

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for
Disability Retirement of:

JONI K. FORSHT,

Respondent,

and

DEPARTMENT OF CORRECTIONS AND
REHABILITATION (PELICAN BAY
STATE PRISON),

Respondent.

Case No. 8183

OAH No. 2010090246

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on October 25, 2012.

Senior Staff Counsel Renee Salazar represented complainant Mary Lynn Fisher, Chief, Benefit Services Division, California Public Employees' Retirement System.

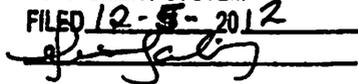
Bill K. Gray, Attorney at Law, Gray & Prouty, represented respondent Joni K. Forsht, both of whom appeared by telephone from Crescent City.

There was no appearance by or on behalf of respondent Department of Corrections and Rehabilitation, Pelican Bay State Prison.

The record closed and the matter was submitted on October 25, 2012.

FACTUAL FINDINGS

1. Respondent Joni K. Forsht was employed by respondent California Department of Corrections and Rehabilitation, Pelican Bay State Prison (CDCR), as a Correctional Officer. By virtue of her employment, respondent became a state safety member of the California Public Employees' Retirement System (CalPERS). On March 8,

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
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2006, respondent signed and then submitted to CalPERS an application for disability retirement. She described the nature of her disability as "lower back injury, progressive. Carrying cart & mail to second tier, twisted lower back & mid-back – [exacerbated] old injury." CalPERS denied respondent's application on November 6, 2006, and respondent filed a timely appeal. Complainant Mary Lynn Fisher, Chief of CalPERS's Benefit Services Division, issued a statement of issues on August 3, 2010, and this hearing followed. Since filing her application, respondent has added "psyche" to her description of her disability.

2. Respondent joined CDCR in or around 1996 and became a correctional officer at Pelican Bay, a maximum security facility. (Before that, respondent had worked for 11 years as a deputy sheriff for Del Norte County.) Respondent's first assignment was in a control booth on the "main line." During the last two and one-half years that she worked, respondent was assigned to a control booth in the secure housing unit, or "SHU."

3. The control booth is accessed by a ladder, and there is a catwalk around the booth; the control booth has windows that overlook "pods" of the SHU. The correctional officer assigned to the control booth controls all inmate movement in a pod by manipulating toggle switches on a control panel that open and close all of the doors. It is an assignment that demands constant vigilance. When a correctional officer goes into a pod, the correctional officer in the booth must "sling arms," that is, pick up a firearm that is under the control panel and be prepared to aim and fire, if necessary. If an emergency occurs, the officer in the booth must sound the alarm, secure the doors, and open the front door for assistance. The officer in the booth cannot leave the control room unless she is ordered to respond to an emergency; that never occurred during the time respondent worked at the facility.

The correctional officer in the control booth does very little lifting, but the officer must twist and bend, and may be required to hand equipment down to another officer on the first floor. During the time she was assigned to the control booth, respondent was not required to run, to extract inmates from their cells, or to subdue inmates.

4. In September 1998, respondent reported a work injury to her back. She was ultimately given a permanent disability rating of 12 percent by the Workers' Compensation Appeals Board. The details of respondent's injury; treatment; time off work, if any; and subsequent work restrictions, if any, were not established by the evidence.

5. In September 2004, respondent reported a second work injury to her back, and also a work injury to her psyche. At hearing, respondent did not describe how the injury to her back occurred. It appears that the psyche injury arose out of respondent's claim that she was being harassed by two male correctional officers who were trying to get her fired; respondent felt that she was being exposed to a hostile work environment. She ultimately received a 21 percent permanent disability award from the Workers' Compensation Appeals Board for these injuries.

6. It was not established by the evidence whether the September 2004 injuries caused respondent to miss time from work, or whether any work restrictions were imposed on her because of the injuries. Before and after September 2004, respondent was under the care of chiropractor Sean Gray and acupuncturist Jody Magnum; after September 2004, she was also under the care of Kevin Caldwell, M.D. No contemporaneous reports from these medical professionals were submitted into evidence, and none of them testified at hearing.

