

**ATTACHMENT E**

**THE PROPOSED DECISION**

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

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

**JOSE E. SAUCEDO LAZALDE,**

**Respondent,**

**And**

**CALIFORNIA DEPARTMENT OF STATE HOSPITALS  
ATASCADERO,**

**Respondent.**

**Agency Case No. 2023-0866**

**OAH No. 2024010723**

**PROPOSED DECISION**

Irina Tentser, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on July 24, 2024.

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

No appearance was made by or on behalf of Jose E. Saucedo Lazalde (Respondent) despite Respondent receiving timely and appropriate notice of hearing.

Jaycob Javaux, Personnel Officer, appeared on behalf of respondent California Department of State Hospitals Atascadero (DSH-A). No testimonial or documentary evidence was presented by the DSH-A at hearing.

The hearing proceeded in default as to Respondent.

CalPERS presented testimonial and documentary evidence and gave a closing argument. The record was closed and the matter was submitted for decision on July 24, 2024.

Concurrent with the issuance of this decision, the ALJ issued a protective order, on her own motion, placing exhibits 3, 7 and 12 under seal because they contain Respondent's medical information.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. CalPERS is a defined benefit plan administered under the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.; undesignated statutory references are to the Government Code.) CalPERS is governed by its Board of Administration (Board). (Ex. 1.)

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2. Respondent was employed by the DSH-A as a Psychiatric Technician at the time CalPERS received Respondent's signed application for disability retirement (or application) on May 17, 2022. (Exh. 3.) By virtue of his employment, Respondent is a state safety member of CalPERS subject to Government Code section 21151. (Exhs. 1, 3.)

3. Respondent's last day of actual service to the DSH-A was on September 17, 2020. At that time, Respondent was employed by the DSH-A in the position of Psychiatric Technician. (Exh. 3.) On April 1, 2020, Respondent sustained his first injury, an injury to his left elbow while performing his duties as a Psychiatric Technician. Respondent returned to work and sustained a second injury, this time to his left knee, on September 17, 2020. Respondent did not return to work after his second injury and exhausted his leave benefits on October 7, 2021. Effective October 8, 2021, Respondent retired from his employment as a Psychiatric Technician with the DSH-A.

4. According to Respondent's application, his disability was the result of the two injuries described above. He wrote that the April 1, 2020 injury to his left elbow occurred when he was stabilizing a patient and fully extended his elbow, resulting in a loud audible pop. He claimed the September 17, 2020 injury to his left knee occurred when the knee hit the concrete floor after Respondent was assaulted by and stabilized the assailing patient. (Exh. 3.) Respondent's specific disability was described as follows:

(4/1/2020) unable to fully extend left elbow and hand,  
numbness to fingers, loss of grip, and weakness in hand  
[s/c] Unable to bare [s/c] weight on left leg causing right leg  
to bare [s/c] all weight causing pain, unable to  
walk/short/long distance [s/c]

(Exh. 3, p. A33.)

5. According to the application, Respondent's limitations and preclusions due to his injury were that "[Respondent] cannot work with assaultive [*sic*] patients. (Exh. 3, p. A33.)

6. CalPERS referred Respondent's application to the Disability Validation Team to conduct surveillance of Respondent to investigate his disability claim. Investigator Yolanda Clive (Investigator Clive) credibly testified at hearing in support of the investigative report she prepared at the conclusion of her surveillance. (Exh. 11.) For six days, spanning October 3 through 28, 2022, Investigator Clive conducted surveillance of Respondent at his residence. Investigator Clive observed Respondent without his knowledge for four to eight hours a day on the six days she conducted surveillance. She also took surveillance video of Respondent on October 4, 2022, which was shown at and submitted into evidence at hearing. (Exh. 10.) The video corroborated Investigator Clive's hearing testimony that she observed Respondent picking up and carrying cardboard boxes several times from his driveway to his garage on October 4, 2022.

