

ATTACHMENT A
THE PROPOSED DECISION

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:

NATHAN E. STOUGH,

Respondent,

and

DEPARTMENT OF CORRECTIONS
DEUEL VOCATIONAL INSTITUTE,
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,

Respondent.

Case No. 2012-0972

OAH No. 2013030712

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on November 19, 2013.

Elizabeth A. Yelland, Senior Staff Attorney, represented petitioner Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Thomas Hoegh, Attorney at Law, Law Offices of Thomas Hoegh, represented respondent Nathan E. Stough.

Respondent Department of Corrections Deuel Vocational Institute, California Department of Corrections and Rehabilitation, did not appear and was not otherwise represented.

Evidence was received and the record left open for the submission of written argument at the parties' request. CalPERS's initial brief was received on December 6, 2013, and marked CalPERS exhibit 12 for identification. Respondent Stough's initial brief was

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received on December 5, 2013, and marked respondent's exhibit 26 for identification.¹ CalPERS' reply brief was received on December 16, 2013, and marked CalPERS exhibit 13 for identification. On December 16, 2013, respondent Stough filed a reply brief, his opposition to CalPERS' motion to exclude respondent Stough's medical evidence, and Notice of Errata (correcting the citation to a statute). These were collectively marked respondent Stough's exhibit 27. The matter was submitted on December 16, 2013.

ISSUE PRESENTED

Whether respondent Stough was substantially incapacitated for the performance of his usual duties as a Correctional Officer with respondent Department of Corrections Deuel Vocational Institute, California Department of Corrections and Rehabilitation, at the time he applied for an industrial disability retirement?²

FACTUAL FINDINGS

1. Petitioner/complainant Anthony Suine filed the Statement of Issues solely in his official capacity as Chief of the CalPERS Benefits Services Division.

2. Respondent Stough was employed by respondent Department of Corrections Deuel Vocational Institute, California Department of Corrections and Rehabilitation. At the time respondent Stough filed his application for retirement, he was employed as a Correctional Officer. By virtue of his employment, respondent Stough is a state safety member of CalPERS subject to Government Code section 21151.

3. On or about April 2, 2012, respondent Stough signed an application for disability retirement. In filing the application, disability was claimed on the basis of an orthopedic (bilateral knees) condition.

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

¹ Each of the appearing parties pre-marked exhibits numerically, so the exhibits will be identified in the Proposed Decision by party and number.

² A sub-issue in this matter is the treatment of medical records and reports offered into evidence by respondent Stough and objected to by CalPERS. This issue is addressed in the Legal Conclusions.

5. Respondent Stough was notified of CalPERS' determination and was advised of his appeal rights by letter dated October 31, 2012.

6. Respondent Stough filed a timely appeal by letter dated November 16, 2012, and requested a hearing.

Usual Duties for a Correctional Officer Employed by Respondent Department of Corrections Deuel Vocational Institute, California Department of Corrections and Rehabilitation

7. A Correctional Officer Essential Functions list and Classification Description and a CalPERS' Physical Requirements of Position/Occupational Title for correctional officer were received in evidence. In addition, respondent Stough testified and described the work environment at Deuel Vocational Institute and his duties. The essential functions document includes among the required duties the ability to perform the duties at all of the various posts. Correctional officers must be able to work overtime. Other relevant requirements, based on respondent's claim of incapacity, include the ability to swing a baton to strike an inmate; the ability to disarm, subdue and apply restraints to an inmate; the ability to defend against an inmate armed with a weapon; the ability to search inmates; the ability to walk occasionally to continually; the ability to run occasionally all out for up to 400 yards including on several flights of stairs and uneven ground; the ability to climb, crawl, crouch and stoop; the ability to lift and carry up to 100 pounds; and the ability to lift and carry an inmate and wrestle an inmate to the floor. The CalPERS physical requirements form, endorsed by the Deuel Vocational Institute's Return to Work Coordinator, includes standing constantly for over 6 hours; occasional running; constant walking over six hours; frequent climbing of stairs over three-to-six hours and up to 150 steps; constant bending; constant twisting; and occasionally lifting and carrying 100 pounds or more for more for a distance of 200 yards.

8. Respondent Stough described the Deuel Vocational Institute as an overcrowded prison for violent offenders with a population comprising approximately 35 to 40 percent level 4 inmates, the highest security classification. Many of the inmates were sentenced under "three strikes" statutes to from 25 years to life. He worked in a wing with three stories/levels and no elevators. There were frequent inmate-on-inmate assaults and assaults on correctional officers occurred at least once a week. Respondent Stough was often required to work overtime from 30 minutes to a full eight-hour shift. Respondent Stough's last assignment was the first level of K wing, but he was required respond to alarms on the second and third levels. Occasionally, respondent was required to participate in a "cell extraction" of an inmate. This was a particularly dangerous situation requiring the forcible subduing of the inmate and removing him from the cell.

Competent Medical Opinion

9. At the request of CalPERS, respondent Stough was examined by independent medical examiner Daniel M. D'Amico, M.D. a board-certified orthopedic surgeon. Dr.

D'Amico examined respondent Stough on September 19, 2012. He prepared a report that was received in evidence. Dr. D'Amico testified at the administrative hearing.

10. Dr. D'Amico took a history from respondent Stough that included a description of the injury that led to respondent Stough's claim of incapacity. Dr. D'Amico also reviewed records relating to the treatment provided respondent Stough for his injury. On June 23, 2011, respondent Stough was required to assist a fellow correctional officer who was physically assaulted by an inmate that respondent Stough and the other officer were escorting. During respondent's "take down" of the inmate, respondent Stough fell down with his left knee landing on the inmate and his right knee striking the cement floor of the cell block. Respondent Stough immediately sensed pain in his right knee and he was seen by a prison nurse. He returned to duty, although his knee was still painful. The next day, the right knee was swollen and respondent Stough's condition worsened when he was required to climb stairs in the unit, retrieve the food cart for the inmates and walk continuously. Respondent Stough asked to see a physician and the Return to Work Coordinator referred him to Dr. Pricco who first saw respondent Stough on July 7, 2011. Dr. Pricco diagnosed respondent Stough's condition as bilateral knee strain. He suggested that respondent Stough take some time away from work, but respondent Stough decided to keep working. Dr. Pricco prescribed an anti-inflammatory Meloxicam and a pain medication Vicodin, the latter of which respondent Stough could only take when away from the job.

11. Respondent Stough periodically visited Dr. Pricco, reporting that his symptoms were getting worse. On August 31, 2011, Dr. Pricco prescribed physical therapy and ordered modified duty for respondent Stough. When respondent Stough was told by the prison's Return to Work Coordinator that no accommodation was available based on his work restrictions, Dr. Pricco loosened the restrictions at respondent Stough's request, but still no accommodation was offered by the coordinator. Respondent Stough did not return to work after the August 31, 2011 work restrictions were imposed by Dr. Pricco.

12. Dr. D'Amico performed a physical examination of respondent Stough, focusing on the areas of complaint. Respondent Stough told Dr. D'Amico that his right knee was sore all of the time. Long periods of walking and standing aggravated the condition. Respondent Stough reported that he could not walk very long without causing pain and that squatting and climbing also caused discomfort. He stated that he could not lift over 30 pounds without causing pain to his right knee. During the orthopedic physical examination, respondent Stough was able to do deep knee bends, but experienced discomfort in his right knee about two-thirds of the way down. Knee flexion was normal while in a seated position. Dr. D'Amico noted that there was a slight atrophy of respondent Stough's right thigh immediately above the knee cap (3/8 inch less circumference measurement compared to left thigh). Mid thighs and calves were equal. There was also mild patellofemoral crepitation without dislocation or subluxation when the left knee was flexed and lateral pressure was applied to the patella. Respondent Stough reported pain and pressure on the knee when "he attempts his quadriceps." The rest of the knee examination was essentially normal, although Dr. D'Amico noted "some tenderness medially in palpation over the joint line and tendon

both medially and posteriorly, and tenderness laterally at the junction between the patella and the joint line itself.”

13. As noted above, Dr. D’Amico’s evaluation included a record review, including reports and diagnostic studies prepared as part of respondent Stough’s related worker’s compensation claim. The reports included an orthopedic surgeon’s consultation, x-rays of the left and right knees which were normal, an MRI of the right knee and the report of a Qualified Medical Examiner and orthopedic surgeon dated February 15, 2012. The MRI report showed minimal effusion, minimal lateral subluxation of the patella, and grade 2 degenerative changes in the posterior portion of the medial meniscus. There were no tears in the menisci. Dr. D’Amico also reviewed a surveillance video taken of respondent Stough in May and June of 2012. The video was viewed at the administrative hearing and received in evidence. The video shows respondent Stough engaged in routine activities including walking, standing, and getting in and out of a vehicle.

14. Dr. D’Amico diagnosed respondent Stough’s condition as:

1. Trauma to knees, left knee resolved without symptoms.
2. Trauma to the right knee with persistent pain. One must rule out the etiology of the pain based on patellofemoral problems, such as mild early articular cartilage degeneration of the patellofemoral joint laterally, or some isoimmune condition such as pseudogout, as mentioned above.
3. Post traumatic patellofemoral pain syndrome, stable, not disabling.

15. Dr. D’Amico explained during his testimony that the rule-out recommendations were included to determine a possible cause of respondent Stough’s chronic pain in the absence of a diagnosable etiology. Dr. D’Amico concluded that whatever the cause of the persistent pain, respondent Stough was not substantially incapacitated for the usual duties of his correctional officer job. His understanding of the usual duties was based on the two documents described in Finding 7 above. Dr. D’Amico added that even if further studies confirm a patellofemoral problem or isoimmune condition, neither would prevent respondent Stough from performing his usual duties.

Respondent Stough’s Proffered Medical Evidence

16. Respondent Stough called no medical experts to testify at the administrative hearing. Instead, he offered medical reports into evidence including the reports of Dr. Martin Pricco, a physical therapist’s report, the report of consulting orthopedic surgeon Dr. Scott Walthour, the Qualified Medical Examiner’s report of orthopedic surgeon Mohinder Nijjar, and the medical reports of Dr. Jackie Chan, a pain management specialist. CalPERS counsel objected to the receipt of the reports on the grounds of hearsay. The two parties addressed the admissibility of the reports in their post-hearing briefs. The substance of the reports is recited below.

17. Dr. Pricco's report of August 18, 2011, imposed work restrictions precluding prolonged walking and included the instruction that respondent Stough should be sent home "if no light duty." In his worker's compensation physician progress report, he stated that respondent Stough could do modified work with limited bending, squatting, climbing and no prolonged walking. He continued the same limitations in his August 31, 2011, progress reports. As noted above, Dr. Pricco referred respondent Stough to consulting orthopedic surgeon Dr. Walthour who saw him on October 31, 2011. Dr. Walthour reviewed the x-rays and an MRI of the right knee and performed a physical examination of the knees. Dr. Walthour continued respondent Stough on modified work status with no lifting of more than 25 pounds, limited squatting and climbing and he recommended continued work on quadriceps rehabilitation and follow up care by Dr. Pricco. Dr. Walthour did not recommend surgery. In a follow up visit on November 3, 2011, Dr. Pricco considered respondent Stough "stationary and permanent" for purposes of worker's compensation benefits. He stated: "He will not be able to return to his normal work duties as a correctional officer." He reiterated the limitations on lifting more than 30 pounds, squatting, climbing and prolonged walking. He also stated: "This patient has subjective complaints with no real objective findings at this time." Dr. Pricco recommended a Qualified Medical Examiner evaluate respondent Stough.

18. On February 6, 2012, Dr. Mohinder Nijjar, a board-certified orthopedic surgeon conducted a Qualified Medical Examiner evaluation of respondent Stough and issued a report dated February 15, 2012. Dr. Nijjar's examination of respondent's right knee revealed minimal tenderness with deep pressure over the front of the knee cap, slight puffiness of soft tissue in front of the knee cap without fluid build-up, and slight crepitus in the knee joint. Dr. Nijjar concluded that there was no "ratable impairment" of the right knee under AMA Guides to the Evaluation of Permanent Impairment, 5th edition, and a two percent impairment under another worker's compensation standard, based on the persistent pain reported by respondent Stough that Dr. Nijjar attributed to minimal prepatellar bursitis. Dr. Nijjar stated that in his opinion, respondent Stough could return to his regular work and vocational rehabilitation was not indicated.

19. In a March 20, 2012 visit following the evaluation by Dr. Nijjar, Dr. Pricco continued his work preclusions and commented that respondent Stough was no longer working as a correctional officer "as he is unable to do the job requirements involved including prolonged walking and climbing and squatting." Dr. Pricco, on March 29, 2012, filled out a CalPERS form entitled Physician's Report on Disability, Dr. Pricco checked the "yes" box indicating that respondent Stough was then substantially incapacitated from performance of his usual duties. He listed the limitations as, "No prolonged walking, limited squatting [and] climbing, no lifting [more than] 30 lbs." Dr. Pricco affirmed that he had reviewed the job description statement and the physical requirements to render his medical opinion.

20. Respondent Stough was referred by Dr. Pricco to Dr. Chan, board certified in physical medicine and rehabilitation and pain management. Dr. Chan first saw respondent Stough on April 29, 2013. Dr. Chan reviewed medical records, the

diagnostic studies, and took a brief social history. He conducted a physical examination. His diagnoses were right knee strain and grade 2 medial meniscal degeneration with a small amount of joint effusion. His plan of treatment included continuing his “permanent work restrictions.” Dr. Chan’s Work Status Form for respondent Stough shows the box checked for “Continue Permanent restrictions.” Dr. Chan saw respondent Stough again on May 28, 2013, and Dr. Chan did not check any of the boxes in the Work Status Form or comment on respondent Stough’s work status in the plan of treatment. The last visit to any physician reflected in respondent Stough’s exhibits was the November 4, 2013 evaluation by Dr. Chan. Again, no work status box was checked and the treatment plan notes that respondent Stough would be medically retiring from his job.

21. To summarize the relevance of the reports described to the incapacity issue, Dr. Pricco, beginning on November 3, 2011, felt respondent could no longer work as a correctional officer. In the CalPERS form signed by Dr. Pricco on March 29, 2012, he expressly stated that respondent Stough was substantially incapacitated from the performance of his usual duties as described in the two documents recited. None of the other physicians whose reports were offered into evidence by respondent expressed an opinion supporting respondent Stough on the ultimate issue. Thus, the question is whether Dr. Pricco’s written opinion regarding the issue can support a finding favorable to respondent Stough in the face of a hearsay objection by CalPERS. As noted previously, this issue will be addressed in the Legal Conclusions.

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.) The party asserting the affirmative at an administrative hearing has the burden of proof including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn.5, citing *So. Cal. Jockey Club v Cal. etc. Racing Bd.* (1950) 36 Cal.2d 167, 177.)

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.)

Treatment of Respondent Stough's Medical Evidence

4. The medical reports offered by respondent Stough and described in the Factual Findings were clearly hearsay. CalPERS objected to their admissibility in evidence during the administrative hearing. After considering the points and authorities provided by counsel and the applicable case and statutory law, the Administrative Law Judge concludes that while the medical records are "admissible" into evidence, they cannot, without more, support a finding favorable to respondent Stough on the ultimate question of substantial incapacity for the performance of his usual duties.

5. These proceedings are governed by the provisions of the formal hearing adjudication provisions of the California Administrative Procedure Act (APA), Government Code sections 11500, et seq. by virtue of Government Code section 21156, subdivision (b)(2). Government Code section 11513 is the APA section dealing with evidence allowable in formal administrative adjudication matters. It reads:

(a) Oral evidence shall be taken only on oath or affirmation.

(b) Each party shall have these rights: to call and examine witnesses, to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her. If respondent does not testify in his or her own behalf he or she may be called and examined as if under cross-examination.

(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible

over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

(e) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing.

(f) The presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (Emphasis added.)

6. By the plain language of subdivision (d) of Government Code section 11513, hearsay is admissible to supplement or explain other (presumably non-hearsay) evidence. However, if an objection is timely raised, such hearsay evidence cannot, standing alone, support a finding. There must be substantial evidence to support an administrative agency ruling, and hearsay, unless specially permitted by statute, is not competent evidence to that end. (*Furman v. Department of Motor Vehicles* (2002) 100 Cal. App.4th 416, 420, citing *Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 536.) Respondent Stough did not establish the requisite foundational requirements for any hearsay exception recognized in civil proceedings, and even if a foundation had been laid for the admission of the medical records as business records, the exception would ordinarily only apply to routine entries of acts, conditions and events and not include the expression of a medical professional's opinion regarding an employee's capacity to perform his usual job duties. (Evid. Code, § 1271, *People v. Reyes* (1974) 12 Cal. 3d 486, 503.)

7. Respondent Stough relies upon language in the *McCoy* case (cited in Legal Conclusion 1 above) to support his argument that there is an inherent conflict between the language of subdivisions (c) and (d) of Government Code section 11513, and therefore hearsay evidence of the sort that responsible persons tend to rely upon in the conduct of serious affairs should suffice to support a finding. Respondent's contention is unsupported by the *McCoy* decision and the language of Government Code section 11513. The *McCoy* decision dealt with the admissibility of a stipulation regarding industrial causation of the employee's injury that was the basis of the disability claim. There was no discussion of the treatment of hearsay. Moreover, there is no inherent conflict between subdivisions (c) and (d) of Government Code section 11513. Among the time-honored principles of statutory construction is a court's obligation to give independent meaning and significance whenever possible to each word, phrase, and sentence in a statute (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387); to avoid an interpretation that makes any part of a statute meaningless (*Id.* at p. 1387; and to harmonize statutes both internally and with each other (*Woods v. Young* (1991) 53 Cal.3d 315, 323.) A specific provision relating to a particular subject will govern a general provision, even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates. (*Woods v. Young, supra*, 53 Cal.3d 315, 325, quoting *People v. Tanner* (1979) 24 Cal.3d 514, 521.) The more general language of subdivision (c) requires that relevant and reliable evidence be admitted despite any technical statutory or common law

rule that might preclude its admissibility in a civil action over objection. However, subsection (d) deals specifically with the treatment of hearsay in formal APA hearings. It does not prohibit the *admission* of otherwise relevant hearsay evidence, but it does preclude exclusive reliance upon hearsay to support a material finding unless the proponent has established an applicable exception recognized in civil proceedings. As reflected in the *Furman* and *Daniels* decisions, case law reinforces the distinction between admissibility and reliance upon hearsay alone to support a finding.

8. In summary, respondent Stough had the burden of producing evidence to support his application for a disability retirement, including the burden to produce “competent medical opinion” that his physical condition rendered him substantially incapacitated for the performance of his usual duties. Nothing other than hearsay evidence was introduced to satisfy that burden. Therefore, respondent Stough’s application must be denied for failure of proof.

9. In the event that the CalPERS Board of Administration determines that the hearsay evidence presented by respondent Stough should have been considered, the result would not change. Dr. D’Amico presented persuasive evidence that although respondent Stough demonstrated persistent tenderness and pain in his right knee, the knee is stable and functional and does not substantially impair his ability to perform the usual duties of a correctional officer. Dr. Nijjar, another orthopedic surgeon, reached the same conclusion. While Dr. Walthour continued the limitations imposed by Dr. Pricco, he offered no opinion regarding the ultimate issue in this matter. Dr. Chan also continued what he described as “permanent” work restrictions for respondent Stough, but did not address the incapacity question. The only person to expressly state that respondent Stough was substantially incapacitated for the performance of his usual duties was Dr. Pricco, and even he acknowledged that there were no objective findings to support respondent’s subjective complaints. Thus, considering all of the medical evidence, Dr. D’Amico’s opinion that respondent Stough was not substantially incapacitated for the performance of his usual duties was most persuasive.

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ORDER

Respondent Stough's appeal from CalPERS' determination that he was not permanently disabled or incapacitated for the performance of his usual duties as a Correctional Officer with respondent Department of Corrections Deuel Vocational Institute, California Department of Corrections and Rehabilitation, at the time that his application for disability was filed is DENIED.

Dated: January 9, 2014



KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings