleman* hearing. There was no evidence that respondent submitted a formal written appeal to CalHR.

22. By letter dated January 12, 2022, Traci Patterson, Chief Executive Officer, CMF, informed respondent that the decision was made to sustain the Notice of AWOL Resignation, after reviewing the *Coleman* Officer's recommendation and the materials upon which the action was based. Accordingly, respondent was AWOL separated from State service and considered to have resigned from employment at the close of business on November 28, 2021. An employee who has resigned from state service due to an AWOL separation may be permissively reinstated, however, there are no automatic reinstatement rights associated with an AWOL separation.

CalPERS' Challenge to Respondent's Application

23. CalPERS obtained documents and information from CDCR regarding respondent's progressive discipline and AWOL separation. This included the NOAA that constituted the LOR, the Notice of AWOL Resignation, and related *Skelly*, *Coleman*, and SPB determinations.

24. By letter dated August 30, 2022, CalPERS notified respondent that, based on additional information received, it determined that respondent is not eligible for industrial disability retirement because his "employment ended for reasons which were not related to a disabling medical condition." On that same date, respondent appealed the CalPERS cancellation of his application for disability retirement.

25. On September 14, 2022, Keith Riddle signed and thereafter filed the First Amended Statement of Issues. This hearing followed.

26. At hearing, CalPERS argued that respondent is precluded from seeking disability retirement pursuant to the courts' holding in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*), and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*). As set forth below, the courts in *Haywood* and *Smith* held that civil service employees may not apply for disability retirement if they have been dismissed from their civil service employment. These courts recognized two exceptions to this preclusion: (1) when the employee establishes that the dismissal was the ultimate result of a disabling condition; and (2) when the employee establishes that the dismissal preempted the employee's otherwise valid claim for disability retirement. CalPERS contends that neither of the recognized exceptions to preclusion apply.

Respondent's Evidence

27. Respondent began working as a physician for CDCR in October 2017. He testified that he applied for industrial disability retirement on October 14, 2020, without any knowledge that he was going to be served with the NOAA that resulted in the LOR the following day. He emphasized he did not apply for industrial disability retirement to avoid disciplinary action or circumvent his separation from employment. Instead, he applied for disability retirement due to his medical conditions and how those conditions interfered with his ability to perform his duties.

28. Respondent went on industrial disability leave as a reasonable accommodation due to his right ankle injury on July 1, 2020. Prior to being placed on leave, he made multiple requests to receive reasonable accommodations that would allow him to continue to work. He requested to telework and be permitted to perform telemedicine from home but was denied. On February 10, 2021, when he received a letter from Jessica Barnes, CMF Return to Work Coordinator, which confirmed that he

was "currently approved" for a reasonable accommodation of a medical leave of absence that rendered him temporarily/totally disabled due to recent ankle surgery.

29. Respondent testified that he decided to apply for disability retirement because CDCR was not responding to his requests for reasonable accommodations and then began overly scrutinizing his work in retaliation to his lawful requests for reasonable accommodations.

30. Respondent failed to return to work in November 2021 as directed for several reasons. This included that CDCR repeatedly refused to provide him with reasonable accommodations; that he disagreed with the findings and conclusions in the PQME report; that he believed he had other disabling conditions, supported by competent medical evidence, that prevented him from returning to work; that he had received work restrictions from his orthopedist on or about April 28, 2021, that put him on a "year long" work restriction which had not ended; because he had relocated to and accepted employment in Texas; and because he had applied for industrial disability retirement and desired to retire from state service.

31. Respondent testified that in addition to his right ankle injury he suffered from other ailments not specified on his application that he experienced prior to his separation from employment with CDCR. This included a left ankle injury and a hip injury. This also included sleep apnea, which decreased his concentration and attention to detail. He asserted that his treating physician, Dr. Perez, Shakil A. Khan, M.D., a "sleep specialist," and Malcolm McHenry, M.D., a cardiovascular disease specialist and independent medical evaluator, all concluded that his sleep apnea substantially incapacitated him from performing his duties when he submitted his disability retirement application and preceded his AWOL separation. Respondent reiterated throughout the hearing that CDCR failed to provide him with reasonable

accommodations for his disabling conditions, that the information CDCR relied upon when he was directed to return to work was erroneous, and that adverse employment actions taken against him and his AWOL resignation from employment, were unwarranted and in retaliation to his objection to CDCR's failure to provide reasonable accommodations.

32. Respondent submitted into evidence, an Independent Medical Evaluation (IME) report and Supplemental IME report prepared by Dr. McHenry, regarding an evaluation he performed on June 13, 2022. These documents were admitted into evidence, over CalPERS' objection, as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).⁴ The initial IME report reflects that Dr. McHenry diagnosed respondent with diabetes mellitus, sleep apnea, recurrent sinus tachycardia, chronic anxiety and depression, peroneal brevis and longus tendon tear of the right ankle, asthma, and allostatic load exceeded by chronic industrial stress. Regarding whether and how respondent's conditions interfered with his ability to perform his job duties, Dr. McHenry included the following in the initial IME report:

I believe [respondent] has [impairment that arises to the level of substantial incapacity to perform his usual job

⁴ Government Code section 11513, subdivision (d), in relevant part, provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

duties due to tachycardia and diabetes mellitus ii, and sleep apnea] but it is temporary and potentially correctable.

[Respondent] indicates that because of the effects of the sleep apnea, the persistent sinus tachycardia and the diabetes with frequent need for urination, he is unable to concentrate on substantive medical needs of the inmates. The effects of sleep apnea preclude him from feeling rested and he lacks alertness. The increased urinary urgency and polyuria he believes diminishes his personal safety and that of others. Hyperglycemia leads to somnolence. The tachycardia which can last up to 15 minutes impairs his decision making and concentration.

I believe that the three conditions which affect [respondent's] ability to substantially carry out the essential duties of his job are short-term and potentially reversible.

33. In his Supplemental IME report, Dr. McHenry included the following information:

I apologize for errors in my IME ... I addressed sleep apnea since [respondent] was adamant about it being included and he did not feel that any other expert would be commenting on a condition which he felt was important to the resolution of this case. Therefore, I am asking you to ignore all the details of sleep apnea and its treatment.

[Respondent] does in fact have substantial incapacity [due to Tachycardia and Diabetes Mellitus II] which is intermittent depending on the presence of tachycardia and the presence of elevated blood sugars.

At the time of my examination, the only objective finding that was abnormal was sinus tachycardia of 130 beats per minute. Despite this tachycardia, [respondent] was lucid, credible and explained his clinical condition in a highly accurate way. Therefore, at the time of my evaluation, objective findings of substantial incapacity were not found. [Respondent] indicated that when he has subjective symptoms of tachycardia and polyuria, he has difficulty concentrating and difficulty making scientific judgments as a physician. Hyperglycemia will lead to somnolence and tachycardia may last up to 15 minutes. Subjective symptoms should not be substantially incapacitating since they are treatable and as such, should be present for 6 months or less.

34. Respondent also submitted documents reflecting that he had been diagnosed with sleep apnea as early as January 10, 2020, and email correspondence with his supervisors, Return to Work Coordinators, and other CDCR/CMF representatives regarding his claimed conditions, workplace accommodations, and employment status. These documents were also admitted into evidence over objection as administrative hearsay.

Analysis

35. The sole issue for determination is whether respondent's application and eligibility for disability retirement is precluded by operation of *Haywood* and its progeny. CalPERS established that respondent voluntarily resigned from employment with CDCR, as a result of AWOL separation, effective at the close of business on November 28, 2021. CalPERS also established that respondent's separation from employment with CDCR constituted a complete severance of the employer-employee relationship with no automatic (i.e., nonpermissive) right to reinstatement.

LEGAL AUTHORITY

36. In *Haywood*, the appellate court held that an employee's termination for cause rendered him ineligible for disability retirement:

[W]e conclude that where, as here, an employee is fired for cause and the discharge is neither the ultimate result of the disabling medical condition or preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed.

(*Haywood*, at p. 1307.)

37. The court in *Haywood* drew a clear distinction between an employee who is *unable* to perform his duties due to a disability and one who is *unwilling* to perform those duties, and explained why only the former is entitled to retire for disability:

Thus, there is an obvious distinction between an employee who has become medically *unable* to perform his usual duties and one who has become *unwilling* to do so. Disability retirement laws address only the former. They are not intended to require an employer to pension-off an unwilling employee in order to maintain the standards of public service. (See *Schneider v. Civil Service Com.*, *supra*, 137 Cal.App.2d at p. 285 [upholding the termination of employment as a means to deal with an unwilling employee].)⁵ Nor are disability retirement laws intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. "The pension roll is a roll of honor a reward of merit, not a refuge from disgrace; and it would be an absurd construction of the language creating it to hold that the intention of the Legislature was to give a life annuity to persons who, on their merits, as distinguished from mere time of service, might be dismissed from the force for misbehavior." (*MacIntyre v. Retirement Board of S.F.*, *supra*, 42 Cal.App.2d at p. 736.)⁶

This unable/unwilling dichotomy, and the role of disability retirement in addressing only the unable-to-work prong, is

⁵ *Schneider v. Civil Service Com.* (1955) 137 Cal.App.2d 277.

⁶ *MacIntyre v. Retirement Bd of S.F.* (1941) 42 Cal.App.2d 734.

apparent in the PERS law. For example, while nothing in the PERS law restricts an employer's right to fire an unwilling employee, the Legislature has precluded an employer from terminating an employee because of medical disability if the employee would be otherwise eligible for disability retirement. (§ 21153.) In such a case, the employer must instead apply for the disability retirement of the employee. (*Ibid.*) In addition, while termination of an unwilling employee for cause results in a complete severance of the employer-employee relationship (§ 19583.1), disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. Until an employee on disability retirement reaches the age of voluntary retirement, an employer may require the employee to undergo a medical examination to determine whether the disability continues. (§ 21192.) And an employee on disability retirement may apply for reinstatement on the ground of recovery. (*Ibid.*) If an employee on disability retirement is found not to be disabled any longer, the employer may⁷ reinstate the employee, and his disability allowance terminates. (§ 21193.)

⁷ In *Department of Justice v. Board of Administration of California Public Employees' Retirement System* (2015) 242 Cal.App.4th 133, the appellate court explained that an employer's duty of unconditional reinstatement under Government

(*Id.* at pp. 1304-1305, emphasis original.)

38. Later, in *Smith*, the same appellate court explained why an employee who has been terminated may still be eligible for disability retirement if his termination was caused by his disabling medical condition or his termination preempted an otherwise valid claim for disability retirement:

This caveat flows from a public agency's obligation to apply for a disability retirement on behalf of disabled employees rather than seek to dismiss them directly on the basis of the disability [citations] or indirectly through cause based on the disability [citation].

(*Smith*, at p. 205.)

39. *Smith* involved a firefighter who filed a backdated application for disability retirement on the effective date of the termination of his employment. With regard to the second prong of *Haywood*, the appellate court explained that even a dismissal based solely for a cause unrelated to the employee's disability "cannot result in the forfeiture of a matured right to a pension absent express legislative direction to that effect." (*Smith*, at p. 206.) The court further explained that the right to a disability pension does not mature until the pension board has concluded the applicant is substantially incapacitated for the performance of his usual duties. (*Ibid.*) In *Smith*, the

Code section 21193 is mandatory "when a recipient of disability retirement is no longer incapacitated by the condition for which she was retired." (*Id.*, at p. 142.)

court concluded that Mr. Smith's right to a disability pension had not matured. The court stated:

In the present case, a CalPERS determination of eligibility did not antedate the unsuccessful certification on the ladder truck. His right to a disability retirement was thus immature, and his dismissal for cause defeated it.

(Ibid.)

40. The *Smith* court recognized that equitable exceptions may exist to the rule that a right to a disability pension is not mature until the pension board has determined the applicant is substantially incapacitated for the performance of his or her usual duties: The court noted that it is "conceivable" that equity may dictate that a right to a disability pension to have matured when, for instance, there was an impending ruling in favor of a disability pension or where a favorable ruling on a disability pension claim would have been a forgone conclusion.

Conceivably, there may be facts under which a court, applying principles of equity, will deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause. This case does not present facts on which to explore the outer limits of maturity, however.

It is not as if the plaintiff had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal. Rather, he did not even initiate the process until after giving cause for his dismissal.

Nor, for that matter, is there undisputed evidence that the plaintiff was eligible for a CalPERS disability retirement, such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb). At best, the record contains medical opinions of a permanent disability for purposes of the prior and pending workers' compensation claims. But a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties is different. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567, 262 Cal.Rptr. 566; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132, 139 Cal.Rptr. 814.) And for purposes of the standard for a disability retirement, the plaintiff's medical evidence is not unequivocal. The defendants would have a basis for litigating whether this evidence demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862, 143 Cal.Rptr. 760; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877, 86 Cal.Rptr. 450; *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.) Thus, an entitlement to a disability retirement cannot rest on the medical evidence of the plaintiff.

(*Smith*, at pp. 206-207.)

41. In *In re Vandergoot* (2013) CalPERS Precedential Bd. Dec. No. 13-01, the Board of Administration extended the rule articulated in *Haywood* and applied in *Smith* to a state employee who voluntarily resigned his employment as a heavy equipment operator with CAL FIRE, rather than being terminated for cause. The Board of Administration concluded that *Haywood's* holding applies whether Mr. Vandergoot was terminated for cause or voluntarily resigned his employment and waived any reinstatement rights, the Board of Administration explained:

In deciding this case, bright line distinctions need not be made in determining when and under what circumstances a resignation becomes a termination for cause for purposes of applying *Haywood*. This is because *Haywood* makes it clear that a necessary requisite for disability retirement is the potential reinstatement of the employment relationship with the District if it ultimately is determined that respondent is no longer disabled. (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at pp. 1296 - 1297.) Such is not possible here. The employment relationship has not only been severed, but the terms of the Stipulation and Settlement Agreement expressly lock respondent out from being reinstated. Such a circumstance must be viewed as wholly inconsistent with the policy behind and rationale for disability retirement

(*In re Vandergoot, supra*, CalPERS Precedential Bd. Dec. No. 13-01, at p. 7; quoting, *Haywood*, at p. 1305.)

CALPERS' CONTENTIONS

42. CalPERS contends that respondent's AWOL separation renders him ineligible for disability retirement. Here, respondent failed to report to work as directed and AWOL "resigned," pursuant to Government Code section 19996.2. His resignation was compelled by his employer and is tantamount to a termination for cause for purposes of this hearing as the AWOL resignation constitutes a complete severance of the employer-employee relationship and respondent has no right to reinstatement. He requested and participated in an informal *Coleman* hearing to contest his separation from employment, without success. He was aware of his right to file a formal written appeal with CalHR but failed to do so. The termination of this employment relationship renders respondent ineligible for disability retirement, unless he can establish that either exception specified in *Haywood* and *Smith* apply to his preclusion from eligibility.

RESPONDENT'S CONTENTIONS

43. Despite his failure to take advantage of the CalHR appeal process, respondent claimed he was essentially wrongfully terminated in retaliation for objecting to CDCR's failure to provide him with reasonable workplace accommodations and because he was directed to return to work based on erroneous information. These claims are only relevant to the extent they support either exception specified in *Haywood* and *Smith*.

44. Respondent asserted his separation from employment was the ultimate result of a disabling condition because he was temporarily off work for several months due to his right ankle injury, and was AWOL separated from employment after refusing to return to work when CDCR agreed to provide the reasonable accommodation

specified by his qualified medical evaluator. Respondent also asserted that his AWOL separation from employment was preemptive of his valid claim for disability retirement because he reportedly had other medical conditions that had not been properly evaluated or accepted in his workers' compensation action, which had not been reasonably accommodated or satisfactorily considered by CDCR prior to his being directed to return to work.

45. Respondent's claims were not persuasive. First, respondent had the right to formally challenge the basis for his AWOL separation before CalHR and failed to do so. His failure to formally challenge the AWOL separation precludes him from challenging that decision now. (See, *In re Michael K.* (2010) 185 Cal.App.4th 1112, 1125.) Moreover, that respondent reported a variety of ailments to his employer before refusing to return to work after being medically cleared to do so, does not mean he was terminated due to a disabling medical condition; nor does his opinion that some of his reported ailments were not fully considered. CDCR provided him with a medical leave of absence as a reasonable accommodation for a right ankle injury, the only subject of his worker's compensation claim, until his condition improved following right ankle surgery. Respondent failed to present sufficient evidence to establish that any other medical condition substantially incapacitated him from the performance of his job duties. There was no evidence that his stated work limitations or medical conditions were factors in his separation from employment. He was discharged for failing to report to work and perform duties he was medically cleared to perform.

46. Respondent also failed to establish that either equitable exception articulated in *Smith* applies. He did not introduce sufficient evidence to establish he had "an impending ruling on a claim for a disability pension that was delayed, through

no fault of his own, until after his dismissal,” as described in *Smith*. (*Smith*, at p. 207.) He argued that the hearing to determine whether CalPERS properly denied his application was unnecessarily delayed, as he applied for disability retirement in October 2020, and the hearing was not scheduled to occur until October 2022. However, there was no evidence that this period constituted a “delay” or was somehow inconsistent with typical disability retirement appeals processes. Moreover, there was no impending ruling on his claim during that time, as CalPERS had denied his application in June 2021.

47. Respondent also argued that because he filed his application in October 2020, approximately 13 months prior to his AWOL separation, he automatically had a matured right to a disability pension at that time. However, *Haywood* and its progeny make it clear that a prerequisite to granting a disability pension is the applicant’s ability to be reinstated with his former employer should it subsequently be determined that he is no longer disabled. If an applicant cannot be reinstated because he was terminated for cause (*Haywood* and *Smith*) or resigned and has no compulsory reinstatement rights (*Vandergoot*), he is ineligible for a disability pension. Respondent’s reasoning was explicitly rejected in *Haywood*:

We reject a construction of section 21154 that would establish eligibility for disability retirement whenever a timely application is submitted. The section simply reflects a legislative intent that a claimed disability bear a causal relationship to the discontinuance of service by providing outside time limits, referenced to the cessation of service, within which an application must be filed or need not be considered. Notably, section 21154 specifies that, when a

timely application is filed, the employee must be both “otherwise eligible to retire for disability” and “incapacitated for the performance of duty” in order to be granted disability retirement. In this respect, the section provides a procedural time limit within which an application for disability retirement must be filed but does not provide for substantive eligibility whenever a timely application is filed.

(Haywood, at p. 1307)

48. Respondent argued that documents he admitted into evidence from his doctors established that he was substantially incapacitated from the performance of his duties prior to his AWOL separation from employment, and that he had a vested right to a disability pension while still employed by CDCR. However, a vested right matures when there is an unconditional right to immediate payment. *(Smith, at p. 206.)* Typically, this arises when a pension board determines that the employee was no longer capable of performing his or her duties. *(Ibid.)*

49. Here, respondent had claimed conditions that were not substantially incapacitating and a right ankle injury that temporarily prevented him from performing his job duties, until that injury was improved through surgical intervention and the related restrictions addressed through reasonable accommodations. There has been no determination by CalPERS that respondent was eligible for disability retirement at any time. Accordingly, respondent’s right to disability retirement could not have matured before his dismissal.

50. Even where there has not yet been a determination of eligibility, there may be facts under which a court, applying principles of equity, will deem an employee

to still have a right to disability retirement. (*Smith, supra*, 120 Cal.App.4th at pp. 206-207.) The equitable principles described in *Smith* have been considered and found not applicable to the facts established at hearing.

