ATTACHMENT E

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:

KIAN HEMMATI,

Respondent,

and

CALIFORNIA DEPARTMENT OF TRANSPORTATION,

Respondent.

Agency Case No. 2020-0027 (Amended Statement of Issues)

OAH No. 2020020682

PROPOSED DECISION

Deena R. Ghaly, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on February 12, 2021, via videoconference.

Austa Wakily, Senior Attorney represented Complainant Keith Riddle, Chief of the Disability and Survivor Benefits Division, California Public Employees' Retirement System (CalPERS). Respondent Kian Hemmati (Respondent) represented himself. No

appearance was made by or on behalf of Respondent California Department of Transportation (DOT).

Oral and documentary evidence was received, and argument was heard. The record was left open until February 23, 2021, for Respondent to submit additional evidence and until March 2, 2021, for Complainant to object or otherwise respond to Respondent's post-hearing submission. Both parties made their post-hearing submissions timely.

On March 2, 2021, the record was closed, and the matter was submitted.

Evidentiary Issues

As part of his post-hearing filing, Respondent submitted a statement containing additional argument and testimony, including a statement purporting to establish that CalPERS' medical expert had admitted that Respondent was disabled during the expert's testimony at the hearing. Respondent's post-hearing statement is marked Exhibit A for identification. Respondent also submitted additional medical records. The medical records are collectively marked Exhibit B for identification.

Complainant objected to Respondent's statement on the grounds that the statements constituted impermissible hearsay. Complainant also argued that accepting Respondent's post-hearing statement into the record would be prejudicial to Complainant because Complainant cannot cross-examine Respondent about these statements.

Further, Complainant objected to admitting the medical records comprising Exhibit B, all of which were dated prior to the day of the hearing. Complainant argued that these documents should have been produced pursuant to the January 6, 2021

prehearing order, which directed both parties to serve and file evidence three days before the hearing day. Because Respondent produced this evidence after the hearing, Complainant argued that its inclusion in the record would prejudice Complainant. Complainant also argued that some of the diagnoses discussed in the medical records went beyond Respondent's stated basis for seeking disability retirement and therefore should be excluded as irrelevant.

Exhibit A is lodged with the record as argument. Exhibit B is admitted as administrative hearsay pursuant to Government Code section 11513[1] solely to supplement or explain direct evidence, provided at the hearing.

ISSUE

Due to conditions of rheumatoid arthritis and asthma, is Respondent permanently disabled from performing the regular and customary duties of a transportation engineer and thereby eligible for industrial disability retirement?

FACTUAL FINDINGS

Background

1. Respondent was employed as a transportation engineer with the DOT when, on July 8, 2019, he signed an application for disability retirement based on a rheumatology (rheumatoid arthritis) condition and asthma. By virtue of his

[1] Further statutory references are to the Government Code.

employment, Respondent is a state miscellaneous member of CalPERS subject to Government Code section 21151. While the length of time Respondent worked at DOT was not established by the record, it is uncontested that he has the minimum service credit necessary to apply for a disability retirement.

2. CalPERS obtained medical reports concerning Respondent's medical condition and commissioned an independent medical examination (IME). After reviewing the records and the results of the IME, CalPERS personnel determined that Respondent did not qualify for a disability retirement. Respondent timely appealed and this hearing followed.

3. The issue on appeal is limited to whether, at the time Respondent filed his application, he was "substantially incapacitated" from the performance of his duties as a Transportation Engineer as that term is defined under applicable law.

CalPERS' Independent Medical Evaluation

4. CalPERS selected Dan La, M.D. to perform an independent medical evaluation of Respondent. Dr. La is a diplomate of the American Board of Rheumatology. He obtained his medical degree from the American University of the Caribbean School of Medicine in Montserrat, West Indies and completed his residency in internal medicine and a fellowship in rheumatology at the University of Southern California (USC) Medical Center. Dr. La maintains a rheumatology private practice and is also an assistant clinical professor at USC School of Medicine.

