

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 CHUNG and CALIFORNIA DEPARTMENT OF
VETERANS AFFAIRS VETERANS HOME, Respondents**

Agency Case No. 2022-0453

OAH No. 2022080673

PROPOSED DECISION

Matthew S. Block, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on January 18, 2023, by videoconference from Sacramento, California.

Nhung Dao, Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

John R. Unruh, Attorney at Law, represented Christopher Chung (respondent) who was present.

There was no appearance by or on behalf of the California Department of Veterans Affairs (VA) Veterans Home. A Notice of Hearing was properly served on the

VA. Consequently, this matter proceeded as a default against the VA under Government Code section 11520, subdivision (a).

Oral and documentary evidence was received, the record closed, and the matter submitted for decision on January 18, 2023.

ISSUE

Is respondent substantially incapacitated from the performance of his usual and customary duties as a dentist on the basis of an orthopedic (right hip and lower back) condition?

FACTUAL FINDINGS

Jurisdictional Matters

1. CalPERS is the state agency responsible for administering retirement benefits to eligible employees. (Gov. Code, § 20000 et seq.) Respondent is employed by the VA as a dentist. By virtue of his employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150. Respondent has the minimum service credit necessary to qualify for retirement.

2. On December 13, 2021, respondent signed and thereafter filed with CalPERS an application for disability retirement (DR). The application claimed disability on the basis of an orthopedic (right hip and lower back) condition.

3. In a letter dated March 18, 2022, CalPERS denied respondent's application for DR. The letter stated that after a review of the medical evidence

submitted, CalPERS found that respondent's orthopedic condition did not render him substantially incapacitated from performing his usual duties as a dentist for the VA.

4. In a letter dated April 25, 2022, respondent appealed CalPERS's denial of his application for DR. Consequently, on July 6, 2022, Keith Riddle, in his official capacity as Chief of CalPERS's Disability and Survivor Benefits Division, signed and thereafter filed a Statement of Issues for purposes of the appeal. The matter was set for evidentiary hearing pursuant to Government Code section 11500 et seq.

Duties of VA Dentist

5. CalPERS submitted two documents explaining respondent's job duties: a "Physical Requirements of Position/Occupational Title" (Physical Requirements); and a "Position Essential Functions/Duty Statement" (Duty Statement) for the position of dentist. The Physical Requirements describe the frequency of a dentist's tasks. A dentist is physically required to complete activities of movement, including: bending and reaching below the shoulder (constantly); bending and twisting the neck, sitting, and standing (frequently); walking and carrying weight of up to 50 pounds (infrequently); and running, crawling, and climbing (never/rarely).

6. The Duty Statement lists the percentage of time spent on tasks relevant to the position of dentist at the Veterans Home. There are five essential categories of time required: (1) performing routine dental procedures and making patient referrals to the appropriate specialist or facility for procedures beyond local capability (45 percent); (2) examining, diagnosing, prescribing treatment and medications, and providing patient instructions (30 percent); (3) providing clinical support and direction to the dental team (10 percent); (4) reviewing charts, charting and integrating results into patients' treatment, and consulting with staff (five percent); and (5) participating

in continuing dental education and maintaining all required licenses to practice (five percent). Additionally, it is expected that a dentist will spend five percent of his time on other non-essential duties as required.

Respondent's Work History and Injury

7. Respondent has worked part-time as a dentist at the VA Veterans Home in Yountville, California, since 2015. He does not know what initially caused the pain in his right hip and lower back. He noted in his application for DR that the pain emerged gradually "since reaching adulthood," and that it was likely caused by "a combination of sports, life, and dentistry."

Medical Evidence

PHYSICIANS' REPORTS ON DISABILITY

8. In support of his application for DR, respondent submitted a Physician's Report on Disability, which was filled out by Nurse Practitioner Elizabeth Gregg and dated December 13, 2021. Nurse Gregg diagnosed respondent with right hip femoral impingement syndrome, as well as chronic lower back pain, which she believes renders him substantially incapacitated from the performance of his usual and customary duties as a dentist. She recommended that respondent refrain from standing for more than 30 minutes at a time, from lifting more than 20 pounds, and from any activity that places additional strain on his hip. Nurse Gregg also wrote that respondent would likely benefit from arthroscopic surgery but noted that he does not wish to undergo surgery at this time.

