

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:

Case No. 9641

LARRY L. HEDRICK,

OAH No. L2012010198

Respondent,

and

DEPARTMENT OF MENTAL HEALTH
(ATASCADERO STATE HOSPITAL)

Respondent.

PROPOSED DECISION

The hearing in the above-captioned matter took place on October 16, 2012, at San Luis Obispo, California. Joseph D. Montoya, Administrative Law Judge, Office of Administrative Hearings, presided. Complainant was represented by JeanLaurie Ainsworth, Senior Staff Counsel, California Public Employees' Retirement System (PERS). Respondent Larry L. Hedrick appeared with his attorney, Steven B. Bassoff. There was no appearance by the Department of Mental Health (Department).

Evidence was received, the case was argued, and the matter submitted for decision on the hearing date. The Administrative Law Judge (ALJ) hereby makes the following Proposed Decision.

STATEMENT OF THE CASE AND ISSUE PRESENTED

Respondent Larry L. Hedrick seeks disability retirement from PERS.¹ Respondent was employed as a psychiatric technician at Atascadero State Hospital (Hospital) in 2006, when he injured his knees on the job. After surgery on each knee, in the latter part of 2007,

¹ Because Hedrick is the only Respondent who appeared in the case, all references to Respondent will be to him unless otherwise noted.

his physician placed restrictions on his return to work, and the Hospital could not accommodate him. Therefore, in August 2008, the Department submitted a disability retirement application to PERS. The application noted the restrictions placed on Respondent, and stated that he was unable to perform job tasks such as participating in patient containments, to perform CPR, or climb stairs. After reviewing medical evidence and having a doctor examine the Respondent, PERS denies he is disabled within the meaning of the statutes and cases that govern disability retirement claims for PERS.

FACTUAL FINDINGS

The Parties and Jurisdiction:

1. Complainant Mary Lynn Fisher filed the Statement of Issues in the above-captioned matter while acting in her official capacity as Chief of the Benefits Services Division of PERS.
2. Respondent Hedrick was previously employed by the Department at the Hospital as a Psychiatric Technician. He is a state safety member of PERS within the meaning of Government Code section 21151.² He was injured on the job in October 2006.
3. On August 14, 2008, Faith Estrada, a Personnel Analyst employed at the hospital, transmitted an employer-originated disability retirement application to PERS, seeking disability retirement for Respondent. Ms. Estrada certified the application, as did Elizabeth Andres, the Human Resources Director for the Hospital. The application stated a retirement date of May 15, 2008.
4. The application stated that Respondent was unable to carry more than 20 pounds, and was “unable to kneel, crouch or climb stairs.” (Ex. 4, p.3.) Further, it stated that as a limitation, Respondent was unable to stand/walk more than four hours per eight hour work day, and could not participate in patient containments, CPR, or climb the stairs to the second floor, and there is no elevator to the second floor. Finally, it was claimed he could not work even part-time.
5. Thereafter, on September 10, 2010, PERS wrote to Respondent, denying the disability retirement application. It was asserted that after reviewing medical evidence, including evidence obtained from an Independent Medical Exam, grounds for disability retirement had not been established. Therefore, PERS concluded that Respondent was not substantially incapacitated from the performance of his duties as a psychiatric technician at the hospital. The letter set out various alternatives Respondent might pursue, including an appeal of the PERS denial of disability retirement.

² All statutory references shall be to the Government Code unless otherwise noted.

6. Respondent requested an appeal and this proceeding ensued. All jurisdictional requirements have been satisfied.

Respondent's Usual Duties As a Psychiatric Technician

7. Two documents were received that shed light on Respondent's duties. One is a duty statement, with an effective date of July 26, 2004. The other is a job duty analysis, prepared in January 1996.

8. (A) The job duty analysis notes at the outset that the Hospital is a maximum security facility, housing about 1,000 inmates, including sexually violent predators, mentally disordered offenders, and persons mentally incompetent to stand trial. Among the job requirements is patient containment, requiring the psych tech to restrain, lift, or carry combative patients, which might require takedowns, or verbal and physical intervention. Another physical requirement is the ability to carry up to 50 pounds, an amount that could be exceeded during physical containment of patients. Non-physical job requirements included such duties as keeping accurate records, and the ability to review physician's orders and noting and transcribing medication orders.

(B) The job duty analysis notes that the routine of the hospital varies according to the shifts, with the first being the most hectic, and the nocturnal being the least demanding, but the document goes on to state that the "PTs must be able to cover any ward, any shift." (Ex. 12, p. 2, emphasis in original.) In a section that describes the tasks of the psych techs, in the section on patient restraint, it states: "must be able to intervene in a takedown situation in immediate work area and/or other areas of the hospital. Use of full body is required to lean/push, hold, and restrain swinging arms and kicking legs." (*Id.*)

(C) In terms of frequency of activity, the job analysis provides that a psych tech must stand frequently, tending to move about, and that they may stand for 60 per cent of a shift. Likewise, walking is a "frequent" activity; it is noted that the hallways connecting the units are one-quarter of a mile long, and may be walked several times per shift. Lifting typically involves loads of up to 15 pounds. However, in takedown situations, a psych tech might be trying to manage a patient weighing up to 300 pounds. Climbing was also an occasional to frequent activity, meaning from 10 to 66 per cent of the day; it was noted that climbing could entail going up and down a 15-step stairwell several times per day. Kneeling and crouching were described as rare activities, meaning less than 10 per cent of the employee's time.

9. (A) The 2004 Duty Statement for the psych techs does not speak directly to the physical aspects of the job. Instead, it refers to performance of nursing procedures, and creation of a clean, safe, and therapeutic environment for patients. One aspect that implies physical activity is "custody tasks," which apparently involves about 10 per cent of the job. (Ex. 11, p. 1.)

10. (A) As part of the application process, Respondent and a hospital representative filled out a PERS form entitled “Physical Requirements of Position/Occupational Title.” (Ex. 13, p. 1.)

(B) According to that document, running, crawling, and lifting in excess of 76 pounds “never” occurs. (Ex. 13, p. 1.) Kneeling, squatting, and lifting 25 to 75 pounds happens occasionally, that is, up to three hours per day. That category also describes walking on uneven ground. Frequent activities—those occurring three to six hours per day—included sitting, standing, walking, climbing, bending and twisting the neck, and carrying 11 to 25 pounds.

Medical History and Assessments From Respondent’s Workers’ Compensation Case

11. Respondent had surgery on both of his knees in 2007. The surgery on the right knee occurred on May 29, 2007, and surgery on the left knee took place on September 13 of that year. In each case, the surgeon performed a partial medial meniscotomy, and a three-compartment synovectomy. Further, in the case of the right knee, the surgeon performed a Chondroplasty of the patella.

12. In connection with the right knee surgery, the doctor's findings were that there was a complex tear of the medial meniscus, there was a three-compartment hypertrophic synovium, and there was chondromalacia of the medial border of the patella. As to the left knee, the findings were that the meniscus had a small inner tear with apparent head loss with the appearance of a previous debridement with partial absence of the meniscus.

13. A series of reports indicates that Respondent complained of pain and discomfort in the years following the surgery, and of limited endurance. For example, in April 2010, nearly three years after the first surgery, he told his surgeon, Dr. Sima, that his knees gave him constant pain, of moderate severity. He claimed his knees “gave out” if he ran, used stairs, or attempted sports. (Ex. H, p. 1.) He told the doctor that his tolerance for walking was one to five blocks, and that the pain was aggravated by bending, driving, exercise, kneeling, and prolonged sitting. He claimed that once the pain started, it could last two or three days, and that if he picked up 20 pounds, and carried it, the pain could last for days.

14. In June 2010, further MRI scans were conducted on Respondent’s knees. Those scans indicated that his left knee still had tears to the medial meniscus, with fraying, as well as other issues. The right knee gave the impression of an abnormal meniscus “presumably representing postoperative change with residual intrasubstance (arthroscopically occult) tear of the body remnant near the posterior horn junction.” (Ex. K.) A second tear was found, along with “osteoarthritic change in the medial and lateral compartments.” (*Id.*)

15. (A) In April 2012, Respondent was re-evaluated by Dr. David E. Fisher, M.D., a Qualified Medical Examiner, in connection with Respondent's workers' compensation proceeding. (Dr. Fisher had performed an earlier evaluation, in June 2008.) Dr. Fisher reviewed all of Respondent's medical records, including the reports that followed the MRI's that were conducted in June 2010, discussed in Factual Finding 14.

(B) According to the report, Respondent reported that he had constant "severe" pain in both knees with stiffness, numbness, and weakness, and that he would have shooting pain in them with contact. He described the symptoms as increasing with "any standing, walking, squatting, or kneeling." His activities of daily living were reportedly affected, as he reported he could not climb stairs without assistance, was able to walk about one block without pain, and he stated he was constantly limping. (Ex. M, p. 3.)

(C) After examining Respondent and reviewing his medical records, Dr. Fisher diagnosed Respondent as follows:

1. Chondromalacia of the patellofemoral joint.
2. Damage to the cartilage of both knees.
3. Tricompartmental arthritis.
4. Status post medial meniscectomies and recurrent tears of the medial menisci, bilateral knees.

(Ex. M, p. 8.)

(D) Dr. Fisher described Respondent as maximally medically improved. He further stated that, in terms of work restrictions, Respondent should avoid kneeling, crawling, climbing ladders, frequent stair climbing, walking on uneven surfaces, concluding that "at this point he will need to be restricted to sit down work only." (Ex. M, p. 9.)

The Independent Medical Exam by PERS

16. In June 2009, Respondent submitted to an Independent Medical Exam conducted by Brendan V. McAdams, M.D., at the request of PERS staff. Dr. McAdams reported that Respondent told him that he had never had relief from his symptoms, and that "any time he stands, squats, or has to lift anything he has pain." (Ex. 9, p. 1.)

17. Dr. McAdams reported that when Respondent came to the offices he walked stiff legged, giving the appearance of having discomfort in his knees. He also gave the impression of having trouble taking off his shoes when he undressed for the exam.

18. During the exam Dr. McAdams asked Respondent to squat, and the latter performed about one-third of a squat before complaining of pain. Light touch upon Respondent's right knee caused Respondent to jump and complain of "severe pain," and he told the physician that he would be in severe pain after the exam. (Ex. 9, p. 3.) He could only flex his right knee 45 degrees, but was able to flex the left knee to 90 degrees.

19. Dr. McAdams believed that Respondent was capable of doing more than he was admitting during the examination, and he stated that the subjective complaints were markedly greater than the objective findings. He recommended that PERS should observe Respondent in a sub rosa fashion.

The Sub Rosa Video of Respondent

20. Following Dr. McAdams' recommendation, PERS investigators were assigned to conduct surveillance on Respondent, to ascertain if his physical restrictions were as significant as he had claimed. The investigators videotaped Respondent in activities outside his home on May 27, 2009, and at his home and another location the next day.

21. Approximately 46 minutes of video recordings of Respondent's activities were received in evidence, and the scenes depicted can be grouped into several segments. The first segment, taped between approximately 7:47 a.m. and 7:52 a.m. on May 27, 2009, shows Respondent outside of his home, with two young children, and a woman.³ During the entire five minutes depicted, Respondent carries the younger child, an infant, in his arms, while standing in front of his house, or walking from the house to the street, where his girlfriend is getting ready to depart. Respondent does not appear to have any problem carrying the child. While it cannot be ascertained if she weighed 20 pounds, according to the investigation report, she was then nine months old, and likely over 10 pounds. .

22. (A) The next activity depicted is that of Respondent washing his pickup truck outside his home, with the older of the two children. This part of the video was taped between 11:50 a.m. and approximately 12:03 p.m.⁴ Two other short segments, pertaining to cleaning the car, follow at approximately 1:42, and then at 2:26.

(B) During the approximately 13 minutes of the main car wash segment, Respondent does not exhibit any of the limited mobility and discomfort that he described to Dr. McAdams. While he does not appear to carry anything clearly weighing 20 pounds, he does engage in movements that would be expected to aggravate knees that otherwise purportedly radiate near-constant pain. For example, he walks back and forth around the truck, stepping off the sidewalk to the street, and back up again, throughout the carwash segment. At times his walk appears brisk (i.e., at approximately 11:52:30). Part of the cleaning is accomplished using a long-handled brush that attaches to a garden hose; the

³ The children were identified in the investigators' report as Respondent's, and the woman as his girlfriend.

⁴ Two cameras were utilized, one looking toward the front of the truck, the other toward the rear. Their clocks are out of alignment, by approximately one minute.

device appears at least five feet long in the video. Respondent has no trouble using what can be an unwieldy device,⁵ making scrubbing (back and forth) motions across his body and also over his head when cleaning the top of the truck and its shell. These motions would be expected to put torque or a twisting motion across Respondent's knees.

(C) In summary, this video sequence does not depict a person who has any discomfort in walking, stepping up and down, or twisting his body while standing. It does not depict the person described by Dr. McAdams in his 2009 report.

23. (A) In a sequence that begins at 1:42, Respondent sprays each of the tires on the truck, to clean or treat them. He sometimes bends at the waist to do so, also bending his knees in a shallow squat. However, in two instances, he kneels on one knee, with that knee on the street or sidewalk. In each instance, he kneels on his right knee, the one that Dr. McAdams could not touch without Respondent claiming extreme pain that was going to last for a significant period of time thereafter. In this segment, Respondent can first be seen kneeling to treat the right rear tire, and then he treats the right front tire while bending at the waist. Respondent then treated the left front tire, and went to the back, where he knelt on his right knee to do the job. When he treated the left rear tire, he was on his knee for approximately 15 seconds, with no visible signs of distress. And, when he finished that activity, he showed no sign of physical distress.

(B) At 2:26 on the video, Respondent can be seen following up on the tire treatment. The tape in this sequence begins with Respondent treating the right rear tire, while kneeling on his right knee, on the sidewalk. He again circles the truck, treating each tire, though spraying the other tree tires by bending at the waist with his knees bent slightly.

24. The last sequence from May 27, 2009, begins at 3:46 p.m., and shows Respondent outside his home, with the two children, and talking to two other adults. After nearly seven minutes of Respondent standing and conversing, he picked up his infant daughter, and carried her as he walked down the street to the mailbox. The short journey took approximately six minutes, which included Respondent reviewing his mail while holding the small child. This sequence, filmed about two hours after Respondent was first seen kneeling to treat the tires on his truck, does not show Respondent to be in severe pain, as he indicated he would be following a mere examination by Dr. McAdams.

⁵ The washing brush appears identical to one owned by the ALJ, who has used it many times to wash cars. The hose being attached at the handle end of the brush tends to drag at it, though the brush is otherwise lightweight. To be effective one must press the brush down onto the vehicle, while moving it back and forth, with the hose pulling at it. Thus, more effort must be used with the device than might at first meet the eye. This information is disclosed because the ALJ's experience is being utilized to weigh the evidence. (See § 11425.50, subd. (c).)

25. (A) The video from May 28 is shorter. The first segment depicts Respondent outside his home at about 8:30 a.m., and the second at a business from about 9:01 until about 9:19 in the morning. Respondent is not seen during that entire period at the business, but when he is, he is standing and talking with others. In fact, he stands and converses for just over 12 minutes, (from 9:07:44 to 9:19:54) before going inside the building.

(B) At 10:18 a.m., Respondent and another man walked out of the business, and down the street out of view. They come back into view at 10:25 on the video clock, carrying coffee. Respondent is briefly seen again at 10:34, carrying what appears to be the larger of his two children.

(C) The investigators' report indicates that during the walk away from the business, Respondent and the other man went to a convenience store, and the addresses were supplied in the report. The ALJ takes notice, based on use of the Mapquest program, including review of a satellite picture, that Respondent walked approximately .16 miles each way, for a total of approximately .32 miles, and that each trip was down two sides of a city block in Grover Beach, the same as if he had walked around that block.

(C) At 10:47, Respondent leaves the business with his girlfriend and two children, and he helps her get them into the cab of the pickup truck. He then walks around to the back of the truck, opens the small window that forms the back of the camper shell, climbs up on the bumper, and into the back of the truck, over the raised tailgate and through the shell opening. It is fairly inferred that due to the relatively small opening Respondent would have to have crawled on his knees to complete entry into the bed area of the pickup truck.

26. During the events videotaped on May 28, 2009, Respondent did not exhibit any distress in his movements, and does not show the stiff walk described by Dr. McAdams. Instead, his knees bend with each step, and he is able to plant his feet and push off with no evident discomfort.

Dr. McAdams' Supplemental Report and Testimony

27. After reviewing the video tape, Dr. McAdams issued a supplemental report to PERS, dated July 16, 2009. Noting that Respondent engaged in activities, such as standing and walking, that Respondent had claimed he could not do, Dr. McAdams concluded that Respondent was not disabled.

28. At the hearing, Dr. McAdams testified that during his physical examination of Respondent there was voluntary restriction of motion at the knees. Dr. McAdams engaged in provocative testing and concluded that the subjective symptoms outweighed the objective symptoms. When he touched either knee, he got a pain response from Respondent that "was not an appropriate response." Acknowledging that the surgeries on Respondent's knees addressed a number of issues—bone lining was removed in the Synovectomies and that the lining of the right patella was shaved—Dr. McAdams believed that Respondent's symptoms should have abated within a few weeks. He noted that in an exam prior to his, Respondent

showed greater range of motion—120 degrees on his left knee—than he did for Dr. McAdams, where 90 degrees was demonstrated for the left knee. Based on his exam and the video evidence, Dr. McAdams believed that Respondent could walk, climb stairs, and otherwise act as a psychiatric technician at the state hospital.

Respondent's Testimony

29. Respondent testified that his duties were greater than those described on the job duty analysis, Exhibit 12. He stated that he was hurt responding to a “red light,” a warning of an altercation, and all nearby staff were obligated to respond. He attested that such warnings are given two or three times per day. He described the patients as typically large—up to 300 pounds—and prone to violent outbursts; many are sexual predators who otherwise would be in prison. He noted that on the day he was hurt, he had traversed approximately one-quarter mile to get to the scene, where a psychiatrist was grappling with a patient.

30. Respondent testified that he is in constant pain, and constantly on medication, and was on the day he saw Dr. McAdams. He is positive that he cannot defend himself from a violent patient, and that he otherwise cannot perform the essential functions of a psychiatric technician at Atascadero State Hospital.

LEGAL CONCLUSIONS

1. Respondent is a state safety officer credited with five years service, and thereby qualified for disability retirement upon the appropriate showing. Further, PERS has jurisdiction to determine whether Respondent is entitled to such disability retirement. This conclusion is based on section 21151 and Factual Findings 1 through 6.

2. A person seeking disability retirement bears the burden of establishing the right to that benefit. (Evid. Code, § 500; *Lindsay v. County of San Diego Ret. Bd.* (1964) 231 Cal. App. 2d 156, 160-61.) The standard of proof is preponderance of the evidence. (Evid. Code, § 115.)

3. A disability, within the meaning of the public employees retirement law, is a condition that is permanent or of extended and uncertain duration, as determined by the Board on the basis of competent medical opinion. (§ 20026.)

4. The Appellant must have been substantially disabled at the time that he filed his application for disability retirement, that is, in November 2009. (*Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, 1307.)

5. Whether a person is incapacitated or disabled must be judged based upon an examination of the regular and customary duties assigned to that person. (*Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, 876.) The applicant must establish that he or she is substantially unable to perform their usual duties. (*Mansperger*,

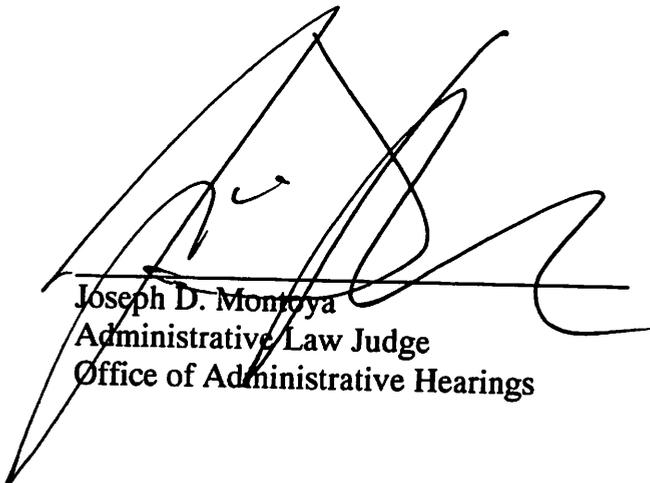
supra, 6 Cal. App. 3d at 876; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.) The cases hold that written job descriptions alone do not control the analysis of what a member's usual job duties are; other evidence may be examined as well. (*Hosford, supra*, 77 Cal.App.3d at 861-862.)

6. Respondent has not carried his burden of proving he is substantially disabled from performing his job as a psychiatric technician, based on all the foregoing. This is because his capacity for performing that job depends very much on his statements regarding his condition, and in light of his statements to Dr. McAdams, and his behavior when videotaped just a few weeks later, his statements to other physicians or during this proceeding cannot be given significant weight. As noted in Factual Findings 22(C), 24, and 26, the man that Respondent tried to depict to Dr. McAdams during his examination is not the man depicted in the video; this is the ALJ's firm belief after watching the video, and parts of it, on numerous occasions, at regular speed and slow motion. Although Respondent claimed to Dr. McAdams that the physician's touching of his right knee was very painful, and would have Respondent in pain for a significant period after the exam, Respondent can be seen kneeling on that right knee, on concrete and pavement, more than once on the afternoon of May 27, 2009, and he can then be seen an hour or two later carrying his child down the street, in no apparent discomfort. While it is true that subsequent examinations reveal further problems in Respondent's knees, just how debilitating those issues are cannot be reliably gauged given the way Respondent was impeached by his activities on May 27 and 28, 2009.

ORDER

The application of Respondent Larry L. Hedrick for disability retirement is denied.

May 16, 2013



Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings