

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for Disability Retirement of:

JOAQUIN T. DAVID,

Respondent,

and

CALIFORNIA SCIENCE CENTER,

Respondent.

Agency Case No. 2022-0800 (Statement of Issues)

OAH No. 2023040238

PROPOSED DECISION

Erlinda Shrenger, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on September 10, 2024.

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

Joaquin T. David (respondent) was present and represented himself.

No appearance was made by or on behalf of the California Science Center.

A Spanish-language interpreter provided interpreter services for the hearing.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on September 10, 2024.

FACTUAL FINDINGS

Jurisdictional Matters

1. At all relevant times, respondent was employed by the California Science Center as an Exhibit Designer-Installer for the California African American Museum (CAAM). By virtue of this 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 August 22, 2021, respondent signed an application for service retirement. Respondent retired for service effective August 13, 2021, and has been receiving his service retirement allowance from that date.

3. On October 3, 2021, respondent signed an application for disability retirement. In filing the application, respondent claimed disability on the basis of loss of hearing, loss of voice, and inability to lift more than 20 pounds. (Exh. 3, p. A14.)

4. By letter dated July 14, 2022, CalPERS notified respondent his application for disability retirement was denied. The basis for the denial for loss of hearing and loss of voice conditions was explained as follows:

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We reviewed all the medical evidence submitted. Our review included the reports prepared by Lindsey Reder, M.D., Sherol Chinchilla, A.U.D., Heng Chhay, M.D., and Geoffrey Smith, M.D. Based on the evidence in those reports, we have determined your otolaryngological (dysphonia and bilateral hearing loss) conditions are not disabling. As a result, we find you are not substantially incapacitated from the performance of your job duties as an Exhibit Designer with the California Science Center. Therefore, we regret to inform you that your application for disability retirement is denied.

(Exh. 4.)

5. The July 14, 2022 letter also indicated CalPERS considered respondent's claim of disability on the basis of being unable to lift more than 20 pounds. The letter noted that on December 14, 2021, CalPERS had requested respondent provide medical records regarding his orthopedic (arms) condition. The letter further noted that, on December 28, 2021, CalPERS spoke with respondent and "you [i.e., respondent] indicated your arm condition did not prevent you from performing your job duties at the time of separation. The medical evidence received is insufficient for us to make a determination on this condition." (Exh. 4.) Thus, respondent's claim of disability based on an orthopedic (arms) condition is not at issue in this appeal.

6. By letter dated August 12, 2022, respondent, through his former attorney, timely appealed the denial of his disability retirement application and requested an administrative hearing. (Exh. 5.)

7. On March 24, 2023, Keith Riddle, Chief, Disability and Survivor Benefits Division for CalPERS, made and filed the Statement of Issues in his official capacity.

8. According to the Statement of Issues, the issue on appeal is limited to “whether at the time of the application, on the basis of otolaryngological (dysphonia, bilateral hearing loss) conditions, respondent David is substantially incapacitated from the performance of his duties as an Exhibit Designer-Installer for respondent California Science Center.” (Exh. 1, p. A4.)

Testimony of Toni Vargas

9. Toni Vargas testified at the hearing. She is an Analyst in the CalPERS Disability Retirement Division. Her duties include making determinations on applications for disability retirement.

10. Ms. Vargas testified regarding the information contained in CalPERS’s denial letter dated July 14, 2022. (Exh. 4.) On December 14, 2021, CalPERS sent a letter to respondent requesting he provide additional medical information for his disability retirement application. (Exh. 13.) The letter stated, in part:

A copy of your medical records from July 1, 2020 to the present is needed regarding your otolaryngological (Loss of hearing and voice) and orthopedic (unable to lift more than 20 pounds) conditions to substantiate your disability. [¶] It is your responsibility to ensure the medical records are submitted to CalPERS by **January 4, 2022**.

We have received a Physician's Report on Disability form from Lindsay Reder, M.D. The doctor does not establish that

you were disabled from the date you last work[ed] to present. [¶] Based on the information on the Physician's Report on Disability form, you do not meet CalPERS' criteria for disability retirement.

(Exh. 13, bold in original.)

11. Ms. Vargas testified that an applicant for disability retirement must provide CalPERS with a Physician's Report on Disability, which is a two-page form, and supporting medical records for each condition of disability claimed by the applicant. Ms. Vargas testified CalPERS received a Physician's Report on Disability and supporting medical records for respondent's otolaryngological conditions. However, CalPERS did not receive a Physician's Report on Disability and supporting medical records for respondent's orthopedic (arms) condition. Consequently, the medical evidence was insufficient for CalPERS to make a determination on that condition.

12. Ms. Vargas testified regarding CalPERS's contact with respondent on December 28, 2021. Ms. Vargas testified that CalPERS Analyst Gabriella Lueras spoke with respondent by telephone on that date. During the telephone call, respondent indicated to Ms. Lueras his arm was not incapacitated. Therefore, respondent's disability retirement application was not based on an orthopedic (arm) condition. Ms. Vargas testified CalPERS documented the telephone call between Ms. Lueras and respondent in its Participant Notes.

Respondent's Job Duties

13. At the time he applied for disability retirement, respondent was employed by the California Science Center as an Exhibit Designer-Installer for the CAAM. According to the CAAM, the job duties of an Exhibit Designer-Installer are:

“constructs, repairs, and maintains exhibit environments; performs basic building maintenance; packs, loads, and transports artifacts and other objects; makes rough sketches and cost estimates on projects; inventories store items and supplies; advises in the selection of building materials; keeps records and makes simple reports, and may instruct and lead skilled and unskilled assistants.” (Exh. 12.)

14. According to the CAAM, the physical demands of the Exhibit Designer-Installer position include, but are not limited to, “constantly” (more than 5 hours) lifting 0 to 10 pounds; “frequently” (2.5 to 5 hours) standing and exposure to dust, gas, fumes, or chemicals; and “occasionally” (31 minutes to 2.5 hours) interacting/communicating with co-workers, walking, reaching (below shoulder), pushing and pulling, power grasping, operating hazardous machinery, and exposure to excessive noise. (Exh. 11.)

Testimony of Dr. Geoffrey A. Smith

MAY 25, 2022 IME REPORT

15. At the request of CalPERS, Geoffrey A. Smith, M.D., F.A.C.S., performed an Independent Medical Examination (IME) in otolaryngology of respondent on May 25, 2022. The purpose of the evaluation was to determine whether respondent was substantially incapacitated for the performance of his duties as an Exhibit Designer-Installer for the CAAM in order to qualify for disability retirement based on his otolaryngological conditions.

16. Dr. Smith’s qualifications were established by his C.V. (Exh. 6.) He graduated from U.C. Davis Medical School in 1972. From 1972 to 1977, he was a Resident and then Chief Resident at UCLA Medical Center in the Division of Head and Neck Surgery (Otolaryngology). His academic appointments include Associate Clinical

Professor-Surgery at UCSD and Visiting Professor in Head and Neck Surgery at UCLA. Dr. Smith is currently licensed as a physician and surgeon by the California Medical Board. He is a Diplomate of the American Board of Otolaryngology. His specialties are Head/Neck Surgery (Ear, Nose, Throat), Plastic Surgery (Face), and is a Qualified Medical Examiner and Forensic Consultant in Otolaryngology.

17. Dr. Smith's otolaryngological medical evaluation of respondent was based on his review of records provided to him by CalPERS, including medical records and job description information, and his physical examination of respondent on May 25, 2022. Dr. Smith prepared a written report of his findings and opinions. (Exh. 8.) At hearing, Dr. Smith credibly testified regarding his findings and opinions.

18. Dr. Smith evaluated respondent with the assistance of a Spanish-language interpreter. Dr. Smith interviewed respondent regarding the history of his injury. Respondent was employed as an exhibit designer and installer for 14 years. The type of work respondent performed was "installation and carpentry work" at the CAAM, which included "wood cutting, working machines, routers, compressors and nail guns." (Exh. 8, p. A49.) Respondent claimed his disability began on August 14, 2021, and he had symptoms with his voice and hearing as a consequence of his duties at work. Respondent claimed his hearing loss precluded him from working with machines and his work tools. He also claimed that wood dust caused problems with his voice.

19. At the time of the May 25, 2022 IME, respondent's complaints were "voice problems, weak voice and damage due to wood dust, and hearing loss due to noise from saws." (Exh. 8, p. A49.) In the IME report, Dr. Smith noted: "In regard to his complaints, [respondent] states his hearing loss was not noticed until a year ago when he could not hear an alarm that was going off. He says his voice problems began six or

seven years ago, but it was not until two years ago that he was diagnosed as having a voice problem. He was given two visits with speech therapy and was told nothing else could be done. He has not worked since." (*Ibid.*)

20. Dr. Smith conducted a "Review of Symptoms" of respondent, as summarized in the IME Report. Dr. Smith noted that, "in talking with [respondent], at times his voice was normal, at times it was a whisper, and other times it was tightened with a falsetto voice." (Exh. 8, p. A50.)

21. Dr. Smith performed a direct laryngoscopic examination of respondent, which respondent tolerated well. The results of the examination did not demonstrate paralysis of the vocal cord. The examination showed "the recurrent laryngeal nerves being functional, [and] the superior laryngeal nerves are functional as well." (Exh. 8, p. A53.) At hearing, Dr. Smith explained that the two main nerves in respondent's larynx were intact and working. He had normal vocal cord mobility on both sides.

22. Dr. Smith conducted a "Physical Examination" of respondent, as summarized in the IME Report. Dr. Smith noted that respondent "gave the impression of not being able to hear. At other times, he heard well and responded appropriately, both in terms of the translator that was speaking quietly to him, as well as with me, both in Spanish and in English. This conversation was both with hearing aids in and with hearing aids out during the examination." (Exh. 8, p. A51.)

23. At hearing, Dr. Smith testified there was no significant functional abnormalities with respondent, except for a moderate loss of hearing. The IME report states: "Today's audiometrics demonstrate [respondent] does have a high frequency noise trauma configuration neurosensory loss of hearing. However, it was apparent that superimposed on the loss of hearing, he exhibited exaggeration in both of the

ears. His otoacoustic emissions were present at the lower frequencies, absent in the higher frequencies.” (Exh. 8, p. A53.)

24. Although Dr. Smith found respondent may have been exaggerating his complaints, he did find respondent had a moderate loss of hearing. In the IME Report, Dr. Smith explained: “A loss of hearing in a woodworker is both aggravated and/or accelerated by the employment. Loud noise is a continuous trauma to the hearing. This is what has been going on. It is certainly true that in the course of his career, he has experienced damage to his hearing via continuous trauma exposure to the loud noise as he described his work. This would cause the loss of hearing that he has. The exaggeration on the audiogram, of course, is superimposed on that and this may be related to psychiatric process going on with him or it may be intentional, functional.” (Exh. 8, p. A54.)

25. Dr. Smith noted the medical treatment indicated for respondent’s hearing loss due to noise trauma at work would be hearing aids. However, Dr. Smith also noted: “Today’s hearing aid evaluation demonstrates that although he has hearing aids, the concern is that because of his exaggerating his loss, the hearing aids could be overamplifying his hearing and, thus, causing damage to his hearing.” (Exh. 8, p. A54.)

26. Based on his evaluation of respondent, Dr. Smith opined there are no specific job duties that respondent is unable to perform because of a physical condition, and he is not substantially incapacitated.

SUPPLEMENTAL IME REPORT

27. On November 1, 2023, CalPERS provided Dr. Smith with respondent’s additional medical records and requested he provide his final recommendations and conclusions after reviewing the records. (Exh. 9.) Dr. Smith reviewed the medical

records (a total of 64 pages) and prepared an Otolaryngological IME Supplemental Report (Supplemental Report) that contained his comments to the medical records. (Exh. 10.)

28. At hearing, Dr. Smith testified respondent's additional medical records provided by CalPERS did not change his findings and opinion stated in the IME Report. There was no information in the additional records demonstrating respondent was incapacitated and unable to perform his usual job duties.

29. The records reviewed by Dr. Smith included a report by Kimanh Nguyen, M.D., dated October 10, 2023, regarding her review of records to determine if respondent had dysphonia and hearing loss and whether those conditions would affect his ability to return to work in his prior position as a carpenter and exhibit installer. (Exh. 10, p. A63.) Dr. Nguyen did not testify at the hearing. Nor was her records review report presented at the hearing. The only evidence presented was Dr. Smith's summary of Dr. Nguyen's report contained in the Supplemental Report. (Exh. 10, pp. A63 to A64.)

30. As summarized in the Supplemental Report by Dr. Smith, Dr. Nguyen commented on the IME performed by Dr. Smith. She noted that Dr. Smith "did not find an anatomic problem and his direct laryngoscopy showed no 'paralysis of the vocal cord.'" (Exh. 10, p. A63.) Dr. Nguyen opined "it would not be possible to diagnose paralysis of the vocal cord during a direct laryngoscopy." (*Ibid.*) Dr. Nguyen's report also noted the audiogram performed as part of the IME did not show any objective signs of exaggeration. Dr. Nguyen stated if there was a valid concern for exaggeration, then a Stenger's test should have been completed during the hearing test, but that was not done for reasons that were unclear to Dr. Nguyen. (*Ibid.*) Dr. Nguyen opined: "The audiogram done during the IME clearly showed moderate to severe hearing loss

in both ears and was consistent with the results of the audiogram done at Kaiser in April 2021. It would have been difficult to exaggerate both audiograms in such a way that the results from the two would be consistent." (*Ibid.*)

31. In the Supplemental Report, Dr. Smith explained that he disagreed with Dr. Nguyen's conclusions regarding the IME he performed on respondent. First, Dr. Smith noted that a direct laryngeal examination is an office procedure and can be done with a rigid telescope, as he did, or with the fiber optic; it does not require an operating room or general anesthetic. By being an in-office procedure, Dr. Smith is able to see vocal cord function as the patient vocalizes, as opposed to inferring during anesthesia.

32. Second, Dr. Smith explained that "functional exaggerated results on a hearing test are determined by the evaluation and the work with a patient by the audiologist to attempt to get an accurate test. The first tests may show substantial loss which varies." (Exh. 10, p. A64.) Dr. Smith explained the skills of an audiologist are used in determining exaggeration, such as comparing pure tone to speech reception, as well as the results of additional testing using otoacoustic omissions. Dr. Smith explained a Stenger's test for speech or pure tone is helpful when there is asymmetrical loss and is included in an evaluation if deemed necessary.

33. Third, Dr. Smith wrote: "I certainly do not agree with Dr. Nguyen's assessment of what a proper direct laryngoscopic examination is, nor do I agree with her assessment of whether or not exaggeration can be determined in the course of an ear, nose and throat clinical examination and audiometric testing. I have been trained in both. I have lectured and published both and have taught medical students and physicians in training and practicing physicians since the 1970s." (Exh. 10, p. A65.) Dr. Smith further wrote: "I continue to feel the patient [i.e., respondent] was exaggerating

both his hearing and speech impairments, although I felt he likely had some hearing loss which would not preclude him from his usual and customary occupation." (*Ibid.*)

Respondent's Evidence and Contentions

34. Respondent presented no documentary medical evidence at hearing.

35. Respondent, in testimony, claimed Dr. Smith is a liar. Respondent claimed Dr. Smith did not conduct a physical examination and merely sat at his desk across the room from respondent. Respondent claimed that a specialist reviewed Dr. Smith's report and told respondent the report was "all lies." Respondent, however, never met the specialist and did not remember the specialist's name. He testified the specialist demanded \$10,000 to appear at this hearing, which respondent could not pay. Respondent claimed he cannot perform any of the duties of an exhibit designer-installer. He contends he "cannot talk much," and has a "hearing problem" and a "throat condition."

LEGAL CONCLUSIONS

1. Government Code section 20026 provides, in pertinent part:

"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 . . . , as determined by the board, . . . on the basis of competent medical opinion.

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2. Government Code section 21154 provides, in pertinent part:

On receipt of an application for disability retirement of a member, . . . the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty.

3. Government Code section 21156, subdivision (a)(1), provides, in pertinent part:

If the medical examination and other available information show to the satisfaction of the board, . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability[.]

4. Respondent has the burden of proving entitlement to disability retirement. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691; *Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.3d 234, 238.) In state administrative hearings, unless indicated otherwise, the standard of proof is "persuasion by a preponderance of the evidence." (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) 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.)

5. Thus, to establish entitlement to disability retirement, an employee must show that he or she is "incapacitated for the performance of duty," which courts have

interpreted to mean a "substantial inability" to perform his or her "usual duties."
(*Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, 876.)
Mere difficulty in performing certain tasks is not enough to support a finding of
disability. (*Hosford v. Board of Administration of the Public Employees' Retirement
System* (1978) 77 Cal.App.3d 854, 860-862.) When an applicant can perform his or her
customary duties, even though doing so may sometimes be difficult or painful, the
applicant is not "incapacitated" and does not qualify for a disability retirement.
(*Hosford, supra; Mansperger, supra*, at p. 876-878.)

6. In this case, the testimony of CalPERS's expert, Dr. Smith, was unrefuted
by any competent medical evidence. Dr. Smith's educational and professional
background, as well as his familiarity with the CalPERS requirements for disability
retirement, contributed to the persuasiveness of his opinions. Dr. Smith's objective
findings of respondent's otolaryngological (dysphonia, bilateral hearing loss) condition
support his conclusion that respondent was not disabled from performing his usual
job duties.

7. Based on the foregoing, the preponderance of the evidence supports
CalPERS's determination that respondent, at the time he applied for disability
retirement, was not substantially incapacitated from performance of his usual and
customary duties as an Exhibit Designer-Installer for CAAM based on his
otolaryngological (dysphonia, bilateral hearing loss) condition. Respondent failed to
establish, by competent medical evidence, his claim of disability on the basis of loss of
hearing and loss of voice. (Factual Findings 1-35; Legal Conclusions 1-6.)

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ORDER

Respondent Joaquin T. David's appeal of CalPERS's denial of his application for disability retirement is denied.

DATE: 10/14/2024

Erlinda Shrenger

ERLINDA SHRENGER

Administrative Law Judge

Office of Administrative Hearings