

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for Industrial Disability

Retirement of:

NORRIS E. LITTLEJOHN, Respondent

and

**CALIFORNIA INSTITUTION FOR WOMEN, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent**

Case No. 2020 0029

OAH No. 2020060750

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by video conference and telephone on January 5, 2022, due to the ongoing COVID-19 pandemic.

Nhung Dao, Staff Attorney, represented petitioner, Keith Riddle, Chief, Disability and Survivor Benefits Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Norris E. Littlejohn, respondent, represented himself.

No appearance was made by or on behalf of respondent California Institution for Women, California Department of Corrections and Rehabilitation (CIW, CDCR). Based on proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default against CIW, CDCR pursuant to Government Code section 11520.

The matter was submitted on January 5, 2022.

PROTECTIVE ORDER SEALING CONFIDENTIAL RECORD

CalPERS's expert's report, Exhibit 13, was received and contained confidential information. It is impractical to redact the information from this exhibit. To protect Mr. Littlejohn's privacy and the confidential personal information in that report from inappropriate disclosure, that exhibit is ordered sealed. This sealing order governs the release of the document to the public. A reviewing court, parties to this matter, their attorneys, and a government agency decision maker or designee under Government Code section 11517 may review the document subject to this order, provided that the document is protected from release to the public.

ISSUE

Was Mr. Littlejohn permanently disabled or incapacitated from performing his usual and customary duties as a Correctional Officer at CIW, CDCR due to his cardiac condition when he filed his application for disability retirement?¹

SUMMARY OF DECISION

Mr. Littlejohn had the burden to prove that he was permanently disabled or incapacitated from performing the usual and customary job duties of a Correctional Officer due to his cardiac condition. The competent medical evidence introduced at this hearing did not support Mr. Littlejohn's claim for industrial disability retirement and it is denied.

FACTUAL FINDINGS

Jurisdictional Matters

1. Mr. Littlejohn was employed by CIW, CDCR as a Correctional Officer. By virtue of his employment, Mr. Littlejohn was a state safety member of CalPERS subject to Government Code section 21151.

¹ Mr. Littlejohn previously withdrew his otolaryngology claim of hearing loss and tinnitus, so only the cardiac claim will be addressed in this decision.

2. On June 10, 2019, Mr. Littlejohn filed a Disability Retirement Election Application with CalPERS. In the "Application Type" section he checked the box marked "Service Pending Industrial Disability Retirement." Mr. Littlejohn identified his disability as "Hypertension, Cardiovascular Disease" that occurred on "01/03/2019 CT, 01/25/2017, 03/15/2003."² In the section asking how the disability occurred, Mr. Littlejohn wrote: "Significant hypertension disease (1/25/17) Hypertension Related Cardiomyopathy, Hypertriglyceridemia." The limitations due to his illness are: "Hypertension Related Cardiomyopathy, Aggravation of Diabetes." His illness affects his ability to perform his job because; "Hypertension Disease I am no longer able to perform the Essential Functions of my job." He was not currently working. Mr. Littlejohn identified his treating physician, Jin Kim, whose specialty was internal medicine.

3. CalPERS obtained medical records and documents related to Mr. Littlejohn's cardiac condition and selected Robert Weber, M.D., F.A.C.C., a board-certified internal medicine and cardiovascular diseases physician, to perform a disability evaluation. Dr. Weber provided CalPERS with a report containing his findings and conclusions. After reviewing all of those documents, CalPERS determined that when Mr. Littlejohn filed his recent application for disability retirement, he was not permanently disabled or incapacitated from performing the usual and customary duties of a Correctional Officer.

² As the application contained both the otolaryngology and cardiac claims, it was unclear which dates specifically pertained to the cardiac one.

4. On April 5, 2021, CalPERS notified Mr. Littlejohn that his application for disability retirement was denied. CalPERS advised him of his right to appeal, which Mr. Littlejohn exercised.

5. On December 6, 2021, petitioner filed the Amended Statement of Issues in his official capacity. The amended statement of issues and jurisdictional documents were served on respondents and this hearing ensued.

Job Description Documents

6. The Physical Requirements of Position/Occupational Title of a Correctional Officer, completed by Mr. Littlejohn and his employer, outlined the physical requirements including the activities and frequency of those activities for that position. The Essential Functions of a Correctional Officer outlined the major tasks including "Examples of Work Involved" that the position required.

Dr. Weber relied upon these documents when formulating his opinions.

CalPERS's Independent Medical Evaluation Conducted by Dr. Weber

7. According to his curriculum vitae, Dr. Weber obtained his Doctor of Medicine degree from The Medical College of Wisconsin in 1974 and was licensed in California in 1975. He did an internship in internal medicine at St. Mary's Medical Center in Long Beach, CA, from 1974 - 1975; and residencies in internal medicine at St. Mary's from 1975 - 1976, and at The Hospital of the Good Samaritan in Los Angeles from 1977 - 1978. He was board certified in 1978. Dr. Weber did a clinical fellowship in cardiology from 1980-1982 at Huntington Beach Memorial Hospital. He worked for two different private practice groups until opening his own cardiology practice. He

now limits his practice to performing patient care 25 - 30 percent of the time and performing CalPERS's and workers' compensation evaluations during the remainder.

8. On March 10, 2021, Dr. Weber performed an independent medical evaluation of Mr. Littlejohn for CalPERS. Dr. Weber reviewed medical records, took a history of the injury, past medical history, family history, and performed a review of systems and a physical examination. Dr. Weber did not request that any cardiac testing be performed because "CalPERS generally does not provide for that" and the medical records he reviewed had all the tests he needed to formulate his opinions. Following the evaluation, Dr. Weber authored a report and testified consistent with it at this hearing.

9. Dr. Weber documented that Mr. Littlejohn was 56 years old and had been a correctional officer from 1989 until retiring in 2019. Mr. Littlejohn stated the reason he retired was "out of concern for his heart, in that he had been told that his heart is weak and that he has an abnormal heart rhythm." Mr. Littlejohn treats with his cardiologist and "experiences sharp pain in his chest daily" which "can occur up to four times per day" and "lasts up to five minutes." The pain is not related to any physical activity. Mr. Littlejohn also has shortness of breath when getting about halfway to the top of the stairs and has not been "particularly physically active since retiring in July 2019." Mr. Littlejohn described the difficulty he had climbing the four flights of stairs to the guard tower when he worked. He continues to experience palpitations, which he described as a fluttering in the muscles of his chest that he can feel with his hand. His legs and hands also get swollen. Both his parents are deceased with his father dying at age 52 and his mother dying at age 50, both having histories of diabetes, heart disease, and hypertension, and his father also had kidney failure.

On physical examination, Mr. Littlejohn's pulse was 82 and regular, his blood pressure was 114/76, his respirations were 14, and his oxygen saturation rates were 98 percent on room air, all of which Dr. Weber testified were within normal limits. Mr. Littlejohn's heart had a regular rhythm with an S4 and a grade II/VI systolic ejection murmur at the base and the left sternal border. Dr. Weber explained that the vast majority of individuals with a murmur have a functional or benign condition and, based upon his exam and review of records, Mr. Littlejohn's murmur was not caused by any cardiac, structural or functional abnormality. All of the cardiac testing documented in the medical records had findings that were either nonspecific, within normal limits, or had minimal/mild findings that were not significant clinically.

During his testimony, Dr. Weber pointed out various findings documented in the medical records that supported his opinions, including notes from Mr. Littlejohn's cardiologist who repeatedly found him to be "stable from a cardiac standpoint." Contrary to Mr. Littlejohn's claim that he suffered a heart attack in March 2017, Dr. Weber referenced the May 2017 Qualified Medical Evaluation (QME) performed as part of Mr. Littlejohn's workers' compensation claim which noted the March 2017 hospitalization was "due to chest pain." The QME documented that Mr. Littlejohn "had sharp pain in the chest, a fluttering, commenced at work. He had ECG, echo, stress test, an angiogram and was told everything was all right. He did not require any stents, results were normal. Denied any prior chest pains." Per Dr. Weber, these records did not show that Mr. Littlejohn suffered a heart attack.

Dr. Weber found nothing in the medical records to corroborate Mr. Littlejohn's claim of a heart attack in March 2017, nor did Mr. Littlejohn tell Dr. Weber that he suffered a heart attack when Dr. Weber took a history from him. Although an August 18, 2020, ECG report noted a "possible inferior infarct, age undetermined," which

meant Mr. Littlejohn may have suffered a heart attack in the past, this was not a definitive finding that an infarct occurred. As Dr. Weber explained, an “experienced cardiologist knows” that a “range of these deviations” on testing is normal and the notation on this report simply meant that the ECG findings may or may not correspond to actual cardiac diseases or pathology which is why the person interpreting the ECG used the word “possible.” Thus, this report does not support Mr. Littlejohn’s claim.

Following his examination, Dr. Weber’s diagnoses were: hypertension, controlled; diabetes mellitus type II; history of hypertriglyceridemia; mild to moderate mitral regurgitation per echocardiogram; December 14, 2019, February 18, 2028; atypical chest pain; non-cardiac; and palpitations; actually represent muscular fasciculations (muscle twitches) of chest wall muscle; no evidence in the medical records of a cardiac arrhythmia noted. Dr. Weber wrote: “My conclusions from his history, taken by myself, as well as review of the medical records indicate that clinically he does not have any objective findings by way of physical examination and there is an array of cardiac testing that would indicate that this member would be not at all substantially incapacitated from performing his essential job duties.”

In the “Questions and Answers” section of his report, Dr. Weber opined that Mr. Littlejohn “does not have an actual present cardiologic impairment that arises to the level of substantial incapacity to perform his usual job duties.” The findings that led Dr. Weber to this opinion were:

[Mr. Littlejohn] has essentially normal physical findings with the single exception of a grade II/IV systolic ejection murmur of the heart which is attributable to his known mild to moderate mitral regurgitation, as demonstrated by

echocardiography. Taking his examination findings as well as the echocardiographic findings together, it is my opinion that the degree of the member's mitral regurgitation does not represent an underlying mechanism for him to be substantially incapacitated from a cardiac perspective.

10. Dr. Weber concluded that Mr. Littlejohn was not permanently disabled or incapacitated from performing his usual and customary duties as a Correctional Officer at CIW, CDCR due to his cardiac condition. Overall, Dr. Weber found nothing in the records or during his examination that supported Mr. Littlejohn's application for a disability retirement. Dr. Weber believed that Mr. Littlejohn put forth his best effort during the examination but noted in his report that "perhaps on the basis of insufficient comprehension of information given to him by his primary care physician, [Mr. Littlejohn] displayed an opinion of his cardiovascular health and condition to be markedly inaccurate and apparently upon which he stated he had based his decision to retire."

11. At hearing, Dr. Weber thoroughly explained his findings, demonstrating that he is an extremely knowledgeable cardiologist. He also testified in a sympathetic manner towards Mr. Littlejohn, answering all questions posed to him, describing his findings, and explaining why Mr. Littlejohn's contentions were not supported by the records. Dr. Weber made a very credible witness.

Mr. Littlejohn's Testimony

12. Mr. Littlejohn testified about his "heart attack" and that his treating physician told him it was a heart attack. However, he presented no evidence, other than his testimony, that refuted Dr. Weber's summary of the medical records which did

not document a heart attack. Mr. Littlejohn also explained how his cardiac condition prevents him from performing his job duties. It was clear that Mr. Littlejohn truly believes his claims, but, as he correctly stated during his testimony, "I am not as educated as Dr. Weber," and Mr. Littlejohn's testimony, absent anything else, was insufficient to meet his burden of providing "competent medical opinions" to support his claims. No physicians testified on Mr. Littlejohn's behalf, and there was no medical evidence, indeed no reliable evidence, to refute Dr. Weber's opinions. As such, Mr. Littlejohn failed to meet his burden and his claim is denied.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

2. "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' [Citations.]..... The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation]." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

Purpose of CalPERS's Laws

3. The court in *Lazan v. County of Riverside* (2006) 140 Cal App 4th 453, examined the purpose of CalPERS's legislation, noting it serves two objectives: inducing persons to enter and continue in public service, and providing subsistence for disabled or retired employees and their dependents. A disability pension is intended to alleviate the harshness that would accompany termination of an employee who became medically unable to perform his or her duties. Generally, CalPERS's legislation is to be construed liberally in favor of the employee to achieve these objectives. Moreover, eligibility for retirement benefits does not turn upon whether the employer dismissed the employee for disability or whether the employee voluntarily ceased work because of disability. (*Id.* at p. 459.)

Applicable Code Sections

4. Government Code section 20021 defines "Board" as "the Board of Administration of the Public Employees' Retirement System" (CalPERS).

5. Government Code section 20026 provides:

"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 or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

6. Government Code section 21150, subdivision (a), provides that a member who is "incapacitated for the performance of duty shall be retired for disability. . ."

7. Government Code section 21151, provides that a state safety member, such as respondent, who is "incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability. . . "

8. Government Code section 21152 sets forth who may make the disability retirement application.

9. Government Code section 21154 states:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety 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. On receipt of the application with respect to a local safety member other

than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

10. Government Code section 21156 states:

(a)(1) If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, 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, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.

(2) In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

(b)(1) The governing body of a contracting agency upon receipt of the request of the board pursuant to Section 21154 shall certify to the board its determination under this section that the member is or is not incapacitated.

(2) The local safety member may appeal the determination of the governing body. Appeal hearings shall be conducted by an administrative law judge of the Office of Administrative Hearings pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of this title.

Incapacitated from Performance of Duty

11. Unlike the right to a widow's or widower's pension that accrues upon the employee spouse's death, the right to a disability retirement does not automatically arise upon the happening of an injury. Rather, the injury must result in the employee being so physically or mentally disabled as to render retirement from active service necessary. The illness or injury is not the controlling factor, but, rather, the resulting inability to perform the work. The employer's duty to find the disability does not attach nor is the right to a disability finding created until that further point of time is reached. The disability finding cannot be made without a determination of the results of the injury, the condition of the employee, and the necessity for the retirement. (*Tyra v. Board of Police and Fire Pension Commissioners of City of Long Beach* (1948) 32 Cal.2d 666, 671, citations omitted.)

12. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform

his or her customary duties, even though doing so may be difficult or painful, the public employee is not “incapacitated” and does not qualify for a disability retirement. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876-877³; *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1057.)

In *Mansperger, supra*, there was no dispute that Mansperger, who was a fish and game warden, had suffered an injury that caused him to be unable to engage in heavy lifting. The sole issue in dispute was whether his physical limitations amounted to “incapacity for the performance of duty.” (*Mansperger, supra*, at p. 876.) After concluding that “incapacity for the performance of duty” meant the substantial inability to perform an applicant’s usual duties, the appellate court assessed the facts in that case as follows (*Id.* at pp. 876-877):

While it is clear that petitioner’s disability incapacitated him from lifting or carrying heavy objects, evidence shows that the petitioner could substantially carry out the normal duties of a fish and game warden. The necessity that a fish and game warden carry off a heavy object alone is a remote occurrence. Also, although the need for physical arrests do occur in petitioner’s job, they are not a common occurrence for a fish and game warden. A fish and game warden generally supervises the hunting and fishing of ordinary

³ The *Mansperger* decision analyzed the language then contained in Government Code section 21022, the substance of which is now contained in Government Code section 20026 (although there have since been some amendments to section 20026).

citizens. Petitioner testified that, since his accident, he was able to perform all his required duties except lifting a deer or lifting a lobster trap out of kelp.

13. A similar result was reached in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854. In that case, a California Highway Patrol (CHP) officer applied for industrial disability retirement, claiming he feared his back injuries placed in him danger of further injury if he was required to overpower someone resisting arrest. CalPERS's determination that he was not substantially incapacitated from performing the usual duties of his job was upheld on appeal. The appellate court determined that the fact that an injury increases an individual's chances of further injury does little more than demonstrate that the injury is prospective, hence, speculative, and presently not in existence. (*Id.* at p. 862-863.) Accordingly, fear of further injury or fear of aggravation of an existing injury is insufficient to support a finding of disability. (*Ibid.*)

Competent Medical Opinion

14. CalPERS makes its determination whether a member is disabled for retirement purposes based upon "competent medical opinion." That determination is based on the evidence offered to substantiate the member's disability. (*Lazan v. County of Riverside* (2006) 140 Cal. App. 4th 453, 461, distinguished on other grounds.)

15. Evidence Code section 801 provides:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

16. The determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the trier of fact in the search for the truth, and "no hard and fast rule can be laid down which would be applicable in every circumstance." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 37-38.)

17. A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact but the expert's opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 529-530.)

18. Determining both the nature of Mr. Littlejohn's medical condition, and whether that condition incapacitated him physically or mentally for the performance of

his duties, is sufficiently beyond common experience that expert testimony is required. Mr. Littlejohn called no expert witnesses. None of his treating physicians testified in this hearing and there was no showing that Dr. Weber incorrectly interpreted or relied on any of the medical records he reviewed.

Request for Judicial Notice

19. CalPERS asked that Official Notice be taken of three precedential decisions. Government Code section 11425.60 authorizes agencies to designate decisions as precedential that contain "a significant legal or policy determination of general application that is likely to recur." Precedential decisions may be expressly relied upon by the administrative law judge and the agency. Official Notice was taken of *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (OAH No. L-1990 906-0537), *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Theresa V. Hasan* (OAH No. N-1990 910-0099), and *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Ruth A. Keck* (OAH No. L-1990 9120097), and these cases were relied upon in rendering the decisions reached herein.

20. *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* involved an injured CHP officer whose employer-retained physician determined he could not return to work but the CalPERS-retained physician determined that he could. The decision stands for the proposition that the opinions of the CalPERS-retained physician, who offered competent medical evidence and who applied the CalPERS industrial disability criteria, were the correct opinions.

21. *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Theresa V. Hasan* involved an injured parole agent and stands for the proposition that prophylactic limitations are insufficient to support a finding of disability and competent medical evidence must be offered to establish that claim.

22. *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Ruth A. Keck* involved an injured school district clerk typist and stands for the proposition that the difficulty performing a task is insufficient, competent medical evidence is required to establish disability and an employer cannot terminate a CalPERS member for medical reasons after CalPERS has denied a disability retirement.

Evaluation

23. In order to qualify for a disability retirement, Mr. Littlejohn must demonstrate, based on competent medical opinion, that he was permanently disabled or incapacitated from performing the regular and customary duties of a Correctional Officer when he filed his application. Mr. Littlejohn did not introduce any competent medical opinion to support his claim. None of his treating physicians testified and he called no expert witness. No reliable evidence refuted any of the opinions put forth by Dr. Weber.

Mr. Littlejohn failed to meet his burden of proof and his application must be denied. Petitioner's determination that Mr. Littlejohn was not permanently disabled or incapacitated from performance of his duties is affirmed.

ORDER

The June 10, 2019, application for service pending industrial disability retirement filed by Norris E. Littlejohn with CalPERS is denied. CalPERS's denial of Mr. Littlejohn's application is affirmed.

DATE: January 19, 2022


Mary Agnes Matyszewski (Jan 19, 2022 16:54 PST)

MARY AGNES MATYSZEWSKI

Administrative Law Judge

Office of Administrative Hearings