7. Respondent stopped working in May 2005. She testified that she was having severe pain in her back and leg, with no relief, and that she could not sit, stand or walk for any length of time without severe pain. In addition, respondent testified, she was having a difficult time psychologically:

I did not trust myself. I was working in a control booth in the SHU which houses very bad people. . . . I became more and more agitated about working in the control booth. It played a huge role in how I dealt with things. I was very emotional on my last day. I knew I could not go back because of the pain and anxiety and that I was going to make a mistake and someone would get hurt because I did not pay attention because I was too wrapped up in my psychological and orthopedic [problems]. I was fearful of making a mistake and letting others get injured.

Respondent testified that these symptoms affected her ability to perform the essential functions of her job: she could not lift an inmate; could not run; could not do a cell extraction; could not disarm, subdue or restrain an inmate; and could not sling arms.

8. At hearing, respondent could not remember if any medical professional took her off work in May 2005, except she believes that Dr. Caldwell told her that she “could not or should not return to her duties because of [her] back and psyche.” The hearsay statement attributed to Dr. Caldwell is not sufficient to support a finding that he took respondent off work. (Gov. Code, § 11513, subd. (d).) Other than respondent’s testimony as to what Dr. Caldwell told her, there is no evidence that any medical professional took her off work, or precluded her from returning to work, in 2005 or 2006.

9. In 2005, respondent testified, CDCR referred her to a psychiatrist, apparently Roy L. Curry, M.D., for evaluation for a “weapons clearance.” According to respondent, because she had submitted a psyche claim, she needed to be cleared by a psychiatrist to return to work. Respondent testified that the psychiatrist cleared her to return to work.

10. There is conflicting evidence as to whether respondent ever returned to work after May 2005. According to psychiatrist Robert T. Levine, M.D., who examined respondent in 2011, respondent told him that she returned to work around August 2005, and continued to work until September 2006. But in July 2006, respondent told orthopedic surgeon Baer I. Rambach, M.D., that she had last worked on May 2, 2005, and had not worked in any capacity since then. In addition, on her March 2006 application for disability

retirement, respondent stated that her last day on the payroll was November 1, 2005. Respondent herself cannot remember what her last day at work was. It is concluded that respondent's contemporaneous statements are more reliable than her statements years after the fact, and that respondent's last day on the job was on or about May 2, 2005.

11. In March 2006, respondent applied for disability retirement. She later took a service retirement from CalPERS. Although the date of her retirement is not completely clear, it appears that she retired on or about December 1, 2006. At that time, respondent was 64 years old.

12. Dr. Rambach examined respondent on July 28, 2006, at the request of CalPERS. His written report is dated August 4, 2006. Dr. Rambach took a history from respondent, examined her, and reviewed the medical records that were provided to him. His diagnostic impressions were:

1. Chronic cervical musculoligamentous strain with no evidence of radiculopathy.
2. Chronic lumbosacral pain probably secondary to degenerative disc disease in the lumbar spine.
3. Probable herniated intervertebral disc, L4-L5 right side, stable without evidence of radiculopathy.

Dr. Rambach concluded that respondent was not disabled from performing her usual duties as a correctional officer. Based on Dr. Rambach's report, CalPERS staff denied respondent's disability retirement application.

13. After Dr. Rambach's 2006 report, there are no records of any treating or evaluating physicians until 2011, and there was no testimony by any medical professionals who saw her during that time.

14. Orthopedic surgeon Donald R. Schwartz, M.D., examined respondent on February 23, 2010, as an agreed medical examiner in her ongoing workers' compensation case. His initial report was dated February 1, 2011; that report was not offered into evidence. He also wrote supplemental reports, dated March 2 and June 14, 2011. In his March 2 report to respondent's counsel, Dr. Schwartz stated that respondent "is incapable of returning to her prior employment, particularly in regard to the work activities involving alarm responses and general activities, and possibly also with regard to annual training, although there was no detailed description of those activities." The report does not set forth a patient history; a description of the medical records Dr. Schwartz reviewed; his findings on examination; or the reasons for his conclusion.

At hearing, Dr. Schwartz testified that his opinion regarding respondent's ability to return to work is based on a document titled "Correctional Officer – Essential Functions." This document, apparently prepared by CDCR, states that "The Correctional Officer may be

required to work in conditions that require one or all of the following essential functions.” It goes on to list over 30 such functions next to bullet points, including the following:

- Disarm, subdue and apply restraints to an inmate
- Defend self against an inmate armed with a weapon
- Run occasionally; run in an all-out effort while responding to alarms or serious incidents, distances vary from a few yards up to 400 yards . . .
- Crawl and crouch occasionally; crawl or crouch under an inmate’s bed or restroom facility while involved in cell searches, crouch while firing a weapon or while involved in property searches.
- . . . [L]ift and carry an inmate and physically restrain the inmate including wrestling an inmate to the floor, drag/carry an inmate out of a cell . . .

The list concludes with the statement that “All Peace Officer . . . employees must be able to perform all essential duties regardless of their assignment or the likelihood of performing the duty, with or without reasonable accommodation.”

15. At hearing, Dr. Schwartz expanded his opinion on respondent’s current disability, and opined that respondent was also disabled in 2005. He testified that his opinion is based on “the information” he reviewed, and on respondent’s report of the symptoms she was experiencing in 2005.

Dr. Schwartz’s opinion concerning respondent’s disability in 2005 is not persuasive. He did not examine respondent in 2005; he saw her for the first time five years later. The “information” that he reviewed to arrive at his conclusion that respondent was disabled in 2005, other than respondent’s own self-report, is not known; Dr. Schwartz’s reports do not contain a summary of the records he reviewed. Dr. Rambach did in fact examine respondent in 2006, and concluded that she was not disabled from performing her usual duties. Dr. Schwartz’s opinion on this issue is based on conjecture or surmise, and is given little weight.

16. Dr. Levine, a psychiatrist, examined respondent on August 1, 2011, at the request of her attorney; he wrote a report dated September 16, 2011. Dr. Levine took a history from respondent, reviewed medical records provided to him, and administered psychological tests. In his report, Dr. Levine opined that respondent’s “permanent industrially related psychiatric disability . . . precludes her from returning to employment in any correctional facility. If she were to return to employment in the Department of Corrections and Rehabilitation, it is most likely that that her psychiatric symptomatology would resurface, and additional anxiety and depression would impair her endeavors to engage in daily living activities.” Like Dr. Schwartz, Dr. Levine relied on the list of essential functions in reaching his conclusion.

17. At hearing, Dr. Levine expanded his opinion on present respondent's disability, and testified that respondent was also psychologically disabled in 2005.

Dr. Levine's opinion on this issue is not persuasive. Dr. Levine did not examine respondent until 2011, over six years after she left work. Dr. Levine's review of respondent's medical records do not support his opinion. The only contemporaneous medical reports he reviewed concerning respondent's psychiatric condition were the July 2005 reports from Webster Psychiatric Associates, written by Roy L. Curry, M.D., and Jonathan Dunn, Ph.D. There is no indication from Dr. Levine's summary of their reports that either of them found respondent psychiatrically disabled. On the contrary: based upon respondent's testimony, it appears that Dr. Curry cleared her to return to work. Dr. Levine's opinion that respondent was psychologically disabled in 2005 is based on conjecture or surmise, and is given little weight.

18. Psychiatrist Herbert Perliss, M.D., examined respondent on January 10, 2012, at the request of CalPERS; his written report bears the same date. Like Dr. Levine, he took a history from respondent, examined the medical records provided to him, and administered a battery of psychological tests. In Dr. Perliss's opinion, respondent has no psychological condition that disables her from performing the duties of a correctional officer.

19. Dr. Rambach re-examined respondent on February 13, 2012, and wrote a report that bears the same date. In Dr. Rambach's opinion, respondent's degenerative arthritis and degenerative intervertebral disc disease have progressed to the point that she is now disabled for the performance of duty as a correctional officer.

LEGAL CONCLUSIONS

1. A state safety member of CalPERS who becomes "incapacitated for the performance of duty" shall be retired. (Gov. Code, § 21151.) The phrase "incapacitated for the performance of duty" is defined by the Public Employees' Retirement Law to mean "disability of permanent or extended and uncertain duration, as determined by the board, . . . on the basis of competent medical opinion." (Gov. Code, § 20026.) The applicant bears the burden of proof. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691.) When an applicant has retired, as is the case here, she must establish that she was disabled at the time she retired. (*Button v. Board of Administration* (1981) 122 Cal.App.3d 730.)

2. The courts have interpreted the phrase "incapacitated for the performance of duty" to mean the "substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876; original emphasis.) Mansperger, a fish and game warden and a peace officer, claimed that he should be retired for disability because he could not effect physical arrests, remove dead animals to the side of the road, or lift lobster traps out of kelp, duties that fish and game wardens may be called upon to perform. The court held that Mansperger was not eligible for disability retirement, because these tasks were not his usual duties:

While it is clear that [Mansperger's] disability incapacitated him from lifting or carrying heavy objects, evidence shows that [Mansperger] 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 [Mansperger'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 citizens. [Mansperger] 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.

(*Id.* at pp. 876-877.)

In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, a highway patrol sergeant advanced an argument similar to Mansperger's. Hosford argued that he was eligible for disability retirement because he was unable to perform the tasks listed in a CHP document titled "Typical Physical Demands." CalPERS argued that Hosford's disability claim should be measured against his job description. The court, citing *Mansperger*, reaffirmed that for the purpose of disability retirement, disability must be measured against the applicant's usual duties:

We reject both the Attorney General's contention that plaintiff's "usual duties" are to be determined exclusively by use of the job description prepared by the State Personnel Board, and Hosford's contrary contention that the document titled "Typical Physical Demands on the State Traffic Officers and Sergeants" prepared by the highway patrol is the exclusive standard. [¶] . . . As the *Mansperger* court enunciated, Hosford is not disabled unless he is substantially unable to perform the usual duties of the job.

(*Id.* at pp. 860-862.) The court found that the "Typical Physical Demands" document described the tasks to which an officer might be exposed, but that Hosford's usual duties as a supervisor were less demanding than the tasks set forth in the Typical Physical Demands. Since Hosford was capable of performing his usual duties, the court held that his application for disability retirement was properly denied.

3. This case is indistinguishable from *Hosford*. The "Essential Functions" document that Drs. Schwartz and Levine rely on describes tasks that a correctional officer may be called upon to perform, not respondent's usual duties. The evidence establishes that, during the last two and one-half years of her employment when she was assigned to a control booth in the SHU, respondent was never called upon to perform the physically demanding tasks of running, subduing or disarming a violent prisoner, or conducting a cell extraction.

Under *Hosford*, respondent's application must be measured against her usual duties as a correctional officer assigned to the control booth, not against the Essential Functions document.

4. Competent medical opinion does not support the conclusion that respondent was incapacitated for the performance of duty as a correctional officer when she retired in 2006. Drs. Fischer and Levine are the only medical professionals who express the opinion that respondent was disabled at that time. Their opinions, however, are based upon an incorrect legal standard – respondent's ability to perform the duties on the Essential Functions document – not her ability to perform her usual duties. In addition, Drs. Fischer and Levine did not examine respondent until 2010 and 2011, respectively. Their opinions that she was disabled when she retired are based on conjecture or surmise, and therefore do not constitute "competent medical opinion" within the meaning of Government Code section 20026.

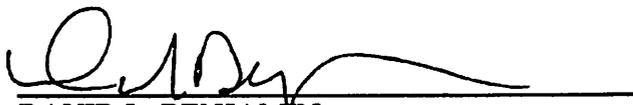
5. It is recognized that both Dr. Schwartz and Dr. Rambach believe that respondent is presently incapacitated for the performance of her duties as a correctional officer, due to the progression of her back condition. Respondent's burden, however, is to establish that she was disabled six years ago, not that she is disabled now. No competent medical evidence was presented to meet that burden.

6. It is also recognized that respondent has received, from the Workers' Compensation Appeals Board, two awards of permanent disability for her back and psyche conditions, one for 12 percent and the other for 21 percent. An award of permanent disability in a workers' compensation proceeding, however, addresses a different issue and involves different parties than this proceeding, which looks to respondent's incapacity for performance of duty and eligibility for disability retirement. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567.) As such, the workers' compensation findings and awards are not binding or controlling on the issue of respondent's eligibility for disability retirement. (*Ibid.*)

ORDER

The application of respondent Joni K. Forsht for disability retirement is denied.

DATED: December 4, 2012


DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings