

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

JIMMY HOPE,

Applicant/Respondent

and

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION,  
STATE PRISON – SIERRA  
CONSERVATION CENTER,

Respondent.

Case No. 9299

OAH No. 2013050486

**PROPOSED DECISION**

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on January 30, 2014, in Sacramento, California.

Jeanlaurie Ainsworth, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Applicant Jimmy Hope represented himself, and was assisted at hearing by his wife, Pamela Hope.

No one appeared for or on behalf of respondent California Department of Corrections and Rehabilitation, Sierra Conservation Center.

Evidence was received, the record was closed, and the matter was submitted for decision on January 30, 2014.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED 2-24 20 14

Sharon Moore

## SUMMARY

This appeal is limited to determining whether applicant is substantially incapacitated for the performance of his usual job duties as a Correctional Supervising Cook I with the California Department of Corrections and Rehabilitation, Sierra Conservation Center, due to an orthopedic condition. Applicant applied for service pending industrial disability retirement benefits on the basis of “chronic back pain in right leg/foot pain and bilateral plantar fasciitis [*sic*].” The persuasive medical evidence established that he is not substantially incapacitated for the performance of his usual job duties due to “chronic back pain in right leg/foot pain and bilateral plantar fasciitis [*sic*].” Therefore, applicant’s application for disability retirement benefits should be denied.

## FACTUAL FINDINGS

### *Procedural History*

1. On May 27, 2008, applicant signed a Disability Retirement Election Application (application) that was received by CalPERS on August 6, 2008. In his application, applicant identified his specific disability as: “chronic back pain in right leg/foot pain and bilateral plantar fasciitis [*sic*].”

2. At the time applicant filed his application, he was employed by the California Department of Corrections and Rehabilitation, Sierra Conservation Center as a Correctional Supervising Cook I. By virtue of his employment, applicant is a state safety member of CalPERS subject to Government Code section 21151, subdivision (a).<sup>1</sup>

3. CalPERS obtained or received medical reports concerning applicant’s claimed disability from competent medical professionals. After review of those documents, CalPERS determined that applicant was not permanently disabled or incapacitated for the performance of his duties as a Correctional Supervising Cook I with the California Department of Corrections and Rehabilitation, Sierra Conservation Center at the time he filed his application.

4. Applicant was notified of CalPERS’ determination and advised of his appeal rights by letter dated March 4, 2009.

5. Applicant filed a timely appeal from the denial of disability retirement by letter dated March 20, 2009, and requested a hearing.

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<sup>1</sup> Government Code section 21151, subdivision (a), states: “any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.”

6. Anthony Suine, Chief of the Benefit Services Division of CalPERS, filed the Statement of Issues in his official capacity on June 17, 2013.

7. On June 17, 2013, CalPERS served a Notice of Hearing on applicant and the Department of Corrections and Rehabilitation, Sierra Conservation Center.

8. This matter was called for hearing on the date and at the time and location stated in the Notice of Hearing. No one appeared for or on behalf of the Department of Corrections and Rehabilitation, Sierra Conservation Center, and an evidentiary hearing was conducted as a default proceeding, as to the Department of Corrections and Rehabilitation, Sierra Conservation Center only, pursuant to Government Code section 11520.

*Job Duties of a Correctional Supervising Cook*

9. The Duty Statement for the position of Correctional Supervising Cook I at the Sierra Conservation Center provides the following job description:

Under direction, in the Department of Corrections in a large correctional culinary program to supervise a large crew in the preparation, cooking, and serving of food to the inmate population. To supervise the maintenance of culinary equipment, supplies, and work areas. To maintain order and supervise the conduct of inmates. To protect and maintain the safety of person and property. And do other related work. Assigns work, supervises, and gives instruction and training to inmate workers, evaluates their performance and takes or recommends appropriate action. Prepares, cooks and dispenses food and serves as lead Cook on a shift. Apportions the food to the various dining rooms. Supervises the maintenance of culinary utensils and equipment, and the cleaning of various storage and work areas. Makes inspections and maintains food handling practices and standards of safety and sanitation. Requisitions, receives, inspects, stores and inventories supplies. Supervises garbage disposal. As required, plans menus in accordance with the established food allowance and determines the amount of food to be prepared. As required acts for the Supervising Correctional Cook DOC in his/her absence, keeps reports and prepares reports. Maintains order and supervises the conduct of persons committed to the Department of Corrections. Prevents escapes and injury by these persons to themselves, to others, or to property. Maintains security of working areas and work materials. Inspects premises and searches inmates for contraband, such as weapons or illegal drugs. The ability to work overtime and various shifts are essential functions of this job.

10. The essential job functions for the position of Correctional Supervising Cook I are identified as follows:

- Must be able to perform all the various posts
- Must be able to work overtime. Overtime is mandatory and could be 8 hours at one time
- Standing Frequently – to watch and supervise inmates involved in mass production of food preparation
- Walking Occasionally – to move throughout the work area providing direction and supervision to inmate crew, taking inventories, and inspecting premises
- Sitting Occasionally – to complete inmate timecards, reports, food and supply orders, and other documentation
- Lifting Occasionally – to handle paperwork and culinary utensils weighing under 5 pounds. When inmate crews are not available, the CSC will frequently lift items weighing up to 25 pounds and will occasionally lift items up to 55 pounds, including flour, frozen vegetables and potatoes
- Carrying Occasionally – to move paperwork or supplies weighing under 5 pounds. When inmate crews are not available, the CSC will carry the items noted above for short distances within the preparation area
- Bending/Stooping Occasionally – to demonstrate procedures to inmate crews, inventory items, and inspect the work area. When inmate crews are not available, the CSC will bend frequently to chop, slice, and otherwise prepare food items, and to move items about the preparation area
- Reaching in Front of Body Occasionally – to prepare paperwork, demonstrate proper procedures to inmate crews, and inspect the premises. When the inmate crews are not available, the CSC will reach in front of their body constantly to prepare and move food items
- Reaching Overhead Occasionally – to reach items stored on upper shelves and conduct inspections
- Climbing Occasionally – to climb stairs accessing the back dock area
- Balancing Frequently – to maintain footing on wet floors
- Pushing/Pulling Occasionally – to move a pallet of inventory with a pallet jack and open and close doors. When inmate crews are not available, the CSC will push and pull on utensils when repetitively storing pots of food, chopping and slicing and moving food about the preparation area
- Knelling/Crouching [*sic*] Occasionally – to inspect the area and inventory items

- Finger dexterity Occasionally – to prepare inmate timecards, food orders, inventories and other reports
- Hand/Wrist Movement Occasionally – to prepare and handle paperwork, and move food item about the preparation area, demonstrate procedures to inmate crews

11. Some of the physical requirements for the position of Correctional Supervising Cook I are described as follows:

- Reaching (above shoulder): occasionally – up to three hours
- Reaching (below shoulder): occasionally – up to three hours
- Pushing & Pulling: occasionally – up to three hours
- Lifting/Carrying (0-10 pounds): frequently – three to six hours
- Lifting/Carrying (11-25 pounds): frequently – three to six hours
- Lifting/Carrying (26-50 pounds): occasionally – up to three hours
- Lifting/Carrying (51-75 pounds): occasionally – up to three hours
- Lifting/Carrying (76-100 pounds): never
- Lifting/Carrying (100 + pounds): never

*Applicant's Injury and Subsequent Work History*

12. On May 16, 1994, applicant injured his back and legs at work when he was carrying a 50-pound sack of flour and slipped. He tried to break his fall by reaching for a table.

13. Applicant initially treated his injuries by undergoing chiropractic treatments. For the most part, those treatments relieved his pain. On April 22, 2002, however, he underwent back surgery and was on disability leave for two years.

14. Applicant returned to work in 2004, with restrictions, but to the position of cook. He worked in that position for one week before his surgeon placed him back on disability leave for three months.

15. Applicant returned to work in June 2004, with restrictions, and continued to work under those restrictions until November 2007, when his employer informed him that it could no longer accommodate his work restrictions.

16. Applicant retired for service, effective June 1, 2008, pending a determination of his application for disability retirement.

## *Medical Evidence*

17. Applicant did not call any medical experts to testify at hearing. Instead, he introduced a Physician's Report on Disability signed by Patrick Rhoades, M.D., a letter dated January 29, 2014, signed by Dr. Rhoades, and Dr. Rhoades' progress reports for examinations of applicant on November 12, 2007, and January 11, February 6, and April 30, 2008.

18. Dr. Rhoades' progress reports provided little objective information about applicant's purported incapacity, other than that applicant had poor range of motion in his lumbar spine upon flexion and extension. None of the reports contain Dr. Rhoades' opinion about whether applicant is substantially incapacitated for the performance of his usual job duties as a result of an orthopedic condition.

19. In the Physician's Report on Disability, which is dated July 25, 2008, Dr. Rhoades identified applicant's subjective complaints as "continued lumbosacral pain radiating down the lower extremity." He wrote that applicant suffered his injury "when he slipped and injured back" at work.

20. Dr. Rhoades also checked the box indicating that applicant is substantially incapacitated for the performance of the usual duties of his position as a Correctional Supervising Cook I. Dr. Rhoades wrote the following with regard to the specific work activities applicant is unable to perform due to incapacity: "No lifting greater than 50 pounds. Limited in bending, pulling, pushing and reaching."

21. In his January 29, 2014 letter, Dr. Rhoades wrote:

This letter is regarding my patient, Jimmy Hope. Mr. Hope has chronic lumbar pain. His most recent MRI scan was done on 01/16/2008. They showed no change since the patient's previous examination in 2003. It showed the postop laminectomy to the right of L4-5 and L5-S1, soft tissue density around that thecal sac at L4-L5 and the right side of the thecal side [*sic*] at L5-S1, which does enhance on post contrast sequences indicating granulation tissues, which may be surrounding the exiting nerve roots at those levels disc and osteophytes at L4-5 measuring up to 3 mm slightly flattening thecal sac with moderate neural foraminal encroachment due to disc and osteophytes and moderate facet degenerative changes and mild 2-3 mm broad based disc bulge at L4-S1 with osteophytes. He is status post two level laminectomy with chronic degenerative changes. He had been through therapy, injections and had surgery. He continues to take medication even up to this day. For many years, we have called him permanent and stationary. It appears that he does not really

have a good outcome likely with surgical intervention. We called him permanent and stationary in 2008. At that time, we said that he was placed on modified restrictions including modified work, no more than 8 hours per day, AM shifts only. This was to make sure that he did not work more than he could tolerate. It was also to make sure that he would get adequate sleep. In addition to this, he should not lift greater than 50 pounds which is quite a limitation for a man of his size, have only limited bending, pulling, pushing and reaching. He should be involved in no altercations. So he could not do the job. He was limited in all that fashion. It is my feeling that he could never return as a Cook I and is very limited in his abilities. I do not feel he could work more than 8 hours, work different shifts, lift more than 50 pounds or do pushing, pulling or reaching more than occasionally. I believe he is permanent and stationary with these restrictions, and at the time of retirement, Mr. Hope, was substantially incapacitated from doing his duties as Cook I.

22. At CalPERS's request, applicant underwent an Independent Medical Examination with Joseph Serra, M.D., an orthopedic surgeon, on January 15, 2009. In forming his opinions about applicant, Dr. Serra relied on his personal interview and examination of him, review of his medical records from May 20, 1994, through July 25, 2008, and his understanding of the normal duties of a Correctional Supervising Cook I.

23. In his written report of his January 15, 2009 Independent Medical Examination of applicant, Dr. Serra wrote the following about applicant's present complaints:

The major area of pain is in Mr. Hope's right buttock and posterior thigh, radiating along the lateral aspect of his right leg to his foot. This pain is constant and is present both day and night.

He occasionally has sharp pain over the top of his right foot. At times, his entire right foot becomes numb and stays that way for the entire day. He also notices weakness in his right lower extremity.

With reference to his feet, Mr. Hope states that the arches of his feet are painful. Due to his back, hip, and leg pain, he tends to invert his foot and this has resulted in pain along the lateral aspect of his foot. He is seeing a doctor of podiatric medicine who has recommended shoes and rest.

Mr. Hope's symptoms, specifically in his back and legs are aggravated by standing longer than 30 minutes. His sitting tolerance is 35-40 minutes. His walking tolerance is 30 minutes with pain.

Mr. Hope's symptoms are somewhat relieved by swimming, which he is doing three times a week at present. Applications of ice or heat also help. Salve also helps to some degree. The TENS unit is helpful. He states that medications help very little.

Mr. Hope does experience pain with sneezing that is referred to the lower back.

Mr. Hope has no bowel problems, however, he does have hesitancy in urination. He has felt that this is due to his back injury. His prostrate [*sic*] has been evaluated and apparently is not a cause of his urinary symptoms.

24. Upon examination, Dr. Serra noted tenderness over the quadratus lumborum bilaterally, as well as tenderness to palpation over the right sciatic notch. Applicant's range of motion in his lumbar spine was 25 percent of normal upon flexion, 25 percent of normal upon extension, and 25 percent of normal bilaterally upon lateral bending, with complaint of stiffness on extremes. Rotation was 25 percent of normal bilaterally, also with discomfort and tightness upon rotation.

25. With regard to the neurologic examination of applicant's lower extremities, Dr. Serra wrote:

There is significant weakness in the right extensor hallices longus and dorsiflexors of the right foot in comparison to the left. There also is diminished sensation to light touch and pinprick throughout the L5 dermatome pattern of the right lower extremity. This extends from the lateral right side towards the anterolateral aspect of the right lower leg and the dorsum of the right foot. There is also mild sensory loss in the left L5 dermatome pattern. Peripheral pulses are intact. Lasegue's and Trendelenburg's tests are negative. Heel and toe standing are carried out well. Squatting is essentially normal.

26. With regard to whether there are any specific job duties he believes applicant is unable to perform because of a physical or mental condition, Dr. Serra wrote:

No. It is my opinion that while Mr. Hope's subjective complaints may make performing certain tasks difficult by causing some pain or discomfort, there are not sufficient

abnormal physical findings that support his subjective complaints, or that suggest that he would be unable to perform his usual and customary work activities.

Therefore, Dr. Serra opined that applicant is not substantially incapacitated for the performance of his usual job duties as a Correctional Supervising Cook I.

27. Dr. Serra testified at hearing in a manner consistent with his written report. Additionally, he criticized Dr. Rhoades' opinion that applicant is substantially incapacitated because the work restrictions Dr. Rhoades imposed could easily be accommodated by applicant's employer, as evidenced by the physical requirements for the position of Correctional Supervising Cook I.

#### *Discussion*

28. Dr. Serra's opinion that applicant is not substantially incapacitated for the performance of the usual duties of his position as a Correctional Supervising Cook I is more persuasive than Dr. Rhoades' opinion to the contrary. Dr. Serra's opinion was based upon his physical examination of applicant on January 15, 2008, whereas there was no evidence that the opinions Dr. Rhoades expressed in his January 29, 2014 letter were based on a physical examination of applicant more recent than April 30, 2008. Additionally, Dr. Serra's opinion was subject to scrutiny at hearing, whereas Dr. Rhoades' was not. Finally, Dr. Serra's criticism of Dr. Rhoades' opinion is well-taken since Mr. Hope's position only "occasionally" required him to push, pull, or reach for things or lift items weighing greater than 50 pounds (but never anything greater than 76 pounds).

### LEGAL CONCLUSIONS

#### *Applicable Statutes*

1. Government Code section 20026 provides, in pertinent part:  
  
"Disability" and "incapacity for performance of duty" as the 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 21151, subdivision (a), provides: "Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service."
3. Government Code section 21156, subdivision (a)(1), 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.

4. The issue of whether applicant is substantially incapacitated for the performance of his usual job duties as a result of a disability is the sole issue for determination on appeal. The issue of causation shall be determined as provided in Government Code section 21166, which states:

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, or in the case of a local safety member by the governing body of his or her employer, is industrial and the claim is disputed by the board, or in case of a local safety member by the governing body, the Workers' Compensation Appeals Board, using the same procedure as in workers' compensation hearings, shall determine whether the disability is industrial.

The jurisdiction of the Workers' Compensation Appeals Board shall be limited solely to the issue of industrial causation, and this section shall not be construed to authorize the Workers' Compensation Appeals Board to award costs against this system pursuant to Section 4600, 5811, or any other provision of the Labor Code.

*Burden of Proof and Legal Standards for Determining Disability*

5. Applicant has the burden of proof to establish by a preponderance of evidence that he is "incapacitated for the performance of duty," which courts have interpreted to mean "the substantial inability of the applicant to perform [his] usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) Discomfort, which may make it difficult to perform one's duties, is insufficient to establish permanent incapacity for the performance of her position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; citing, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability determined. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

*Conclusion*

6. As set forth in Factual Finding 28, the persuasive medical evidence established that applicant is not substantially incapacitated for the performance of his usual duties as a Correctional Supervising Cook I with the California Department of Corrections and Rehabilitation, Sierra Conservation Center due to orthopedic conditions.

ORDER

The Application of Jimmy Hope for disability retirement benefits is DENIED.

DATED: February 21, 2014

  
COREN D. WONG  
Administrative Law Judge  
Office of Administrative Hearings