5. Dr. La examined Respondent on October 9, 2019 and prepared his report the same day. Dr. La's physical examination of Respondent took 50 minutes. He also spent and additional 45 minutes reviewing Respondent's medical records. Dr. La testified at the hearing. His report was also introduced and admitted into evidence.

6. In his report, Dr. La described Respondent's work as follows:

> [Respondent's] job title is Transportation Engineer (Civil). He works as a Civil Engineer for California Transportation. His job duties were reviewed including working on the computer for up to 8-hours during the workday. His tasks included developing and reviewing transportation projects by using his engineering knowledge and skills. He would use programs such as Microsoft Excel or Word. He would complete complex engineering mathematical calculations and drafting using CAD.
>
> Physical Requirements:
>
> Constantly (6+ hours): Sitting, repetitive use of hands, keyboard use, mouse use.
>
> Frequently (3-6 hours): Twisting neck, twisting waist, fine manipulation.
>
> Occasionally (up to 3 hours): Standing, running, walking, crawling, kneeling, climbing stairs, squatting, bending neck, bending waist, reaching above shoulder, reaching below shoulder, pushing & pulling, power grasping, simple grasping, lifting/carrying up to 50 pounds, walking on uneven ground, driving, working with heavy equipment, exposure to excessive noise, exposure to extreme temperature/humidity/wetness, exposure to gas/fumes/chemicals, working at heights, operation of foot

controls or repetitive movement, use of special visual or auditory protective equipment.

(Exh. 8, p. 5.)[2]

7. CalPERS included specific questions for Dr. La to answer as part of the IME. The questions (in bold text) and Dr. La's answers are as follows:

> **1. Does the member have an actual and present rheumatological (rheumatoid arthritis and asthma) impairment that arises to the level of substantial incapacity to perform their usual job duties?**
>
> Based on my assessment I have some doubt regarding the diagnosis of rheumatoid arthritis as this claimant has no objective findings of synovitis on examination. There is no swelling involving the wrists, MCP, or PIP joints as I would expect to see with an inflammatory arthritis. Additionally, given his long disease status of diagnosis in 2010, I do not find any objective findings of joint deformities involving the wrists and hands, such as fusion or ulnar deviation or MCP subluxation that would signify joint damage and destruction.

[2] The job duties and conditions considered by Dr. La are consistent with those Respondent listed in his disability retirement application (see Exh. 11) and were not otherwise disputed.

The Fibromyalgia Questionnaire given during his visit today demonstrated a Widespread Pain Index (WPI) of 14 and Symptom Severity Score (SSS) of 7, which can contribute to a fibromyalgia diagnosis. I do not find the member substantially incapacitated to perform his usual job duties.

2. If you find the member to be substantially incapacitated, is the incapacity permanent or temporary? (As specified in California Public Employee Retirement Law G. C. 20026). If temporary, will the incapacity last longer than 12 months? Please explain in detail.

I do not find the member substantially incapacitated based on his arthritis condition. The diagnosis of rheumatoid arthritis is in question and needs to be further evaluated by additional blood tests and possibly imaging studies of the hands, wrists, and feet.

3. What objective findings (or lack thereof) lead you to the conclusion the member is or is not, substantially incapacitated? Please explain fully.

The primary reason I find the member not to be substantially incapacitated is that there are no objective findings of any joint swelling of his wrists, hands, knees, ankles, or feet. He primarily has subjective complaints of joint pains, which can be attributed to fibromyalgia rather than rheumatoid arthritis. Serologies for rheumatoid

arthritis have revealed negative rheumatoid factor and negative ANA. There is no evidence of muscle atrophy of the muscle groups of the upper and lower extremities. No significant weakness is demonstrated on physical examination.

4. Please list the specific Job Duties and/or Physical Requirements of Position the member is unable to perform <u>for each</u> substantially incapacitated body part/condition.

The claimant is not found to be substantially incapacitated due to rheumatoid arthritis.

5. As of what date did the member's condition become "substantially incapacitating"?

The member is not substantially incapacitated from his history of rheumatoid arthritis.

6. Is the member cooperating with the examination and putting forth their best effort, or do you feel there is exaggeration of complaints?

Yes, the member is cooperating with the examination to the best of his abilities in terms of answering questions appropriately, filling out the Fibromyalgia Questionnaire, and cooperating with the physical examination today.

(Exh. 8, pp. 6-8 [underlined text in the original].)

8. By letter dated December 13, 2019, CalPERS personnel supplied Dr. La with additional medical records provided by Respondent and asked Dr. La to clarify his conclusions regarding whether Respondent was disabled due to rheumatoid arthritis. Dr. La responded as follows:

> Based on my examination of the medical records and member questioning, I do not feel the member has substantial impairment caused by rheumatoid arthritis to the level of substantial incapacity to perform their usual job duties. The member does not have any joint deformities in the small joints of the wrist and fingers. Additionally, there is no swelling involving the wrists, MCP, and PIP joints. There is no evidence of ulnar deviation, MCP subluxation, or hand deformities to signify underlying joint damage or destruction.

(Exh. 10, p. 1.)

9. During Dr. La's testimony at the hearing, he stated that, in the absence of objective indicia of rheumatoid arthritis – particularly swollen or deformed joints and muscle atrophy – it is not medically possible to conclusively establish that Respondent suffers from the condition. Asked whether Respondent could suffer from another condition with similar symptoms, Dr. La stated that Respondent could have fibromyalgia, however, Dr. La had not specifically evaluated Respondent for that condition except to have him complete a fibromyalgia questionnaire, the results of which were suggestive of such a diagnosis.

Respondent's Testimony

10. Respondent is 37 years old. He began experiencing physical symptoms which interfered with his ability to work in 2012 and was initially diagnosed with fibromyalgia. Subsequently, Respondent was diagnosed with "seronegative" rheumatoid arthritis, a form of rheumatoid arthritis that does not have any markers of the condition in the patient's blood. Various medications prescribed by his doctors alleviated his symptoms but either caused intolerable side effects or became increasingly ineffective.

11. Respondent has not worked since February 2019. He maintained that the fatigue and pain from his condition, as well as related symptoms such as photophobia prevented him from spending hours before a computer and otherwise fulfilling the basic duties of his position. Respondent also stated that he could not work during periods of asthma flair-ups and that his employer's efforts to help him cope with these, such as moving his work location, were not effective.

Respondent's Post-Hearing Submissions

12. In his post-hearing statement, Respondent argued that Dr. La's testimony at the administrative hearing established that he had essentially found Respondent to be disabled, albeit as a result of fibromyalgia, not rheumatoid arthritis:

> I again would like the courts to consider the lack of legitimacy of the IME performed by Dr. La because during my questioning of him he essentially admitted on record that he in fact does feel I am disabled; thusly, I have fulfilled the burden proof (*sic*) required by courts . . . Within my questioning I had Dr. La confirm there are some similar

> symptoms between seronegative rheumatoid arthritis and fibromyalgia [,] [t]he main one being malaise, of which Dr. La explained that it medically means overall fatigue. Malaise is a main disabling symptom that I am suffering from as documented in multiple medical opinions which confirm my incapacitation in combination with other symptoms that fall under an all encompassing diagnosis of seronegative rheumatoid arthritis . . .

(Exh. A, p. 1.)

13. The second part of Respondent's post-hearing submission is a set of medical forms and records collectively marked Exhibit B. Summaries of these documents is as follows:

A. Two CalPERS' "Physician's Report on Disability" forms completed by one of Respondent's treating physicians, Ardeshir Talieh, M.D. In the forms, Dr. Talieh wrote that Respondent suffers from seronegative rheumatoid arthritis and mild asthma. (See Exh. B, pp. 2/26[3] and 5/26.) Under each section of the form asking for objective findings, Dr. Talieh wrote "no acute findings on last visit, mostly subjective" and "no acute findings, all is subjective." (*Ibid.*)

[3] Pagination cites to Respondent's exhibits track his pagination system as hand-marked in his post-hearing submissions.

B. "Visit notes" from Respondent's ophthalmologist reflecting that Respondent reported experiencing photophobia and episcleritis. Episcleritis is inflammation of the whites of the eyes and is a condition related to rheumatoid arthritis.

C. A report by Rheumatologist Benedict Tiong, M.D. Dr. Tiong's notes included an extensive chronicle for Respondent's medical history as relayed by Respondent as well as his own conclusions:

> On evaluation today, he does present with active inflammatory polyarthritis, mainly in the small joints of his hands in a symmetric distribution. MCP's are the most symptomatic joints. This could be from being off anti-inflammatory treatment . . . One of his main questions today is if he actually has seronegative rheumatoid arthritis. An alternative diagnosis of Fibromyalgia has been discussed by other providers. Discussed with the patient that today is my first time meeting him (his is unsure if he can follow up at this time) and it is impossible to adequately confirm or refute previously diagnosed etiologies from prior provider visits in years past.

(Exh. B., p. 14/26.)

Although he refrained from making a definitive diagnosis without further tests and examinations, Dr. Tiong's report includes his working theories of Respondent's condition:

> I discussed that [Respondent's medical] history is certainly notable for rheumatoid arthritis, including the following

> aspects of his history: response to Enbrel and other anti-inflammatories, chronicity of symptoms in multiple small joints in a symmetric distribution, and other diagnosed rheumatologic disease. I discussed with [Respondent] that with seronegative rheumatoid arthritis, it is a more challenging diagnosis. Often, there can be concomitant etiologies, or overlap etiologies. Given the chronicity of his symptoms and the history that I have obtained, there is likely an inflammatory aspect to his joint symptoms, and that there is likely an autoimmune and rheumatologic component.

(Exh. B, p. 14/26.)

E. Report from Rheumatologist Daniel Arkfeld, M.D. after Respondent's September 29, 2020 telemedicine examination. Dr. Arkfeld's report, written in short and incomplete sentence fragments, did not clearly communicate his impressions. By way of some sort of diagnosis or medical opinion Dr. Arkfeld offered the following:

> I am concerned about the possibility of radiographic negative axial spondyloarthropathy . . . The second thing in the differential would be a rheumatoid arthritis pattern arthritis, which the evidence seems to a be a little bit more lacking for, but UCLA notes did mention inflammatory arthritis. Checking inflammatory markers during flare would actually be helpful for this and certainly fibromyalgia quite severe.

(Exh. B, p. 20/26.)

F. Chart notes prepared by Rheumatologist Boris Ratner, M.D. after a February 8, 2021 examination of Respondent. As with Dr. Tiong, Dr. Ratner chronicled Respondent's lengthy medical history. He also examined him. Dr. Ratner's notes conclude as follows:

> Impression: typical FM [fibromyalgia] with nonspecific [joint] pain, muscle pain, fatigue, anxiety, poor sleep, mental fogginess, negative lab work up serval times, negative x-rays na MRI, no evidency of any CT or autoimmune disease on labs, e-rays, exam[.] [¶] [A]t this point he is not very functional and barely get sour (*sic*) of his house . . . his prospects for going back to work in the next few years are very low [.] [H]e would certainly not be able to work as an engineer at this time.

(Exh. B, p. 25/26.)

14. Respondent's post-hearing submission also includes multiple requests to his employer for accommodations to help him with his symptoms. During his testimony, Respondent maintained that he had sought accommodations to allow him to work at home and, in the alternative, to change of work location within DOT's facilities to alleviate exposure to various allergens.

