

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:

ROBERT ACEVES,

Respondent,

and

SAN DIEGO UNIFIED SCHOOL
DISTRICT,

Employer.

CASE NO. 7703

OAH NO. 2012080708

(STATEMENT OF ISSUES)

PROPOSED DECISION

This matter came on regularly for hearing before Roy W. Hewitt, Administrative Law Judge, Office of Administrative Hearings, in San Diego, California on November 15, 2012.

Robert Aceves (respondent) personally appeared and was represented by Edward L. Faunce, Esq.

CalPERS' senior staff attorney Rory J. Coffey, Esq., represented the California Public Employees' Retirement System (CalPERS).

There was no appearance on behalf of the employer.

Oral and documentary evidence was received, and the record was left open for briefing.

The matter was deemed submitted on December 17, 2012.

FACTUAL FINDINGS

1. Mary Lynn Fisher made and filed the Statement of Issues while acting in her

official capacity as the Assistant Division Chief of the Benefit Services Division of CalPERS.

2. Respondent was employed as a Campus Police Officer by the San Diego Unified School District (employer). By virtue of this employment respondent is a state safety member of CalPERS.

3. On October 14, 2004, respondent signed and thereafter submitted a completed application for Industrial Disability Retirement. Respondent claimed disability due to orthopedic conditions related to injuries to his neck, right shoulder, right elbow, left knee, left hip, right wrist, and fingers. (Exh. 5)

4. On April 20, 2006, respondent signed and thereafter submitted a completed application for Service Retirement pending disability retirement. Respondent's service retirement became effective on November 1, 2005, and he has been receiving his retirement allowance since that date.

Respondent's Medical History

5. On March 15, 2001, respondent suffered a work-related injury to his left knee and underwent surgical intervention on two occasions.

6. On February 20, 2003, respondent suffered work related injuries due to a trip and fall accident. Respondent was examined by Dr. William L. Shoemaker, D.O. on October 23, 2003. Dr. Shoemaker's diagnoses were as follows: "1) status-post contusion sprain, right wrist/hand, rule out carpal tunnel syndrome; 2) status-post contusion sprain, right shoulder, rule out rotator cuff tear; cervicothoracic musculoligamentous sprain/strain syndrome, rule out cervical radiculopathy." (Exhs A & B)

7. On November 12, 2003, Dr. Shoemaker reviewed an MRI taken of respondent's left knee and found no fractures or destructive changes. There was a "very small joint effusion present;" however, "there were no tears in the medial and lateral menisci." (Exh. C-1)

8. Respondent was re-examined by Dr. Shoemaker on November 21, 2003, based on respondent's subjective report that his light duty work was causing pain in his right neck and shoulder areas and that he noticed "increased numbness and tingling in his hand." Dr. Shoemaker noted that "Recent imaging of the right shoulder showed low signal intensity over the supraspinatus, suspicious for tendinitis as well as hypertrophic changes of the acromion and the AC joint. He has had a cervical MRI which showed multi-level degenerative disc disease." (Exh. D)

9. As a result of a December 3, 2003, examination Dr. Shoemaker recommended that respondent undergo "right shoulder arthroscopy with probable subacromial decompression." (Exh. E)

10. Respondent underwent right shoulder arthroscopy with subacromial decompression on February 27, 2004, and was examined by Dr. Shoemaker on March 30, 2004. As a result of the examination Dr. Shoemaker encouraged respondent to continue physical therapy to “further increase his active range of motion.” (Exh. J) With respect to respondent’s left knee and left hip, Dr. Shoemaker recommended that respondent “continue his home exercise program. . . .” (Exh. K)

11. On November 9, 2004, Dr. Shoemaker issued a “Primary Treating Physician’s Permanent and Stationary Report” concerning respondent’s left knee and hip injuries/conditions. Dr. Shoemaker noted in his report that “it is not clear to me whether [respondent’s] disability is congenial [sic] to his occupation. I would appreciate the opportunity to review a Job Analysis or RU-91 before rendering an opinion in this regard.” (Exh.Q)

12. As a result of a March 10, 2005, examination Dr. Shoemaker authored another “Permanent and Stationary Report” concerning respondent’s neck, right shoulder, right wrist and right hand injuries. Dr. Shoemaker’s diagnoses were as follows:

- 1) Chronic cervical musculoligamentous sprain/strain syndrome, aggravating pre-existing degenerative disc disease
- 2) Mild right upper extremity radiculitis
- 3) Chronic right shoulder impingement syndrome (rotator cuff tendinitis)
- 4) Status-post right shoulder arthroscopy with subacromial decompression
- 5) Status-post contusion sprain, right wrist
- 6) Chronic right wrist carpal tunnel syndrome (Exh. R)

As a result of this evaluation Dr. Shoemaker believed the following future medical treatment may be necessary: “surgical intervention for his cervical spine as well as right wrist carpal tunnel surgical release, which should be provided on an industrial basis.” (Exh. R) In the “Vocational Rehabilitation” section of his report Dr. Shoemaker stated:

[Respondent], due to the permanent disability relative to the injury of February 20, 2003, cannot perform his usual and customary job duties. Therefore, if a permanent modified position is not provided to him, he should be considered medically eligible for vocational rehabilitation. (Exh. R)

13. By letter, dated October 18, 2005, employer notified respondent of the following:

As you know, the district is unable to accommodate you due to your work restrictions. . .

Since the district cannot accommodate you, and you are out of

sick leave and vacation, I have included a retirement/resignation form for you to complete and return to me.

Please return the enclosed form to me by October 28, 2005. If I do not receive the form by that date, I will have no choice but to proceed with termination procedures. (Exh. U)

14. By a second letter, dated November 17, 2005, employer notified respondent of the following:

As you know, the district is unable to accommodate you due to your work restrictions. . .

Since the district cannot accommodate you, and you are out of sick leave and vacation, I have included a retirement/resignation form for you to complete and return to me.

Please return the enclosed form to me by November 30, 2005. If I do not receive the form by that date, I will have no choice but to proceed with termination procedures. (Exh. U)

15. As noted in Finding 4, on April 20, 2006, respondent signed and thereafter submitted a completed application for Service Retirement, as ordered by employer, pending disability retirement.

CalPERS' Response to Respondent's October 14, 2004, Application for Industrial Disability Retirement

16. By letter, dated February 27, 2006, CalPERS notified respondent that it had scheduled an orthopedic appointment for an Independent Medical Examination (IME) with Dr. Paul Milling.

17. On April 4, 2006, respondent was evaluated by Dr. Milling. As part of the evaluation process Dr. Milling reviewed Dr. Shoemaker's reports and reports of the MRIs concerning respondent's right shoulder, cervical spine and left knee. Additionally, Dr. Milling performed a physical examination. The entire report of Dr. Milling's physical examination consisted of the following:

The patient is a very healthy-looking man. He is muscular, well fit, and only slightly overweight. He is 5', 11" and weighs 225 pounds. He has a normal heel-to-toe gait. He is able to walk on his heels and toes. He can do a partial squat. He has full, 100 percent range of motion of the cervical spine. Full, 100 percent range of motion of thoracic and lumbar spine. There is full, 100 percent range of motion in right and left shoulders, elbows,

wrists, and hands. Full, normal range of motion in his hips, knees, and ankles. Straight leg raising is negative. Reflexes are normal and equal bilaterally in the right and left upper and lower extremities. Motor and sensory exam is normal in the upper and lower extremities. There is no joint swelling. The only tenderness on palpation that I can pick up is some mild tenderness over the right greater tuberosity. (Exh. 11)

As a result of the records review and physical examination Dr. Milling concluded that respondent is able to perform “all aspects of the job” and “In my [Dr. Milling’s] opinion, the member [respondent] is presently not substantially incapacitated for the performance of his usual duties of his current position.” (Exh. 11)

18. As a result of Dr. Milling’s IME, CalPERS notified respondent on August 8, 2006 that “. . . we have concluded that you are not substantially incapacitated from the performance of your job duties as a Campus Police Officer with the San Diego Unified School District . . .” (Exhs. 7 & X)

19. Respondent timely appealed CalPERS’ denial of his disability application and the instant hearing ensued.

Hearing Testimony

The parties stipulated that the expert reports could be received in evidence and considered as if the experts had appeared and testified to the contents. Consequently, there was no expert testimony presented during the hearing; however, respondent and one lay witness, the Director of Classified Personnel for the San Diego Unified School District (the director), did provide live testimony.

20. The director testified that respondent worked as a School Police Officer. As such, he was required to be a California Peace Officer so that he could make arrests and use deadly force, if necessary. Respondent had suffered a number of work related injuries and his treating physician, Dr. Shoemaker, had prescribed certain work restrictions that employer could not accommodate. The director met with his supervisor and attended a committee meeting to discuss respondent’s employment situation. It was concluded that employer could not accommodate respondent so, as set forth in Findings 13 and 14, employer notified respondent that if respondent did not resign or retire from his position as a Campus Police Officer, employer was going to initiate employment termination proceedings.

21. Respondent testified in support of his belief that Dr. Milling did not perform a full and fair IME. According to respondent, Dr. Milling’s waiting room was full and respondent had to wait for almost an hour after his scheduled appointment to be seen. When respondent’s name was called he went from the waiting room to Dr. Milling’s office. As respondent entered the office he noticed that Dr. Milling had a “stack of papers” sitting on his desk. Dr. Milling was obviously behind in his schedule and appeared to be somewhat

“upset and very tense.” Dr. Milling made the following comment to respondent: “this is your file, it is heavy.” Dr. Milling then had respondent stand on his heels, bend over at the waist, hold his hands out to the sides, and perform some other, similar, movements. Respondent tried to explain his physical problems to Dr. Milling but Dr. Milling interrupted respondent by saying he “already knew” respondent’s problems. The “physical examination” lasted less than five minutes.

Evaluation of the Evidence

22. There is no question that respondent suffered numerous work related injuries over the past several years and that the injuries resulted in his primary treating physician ordering certain work restrictions. In fact, at a certain point, as a result of his March 10, 2005 examination of respondent, Dr. Shoemaker expressly noted in his report that “due to the permanent disability relative to the injury of February 20, 2003, [respondent] cannot perform his usual and customary job duties.” Dr. Shoemaker’s conclusion that respondent could not perform his usual and customary job duties was validated by respondent’s employer. Based on respondent’s physical limitations his employer notified him that they could not accommodate him; consequently, employer directed respondent to quit, retire, or be fired. This evidence that respondent is permanently disabled and incapacitated from performance of his usual and customary duties as a Campus Police Officer from employer is much more compelling than Dr. Miller’s conclusion, after a cursory medical examination and review of records, to the contrary.

LEGAL CONCLUSIONS

Applicable Code Sections

1. California 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 . . . on the basis of competent medical opinion.”

2. California Government Code section 21151, subdivision (a) provides: “Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.”

3. California Government Code section 21156 provides, in pertinent part: “In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination the basis of competent medical opinion . . .”

Evaluation of Respondent’s Disability Retirement

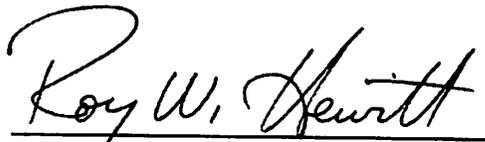
4. As set forth in Finding 22, in the present instance an evaluation of the medical evidence in conjunction with the assessment by respondent's employer, who is the most knowledgeable about the job requirements of respondent's position as a Campus Police Officer, established¹ that respondent is permanently disabled and incapacitated from performance of his job duties within the meaning of Government Code sections 20026 and 21156.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Respondent's appeal is granted and his application for disability retirement is approved.

Dated: January 7, 2013



ROY W. HEWITT

Administrative Law Judge

Office of Administrative Hearings

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.)