

RESOLUTION NO. 8786

A RESOLUTION OF THE BOARD OF ADMINISTRATION FOR THE FEDERATED CITY EMPLOYEES' RETIREMENT SYSTEM ADOPTING FINDINGS, CONCLUSIONS, AND DECISION IN THE MATTER OF THE APPLICATION OF MIKE RICHARDSON FOR A CHANGE OF STATUS FROM A SERVICE RETIREMENT TO A SERVICE-CONNECTED DISABILITY RETIREMENT

The application of Mike Richardson for a change of status from a service retirement to a service-connected disability retirement was heard by the Board of Administration for the Federated City Employees' Retirement System (the "Board") at its regularly scheduled meeting on August 16, 2018.

Mr. Richardson participated by telephone at the hearing and was offered an opportunity to present witnesses and documentary evidence, cross examine the City's Return-to-Work Coordinator, the representative of his employing department, and the Board's medical advisor, and to present a closing argument.

DOCUMENTARY EVIDENCE

The documentary evidence presented to the Board in this matter is listed in Attachment A, entitled "EXHIBITS", which is attached hereto and incorporated herein by this reference.

FINDINGS

Having considered all relevant evidence presented in this matter, the Board makes the following findings:

1. Mr. Richardson was 55 when he retired for service, effective February 2015.
2. Mr. Richardson commenced employment with the City of San Jose in 1997.
3. Mr. Richardson was employed as an Engineering Technician II when he retired for service.
4. Mr. Richardson had 17.87 years of service credit with the Retirement System at the time he retired for service.
5. Mr. Richardson contends that his low back and left shoulder rendered him incapacitated as of February 2015.
6. Mr. Richardson injured his lower back off the job in 2007 and injured his back on the job in 2011.
7. Mr. Richardson injured his left shoulder on the job in 2000, 2004, and 2007.

<p>NOTICE TO APPLICANT: PURSUANT TO SAN JOSE MUNICIPAL CODE SECTION 1.16.010, THE TIME IN WHICH TO SEEK JUDICIAL REVIEW OF THIS DECISION IS GOVERNED BY SECTION 1094.6 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE.</p>
--

8. Mr. Richardson has degenerative disc disease, osteoarthritis, spondylosis of the thoracic and lumbar spine, and chronic L5 radiculopathy with pain radiating down his right leg and decreased sensation.
9. Appropriate work restrictions for Mr. Richardson's back condition would be no lifting greater than twenty pounds, no repeated bending, no repeated stooping, no repeated twisting, able to stand and sit at will, and limited running.
10. Mr. Richardson has fibrosis and adhesions in his left shoulder joint.
11. Appropriate work restrictions for Mr. Richardson's left shoulder condition would be no lifting greater than twenty pounds with his left arm, no overhead work, and avoidance of working with vibratory equipment.
12. Mr. Richardson was working full duty when he retired for service in February 2015.
13. Mr. Richardson's employing department in 2012 accommodated his work restrictions by transferring him from the position of Maintenance Worker II to Engineering Technician I, with Mr. Richardson thereafter being promoted to Engineering Technician II, the position he was in when he retired for service.

CONCLUSIONS

1. Mr. Richardson is applying for a change of status from a service retirement to a service-connected disability retirement benefit on the basis of injuries sustained to his lower back and left shoulder, all allegedly arising out of and in the scope of his employment with the City of San Jose while a member of the Retirement System.
2. The Board of Administration as a fiduciary is obligated to administer the retirement provisions of the San Jose Municipal Code applicable to Mr. Richardson's application.
3. The Municipal Code at section 3.28.1280 requires an applicant for a service-connected disability retirement to be incapacitated for the performance of the duties of the applicant's job, with the incapacity to have occurred while the applicant was a member of the Retirement System.
4. The Municipal Code at section 3.28.1210 (A) defines "incapacitated for the performance of duty" to mean "disability of a member...of permanent or extended duration, occurring while such member is an employee of the city in the federated city service of the city, as a result of an injury...which renders the member physically...incapable of continuing to satisfactorily assume the responsibilities and perform the duties and functions of the position then held by him...".
5. The Municipal Code at section 3.28.1210 (C) requires that an incapacity to be "service-connected" must be one that "arises and results from an injury or disease arising out of and in the course" of the applicant's employment while the applicant was a member of the retirement system.

NOTICE TO APPLICANT: PURSUANT TO SAN JOSE MUNICIPAL CODE SECTION 1.16.010, THE TIME IN WHICH TO SEEK JUDICIAL REVIEW OF THIS DECISION IS GOVERNED BY SECTION 1094.6 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE.

6. The Municipal Code at section 3.28.1210 (A), section 3.28.1260, and section 3.28.1270 accords to the Board the discretion to weigh the evidence and make determinations as to incapacity and service-connection.
7. Mr. Richardson bears the burden of persuasion of establishing that, as of February 2015, i.e., his date of service retirement, he was incapacitated and that his incapacity was service-connected.
8. The Board concludes that, as to the two body parts at issue, Mr. Richardson did not meet his burden of persuasion of establishing that he was incapacitated as of his service retirement in February 2015.
9. The Board concludes that Mr. Richardson was not incapacitated as to either his back condition or his left shoulder because he was working full duty as of the date of his service retirement, a status that is inconsistent with a conclusion of incapacity.
10. The Board concludes that Mr. Richardson was not incapacitated as to either his back condition or his left shoulder condition because his employing department since 2012 had been accommodating his work restrictions.
11. Assuming for the sake of argument that Mr. Richardson was incapacitated due to his back condition as of the date of his service retirement, the Board concludes that any incapacity with respect to his back was not service-connected because his back condition was due to genetic factors and to aging, with the work injuries not having aggravated his underlying condition.
12. The Board concludes that the report of Dr. Tierman on this issue is more persuasive than the reports of Keith Loudon, M.D., because of its greater detail and greater analysis of the factors causing back conditions.
13. Assuming for the sake of argument that Mr. Richardson was incapacitated with respect to his left shoulder as of the date of his service retirement, the Board concludes that incapacity with respect to his left shoulder was service-connected.
14. The Board's conclusions as to Mr. Richardson's back are separate and distinct from its conclusions as to his left shoulder; each constitutes the conclusions of the Board on that body part, even if the conclusions on the other body part were to be determined to be erroneous.

DECISION AND ORDER

It is the DECISION AND ORDER of the Board of Administration for the Federated City Employees' Retirement System that the Findings and Conclusion stated above are adopted, and that the application of Mike Richardson for a change in status from a service retirement to a service-connected disability retirement be, and hereby is, **DENIED**.

NOTICE TO APPLICANT: PURSUANT TO SAN JOSE MUNICIPAL CODE SECTION 1.16.010, THE TIME IN WHICH TO SEEK JUDICIAL REVIEW OF THIS DECISION IS GOVERNED BY SECTION 1094.6 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE.
--

ADOPTED this ___ day of _____, 2018, by the following vote:

AYES:

NOES:

ABSENT:

MATT LOESCH
Chairperson

ATTEST:

ROBERTO L. PENA
Secretary

NOTICE TO APPLICANT: PURSUANT TO SAN JOSE MUNICIPAL CODE SECTION 1.16.010, THE TIME IN WHICH TO SEEK JUDICIAL REVIEW OF THIS DECISION IS GOVERNED BY SECTION 1094.6 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE.

	A	B	C
1			
2			
3		APPLICANT: Mike Richardson	
4			
5			
6	Item No.	Date	Medical Provider
7			
8		<u>Left Shoulder</u>	
9			
10		Review of Medical Records	
11	1	September 17, 2007	John Colman, M.D.
12	2	September 20, 2007	Los Gatos MRI
13	3	September 20, 2007	John Colman, M.D.
14	4	September 26, 2007	John Colman, M.D.
15	5	October 9, 2007	Armando Bajacan, PT
16	6	October 11, 2007	John Colman, M.D.
17	7	November 1, 2007	John Colman, M.D.
18	8	November 29, 2007	John Colman, M.D.
19	9	December 20, 2007	John Colman, M.D.
20	10	December 29, 2007	John Colman, M.D.
21	11	January 11, 2008	John Colman, M.D.
22	12	February 22, 2008	John Colman, M.D.
23	13	February 26, 2008	John Colman, M.D.
24	14	March 17, 2008	John Colman, M.D.
25	15	April 28, 2008	John Colman, M.D.
26	16	July 28, 2008	John Colman, M.D.
27	17	November 5, 2008	John Colman, M.D.
28	18	February 22, 2009	John Colman, M.D.
29	19	August 12, 2009	John Colman, M.D.
30	20	May 3, 2010	Jeffrey Holmes, M.D.
31	21	June 8, 2010	Jeffrey Holmes, M.D.
32	22	September 29, 2010	Jeffrey Holmes, M.D.
33	23	April 8, 2015	Jeffrey Holmes, M.D.
34			
35			
36		<u>Back</u>	
37			
38		Review of Medical Records	
39	1	January 27, 2011	Jin Kim, M.D.
40	2	January 31, 2011	Kaiser Permanente
41	3	January 31, 2011	Peter Chiu, M.D.
42	4	February 7, 2011	Fulton Chen, M.D.
43	5	February 14, 2011	Bradford Piatt, In View Medical Imaging
44	6	February 23, 2011	Fulton Chen, M.D.
45	7	February 25, 2011	Fulton Chen, M.D.
46	8	February 28, 2011	Fulton Chen, M.D.
47	9	March 1, 2011	Fulton Chen, M.D.
48	10	March 16, 2011	Fulton Chen, M.D.
49	11	March 23, 2011	Fulton Chen, M.D.
50	12	March 25, 2011	Fulton Chen, M.D.
51	13	April 7, 2011	Fulton Chen, M.D.
52	14	April 11, 2011	Fulton Chen, M.D.

	A	B	C
3		APPLICANT: Mike Richardson	
53	15	May 2, 2011	Fulton Chen, M.D.
54	16	May 4, 2011	Fulton Chen, M.D.
55	17	May 13, 2011	Jan Henstorf, M.D.
56	18	May 14, 2011	Jason Cheng, M.D.
57	19	May 17, 2011	Jan Henstorf, M.D.
58	20	May 31, 2011	Fulton Chen, M.D.
59	21	June 8, 2011	Fulton Chen, M.D.
60	22	June 9, 2011	Fulton Chen, M.D.
61	23	June 10, 2011	Fulton Chen, M.D.
62	24	June 15, 2011	Fulton Chen, M.D.
63	25	June 23, 2011	Fulton Chen, M.D.
64	26	June 27, 2011	Fulton Chen, M.D.
65	27	June 28, 2011	Fulton Chen, M.D.
66	28	July 6, 2011	Fulton Chen, M.D.
67	29	July 11, 2011	Fulton Chen, M.D.
68	30	July 11, 2011	James Rhee, M.D.
69	31	July 29, 2011	Fulton Chen, M.D.
70	32	August 12, 2011	Fulton Chen, M.D.
71	33	August 16, 2011	Fulton Chen, M.D.
72	34	September 6, 2011	James Rhee, M.D.
73	35	September 12, 2011	Fulton Chen, M.D.
74	36	September 14, 2011	Fulton Chen, M.D.
75	37	October 6, 2011	Jan Henstorf, M.D.
76	38	October 12, 2011	Fulton Chen, M.D.
77	39	November 9, 2011	Fulton Chen, M.D.
78	40	November 10, 2011	Fulton Chen, M.D.
79	41	November 16, 2011	Fulton Chen, M.D.
80	42	December 7, 2011	Fulton Chen, M.D.
81	43	January 8, 2012	Kathleen Serventi, M.D.
82	44	January 11, 2012	Randall Seago, M.D.
83	45	January 18, 2012	Fulton Chen, M.D.
84	46	January 25, 2012	Randall Seago, M.D.
85	47	February 8, 2012	Fulton Chen, M.D.
86	48	March 2, 2012	Fulton Chen, M.D.
87	49	March 8, 2012	Fulton Chen, M.D.
88	50	March 15, 2012	Fulton Chen, M.D.
89	51	May 8, 2012	Fulton Chen, M.D.
90	52	May 24, 2012	Randall Seago, M.D.
91	53	June 22, 2012	Randall Seago, M.D.
92	54	August 15, 2012	Fulton Chen, M.D.
93	55	January 15, 2015	Fulton Chen, M.D.
94	56	March 30, 2015	Fulton Chen, M.D.
95			