7. In the October 4, 2022 video, Respondent comes outside his home, bends over 90 degrees, fully extends his elbows, and picks up a cardboard box from his driveway. The box is fairly large, wider than Respondent's body, requiring two hands to lift. Respondent does this physical activity twice, inspecting the second cardboard box and then a third, flexing at the waist 90 degrees and touching the ground for each box. There is no indication of pain in Respondent's expression or mannerisms. Respondent carries all three boxes. (Exh. 10.)

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8. CalPERS obtained medical reports concerning Respondent's orthopedic (left elbow, fingers, hands and legs) conditions from competent medical professionals. (Exhs. 7 and 12.) After review of the medical reports, the investigative report, and the surveillance video, CalPERS determined Respondent was not permanently disabled or incapacitated from performance of his duties as a Psychiatric Technician at the time he filed his application.

9. By letter dated May 31, 2023, CalPERS notified Respondent of its determination to deny his application. By email dated July 21, 2023, Respondent filed a timely appeal of CalPERS determination, and requested an administrative hearing. (Exh. 4.)

10. On January 11, 2024, a Statement of Issues was signed by Sharon Hobbs in her official capacity as Chief of CalPERS's Disability and Survivor Benefits Division, seeking to affirm CalPERS's determinations described above. (Ex. 1.)

11. As alleged in the Statement of Issues, the issue on appeal in this case is:

[ ]imited to whether at the time of the application, on the basis of orthopedic (left elbow, fingers, hands and legs) conditions, [Respondent] is substantially incapacitated from the performance of his usual and customary duties as a Psychiatric Technician for [DSH-A]. If disability is found to exist, any dispute as to whether the disability is industrial or nonindustrial will be resolved pursuant to Government Code section 21166.

(Ex. 1, p. A3.)

12. All jurisdictional requirements have been met.

## **Respondent's Work History with the DSH-A and Injuries**

13. Respondent began his employment as a Psychiatric Technician with the DSH-A in 2015 or 2016. (Ex. 7, p. A60.) The DSH-A is a hospital for psychiatric patients (*Id.*)

### **FIRST INJURY – APRIL 1, 2020**

14. On April 1, 2020, Respondent reported an injury to his left elbow while stabilizing a patient on the wall and fully extending his left elbow. According to Respondent, he heard a loud pop in the left elbow and has since experienced popping in the left elbow when he extends it. (Exh. 7, p. A55.) (The information regarding the circumstances of Respondent's injuries is based on information provided by Respondent to Dr. Don T. Williams, M.D., M.S. during Dr. Williams's March 3, 2023 Independent Medical Evaluation (IME) of Respondent and additional medical documents received by Dr. Williams after the IME which were included in his February 26, 2024 Supplemental Report. (Exhs. 7 and 12).)

### **SECOND INJURY – SEPTEMBER 17, 2020**

15. On September 17, 2020, Respondent was assaulted by a patient and during the patient's stabilization, Respondent reported his left knee hit the concrete floor. (Exh. 7.) Respondent was treated by multiple doctors, the first of whom he saw on September 18, 2020. Respondent has not worked since his second injury. He has received physical therapy and was seen by orthopedics specialists. Respondent provided CalPERS with the result of his magnetic resonance imaging (MRI's) of his left knee and left elbow.

16. The physician forms submitted by Respondent to CalPERS regarding his first injury indicate Respondent hyperextended his elbow and was off work due to persistent pain. In response to the question whether Respondent's incapacity is permanent, Respondent's treating physician, Dr. Nima Alipour (doctor's specialization not in evidence), indicates "no, it is not permanent." (Exh. 7, p. A59.) As to the second injury, the physician form submitted by Respondent to CalPERS, from Renee Cohen (profession of this provider is not in evidence), indicates a diagnosis of left knee sprain in that the MRI of the left knee that was done on May 10, 2022, but not submitted to CalPERS, showed no meniscal tear. No bending and no squatting were recommended. Physical Therapy (PT) and a knee brace were recommended and the reply to a question by an unspecified doctor stated, "yes, substantially incapacitated, unable to bend, stoop, squat, stand for long periods." There was also a crossover under "no," then indicating the final answer of "yes." (*Id.* at p. A59.)

17. According to the DSH-A, Duty Statement (Duty Statement) for the position of Psychiatric Technician (Safety), Respondent was required to work under general supervision, have custody responsibilities, and provide a basic level of general and psychiatric nursing care. Respondent was also expected, through his attitude, knowledge, and performance, to facilitate the rehabilitation of patients and clients. In addition, Respondent's duties included working to maintain order and supervise the conduct of clients and patients to protect and maintain the safety of persons and property, to provide a basic level of general behavioral psychiatric nursing care to patients and clients who are mentally disordered, and to participate in the overall psychiatric treatment program. (Exh. 8.)

18. According to the Duty Statement, the physical requirements of the Psychiatric Technician position include the prevention and management of assaultive



behavior (PMAB), which may involve patient containment, heavy lifting (over 50 pounds), applying restraints, and intervening in patient behavior that may injure people and damage property or signal impending escape attempts. (Exh 9.)

19. According to Respondent's application, the position of Psychiatric Technician has physical requirements that include interacting with patients; frequent lifting of up to 25 pounds; occasional lifting of up to 50 pounds; frequent standing and walking; barely any running or climbing; some twisting of the neck; and occasional reaching above the shoulder. (Exh. 3.)

### **CalPERS' Evaluation of Respondent's Application**

20. As set forth in Factual Finding 8, after review, CalPERS found Respondent was not substantially incapacitated from the performance of his job duties as a Psychiatric Technician with the DSH-A, denying Respondent's application.

### **INDEPENDENT MEDICAL EXAMINATION (IME)**

#### **March 3, 2023 Examination and Report**

21. On March 3, 2023, CalPERS directed Respondent to submit to an IME by board-certified orthopedic surgeon Dr. Williams. (Ex. 7.)

22. As part of the IME, Dr. Williams interviewed Respondent, examined his body (including his left elbow, fingers, hands and legs), and reviewed relevant medical records. Dr. Williams prepared a report of his examination and findings. (Ex. 7.) He also credibly and convincingly testified during the hearing.

23. Dr. Williams found Respondent is not substantially handicapped. (Exh. 7, p. A61.) Dr. Williams's impressions of Respondent included: 1) left elbow sprain, no

internal derangement; 2) left knee sprain, no internal derangement; and 3) headaches.  
(*Id.*)

24. Based on Respondent's specific job duties and the physical requirements of the Psychiatric Technician position with the DSH-A, Dr. Williams concluded Respondent was not substantially incapacitated as follows. For Respondent's left elbow, Dr. Williams noted that Respondent's elbow motion is 0 to 140 degrees bilaterally; while there is a mild initial pop (that subsequently disappears with use) when Respondent quickly thrusts his left elbow, it is unclear where it is coming from because with slow flexion and extension, the left elbow no longer pops. In addition, there is no change in Respondent's expression when going through elbow motion, no detectible pathology on exam, no pain with resistance to wrist extension or resistance to wrist flexion, no tenderness over the epicondyles, no locking, and no substantial pathology detected. (Exh. 7, p. A57.)

25. For Respondent's wrists, Dr. Williams noted wrist motion is normal with 80 degrees extension and flexion bilaterally, and Respondent can make a full fist. (Exh. 7, p. A58.) Respondent's grip strength is "excellent at 100, 100, 100 pounds on the dominant right and 80, 80, 80 pounds on the left." (*Id.*)

26. For Respondent's knees, Dr. Williams noted knee motion is 0 to 140 degrees bilaterally, with negative anterior drawer, medial and lateral laxity, and McMurray testing. While some tenderness of the medial joint line is noted, "[T]here is no substantial pathology, a normal examination of [Respondent's] knees." (Exh. 7, p. A58.)

27. Respondent's lumbar spine examination was normal. Respondent reported on his disability form he could not get dressed on his own, washes with

difficulty, stays in bed, lies down most of the day, is only able to lift light objects, can only walk very short distances, and only carries very light objects. Dr. Williams found Respondent's subjective description of his symptoms contrasted with the doctor's objective observations of Respondent during the IME, leading Dr. Williams to conclude, "[T]he magnitude of [Respondent's] ADL problems is a significant sign of exaggeration." (Exh. 7, p. A58.) Dr. Williams observed Respondent remove his slip-on shoes, slacks, and his custom-made hinged left knee brace without problems. Dr. Williams also reviewed the surveillance video and investigative report of Respondent fully extending his left elbow and hand and bearing weight on his left knee, concluding Respondent's actions during the video directly contradicted Respondent's claims he was unable to extend his left elbow due to his first injury and bear weight on his right knee due to his second injury.

### **February 26, 2024 Supplemental Report**

28. On February 26, 2024, CalPERS requested Dr. Williams review additional medical records provided by Respondent and provide a Supplemental Report. (Exh. 12.) The additional medical records included a February 3, 2023 MRI of Respondent's left knee showing "normal" results and a May 16, 2023 note by Respondent's doctor, Dr. Alipour, finding "0% disability" of Respondent's left elbow. (Exh. 12, pp. A73-A74.)

29. After reviewing the additional medical records, Dr. Williams concluded that the records "support my impression [Respondent] has no substantial incapacity" and could perform his usual and customary duties as a Psychiatric Technician with the DSH-A. (Exh. 12, p. A74.)

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## LEGAL CONCLUSIONS

### Burden and Standard of Proof

1. An applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he is entitled to it absent a statutory presumption. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.)

2. In this matter, the preponderance of the evidence standard requires Respondent to present 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.)

### Disability Retirement

3. Disability retirement requires a "disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the [B]oard . . . on the basis of competent medical opinion." (§ 20026.)

4. The Board shall immediately retire a member for disability, "[I]f the medical examination and other available information show to the satisfaction of the [B]oard that the member . . . is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability....." (§ 21156, subd. (a)(1).)

5. An applicant does not qualify for a disability retirement when he can perform customary duties, even though doing so may sometimes be difficult or painful. (*Mansperger, supra*, 6 Cal.App.3d 873; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) The term "incapacitated for performance of duty" has been

defined 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, 876–877 [*Mansperger*].)

### **Respondent Did Not Establish He Is Substantially Incapacitated**

6. Here, the weight of the convincing medical opinion of Dr. Williams establishes Respondent is not incapacitated for performance of his duties as a Psychiatric Technician with the DSH-A. Because this hearing proceeded by default, no competing evidence was presented by Respondent. (Factual Findings 21-29.)

7. The medical records submitted to CalPERS do not establish Respondent has medical conditions affecting his left elbow, fingers, hands and legs which preclude him from being able to perform his duties as a Psychiatric Technician with the DSH-A. (Factual Findings 21-29.)

8. Respondent’s claims of injury to left elbow, fingers, hands and legs, causing substantial incapacity to perform his job duties, are also inconsistent with the demonstrative evidence. The October 4, 2023 surveillance video shows Respondent fully extending his left elbow and bearing weight on his right knee as he lifts and carries cardboard boxes several times out of his garage onto his driveway. (Factual Finding 6-7.)

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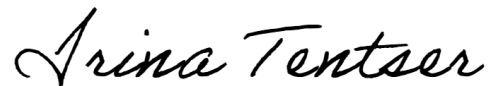
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## **Disposition**

9. Respondent failed to meet his burden of establishing by a preponderance of the evidence that he is substantially incapacitated for the performance of his duties as a Psychiatric Technician for the DSH-A. CalPERS's denial of his disability retirement application is affirmed. (Factual Findings 1-29; Legal Conclusions 1-8.)

## **ORDER**

CalPERS' denial of respondent Jose Saucedo Lazalde's application for disability retirement is affirmed.



DATE: 08/19/2024

IRINA TENTSER

Administrative Law Judge

Office of Administrative Hearings