ATTACHMENT A

THE PROPOSED DECISION

Attachment A

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

In the Matter of the Statement of Issues (Application For Disability Retirement) Of: DAWN M. JONES, Respondent, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, PELICAN BAY STATE PRISON, Respondent.	Case No. 9480 OAH No. 2012030009

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on March 14, 2013.

Carol A. McConnell, Senior Staff Counsel, represented petitioner Mary Lynn Fisher, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Although properly served with the Statement of Issues and Notice of Hearing, respondent Dawn M. Jones did not appear and was not otherwise represented. There was also no appearance on behalf of respondent California Department of Corrections and Rehabilitation. The matter was conducted as a default pursuant to Government Code section 11520.[1]

[1] Government Code section 11520, subdivision (a), permits an agency to act without taking evidence in a default when the respondent has the burden of proof. Although respondent Jones carried the burden of establishing her entitlement to a disability retirement, complainant elected to present evidence in support of its denial of respondent's application.

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Evidence was received as well as closing oral argument. The matter was submitted on March 14, 2013.

ISSUE PRESENTED

Whether respondent Jones was substantially incapacitated from the performance of her usual duties as a Correctional Officer with respondent California Department of Corrections and Rehabilitation at the time she applied for an industrial disability retirement?

FACTUAL FINDINGS

1. Petitioner/complainant Mary Lynn Fisher filed the Statement of Issues solely in her official capacity as Chief of the CalPERS Benefits Services Division.

2. Respondent Jones (formerly Dawn Costner)[2] was employed by respondent California Department of Corrections and Rehabilitation. At the time respondent filed her application for retirement, she was employed as a Correctional Officer at Pelican Bay Prison. By virtue of her employment, respondent is a state safety member of CalPERS subject to government code section 21151.

3. On or about January 3, 2009, respondent signed an application for disability retirement. In filing the application, disability was claimed on the basis of an orthopedic (back, right leg and knee with associated migrating pain) condition.

4. CalPERS obtained a medical report concerning respondent's orthopedic condition from a competent medical professional. After review of the report, CalPERS determined that respondent was not permanently disabled or incapacitated from performance of the usual duties of a Correctional Officer at the time the application for disability retirement was filed.

5. Respondent was notified of CalPERS' determination and was advised of her appeal rights by letter dated April 30, 2009.

6. Respondent filed a timely appeal by letter dated May 19, 2009, and requested a hearing.

Usual Duties for a Correctional Officer Employed by Respondent California Department of Corrections and Rehabilitation at Pelican Bay State Prison

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[2] All future references to "respondent" refer only to respondent Jones, unless otherwise indicated.

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7. Correctional Officer Essential Functions and a CalPERS' Physical Requirements of Position/Occupational Title for Correctional Officer at Pelican Bay Prison were received in evidence. The essential functions included the ability to disarm, subdue and apply restraints to an inmate; self-defense; walking occasionally to continuously; running all out occasionally to serious incidents up to 400 yards; occasional climbing to frequent ascent/descent of stairs; crawling and crouching during cell searches; occasional to continuous standing; stooping and bending to search cells and inmates; lifting 20 to 50 pounds frequently to 100 pounds occasionally; and pushing and pulling cell doors and gates. The physical requirements for a correctional officer at Pelican Bay Prison included walking up 15 minutes at one time and up to 12 miles in a shift; climbing up to 150 steps; pushing and pulling up to 25 pounds; lifting and carrying up to 100 pounds occasionally; and driving up to 8 hours.

Competent Medical Opinion

8. The only "competent" medical opinion received in evidence comprised the testimony and report of Baer Rambach, M. D., board-certified in orthopedic surgery. Dr. Rambach evaluated respondent for CalPERS on October 22, 2008. Respondent complained of constant lower back pain, varying in intensity according to her physical level. She described neck pain at least once a week and right leg and knee pain with a burning sensation down her right leg. Respondent was taking Norco, Soma, and Naproxen daily. Respondent told Dr. Rambach that she was injured at least twice on the job as a correctional officer at Pelican Bay. The first occasion occurred in 2000 while she was packing inmate food trays. She described back and right leg pain and difficulty getting up (she apparently fell). She was treated by a chiropractor and was able to return to work. The second incident occurred in December of 2007, when she was feeding inmates and had to drop her 20 pound equipment belt with all of the gear she carried. Respondent told Dr. Rambach that after the second incident, she had considerable difficulty wearing the duty belt. She had physical therapy but continued to have problems.

9. Dr. Rambach reviewed medical records spanning the time span August 8, 2000, to January 19, 2008, and summarized them in his report. A treating chiropractor's August 8, 2000 report included the diagnoses of lumbosacral spine sprain/strain, thoracic spine sprain/strain, and sciatica. Physical therapy followed. MRI studies of the lumbar spine and right knee were performed on November 14, 2001. The radiologist reported minor degenerative changes at L5-S1 with no significant extradural abnormalities and a normal MRI of the right knee. The 2007 injury occurred on or about February 7. Respondent was packing food trays and felt a burning in her right buttock. She also complained of back pain and a stiffening of her right leg. The diagnosis was lumbosacral spine sprain. The sciatic stretch (straight leg raising) was negative. Respondent was evaluated by an Agreed Medical Examiner in conjunction with her related worker's compensation claim. The evaluator noted the minor degenerative changes in the MRI studies and opined that respondent had a flare up of chronic back pain. He concluded that she was at risk for further serious injury to her back if she continued as a correctional officer. Conservative treatment was recommended. Donna Sund, D.O., the physician who treated respondent for the 2007 injury continued to treat her

until at least January of 2008. Dr. Sund on January 17, 2008, diagnosed respondent as having lumbar strain and back pain and indicated that she was substantially incapacitated from being able to perform the usual duties of her position. More specifically, she could not lift, carry, or respond to emergency situations relating to inmates. Dr. Sund considered respondent permanently disabled.

10. Dr. Rambach conducted a complete orthopedic physical examination of respondent's areas of complaint. At the time of the examination, respondent was 37, stood 5 feet, 3 inches tall, and weighed 150 to 160 pounds. Apart from some tenderness, the cervical, thoracic and lumbosacral spines appeared normal. Reflexes were intact and tactile sensations were intact as were vibratory sensations. Range of motion was within normal limits. Straight leg raising from a sitting position and a supine position were accomplished to 90 and 80 degrees, respectively. There was no referred pain. No abnormalities were revealed in the examination of the right knee, except for some tenderness. Dr Rambach's diagnoses were chronic lumbosacral syndrome, etiology (cause) unknown and chronic right knee complaints, etiology not identified.

11. Dr. Rambach reviewed respondent's duties in the documents described above, and concluded that respondent was not incapacitated from her usual duties. He explained that he could not corroborate her subjective complaints with objective findings of an abnormal nature. Therefore, he assumed that there was some degree of exaggeration of her complaints.

12. Complainant offered reports prepared by Dr. Martin Smukler who treated respondent in 2010 and 2011. On February 11, 2010, Dr. Smukler refused to authorize respondent's return to work based on the conclusions of the Agreed Medical Examiner described above. He did note, however, that respondent was going to return to work on February 16, 2010, upon advice of her legal counsel. On May 4, 2010, Dr. Smukler cleared respondent to return to "full and unrestricted work," and reauthorized her full return on August 23, 2010, April 28, 2011, and August 24, 2011.

LEGAL CONCLUSIONS

1. An applicant for retirement benefits has the burden of proof to establish a right to the entitlement absent a statutory provision to the contrary. (*Greatorex v. Board of Administration* (1979) 91 Cal. App.3d 57.)

2. Government Code section 20026 reads, 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 by the board... on the basis of competent medical opinion....

3. Incapacity for performance of duty means the substantial inability to perform usual duties. (*Mansperger v Public Employees' Retirement System* (1970) 6 Cal. App.3d 873, 876.) In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, at page 860, the court rejected contentions that usual duties are to be decided exclusively by State Personnel Board job descriptions or a written description of typical physical demands. The proper standard is the actual demands of the job. (See also, *Thelander v. City of El Monte* (1983) 147 Cal. App.3d 736.) The ability to substantially perform the usual job duties, though painful or difficult, does not constitute permanent incapacity. (*Hosford, supra*, 77 Cal. App.3d 854, at p. 862.)

4. Respondent failed to establish that she was substantially incapacitated from performing her usual job duties as a Correctional Officer at Pelican Bay Prison at the time that she applied for industrial disability retirement. Respondent is therefore not entitled to disability retirement and her application should be denied.

ORDER

Respondent's appeal from CalPERS' determination that she was not permanently disabled or incapacitated from performance of her usual duties as a Correctional Officer at the time that her application for disability was filed is denied. Her application for disability retirement is denied.

Dated: April 10, 2013

KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings