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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MICHAEL HEREK, Plaintiff and Appellant, v. LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION, Defendant and Respondent.	B275805 (Los Angeles County Super. Ct. No. BS155097)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert H. O'Brien, Judge. Affirmed.

Lewis, Marenstein, Wicke, Sherwin & Lee, Thomas J. Wicke and Joon Y. Kim for Plaintiff and Appellant.

Steven Rice and Francis J. Boyd for Defendant and Respondent.

* * * * * *

Petitioner Michael Herek (petitioner) applied for a disability retirement from the Los Angeles Sheriff's Department (Department), and his application was denied. He filed a writ petition challenging that denial. He now appeals from the trial court's denial of his petition. We conclude that there was no error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Petitioner worked for the Department from August 1976 until October 2007, first as a Deputy, then a Sergeant, and finally, a Lieutenant. In September 2007, petitioner was assigned to the Department's Communications Center as the Lieutenant in charge of supervising 10 to 15 radio dispatchers who handled the Department's field communications, including 5 to 10 emergency calls per day. Petitioner's duties included processing paperwork and memos, attending meetings, and walking around the Communications Center facility. Between 2004 and 2007, he received "outstanding" and "very good" performance evaluations.

Petitioner's last day of work was October 24, 2007, and he formally retired on March 31, 2008.

II. Procedural Background

A. Application for Disability Retirement

In February 2008, petitioner filed an application with respondent Los Angeles County Employees Retirement Association's Board of Retirement (the Board) for a disability retirement due to "[c]ardiovascular, high blood pressure, gastrointestinal, [and] back" injuries.

B. Evidence

1. Objective data

Blood pressure readings. Petitioner's doctors documented 23 blood pressure readings between March 14, 2003 and May 3, 2011. Of those 23 readings, only four are outside of "normal" range or, depending on the scale used, just outside the "normal" but within the "pre-hypertension" range—namely, the readings on November 10, 2006, December 3, 2008, September 3, 2009, and January 5, 2011.

Body scan CT. A body CT scan conducted in July 2007 showed "advanced calcification and some soft plaque" in petitioner's arteries.

Echocardiograms. Petitioner was subjected to echocardiograms on November 27, 2007, on February 4, 2008, and on October 27, 2009. Each test indicated "normal" readings for "left ventricular chamber size, wall thickness, [and] regional wall motion." The tests each showed a "mitral valve insufficiency 1+."

24-hour ambulatory blood-pressure monitoring. Petitioner's blood pressure was monitored over a 24-hour period in July 2008. The test revealed that his systolic reading (blood pressure during heartbeats) exceeded the normal range 30 percent of the time, and his diastolic reading (blood pressure between heartbeats) exceeded the normal range 17 percent of the time.

Treadmill (Bruce protocol) test. Petitioner took two treadmill tests. The first, in November 2007, lasted for 7 minutes and 14 seconds and revealed no chest pain or "electrocardiographic changes of ischemia" (that is, inadequate blood flow to the heart). The second test, in October 2009, lasted

for 5 minutes and 2 seconds and indicated "ventricular tachycardia at high workload" that was "suggestive of ischemia" (that is, insufficient blood supply to the heart).

2. Medical opinions

Three doctors offered opinions interpreting this data.

a. Dr. Hirsch

Dr. Jeffrey Hirsch (Dr. Hirsch) issued an initial report on November 30, 2007. Dr. Hirsch reported petitioner's comments that his job as a "watch commander" caused him "greatly increased stress," and that he "sometimes" experiences a dull chest pain "while he is under stress." Dr. Hirsch reviewed petitioner's medical records from 2003 through 2007, which contained petitioner's largely normal blood pressure readings, a few instances of high blood pressure that were controlled with medication, and complaints of stress at work. Dr. Hirsch also reviewed the November 2007 treadmill test, the November 2007 echocardiogram, and the July 2007 body CT scan; Dr. Hirsch read the body CT scan's calcification results as showing "at least 60 percent luminal narrowing of the proximal . . . carotid artery on the right" and "moderate . . . plaque" in the "proximal . . . carotid artery on the left." (See *Muznik v. Workers' Comp. Appeals Bd.* (1975) 51 Cal.App.3d 622, 627 & fn. 2 [explaining how cardiac calcification refers to inflammation of the walls of arteries that can block blood flow].) Dr. Hirsch diagnosed defendant as having (1) "[h]ypertension with probable hypertensive heart disease awaiting final interpretation by a cardiologist," (2) "[c]oronary artery disease based on high-resolution CT scan," (3) "[c]hest pressure, not due to cardiac ischemia," and (4) "[o]ccupational exposure to stress." Dr. Hirsch declared petitioner both "[t]emporarily totally disabled" and "permanently and

substantially incapacitated."

In a supplemental report dated November 10, 2009, Dr. Hirsch reported the October 2009 treadmill test rendered petitioner "temporarily totally disabled from the date of this positive treadmill test."

b. Dr. Revels Cayton

Dr. Revels Cayton (Dr. Cayton) issued an initial evaluation letter on February 12, 2008. Dr. Cayton reviewed petitioner's medical records as well as the November 2007 and February 2008 echocardiogram results and the July 2007 body CT scan results. Although petitioner's prior doctors had diagnosed him with hypertension, Dr. Cayton found "no evidence in the medical records of hypertension" because petitioner's prior doctors never prescribed a "treatment for hypertension." Dr. Cayton noted the presence of some "calcium deposits" in petitioner's arteries, but opined that "in the absence of clinical symptoms of coronary artery disease, this should not be pursued."

Dr. Cayton issued a supplemental letter on July 30, 2008. In that letter, Dr. Cayton considered the results of the 24-hour ambulatory blood pressure monitoring test, which he opined was evidence of "intermittent" "hypertension."

Dr. Cayton was thereafter deposed—in August 2009 and February 2010. During his August 2009 deposition, Dr. Cayton testified that petitioner had hypertension but it was not "suggestive of coronary artery disease." He also explained that the results of the 24-hour blood-pressure monitoring demonstrating abnormal readings a total of 47 percent of the time were not indicative of "real clinical stenosis" because the abnormalities were less than "50 or 60 percent" of the time. During his February 2010 deposition, Dr. Cayton testified that

there was "no clinical evidence of coronary disease." He also opined that the "mitral valve insufficiency 1+" in the echocardiogram results was clinically "insignificant."

Dr. Cayton issued a further supplemental letter a few days after his second deposition, on February 10, 2010. In that letter, he concluded that petitioner was not temporarily or permanently totally disabled and could return to work.

c. Dr. Ronald Carlish

Dr. Ronald Carlish (Dr. Carlish) issued his initial report on December 2, 2008. Dr. Carlish considered petitioner's past medical history as well as the July 2007 body CT scan and prior echocardiograms. Dr. Carlish noted petitioner's above-normal blood pressure, but noted that petitioner had not been taking his blood pressure medication. Dr. Carlish found "no documentation of hypertensive heart disease from available records" and no "end-organ injury due to hypertension." He also found no evidence of "ischemia of any degree" and "insufficient objective data to warrant [a] diagnosis of coronary artery disease." However, because petitioner suffered from "extensive" symptoms of heart injury without any objective data supporting that injury, Dr. Carlish opined that petitioner suffered from "a psychophysiological cardiac stress reaction" tied to an "increased perception to environmental stress." Dr. Carlish opined that petitioner's "psychophysiological cardiac stress reaction" rendered petitioner "permanently incapacitated" from working.

Dr. Carlish issued two supplemental reports. In an October 2013 report, Dr. Carlish considered the testing, reports, and deposition testimony of the other physicians that postdated his initial report. Dr. Carlish opined that petitioner's ischemia had worsened, and adhered to his initial conclusions that

petitioner was permanently incapacitated from working. In a November 2013 report, Dr. Carlish repeated his initial diagnosis that petitioner was incapacitated as of December 2008 due to "intractable blood pressure," as evidenced by petitioner's normal blood pressure reading by Dr. Hirsch in November 2007 and his abnormal blood pressure reading by Dr. Carlish just "days later."

C. The Board's Ruling

On the basis of the evidence available to it in July 2009, the Board denied petitioner's application for a disability retirement.

Petitioner requested a formal administrative hearing before a Board Referee. Following that hearing, the referee in October 2014, issued proposed findings of fact and a recommended decision denying petitioner's application because he was not "permanently incapacitated from the performance of his duties." The Board adopted the referee's recommendation.

D. Writ Petition

In April 2015, petitioner filed a verified petition for a writ of mandate in the Superior Court challenging the Board's denial of his application for a disability retirement. He subsequently filed a motion for a writ, arguing that a "preponderance of [the] evidence demonstrates [petitioner] was permanently incapacitated by disabling heart conditions, including intractable hypertension, coronary artery disease, and associated symptoms and risks for future cardiac events."

Following briefing and a hearing, the trial court issued a written decision denying the petition. The court stated that it was reviewing the administrative record under the "independent judgment" standard and recounted in detail the medical evidence presented to the Board. The court credited Dr. Cayton's medical opinion that petitioner was not permanently disabled over the

opinions of Dr. Hirsch and Dr. Carlish. The court explained why it put little weight on the latter two doctors' opinions. Dr. Hirsch's opinion of incapacity was based on a finding of hypertension and coronary artery disease grounded in the calcification shown in the body CT scan, but the court noted that Dr. Hirsch's finding of hypertension was "largely unsupported by contemporaneous objective blood pressure readings"; that Dr. Hirsch's finding of coronary artery disease was undercut by Dr. Cayton's opinion that the extent of calcification shown in the body CT scan did not indicate coronary artery disease; and that Dr. Hirsch's finding of incapacity was belied by the absence of any "indication of a negative impact on . . . [p]etitioner's job performance." Dr. Carlish's opinion of incapacity was internally "contradict[ory]" because Dr. Carlish noted the absence of "objective evidence" confirming hypertension and coronary artery disease, but went on to find petitioner permanently incapacitated. The court noted that the October 2009 treadmill test came back with "negative" results, but concluded that "the occurrence of this negative test more than a year and a half after . . . [p]etitioner had retired and nearly two and a half years after he had stopped working is not probative of his incapacity" at the time of retirement.

E. Judgment and Appeal

Following entry of judgment, petitioner filed this timely appeal.

DISCUSSION

In this appeal, petitioner argues that the trial court's ruling denying his writ must be overturned because (1) the court did not *really* apply the independent judgment standard, as it was required to do, and (2) the court's ruling was not supported by

substantial evidence.

I. Standard of Review

A person who is aggrieved by a "final administrative order or decision" made after an administrative hearing may seek a writ of mandate. (Code Civ. Proc., § 1094.5, subd. (a).) Where the administrative agency's decision involves, or substantially affects, a "fundamental vested right" of the party seeking review, the trial court is to examine the administrative record for errors of law and to "exercise[] its independent judgment upon the evidence." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143-144.) Because "employees have a fundamental vested right in their retirement benefits" (*County of Alameda v. Board of Retirement* (1988) 46 Cal.3d 902, 915), the trial court was required to exercise its independent judgment in reviewing the administrative record underlying petitioner's application for disability retirement. (See *Valero v. Board of Retirement of Tulare County Employees' Assn.* (2012) 205 Cal.App.4th 960, 965 [so holding].)

Contrary to what petitioner argues, the trial court exercised its independent judgment in reviewing the record. In assessing what level of review a trial court has employed, we look both to (1) what the court says it was doing, and (2) the nature of the court's review. (*Rodriguez v. City of Santz Cruz* (2014) 227 Cal.App.4th 1443, 1453.) Here, the court expressly stated that it was employing this standard of review. Absent evidence "to the contrary, we must take the trial court at its word and assume it did its duty." (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 400; Evid. Code, § 664.) Further, the trial court *itself* reviewed and weighed the competing expert opinions (rather than assessing whether the Board's treatment of those

opinions was supported by substantial evidence). This is consistent with independent judgment review.

Petitioner raises two further arguments. He complains the trial court was deferring to the Board because, in describing the independent judgment standard, the Board indicated that an administrative agency's findings are to be accorded "a strong presumption of correctness." However, that is how our Supreme Court has defined the independent judgment standard. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 816-817.) He also suggests that his disagreement with how the court ultimately came out with its independent assessment of the experts' opinions and with the court's decision to exclude evidence of his October 2009 treadmill test is evidence that the court applied a different standard; it is not.

II. Substantial Evidence

Under the County Employees Retirement Law of 1937 (CERL; Gov. Code, § 31450 et seq.), a county employee may apply for a disability retirement upon a showing that he is "permanently incapacitated" for the performance of his work duties. (*Id.*, § 31720 et seq.; *Flethez v. San Bernardino County Employees Retirement Assn.* (2017) 2 Cal.5th 630, 635-636.) An employee is "permanently incapacitated" if he proves, among other things, that he is "substantial[ly] [unable] . . . to perform his usual duties" at the time he separates from service. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876 (*Mansperger*); §§ 31720 & 31722; see also *Flethez*, at p. 636.)

Where, as here, the trial court has applied the independent judgment standard, our job is to evaluate the trial court's ruling for substantial evidence. (*Cameron v. Sacramento County*

Employees' Retirement System (2016) 4 Cal.App.5th 1266, 1278.) Under this standard of review, we defer to the trial court's resolution of competing expert opinions as long as the experts are competent and their opinions are supported by reasoned analysis. (*Kyles v. Workers' Comp. Appeals Bd.* (1987) 195 Cal.App.3d 614, 621 ["the Board may choose between conflicting medical opinions"]; § 31720.3 [medical evidence may be considered if "competent"]; see generally *People v. Alexander* (2010) 49 Cal.4th 846, 882-883; *San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1292; *Simonet v. Frank F. Pellissier & Sons, Inc.* (1943) 61 Cal.App.2d 41, 45-46.) A single medical opinion, "although inconsistent with other medical opinions, may constitute substantial evidence." (*Kyles*, at p. 621; *Curtis v. Board of Retirement* (1986) 177 Cal.App.3d 293, 298.)

Petitioner raises three challenges to the substantiality of the evidence supporting the trial court's ruling: (1) the court erred in rejecting Dr. Carlish's opinion; (2) the court erred in crediting Dr. Cayton's opinion; and (3) the court erred in giving no weight to the 2009 treadmill test.

A. Dr. Carlish's Opinion

Petitioner offers two reasons why the trial court erred in discounting Dr. Carlish's opinion: (1) the court impermissibly subjected Dr. Carlish's opinion to a "piecemeal" analysis by ignoring his opinion that petitioner was incapacitated due to "psychophysiological stress"; and (2) the court erred in concluding that Dr. Carlish's opinion was internally contradictory because no objective evidence undercut his opinion regarding psychophysiological stress.

As a threshold matter, petitioner forfeited these arguments because he did not raise the issue of his incapacitation due to

psychophysiological stress in his writ petition or in his motion for the writ (which, as noted above, challenged the Board's failure to recognize that he was "permanently incapacitated by disabling heart conditions, including intractable hypertension, coronary artery disease, and associated symptoms and risks for future cardiac events"). The first time petitioner mentioned psychophysiological stress or its ilk was in his reply brief in support of his motion for the writ. That was too late, at least where, as here, the trial court did not excuse that forfeiture and consider the issue. (Accord, *Moore v. William Jessup University* (2015) 243 Cal.App.4th 427, 432, fn. 3 [trial court's refusal to consider evidence included in reply warrants forfeiture on appeal]; *Nick v. City of Lake Forest* (2014) 232 Cal.App.4th 871, 879 [arguments raised for the first time in appellate reply brief are forfeited absent good cause].) Petitioner responds that Dr. Carlish's opinions were part of the record before the trial court and hence were "before" the court, but the California Rules of Court place the burden on petitioner to specifically articulate "the grounds of [his] petition" (Cal. Rules of Court, rule 8.452(a)(1)(D)), and he did not timely challenge the Board's rejection of Dr. Carlish's opinion of incapacity due to psychophysiological stress.

Petitioner's arguments lack merit in any event. Petitioner is correct that trial courts may not engage in piecemeal review by "isolating evidence which supports the Board and ignoring other relevant facts" (*Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 255), and that a "psychoneurotic injury" can qualify as a "disabling industrial injury" (*Baker v. Workers' Comp. Appeals Bd.* (1971) 18 Cal.App.3d 852, 860-862 (*Baker*)). However, the trial court's failure to consider Dr. Carlish's opinion

regarding psychophysiological stress was harmless because that opinion was undercut by (and inconsistent with) the evidence that petitioner's job performance during the periods when he was allegedly suffering from this disabling injury—including the "most severe" anxiety attack in March 2005—was either "outstanding" or "very good." What is more, Dr. Carlish's opinion in this regard was based in part upon his finding that petitioner suffered "daily anxiety attacks" and that petitioner's blood pressure was bouncing around from normal (during Dr. Hirsch's testing) to abnormal (during his testing) just "days later," but petitioner reported to Dr. Hirsch that he only "sometimes" experienced physical symptoms of stress, and Dr. Carlish's blood pressure test was a *year* after Dr. Hirsch's test and at a time when petitioner was not taking his blood pressure medication. (Cf. *Baker*, at pp. 860-862 [five doctors all concluded the employee suffered from a psychoneurotic injury].) For these reasons, Dr. Carlish's opinion regarding psychophysiological incapacity does not call into question the soundness of the trial court's ruling or its finding that Dr. Carlish's opinion was internally contradictory.

B. Dr. Cayton's Opinion

Petitioner posits two reasons why the trial court erred in crediting Dr. Cayton's opinion: (1) Dr. Cayton did not discuss in detail petitioner's job duties as a Lieutenant in the Communications Center, and on one occasion mistakenly named him a "deputy sheriff"; and (2) Dr. Cayton only looked to the objective evidence and placed insufficient weight on petitioner's subjective complaints.

Because the definition of "permanent[] incapacit[y]" turns on the "*substantial* inability . . . to perform [one's] usual duties"

(*Mansperger*, *supra*, 6 Cal.App.3d at p. 876), a medical opinion regarding incapacity must necessarily take into account the employee's job duties. (*Bechtel v. Board of Retirement of Contra Costa County Employees Assn.* (1980) 102 Cal.App.3d 9, 16.) Although Dr. Cayton did not expressly set forth petitioner's job duties as Lieutenant in any of his reports, he indicated that he obtained petitioner's "occupational history" and had reviewed Dr. Hirsch's earlier report that described petitioner's job duties. This is sufficient to indicate that he had petitioner's duties in mind, and petitioner cites us no statute or case requiring us to reject a doctor's medical opinion that considers the employee's job duties just because the doctor does not set those duties forth in his or her report. Moreover, Dr. Cayton found no injury whatsoever, such that petitioner was not incapacitated from *any* job, no matter what its duties.

A medical opinion underlying a finding of capacity (or incapacity) must also rest on "objective evidence." (*Universal City Studios, Inc. v. Workers' Compensation Appeals Bd.* (1979) 99 Cal.App.3d 647, 656; *Baker*, *supra*, 18 Cal.App.3d at p. 855.) Neither an employee's "subjective complaints" nor the presence of symptoms consistent with an injury will support a finding of incapacity absent objective evidence confirming those complaints or those symptoms. (*Universal City Studios, Inc.*, at p. 656; *Baker*, at p. 858.) Thus, Dr. Cayton did not err in focusing on the absence of objective evidence supporting petitioner's claims. Petitioner cites several cases indicating that courts must take into account an employee's complaints of pain. (*Employers' Liability Assurance Corp. v. Industrial Accident Com.* (1941) 42 Cal.App.2d 669, 671-672; *Sweeney v. Workers' Comp. Appeals Bd.* (1968) 264 Cal.App.2d 296, 303.) However, "subjective

complaints of pain . . . [are] insufficient to alone prove disability." (*Anthony v. Kizer* (1991) 230 Cal.App.3d 990, 998-999.) Dr. Cayton's opinion was not deficient for properly adhering to these maxims. Further, petitioner's complaints *were* credited; they were simply not confirmed by any objective evidence and were for that reason not controlling on a diagnosis of any injury causing permanent incapacity.

C. 2009 Treadmill Test

Petitioner lastly argues that the trial court erred in finding the October 2009 treadmill test not to be "probative of his incapacity" due to the fact it occurred long after his separation from service, the pertinent time for evaluating incapacity. Citing *Finegan v. County of Los Angeles* (2001) 91 Cal.App.4th 1, petitioner reasons that the 2009 results showing some cardiac injury tend to show that the seed of that injury may have existed earlier. The trial court's finding that the 2009 test was not "probative" could either be a finding that is not relevant at all (Evid. Code, § 210) or that its probative value was so weak that its value was substantially outweighed by the probability that its admission would "confus[e] the issues" or "mislead[] the" court (*id.*, § 352). In either event, we review the court's ruling for an abuse of discretion. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1114 [relevance]; *People v. Jones* (2017) 3 Cal.5th 583, 609 [Evidence Code section 352].) Given the timing of the 2009 test and its remoteness to the pertinent date (that is, the date petitioner separated from service), given the evidence that petitioner had not taken his blood pressure medication during the interim period between his separation and the 2009 test, and given the objective evidence regarding petitioner's physical state at the time of his retirement, the trial court did not abuse its

discretion in according the 2009 test no weight. *Finegan* holds that "later-acquired medical evidence" is admissible (*Finegan*, at pp. 12-13), not that it is *always* admissible notwithstanding the other rules of evidence.

DISPOSITION

The judgment is affirmed. The Board is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