

ATTACHMENT A
THE PROPOSED DECISION

**BEFORE THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

In the Matter of the Statement of Issues Of:

RICHARD HOWARD,

Respondent,

and

**DEPARTMENT OF MENTAL HEALTH,
ATASCADERO STATE HOSPITAL,**

Respondent.

Case No. 2012-0909

OAH No. 2013040784

PROPOSED DECISION

This matter came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in San Luis Obispo, California, on September 12, 2013.

Rory J. Coffey, Senior Staff Counsel, represented Complainant Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Richard Howard (Respondent) represented himself.

Respondent Department of Mental Health, Atascadero State Hospital (ASH) did not appear at the hearing.

Complainant seeks to deny Respondent's disability retirement application on grounds that the medical evidence does not support his claim of disability based on his orthopedic (lower back) condition. Respondent asserts that he is disabled for the performance of his duties.

Oral and documentary evidence and argument was received at the hearing and the matter was submitted for decision.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in his official capacity.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED September 8, 2013

Richard Reyes

2. At the time Respondent filed his application for disability retirement, he was employed by Respondent Department of Mental Health as a psychiatric technician at ASH. By virtue of his employment, Respondent is a state safety member of CalPERS.

3. As a psychiatric technician, Respondent was responsible for maintaining order and supervising mentally disordered offenders who are clients/patients at ASH, for providing a basic level of general behavioral psychiatric nursing care to the clients/patients, for participating in the overall psychiatric treatment program of the clients/patients, and for supervising other nursing staff.

4. Respondent filed the application for disability retirement on January 25, 2012. He described his specific disability as "Lumbar 3-5 herniated. [sic] Specific disability [sic] Back on 2/25/11 while running to red light. [Also cumulative] trauma." (Exh. 1, at p. 2.)

5. On February 25, 2011, Respondent hurt his back while responding to an incident involving patients at ASH. His regular physician until approximately three months ago, Douglas T. Cannon, M.D. (Cannon), thereafter diagnosed lumbosacral spondylosis. Dr. Cannon provided treatment for Respondent's pain, including nerve block and epidural steroid injections and methadone tablets. Respondent returned to work in July 2011 with some restrictions. On September 25, 2011, Respondent stopped working, due to complaints of back pain, headaches, and irritability toward his coworkers.

6. On April 27, 2012, Edwin J. Kingsley, M.D. (Kingsley), performed a Qualified Medical Evaluation in connection with the then pending workers' compensation claim. Dr. Kingsley made the following diagnoses: degenerative disc disease at L3-L4, L4-L5, and L5-S1; disc herniations at L3-L4 and L4-5; recurrent low back pain with right radiculitis; and status post epidural steroid lumbar injections. Dr. Kingsley noted that Respondent has had recurrent back pain on a cumulative trauma basis associated with multiple episodes of recurrent incidents at work, and that he suffered a specific injury on February 25, 2011, which continued to produce back and leg pain. Dr. Kingsley concluded that Respondent had reached the point of maximal medical improvement. In his opinion, Respondent would be unable to lift over 20 pounds on a repetitive basis, should avoid any running, jumping, pushing or pulling, should avoid repetitive use of ladders or stairs, and would be unable to participate in the take down of hostile persons.

7. Respondent has suffered prior injuries to his back and other parts of his body, often in incidents with patients. In 2008, he was attacked by a patient and suffered a head injury and returned to work after receiving treatment. Bonnie Wolfe, Ph.D., provided psychotherapy for injuries suffered following the attack, including post-traumatic stress, and concluded on April 8, 2009, that Respondent could return to work without restriction despite a slight residual psychological impairment. Lawrence J. Fogel, M.D., a neurologist who examined Respondent on June 25, 2009, concluded that Respondent's headaches were not severe or problematic enough to warrant treatment, and expected they would resolve within one to three years.

8. a. On June 12, 2012, Brendan V. McAdams, Jr., M.D. (McAdams), an orthopedic surgeon contracted by CalPERS, conducted an evaluation to ascertain whether Respondent was disabled by reason of his orthopedic condition. Dr. McAdams obtained pertinent medical and other history, examined Respondent, and reviewed pertinent medical records.

b. Respondent complained of low back pain, which on occasion went into his right leg. He denied numbness or tingling. He described the February 25, 2011 and the 2008 incidents, and provided information about his prior treatment. He reported taking two tablets of methadone of unspecified strength per day for his pain and amitriptyline for the concussion.

c. On the basis of his physical examination, Dr. McAdams concluded that Respondent's condition was essentially normal. Many of the physical findings were normal. For instance, Respondent stood erect and walked without any limp; he was able to walk on heels and toes without difficulty; he was able to squat down and come back up without assistance; in a sitting position, deep tendon reflexes, knee jerks and ankle jerks were full and active; he had full extension of the knees without any evidence of lurch; he had excellent strength of the extensor longus, extensor digitorum communis, anterior tibialis, and peroneal muscles. In Dr. McAdams's opinion, Respondent appeared to voluntarily control some of his responses to produce positive findings. For example, range of motion was markedly restricted in flexion (45 degrees) and minimal on lateral bend (20 degrees) despite near-full rotation (80 degrees) in both directions. Dr. McAdams was unable to elicit sensory responses consistent with the articulated complaints. Thus, rather than responding consistent with an impacted nerve, Respondent reported scattered tenderness on different muscles, which led Dr. McAdams to conclude that there was no dermalogic pattern of sensory deficit.

d. Dr. McAdams concluded that Respondent's lumbar strain was now resolved, with no evidence of lumbar neuropathy.

e. With specific reference to the CalPERS criteria for disability, Dr. McAdams concluded that Respondent was not incapacitated for the performance of his usual duties. In his opinion, there were no specific duties of the psychiatric technician position that Respondent could not perform.

9. The credible medical evidence and opinion establishes that Respondent is not incapacitated for the performance of duty by reason of a low back orthopedic condition. Dr. McAdams presented the only direct evidence of Respondent's condition. He was the only examiner who testified at the hearing. His testimony is sufficient to establish that Respondent is not disabled. Neither Dr. Cannon nor Dr. Kingsley testified at the hearing to support or explain their findings, and it is not known whether either physician opines that Respondent is incapacitated for the performance of his usual duties pursuant to governing CalPERS definitions.

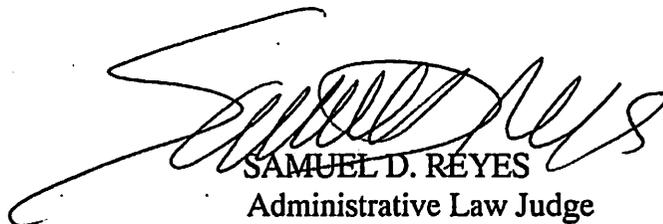
LEGAL CONCLUSIONS

1. Government Code section 20026 defines the following relevant terms: “‘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.”
2. Government Code section 21156 provides, in pertinent part: “If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability. . . .”
3. By reason of factual finding numbers 3 through 9, Respondent has not established that he is incapacitated for the performance of duty within the meaning of Government Code sections 20026 and 21156. On the contrary, the competent medical evidence received at the hearing shows that he is not disabled by reason of an orthopedic condition related to his lower back.

ORDER

The application for disability retirement of Richard Howard is denied.

DATED: 10/4/03


SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings