

BEFORE THE  
CITY OF SAN BUENAVENTURA  
STATE OF CALIFORNIA

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

FREDERIC SMEAD,

Respondent.

OAH No. 2012120055

Agency Case No. A12-00339

**PROPOSED DECISION**

Administrative Law Judge Glynda B. Gomez, State of California, Office of Administrative Hearings, heard this matter in Los Angeles, California on March 28, 2013.

Andy H. Viets, Assistant City Attorney, represented the City of San Buena Ventura (hereinafter “the City”) a contracting agency under the California Public Employees’ Retirement System (hereinafter “CalPERS”).

Respondent Frederic Smead (Respondent) appeared and represented himself.

The matter was submitted on March 28, 2013.

**FACTUAL FINDINGS**

1. Respondent was employed by the City as a firefighter/fire engineer from 1973 until his service retirement on December 28, 2010. The City is a contracting agency under CalPERS. By virtue of his employment with the City, respondent is a member of CalPERS and subject to the benefits and restrictions of the Public Employees’ Retirement Law (hereinafter “PERL”) (Gov. Code § 20000 *et seq.*).<sup>1</sup>

2. On January 24, 2011, Respondent completed and signed an application for Industrial Disability Retirement. The City denied the application on July 3, 2013. On August 1, 2012, CalPERS notified Respondent that his application for Industrial Disability Retirement had been denied by the City. Respondent filed a timely appeal of the decision on

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<sup>1</sup> All statutory references are to the California Government Code unless otherwise specified.

August 20, 2012. Pursuant to the City's request on September 24, 2012, Respondent filed a written statement of the facts and law forming the basis of the appeal. Specifically, Respondent alleged that he was disabled by left ventricle disease of the heart, coronary hypertension, a ventral hernia and an inguinal hernia. On December 4, 2012, the City filed a request for administrative hearing with the Office of Administrative Hearings.

3. Respondent contends that his various ailments disable him from performing his regular duties as a fire engineer. The City contends that Respondent was performing his regular duties as a fire engineer at the time of his service retirement and therefore was not disabled. The City also contends that to the extent that it is determined that Respondent is disabled by the presence of a ventral hernia, a surgical procedure is available to repair the hernia and restore Respondent to full capabilities.

4. Respondent was 66 years old at the time of his application for disability retirement. He had been employed as a firefighter/fire engineer with the City since 1973 and was promoted to a fire engineer position in or about 2000. He worked three 24-hour shifts with an average of 56 hours per week.

5. The evidence established that the normal and regular duties of a fire engineer for the City included: driving a fire engine, maintaining a fire engine, participation in the laying of hose lines, directing water streams, placing ladders, ventilating buildings, rescuing persons and cleaning up premises after fires have been extinguished; participation in physical fitness training sessions; intermittent standing for two or more hours; intermittent sitting for two or more hours; intermittent walking for two or more hours; intermittent but regular lifting of more than 50 pounds; intermittent pushing, pulling, bending, stooping, crouching, crawling, kneeling, climbing, twisting and balancing when performing firefighting tasks.

6. Respondent regularly performed emergency operations, rescue, medical response, and firefighting involving structures and brush fires in addition to driving and maintaining the fire engine. He routinely wore heavy firefighting equipment, drove a fire engine, maintained the fire engine, was required to go up and down ladders, lift hoses and frequently lift 100 pounds on a daily basis. He was required to lift people and debris with assistance from co-workers. The job regularly required the following activities on an intermittent basis: sitting; standing; walking, often on uneven ground; bending, crawling, kneeling, climbing, reaching at/below shoulder level; and working with heavy rescue equipment. Respondent was also certified as a hazardous materials specialist and was responsible for handling and clean-up of hazardous materials.

7. There was no evidence that by policy or practice the City made available light or modified duty assignments to accommodate any physical limitations of a fire engineer.

8. Respondent had suffered various orthopedic injuries and a ventral hernia during his career as a firefighter/ fire engineer with the City. Because of these work related injuries Respondent had missed some time from work, but had never been determined to be permanently disabled. In one incident in 2010, shortly before his retirement, Respondent

experienced high blood pressure and was not allowed to continue his participation in a training exercise for a short period of time. Respondent moved to Mexico upon retirement, but he found it necessary to return to the United States to live because of his need for medical treatment of his blood pressure.

9. Respondent passed a City administered physical examination on August 17, 2010. Respondent's last injury occurred when his ankle and foot became entangled in a water hose causing him to fall from a fire engine in December 2010. Respondent returned to work, and was working without restrictions, in his regular assignment as a fire engineer until his service retirement on December 28, 2010.

10. Respondent testified that he retired because he was concerned about his health and that he seemed to be slowing down. He also credibly testified that younger members of the crew often assisted him when heavy lifting was required.

11. Respondent's Fire Chief Don McPhearson and Battalion Chief Matt Brock both testified at the hearing that they were not aware respondent was restricting himself in the performance of duties or that he received extra assistance from the crew. Both Chief McPhearson and Battalion Chief Brock testified that had they been aware of any limitations or his need for extra assistance, Respondent would have been referred for medical examination for his safety and that of the crew.

12. Robert Weber, M.D., a board certified internal medicine specialist, was retained by the City to conduct a records review and render an opinion as to whether Respondent was able to perform the duties of his job up until his retirement from the City. Weber reviewed Respondent's medical records, a transcript of Respondent's deposition, and the City's fire engineer job description. Weber opined that Respondent was able to perform the duties of his job up until his retirement from the City.

13. At the administrative hearing, Weber testified that Respondent's medical records do not contain a diagnosis of inguinal hernia. Each mention of an inguinal hernia in Respondent's medical records is followed by a notation that there is no indication of the presence of an inguinal hernia.

14. Weber testified that although Respondent has had episodes of high blood pressure which could be labeled as coronary hypertension, he was not disabled by coronary hypertension. Weber explained that the concern about high blood pressure relates to the potential for development of ischemic heart disease. Weber ruled out the presence of ischemic heart disease based upon the results of various cardiac stress tests and echocardiograms throughout Respondent's career which were normal and the notations in Respondent's medical records that he did not have indications of ischemic heart disease. Weber also testified that Respondent has a cardiac conduction abnormality and sinus bradycardia; a low heart rate. The cardiac conduction abnormality is a left anterior fascicular block, but did not produce any symptoms in Respondent. Weber opined that Respondent has inadequately treated hypothyroidism which is the cause of his bradycardia. Weber noted that

Respondent's medical records show three asymptomatic episodes of bradycardia, which did not progress, and did not impact Respondent's ability to perform his job before retirement.

15. Respondent has a ventral hernia which has increased from 2mm x 6mm in 2004 to 9mm x 6mm in 2012. Weber opined that it is well established that a ventral hernia would increase in size in the type of heavy physical activity that Respondent's position as a fire engineer required. Nevertheless, Weber opined that the ventral hernia was largely asymptomatic and did not prevent Respondent from performing his regular job duties despite its increasing size. Weber explained the danger of the increasing size of the ventral hernia is that it could become "incarcerated" cutting off Respondent's blood flow; a life threatening situation. Weber opined that the standard treatment for a ventral hernia is surgery. He also opined that although all surgery has some risk, including the risk associated with the use of anesthesia, a ventral hernia surgery does not have any exceptional risk and is a standard surgical procedure.

16. On March 29, 2013, over two years after Respondent's retirement, Gerald M. Weingarten, M.D., a physician that examined Respondent, and reviewed his medical records, prepared a report with his opinions pertinent to Respondent's fitness to return to work as a fire engineer. In that regard, Dr. Weingarten opined that Respondent has hypertensive cardiovascular disease which can be controlled with medication. Dr. Weingarten opined that with appropriate medication and controlled blood pressure; Respondent could continue working as a fire engineer and engage in strenuous activity. However, Dr. Weingarten opined that Respondent would be precluded from heavy lifting because of his ventral hernia and would only be able to work with restrictions in place, unless the ventral hernia was surgically repaired.

17. At hearing, Respondent testified that he has not wanted to have surgery for the ventral hernia in the past because he was concerned about the anesthesia risk, the recovery time for surgery, and the financial impact that he would suffer if the surgery resulted in his inability to return to work.

## LEGAL CONCLUSIONS

1. In an administrative hearing concerning retirement benefits, the respondent has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

2. Pursuant to Government Code section 21151, a local safety member of CalPERS who is incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, regardless of age or amount of service. The phrase "incapacitated for the performance of duty" within section 21151(a) means "*substantial* inability of the applicant to perform his or her usual job duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) If the activities that the

employee is unable to perform are not common occurrences, then he may be able to substantially carry out the normal duties required by the job. (*Id.*)

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 and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

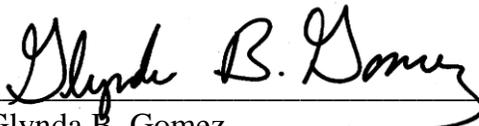
3. A person is not considered disabled under the PERL if a medical condition that affects his ability to perform duties can be successfully treated by the kind of medical treatment to which a reasonable man would submit. (*Reynolds v. City of San Carlos*, (1981), 126 Cal.App.3d 208, 211.) If the medical probabilities are great that the employee will be restored to normal functioning if he submits to recommended medical treatment, the disability is not permanent. (*Id.*)

4. The preponderance of the evidence established that at the time of his application for disability retirement, respondent was not disabled or incapacitated from the performance of duty within the meaning of the PERL by reason of factual findings 1-17 and factual findings 1-4. The evidence established that Respondent does not and did not have an inguinal hernia. Respondent has had sinus bradycardia and coronary conduction issues which began before his retirement. The sinus bradycardia and coronary conduction issues have been asymptomatic and do not prevent Respondent from working as a fire engineer. Respondent has also suffered from coronary hypertension which began before his retirement. His coronary hypertension can be controlled with medication and does not prevent him from working as a fire engineer. The evidence also established that Respondent has a ventral hernia which is debilitating and restricts his ability to lift heavy objects, but can be repaired by a surgical procedure. The evidence is unclear about when the hernia increased in size. Nevertheless, the hernia can be repaired by a surgical procedure and Respondent would be able to continue working as a fire engineer after repair of the ventral hernia.

#### ORDER

Respondent’s appeal of the decision of the City of San Buena Ventura is denied and his application for disability retirement is denied.

DATED: May 28, 2013

  
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Glynda B. Gomez  
Administrative Law Judge  
Office of Administrative Hearings