

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
Disability Retirement of:

GARY A. COOPER,

Respondent,

and

MARTINEZ UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. 9821

OAH No. 2012100071

PROPOSED DECISION

Administrative Law Judge Mary-Margaret Anderson, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on January 14, 2013.

Jeanlaurie Ainsworth, Staff Counsel, represented Petitioner California Public Employees' Retirement System (CalPERS).

Respondent Gary A. Cooper represented himself.

No appearance was made by or on the behalf of Respondent Martinez Unified School District.

The record closed on January 14, 2013.

ISSUE

Whether Respondent is disabled either permanently, or for an extended and uncertain duration, and unable to substantially perform the duties of a custodian for the Martinez Unified School District.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED January 31 20 13
Robert D. [Signature]

FACTUAL FINDINGS

1. Gary A. Cooper (Respondent) was employed as a custodian for the Martinez Unified School District (District). By virtue of this employment, Respondent is a local miscellaneous member of CalPERS. On January 29, 2009, Respondent signed an application for disability retirement. In the Disability Information section Respondent wrote: "neck damage, shoulder right side arms, hands right knee, lower back. Repetitive strains and fall." In the section that asks: "How has your injury or illness affected your ability to perform your job?" Respondent wrote "my work restrictions were too severe for my employer . . . they let me go since I couldn't perform my usual and customary work after 17 years of service." Petitioner denied the application, Respondent appealed, and this hearing followed.

2. The District defines the custodian position as follows: "Under supervision, to keep an assigned building area clean, sanitary, safe and orderly, to secure rooms and buildings, to do special cleaning and building maintenance, and to do related work as required." Respondent was a custodian at the Martinez Adult School. His last day at work was approximately January 20, 2007, but he was on the payroll until July 4, 2007, due to accumulated leave time.

3. Respondent testified that he tried to work the best he could the last year or two of employment. His hands, however, "got too bad" and he was afraid that his employers "were getting mad at me." He felt that doing the mopping, vacuuming and sweeping was taking longer than the time allotted by his work restrictions. He also asserts that the constant movement required by his job caused great pain and suffering, preventing him from working in a satisfactory manner. Respondent went to vocational rehabilitation, but decided that being trained for computer work would not be the solution because his arms were a problem. He therefore decided to apply for disability retirement.

4. The Social Security Administration issued a Notice of Award to Respondent, finding that he "became disabled under our rules on January 19, 2007."

Medical evidence

5. The records reflect that Respondent suffered three injuries while employed by the District: on September 25, 1997, November 14, 2002, and October 29, 2003. Justin J. Frieders, DC, QME, IME, authored a report for the workers' compensation system on August 26, 2005. He wrote that two of the injuries were "cumulative in nature, one from a specific event. Areas of involvement include the cervical spine, lumbar spine, shoulders, wrist and right knee." He opined that Respondent at that point had "sustained a permanent partial disability."

6. Petitioner retained John R. Lang, M.D., an orthopedic surgeon, to conduct an independent medical examination of Respondent and issue a written report. Dr. Lang examined Respondent and reviewed medical records, including reports from Respondent's treating chiropractor, Gerald Oranje. In his report, dated October 13, 2009, Dr. Lang noted

that Respondent underwent carpal tunnel surgery from a Dr. Lewis and was not released to return to work by Dr. Oranje. He opined, however, that based upon his evaluation, Respondent “exhibits no evidence of residual or recurrent carpal tunnel syndrome. His grip is unremarkable. Sensory and motor testing is unremarkable as is range of motion.”

Dr. Lang further opined:

[T]here is insufficient reason to indicate that he could not perform his usual and customary work as a custodian after reviewing all of the subjective/objective factors and consideration of his work status. Apparently, he has recovered from an objective standpoint quite well from the carpal tunnel surgery and it is fortunate that he does not demonstrate any specific objective residuals.

With regards to the lumbar spine, there were no specific abnormalities other than minimal tenderness to the right of the midline without hypertonicity. Cervical spine showed reasonable range of motion with normal neurologic examination of the upper extremities.

No records were submitted regarding a possible MRI of the cervical and lumbar spines but, in my opinion, that would make no difference in deterioration. There is no reason from the consideration of lumbar and cervical complaints why [Respondent] could not return to his usual and customary job.

With regards to the right shoulder, I am not sure if there has been much in the way of workup. He does have minimal discomfort with supraspinatus testing but there is no indication that he would not be able to perform his usual and customary work with these minimal complaints.

With regards to the right knee, apparently there was a work injury. He does have right medial knee pain. He states an MRI was done apparently a few years ago but surgery was not performed, however, if surgery were to be performed, it would be a transient episode, and most individuals with a torn meniscus who undergo arthroscopic partial meniscectomy can return to work within a few weeks.

7. In answer to specific questions, Dr. Lang further opined that were no specific job duties that Respondent was unable to perform because of a physical condition. Further, he found “insufficient evidence to recommend work restrictions,” and “[Respondent] is not presently substantially incapacitated.”

8. It was not proven that Respondent is substantially disabled from the performance of his duties as a custodian.

LEGAL CONCLUSIONS

1. Under Government Code section 21150, a CalPERS member is entitled to a disability retirement if he or she is "incapacitated for the performance of duty." Government Code section 20026 provides, in pertinent part, that "[d]isability' and 'incapacity for the performance of duty' as a basis of retirement, means disability of a permanent or extended and uncertain duration . . . on the basis of competent medical opinion." The Court in *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, held that to be "incapacitated for the performance of duty" within the meaning of section 21022,¹ the applicant must be substantially unable to perform the usual duties of his or her position. The burden of proof is with the applicant.

2. The evidence was insufficient to support a determination that Respondent is (or was at the time he applied for disability retirement) substantially unable to perform the usual duties of a school custodian. Dr. Lang found no basis for such a conclusion. Dr. Oranje is a chiropractor, and his opinion is entitled to less weight than that of a medical doctor. All in all, there was not sufficient "competent medical opinion" to support a finding of disability. Accordingly, it is concluded that Respondent is not disabled within the meaning of Government Code section 20026, and his application for disability retirement will be denied.

ORDER

The application of Gary A. Cooper for CalPERS disability retirement is denied.

DATED: January 30, 2013



MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings

¹ Section 21022 is the pre-1996 designation of section 21151, the statute for peace officers that parallels section 21150.