

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Application for Industrial
Disability Retirement of:

DOYEL S. GUILLORY,

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION
(CALIFORNIA STATE PRISON
FOLSOM),

Respondents.

Case No. 8644

OAH No. 2013050772

PROPOSED DECISION

Administrative Law Judge Floyd Shimomura, State of California, Office of
Administrative Hearings, heard this matter on January 10, 2014, in Sacramento, California.

John A. Mikita, Senior Staff Counsel, represented the California Public Employees'
Retirement System (CalPERS).

Respondent Doyel S. Guillory (respondent) was present and represented himself.

Evidence was received, and the matter was submitted for decision on January 10,
2014.

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PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED January 30, 2014

Richard Schrey

FACTUAL FINDINGS

Jurisdictional Facts:

1. On January 11, 2007, respondent, a Correctional Sergeant with the California Department of Corrections and Rehabilitation (CDCR), filed an application for industrial disability retirement with CalPERS. Respondent alleged that he had a “radial tear in two (2) discs” in his back after he had “slipped on a wet floor in the main kitchen and twisted ...[his] back.”

2. On November 28, 2007, CalPERS denied respondent’s application for industrial disability retirement based on a review of relevant medical evidence, including reports by Dr. Stephen Mann and Dr. Joseph W. McCoy.

3. By letter dated December 19, 2007, respondent submitted a written appeal to the denial of his application.

4. On June 18, 2013, Anthony Suine, Chief, Benefit Services Division, CalPERS, filed a Statement of Issues with regard to respondent’s appeal and noticed a hearing for January 10, 2014, before an Administrative Law Judge with the Office of Administrative Hearings. Pursuant to the Statement of Issues, this appeal is limited to whether or not respondent is permanently disabled or incapacitated from performing his former duties as a Correctional Sergeant at CDCR on the basis of an orthopedic (back) condition.¹ In filing the Statement of Issues, Mr. Suine was acting only in his official capacity and not personally.

Respondent’s Work History and Job Duties:

5. Respondent was born on January 29, 1948. In 1998, at age 50, Respondent began working as a Correctional Officer at the CDCR. Respondent retired for service effective January 27, 2007. At the time of his service retirement, respondent held the position of Correctional Sergeant.

6. The essential functions of a Correctional Sergeant, like other correctional officers, include the ability to disarm, subdue and apply restraints to an inmate, to inspect inmates for contraband, to stand continuously depending on the assignment, to stoop and bend while inspecting cells, and to wear an equipment belt weighing 15 pounds.² The

¹ The Statement of Issues provides that, “[i]f disability is found to exist, any dispute as to whether the disability is industrial or nonindustrial will be resolved pursuant to Government Code section 21166.”

² CalPERS submitted evidence received from CDCR on respondent’s job duties as a Correctional Sergeant. Such evidence consisted of a document listing the essential duties of a Correctional Officer and a “check off” document listing the particular activities (i.e., running, standing, lifting, etc.) of a Correctional Sergeant. Respondent did not object to such

position's physical requirements also involve the ability to run, bend and twist at the waist, and lift and carry objects.

Independent Medical Examination:

7. Dr. Joseph W. McCoy is an orthopedic surgeon engaged in the private practice of medicine in Napa, California. He graduated from Stanford University in 1978. In 1982 he received his Doctorate of Medicine from the University of Oregon Health Sciences Center. His residency training included general and orthopaedic surgery. He is board certified in orthopaedic surgery. Spine care represents about 40 percent of his practice.

8. On June 18, 2007, Dr. McCoy saw respondent for an independent medical examination (IME) at the request of CalPERS. As part of the IME, Dr. McCoy obtained a history and conducted a physical examination. He also reviewed respondent's medical records and job duties. His IME report is summarized as follows:

Medical Records. Respondent's medical records indicate that he reported an injury occurring on April 19, 2006, when he said he slipped on a wet floor with pain toward his left buttock and constant difficulties with his neck. A week after the incident, a work status report by Catholic Healthcare West indicated that respondent "stepped over a box at home and after substantial improvement is now back to square one." During May and June 2006, respondent's records indicated more follow-up visits and physical therapy. During August and September 2006, the medical records show Dr. Mann evaluated respondent with lumbar spine x-rays "showing mild degenerative disc disease" and with an MRI showing "multiple level degenerative disc disease without specific herniation or stenosis" Dr. Mann recommended stabilization exercises. The medical records indicate some physical therapy followed. By December 2006, Dr. Mann reported improvement and anticipated a return to work on January 27, 2007.

Activity. At his IME with Dr. McCoy, respondent reported that he held two part-time jobs since February 2007. He did crowd control for the River Cats baseball team at Raley Field. He also was a part-time employee at the Empire Ranch Golf Course. He also admitted that he was able to play golf and ride his motorcycle although both created irritation to his lumbar spine.

Physical Examination. Dr. McCoy's IME report describes respondent as a 59-year old gentleman who was right-handed, five feet 11 inches tall, and 210 pounds in weight. Although cooperative, Dr. McCoy believes respondent "also appear[s] to exaggerate his complaints to a measurable degree." Dr. McCoy found no palpable spasm in the lumbar spine although respondent reacted to light palpation with complaints of tenderness and pain throughout the thoracolumbar area. Dr. McCoy found no palpable deformity and determined

documents as constituting evidence of his job duties as a Correctional Sergeant. From this, it is inferred and found that the job duties of a Correctional Sergeant include the essential duties of a Correctional Officer.

that respondent has a normal thoracic kyphosis and lumbar lordosis. Yet respondent was “unwilling to flex beyond about 20 degrees and extends 20 degrees and lateral bends 20 degrees.” He found no pain or atrophy in respondent’s legs. With regard to respondent’s back, Dr. McCoy’s active diagnoses was “a lumbar strain superimposed upon mild diffuse degenerative disc disease of the lumbar spine”

Dr. McCoy ends his IME report by concluding that respondent “does not seem substantially incapacitated at this time” although he might have some difficulty with more demanding tasks of a Correctional Sergeant. Dr. McCoy was particularly influenced by the fact that respondent’s treating physician, Dr. Mann, anticipated in December 2006 that he would be returning to work in January 2007.

Respondent’s Evidence:

9. At the IME, respondent described to Dr. McCoy daily back pain varying between 2 to 8 on a scale of 1 to 10. He stated that on one day he could tolerate certain activities very well and on another day he could not. He also described occasional episodes of spasm and his back pain as centered in the midline extending down toward his tailbone. He admitted he was able to play golf and ride his motorcycle, although both activities created irritation to his back.

10. At hearing, respondent testified that he still had problems with his back. He said he had difficulty bending over and lifting things. He said he still played golf, but had not ridden his motorcycle in four years. In response to questions, he acknowledged that he had worked at a golf course and had done security work at River Cat games at Raley Field. He also acknowledged that he prepared his meals and did his own housekeeping, including laundry. When asked how he could play golf if he had difficulty bending over, he replied he swung his club keeping his back straight and indicated, using a hand movement, how he used a stick device to retrieve a golf ball from the cup.

11. Respondent placed into evidence certain³ medical records from 2006 and January 2007 concerning his back injury from Catholic Healthcare West and Dr. Mann.

12. Respondent did not call any doctor or other medical witnesses to testify on his behalf.

Discussion of Medical Evidence:

13. After considering all the evidence, Dr. McCoy’s IME report, including his conclusion that respondent was not substantially incapacitated from performing his duties as

³ Respondent did not include Dr. Mann’s medical report dated December 11, 2006, which, according to the IME report, indicated improvement and anticipation of a return to work on January 27, 2007. At hearing, respondent did not question the existence of this report or its characterization in the IME.

a Correctional Sergeant, are found to be thorough and based upon competent medical evidence and opinion.

14. The lay testimony of respondent regarding the extent of his pain and limitations on his movements are given little weight as there was credible evidence of exaggeration and inconsistent activity by respondent.

15. The medical records reviewed by Dr. McCoy from 2006 and early 2007 by respondent's treating physicians indicated progress toward an anticipated return to work on January 27, 2007.

16. It is found that respondent, at the time of his application, was not permanently disabled or incapacitated from performing his former duties as a Correctional Sergeant at CDCR on the basis of an orthopedic (back) condition.

LEGAL CONCLUSIONS

Statutes Governing Industrial Disability Retirement

1. Government Code section 21154 provides, in part, that:

On receipt of an application for disability retirement of a member ... the board shall ... order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. ...

Government Code section 21156, subdivision (a) provides, in part, that:

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 ... duties and is eligible to retire for disability, the board shall immediately retire him ... for disability
....

Government Code section 21166 provides, in part, that:

If a member is entitled to a different disability retirement allowance according to whether the disability is industrial or nonindustrial and the member claims that the disability as found by the board ... is industrial and the claim is disputed by the board ... the Workers' Compensation Appeals Board, using the

same procedure as in workers' compensation hearings, shall determine whether the disability is industrial. ...

Eligibility to Apply:

2. Respondent was employed by the CDCR, is a safety member of CalPERS, and is eligible to apply for disability retirement under Government Code sections 21151 and 21152.

Burden of Proof on Respondent

3. In order to qualify for disability retirement, respondent must prove that, at the time of application, he was "incapacitated physically or mentally for the performance of his... duties" in state service. (Gov. Code, § 21156.) Government Code section 20026 provides, in part, that:

"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.

In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted similar language to mean "the *substantial* inability of the applicant to perform his usual duties." In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863, the court held that restrictions imposed to prevent the risk of future injury or harm is not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. Finally, in *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court indicated that an applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position.

Failure to Carry Burden of Proof:

4. Dr. McCoy, CalPERS' independent medical examiner, testified at the hearing. He reiterated the basic conclusion of his IME report that respondent was not substantially incapacitated from performing his duties as a Correctional Sergeant although he might have difficulties with more demanding tasks. Dr. McCoy's conclusion was based on his examination of respondent's relevant medical records, which indicated progress toward a return to work, on respondent's post-injury activities, which indicated part-time work at a golf course and at a baseball stadium, and finally his physical examination of respondent, which revealed measurable exaggeration of his complaints.

5. Respondent testified at the hearing about his back pain and his limited ability to bend and twist at the waist. He also introduced medical records from 2006 and January 2007 from doctors who treated him after he injured his back. However, respondent's

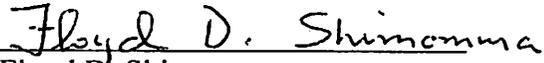
testimony can be given little weight based on Dr. McCoy's assessment that respondent exaggerated his complaints to a measurable degree at the IME because the extent of his complaints were not supported by his physical examination and were inconsistent with his continuing activities, such as golfing and security work at River Cats baseball games. Moreover, the medical records reviewed by Dr. McCoy from respondent's treating physicians in 2006 and early 2007 reveal continuing improvement in respondent's back condition such that a return to work in January 2007 was anticipated. Government Code section 20026 requires a disability retirement to be based on "competent medical opinion." Respondent did not call any doctors to testify on his behalf or present other sufficient supporting medical evidence to establish his claim of disability retirement.

6. In sum, respondent did not carry his burden of proof. He did not establish by competent, objective medical opinion that, at the time of application, he was permanently disabled or incapacitated from performing his usual duties as a Correctional Sergeant for the CDCR due to a back injury.

ORDER

The application of respondent Doyel S. Guillory for industrial disability retirement is DENIED.

Dated: January 28, 2014


Floyd D. Shimomura
Administrative Law Judge
Office of Administrative Hearings