51. Respondent did not establish by "undisputed evidence" that he was eligible for a CalPERS disability retirement, "such that a favorable decision on [respondent's] claim would have been a foregone conclusion (as perhaps with a loss of limb)." (*Ibid.*) That he was off work for several months due to a right ankle injury and also complained of other conditions he deemed debilitating is insufficient to conclude he was eligible for disability retirement at any time prior to his separation from employment. That there was no foregone conclusion that respondent was eligible for a disability pension is even more obvious considering he had been approved to return to work prior to his separation from employment and had been working as a physician in Texas for approximately eight months, performing job duties very similar to those he had with CDCR. Therefore, respondent did not have a matured right to a disability pension when he was AWOL separated from employment. Consequently, the severance of his employer-employee relationship with CDCR did not effectuate a forfeiture of a matured right to a disability retirement.

52. Respondent's testimony regarding his medical condition included primarily subjective complaints of his symptoms and he produced medical evidence entirely through hearsay documents. This is insufficient to support a finding in an administrative hearing.⁸ As in *Smith*, for purposes of the standard for disability retirement, the medical evidence here is not unequivocal. CalPERS would have a basis for litigating whether the evidence provided by respondent demonstrated a

⁸ See footnote 4.

substantial incapacity to perform his job duties or instead only made it difficult to perform his duties, which is insufficient. (*Smith*, at pp. 206-207.)

53. When all the evidence is considered, CalPERS established that respondent's AWOL resignation constituted a complete severance of his employer-employee relationship with CDCR on November 28, 2021. Respondent failed to establish that the severance of his employment relationship with CDCR was the ultimate result of a disabling medical condition or that his dismissal preempted an otherwise valid claim for disability retirement. Respondent also failed to present sufficient evidence to establish that he should be deemed to have had a matured right to disability retirement under the principles of equity. Therefore, respondent is ineligible for disability retirement as a matter of law and his application for industrial disability retirement is precluded by operation of *Haywood* and *Smith*.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. CalPERS contends *Haywood* and its progeny preclude respondent from eligibility for industrial disability retirement as a matter of law. CalPERS' contention is akin to an affirmative defense to respondent's claim for industrial disability retirement. Therefore, CalPERS has the burden to prove that respondent AWOL resigned from employment and that the resignation constituted a complete severance of the employer-employee relationship. (Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"]; *Haywood, supra*, 67 Cal.App.4th 1292.) The standard of proof is a preponderance of the evidence.

(Evid. Code, § 115 [“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence”].) Evidence that is deemed to preponderate must amount to “substantial evidence.” (*Weiser v. Bd. of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be “substantial,” evidence must be reasonable in nature, credible, and of solid value. (*In re Teed’s Estate* (1952) 112 Cal.App.2d 638, 644.) If CalPERS meets its burden, the burden then shifts to respondent to establish whether either of the *Haywood* exceptions apply.

Applicable Law

2. The termination of a member’s employment in such a manner that there is no possibility of reinstating the employer-employee relationship in the future renders him ineligible for disability retirement so long as the termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. (*Haywood, supra*, 67 Cal.App.4th at pp. 1306-1307.) That respondent filed his application for disability retirement and complained of potentially disabling conditions prior to his complete separation from employment does not allow him to somehow remain eligible to disability retire. As in *Haywood*, respondent’s AWOL separation from employment eliminated “a necessary requisite for disability retirement—the potential reinstatement of his employment relationship with [CDCR] if it ultimately is determined that he is no longer disabled.” (*Ibid.*)

Conclusion

3. In sum, CalPERS established that respondent’s AWOL resignation constituted a complete severance of the employer-employee relationship between respondent and CDCR, and respondent did not establish that the separation from employment was the ultimate result of a disabling condition or preemptive of an

otherwise valid claim for disability retirement. For these reasons, cause exists to uphold CalPERS' determination that respondent is not entitled to file an application for disability retirement allowance.

ORDER

Respondent Eusebio M. Montejo's Disability Retirement Election Application seeking an industrial disability retirement is CANCELLED.

DATE: November 18, 2022

Ed Washington

ED WASHINGTON

Administrative Law Judge

Office of Administrative Hearings