9. Respondent also submitted a Physician's Report on Disability, which was filled out by Parvin Peddi, M.D., and dated January 10, 2022. Dr. Peddi, who is

respondent's primary treating physician, confirmed Nurse Gregg's diagnosis of right hip femoral impingement syndrome, and expressed the opinion that the condition renders respondent substantially incapacitated from the performance of his duties as a dentist. Additionally, Dr. Peddi wrote that respondent should refrain from bending, kneeling, or any other movement that places strain on his hips and lower back. Dr. Peddi also wrote that respondent would likely benefit from arthroscopic surgery but noted that he does not wish to undergo surgery at this time.

INDEPENDENT MEDICAL EVALUATION

10. On February 8, 2022, Don Williams, M.D., performed an Independent Medical Evaluation (IME) of respondent. Dr. Williams earned a bachelor's degree in engineering science from Trinity University before receiving his medical degree from Case Western Reserve Medical School. He then completed a residency at St. Vincent Hospital in New York City before serving as a doctor in the United States Army for five years. He is certified by the American Board of Orthopedic Surgery, and he has practiced as an orthopedic surgeon in California for 30 years.

11. As part of respondent's IME, Dr. Williams reviewed the CalPERS medical qualifications for disability retirement, respondent's medical records, and the duties and physical requirements of respondent's position at the Veterans Home; obtained his medical history and report of symptoms; and performed a thorough physical examination of respondent's cervical spine, lumbar spine, and upper and lower extremities. Following the IME, he prepared a report dated February 8, 2022, and a supplemental report dated November 29, 2022. He also testified at hearing.

12. A September 2020 MRI and x-ray of respondent's right hip revealed that the major ligaments in the hip joint were normal, and that the major tendons and

muscles were intact. The cartilage on respondent's right hip had worn thin but was not completely gone. Dr. Williams did note irregularities in the "labrum." He did not see a tear in the labrum but suspected a tear was present because the images revealed the presence of "paralabral cysts" that are indicative of tearing.

13. Records indicate that respondent received chiropractic treatment from Laura Agnew, D.C., from February through November 2021. Most of Dr. Agnew's treatment notes indicate that respondent was expected to make a "good recovery" and that he was responding well to treatment. It is unclear from the record why respondent stopped attending chiropractic treatment with Dr. Agnew.

14. During the physical examination, Dr. Williams found respondent to have good range of motion in his cervical spine with no complaints of pain, and normal motion in his upper and lower extremities. However, when respondent flexed approximately 70 degrees at the waist, he experienced pain. Respondent had good motion in his hips, though Dr. Williams noted a slight loss of internal rotation in the right hip.

15. Following his review of respondent's records and the physical examination, Dr. Williams diagnosed respondent with a lumbar strain and impingement of the right hip, with a labral tear and early arthritis. He concluded that respondent is not substantially incapacitated from performing his usual and customary duties as a dentist, because "[d]ifficulty in performing certain tasks alone is not enough to support a finding of disability." Dr. Williams also noted that arthroscopic surgery has been recommended, but that respondent is unwilling to undergo the procedure at this time.

ADDITIONAL MEDICAL RECORDS

16. In response to Dr. Williams' conclusion that he is not substantially incapacitated from the performance of his duties as a dentist, respondent submitted an additional Physician's Report on Disability, filled out by Rebecca Sudore¹, and dated June 27, 2022. Ms. Sudore confirmed Nurse Gregg and Dr. Peddi's diagnoses regarding respondent's hip, and similarly recommended that he refrain from standing for more than 30 minutes or lifting more than 20 pounds. She also wrote that respondent would likely benefit from arthroscopic surgery but noted that respondent does not wish to undergo surgery at this time.

17. Respondent also submitted VA treatment notes from October 2022. The notes indicate that approximately once or twice per year, respondent suffers pain in his right hip for about six weeks at a time, during which he is unable to practice dentistry.

SUPPLEMENTAL IME REPORT

18. Dr. Williams reviewed the additional Physician's Report on Disability and the October 2022 VA treatment records. In a supplemental IME report, dated November 29, 2022, Dr. Williams wrote that the additional records did not change his opinion that respondent is not substantially incapacitated from the performance of his duties as a dentist. Dr. Williams' testimony at hearing mirrored his opinion in the supplemental IME report.

¹ It is unclear from the record whether Ms. Sudore is a medical doctor, registered nurse, nurse practitioner, or any other type of medical practitioner.

Respondent's Evidence

RESPONDENT'S TESTIMONY

19. Respondent testified at hearing. He has worked part-time as a dentist at the Veterans Home in Yountville since September 2015. He works eight-hour shifts every Tuesday and Friday, and an eight-hour shift every other Wednesday. He earns eight hours of sick leave per month, or 12 days per year.

20. Respondent resides in San Francisco, California, with his wife and two children. It typically takes him one and a half hours to drive from San Francisco to Yountville in the morning, and two hours to drive from Yountville back to San Francisco in the evening. The commute time spent sitting down in his vehicle tends to worsen the pain in his hip and lower back.

21. Respondent usually spends at least half of each shift standing and will see up to eight patients on any given day, plus emergency walk-in patients. Each patient appointment generally ranges from 30 to 90 minutes in length. Respondent usually experiences discomfort performing dental procedures that last longer than 30 minutes.

22. Respondent is right-handed. Most of his patients are 80 years old or older and have limited mobility. As a result, respondent tends to have to lean "aggressively" to the right in a non-ergonomic position while treating his elderly patients. He experiences increased pain in his back while sitting on a stool, and increased pain in his right hip while standing. He has started stretching before performing dental procedures and taking short breaks during procedures to stretch. However, it is not always feasible to stop and stretch in the middle of a dental procedure.

23. Respondent is unsure what caused his injury. He first experienced pain in 2020. The pain has gradually increased since its initial onset, particularly while performing dental procedures. Respondent has taken three one-and-a-half month sabbaticals from work due to the pain, the most recent of which was in Fall 2022. He has sought treatment through Kaiser Permanente (Kaiser) and through the VA. Both of his medical teams have concluded that hip replacement surgery will need to be performed. His medical team at the VA recommends that he proceed with the surgery now. His medical team at Kaiser recommends prolonging the surgery as long as possible, because once he undergoes a hip replacement procedure, the procedure will have to be re-performed approximately every 15 years. Respondent does not wish to undergo arthroscopic or hip replacement surgery at this time.

TESTIMONY OF TRACY DAVIS

24. Tracy Davis has worked as a dental assistant at the Veterans Home for 21 years. She has worked with respondent the entire time he has worked at the Veterans Home and testified at hearing. Respondent began complaining about being in physical pain during dental procedures approximately three or four years ago. Ms. Davis has recently observed him in apparent physical discomfort at work, particularly while performing longer dental procedures.

TESTIMONY OF YURY MARTINEZ

25. Yury Martinez has worked as a dental assistant at the Veterans Home for six years. Respondent has previously discussed his orthopedic symptoms with her, and she believes that they have worsened over the years she has worked with him. She has observed respondent stretching before performing dental procedures and taking breaks while performing dental procedures due to physical discomfort.

Analysis

26. Dr. Williams' opinion that respondent is not substantially incapacitated due to his orthopedic (hip and lower back) condition is persuasive. It is supported by a thorough review of respondent's medical records and a detailed physical examination, and he persuasively explained the factual bases for his conclusions and opinion.

27. It is undisputed that respondent experiences discomfort while performing longer dental procedures. However, discomfort alone is insufficient to establish incapacity. All the medical professionals who submitted reports in this case agree that respondent would substantially benefit from arthroscopic and/or hip replacement surgery. However, respondent is unwilling to undergo either procedure. Finally, treatment notes indicate that respondent was responding well to chiropractic treatment. As such, respondent's discomfort cannot be said to be incapacitating such that he cannot perform his usual job duties.

28. In sum, respondent has not met his burden of demonstrating that he is substantially incapacitated from the performance of his usual and customary duties as a dentist due to his orthopedic (right hip and lower back) condition. Consequently, his application for DR must be denied.

LEGAL CONCLUSIONS

1. As the applicant, respondent has the burden of proving by a preponderance of the evidence that he is entitled to CalPERS disability retirement. (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"]; *McCoy v. Bd. of Retirement* (1986) 183

Cal.App.3d 1044, 1051, fn. 5.) A preponderance of the evidence means "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

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, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion." (Gov. Code, § 20026.)

Courts have interpreted the phrase "incapacitated for the performance of duty" to mean "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) It is not necessary that person be able to perform any and all duties, because public policy supports employment and utilization of the disabled. (*Schrier v. San Mateo County Employees' Retirement Association* (1983) 142 Cal.App.3d 957, 961.) Furthermore, mere discomfort, which may make it difficult for one to perform his duties is insufficient to establish incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

3. Based on the Factual Findings and Legal Conclusions as a whole, respondent has not demonstrated by a preponderance of the evidence that he is substantially incapacitated from performing his usual and customary duties as a dentist on the basis of an orthopedic (right hip and lower back) condition. Consequently, his application must be denied.

ORDER

The application for disability retirement filed by respondent Christopher Chung is DENIED.

DATE: February 9, 2023

Matthew Block

MATTHEW S. BLOCK

Administrative Law Judge

Office of Administrative Hearings