Discussion

15. A. Respondent's stated disabling condition at the time of his application for disability retirement and the only ones at issue in this proceeding, are rheumatoid

arthritis and asthma. Respondent's testimony established that at least as early as the time of his application in February 2019 and on an ongoing up to the time of the hearing, he has experienced symptoms associated with his health that have been, for him, debilitating. Medical records he introduced chronicle his reported history in a manner consistent with his testimony. The medical records also reflect some consensus about his condition; however, there is also some disagreement. Only Dr. Talieh conclusively determined that Respondent suffers from rheumatoid arthritis. Others, including Complainant's own witness, Dr. La, suggested that Respondent may instead suffer from fibromyalgia. Contrary to Respondent's assertions in his post-hearing statement, however, Dr. La never conclusively came to that conclusion. Dr. La was directed to evaluate Respondent for just one condition, rheumatoid arthritis and had neither the authority nor opportunity to go beyond that assignment.

B. Much of Respondent's medical submissions discuss the difficulty of diagnosing rheumatoid arthritis and its overlap and similarity to other conditions, including fibromyalgia. There is insufficient evidence in the record, however, to find that the two conditions are essentially interchangeable. Read collectively, they do not support Respondent's claim of disability based on rheumatoid arthritis and asthma.

D. Respondent's medical evidence is insufficient in two other aspects. First, none of his medical experts expressly incorporated his job duties and their relationship to his condition. Without acknowledging and incorporating the specific physical and mental requirements of his work, their opinions cannot adequately support factual findings specific to the central question in this matter. This deficiency is exacerbated by the fact that the medical evidence Respondent introduced was all in the form of writings. Without live testimony, there is no opportunity to question them directly and with specificity about whether or how Respondent's condition impacts his

ability to work. Such writings are also subject to legal principles limiting their impact as discussed in the Legal Conclusion below.

16. Respondent's assertions about having asthma are addressed in a brief statement by Dr. Talieh and in documents requesting accommodations from his employer when he was still working. There is insufficient evidence to establish a factual finding that Respondent's asthma condition keeps him from working.

LEGAL CONCLUSIONS

General Principles of CalPERS-Provided Disability Retirement

1. The Public Employees' Retirement Law (Retirement Law) governs disability retirement and reinstatements and grants sole jurisdiction to CalPERS to make such determinations. (See Gov. Code,[4] §§ 20026, 20125, 21154, 21156, 21190, 21192 and 21193.)

2. "'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." (§ 20026.)

3. "Incapacitated for the performance of duty," means the "substantial inability of the applicant to perform [her] usual duties," as opposed to mere discomfort

[4] Further statutory references are to the Government Code unless otherwise indicated.

or difficulty. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.)

Disability Retirement Application Process

4. Members who have been denied benefits on their initial application may appeal the disability retirement determination. The appeal hearing must be conducted by an administrative law judge in accordance with the formal hearing provisions of the Administrative Procedure Act (APA), codified at § 11500 et seq.)

Appeals Process

5. An applicant for disability retirement has the burden of establishing eligibility by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) '"Preponderance of the evidence means evidence that has more convincing force than that opposed to it. [Citations.]" (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the quality of the evidence. The quantity of the evidence presented by each side is irrelevant." (*Ibid.*)

6. The moving party has the burden to prove the elements of the claim. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 175.)

Analysis

7. Respondent has not established a qualifying condition with "competent medical opinion" pursuant to section 20026. Under the evidentiary principles of APA, the technical rules of evidence are relaxed somewhat, however, hearsay statement – out-of-court statements provided for the truth of the matter asserted- can only be used to supplement or explain direct evidence such as

sworn testimony. (§ 11513.) Here, Respondent testified about his symptoms. Such evidence, however, is not medical opinion. Respondent's many submissions of medical records comprise medical opinion but, as hearsay, cannot independently establish the required legal element of "competent medical opinion" necessary to successfully establish his claim. Under these circumstances, Complainant's decision to deny his disability retirement application must be affirmed, consistent with the order below.

ORDER

Complainant's denial of Kian Hemmati's industrial disability application for industrial disability retirement is affirmed.

DATE: 03/29/2021

Deena R. Ghaly
Deena R. Ghaly (Mar 29, 2021 11:04 PDT)

DEENA R. GHALY

Administrative Law Judge

Office of Administrative Hearings