

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Involuntary
Reinstatement from Industrial Disability
Retirement of:

MELLODY M. WILSON,

Case No. 2012-0905

Respondent,

OAH No. 2013030585

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
STATE PRISON – CORCORAN,

Respondent.

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, Office of Administrative Hearings, on February 13, 2014, in Fresno, California.

The California Public Employees' Retirement System (CalPERS) was represented by Elizabeth Yelland, Senior Staff Counsel.

Melody Wilson appeared on her own behalf. There was no appearance on behalf of the California Department of Corrections and Rehabilitation, State Prison, Corcoran.

Evidence was received, the record was closed, and the matter was submitted for decision on February 13, 2014.

FACTUAL FINDINGS

1. Melody M. Wilson (respondent) was employed by the California Department of Corrections and Rehabilitation (Department) as a Correctional Officer. By virtue of her

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 24 FEB 2014
[Signature]

employment, respondent was a state safety member of CalPERS subject to Government Code section 21151.¹

On April 10, 2003, respondent filed an application for industrial disability retirement with the Benefits Services Division of CalPERS. Industrial disability retirement was approved by CalPERS for respondent. She retired for disability effective June 10, 2002.

Respondent was born on October 24, 1976. She was under the minimum age for voluntary service retirement applicable to members of her classification. (Gov. Code, § 21060.)

2. CalPERS may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service to undergo a medical examination. (Gov. Code, § 21192.) By letter dated December 8, 2011, CalPERS requested respondent to undergo such examination, which she did in August 2012.

CalPERS obtained or received medical reports concerning respondent's orthopedic (left hip) condition from competent medical professionals. After reviewing the reports, CalPERS determined that respondent was no longer disabled or incapacitated from performance of her duties as a Correctional Officer. CalPERS' determination was based upon its review of medical records pertaining to respondent's orthopedic condition, including a report prepared by orthopedic surgeon Mohinder Nijjar, M.D.

By letter dated October 15, 2012, CalPERS notified respondent of its determination and advised her of her appeal rights. Respondent filed an appeal and request for hearing by letter dated November 1, 2012. CalPERS filed an Accusation on February 22, 2013. Per the Accusation, respondent's appeal is limited to the issue of "whether respondent Wilson is disabled or incapacitated from performance of her usual duties." If her left hip disability no longer exists, CalPERS requests that she be reinstated to her former usual job duties as a Correctional Officer with the California Department of Corrections and Rehabilitation, State Prison – Corcoran.

3. Respondent began working as a Correctional Officer in July 1999. She reported that an ill-fitting utility vest caused her to experience pain in her left hip. She was diagnosed with trochanteric bursitis, and treated with Celebrex and anti-inflammatory medications. She was declared permanent and stationary as of May 3, 2002, and applied for retirement when it was determined that she was unable to return to work.

4. The Department of Corrections and Rehabilitation has identified 37 "Essential Functions" for the position of a correctional officer, including the following:

¹ 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."

- Must be able to work in both minimum and maximum security institutions as well as male and female institutions
- Must be able to perform the duties of all the various posts
- Must be able to work overtime. Overtime is mandatory and could be 8 hours at one time, and on very rare occasions up to 16 hours in a situation such as a riot
- Must range qualify with departmentally approved weapons, keep a firearm in good condition, fire weapon in combat/emergency situation
- Must be able to swing baton with force to strike an inmate
- Disarm, subdue and apply restraints to an inmate
- Defend self against an inmate armed with a weapon
- Inspect inmates for contraband, conduct body searches
- Occasionally, lift and carry an inmate and physically restrain the inmate including wrestling an inmate to the floor, track/carry an inmate out of the cell, perform lifting/carrying activities while working in very cramped space
- Must have mental capacity to be aware/alert in their observation/identification of security risks. Correctional Officers are at risk to [*sic*] a variety of inmate behaviors, including but not limited to aggressive or violent inmates, psychological manipulation, or verbal abuse/harassment. Correctional officers must also have mental capacity for exposure to very unpleasant situations including inmates who have attempted or committed suicide by hanging themselves in their cell or slashing their wrists, or inmates who throw bodily fluids at them
- Must have the mental capacity to judge an emergency situation, determine the appropriate use of force, and carry out that use of force. Use of force can range from advising an inmate to cease an activity to firing a lethal weapon at an inmate when another life is threatened with great bodily harm or death

Other essential functions include the ability to walk occasionally to continuously; run occasionally while responding to alarms or serious incidents; climb occasionally to frequently; ascend or descend stairs or ladders; crawl and crouch occasionally; stand occasionally to continuously; sit occasionally to continuously; stoop and bend occasionally to frequently; lift and carry continuously to frequently (20 to 50 pounds) and occasionally up to 100 pounds; continuously wear equipment belt weighing 15 pounds; pushing and pulling occasionally to frequently; reaching occasionally to continuously, reach overhead while performing cell or body searches, etc.; head and neck movement frequently to continuously throughout the workday; arms movement occasionally to continuously; hand and wrist movement frequently to continuously; and twisting of the body frequently to continuously.

Evaluation by Mohinder Nijjar, M.D.

5. Respondent was seen for an independent medical examination by orthopedic surgeon Mohinder Nijjar, M.D., on or around August 16, 2012, in Visalia, California. Dr. Nijjar is board certified in orthopedic surgery and has been licensed to practice medicine in California since 1980. Dr. Nijjar testified at hearing.

Respondent reported to Dr. Nijjar that she had pain in the left groin area, constant, and with an intensity ranging from 4 to 9 on a 10-point scale. She reported that the pain worsened with standing more than five minutes, and walking for more than 10 minutes. She indicated that bending and squatting hurt more than the pain she constantly experienced. And that sitting for over 20 to 30 minutes increased pain in the groin. Respondent also reported that her knees were popping because of the hip pain she was experiencing.

6. Dr. Nijjar reviewed respondent's job description as a Correctional Officer, including the physical requirements for the position as summarized in Finding 4.

Dr. Nijjar also reviewed the substantial medical records and reports dating from a January 17, 2001 image of respondent's left hip, to May 1, 2012 medical progress notes prepared by R. Castillo, M.D. Dr. Nijjar considered a number of medical records and reports from other physicians including Christopher Parks, M.D., Michael Tivnon, M.D., Ajit S. Nijjar, M.D., Gaylene Solonuisck-Tays, M.D., Timothy Brox, M.D., David Schale, M.D., Frank Cantrell, M.D., Merlin Smith, M.D., Frank Archibeque, M.D., Rolf Sherman, M.D., Robert Reinke, M.D., Kamran Koochek, M.D., Kenneth W. Melashenka, M.D., Robert Stevenson, M.D., Kok L. Chong, M.D., Robert Rabiea, M.D., Deborah Ash, M.D., and Sanjeev Athale, M.D.

7. Dr. Nijjar also viewed and considered surveillance video taken of respondent in July 2011.² He provided the following summary of the video that he reviewed:

[Respondent] is seen to be performing normal activities of life where she was seen walking pretty briskly, running, boating, bending, and squatting. For most of the activities portrayed in these video tapes recorded, she was seen to have no pain behavior. Most of the activities she could perform were without any limitation and there were no signs of any limitation of hip function in the activities. No restricted motion is noted. No limp is noted. There were no signs of hip pain involvement, which if there was, would be noticeable in these video tapes.

² Two DVDs were prepared from the surveillance video and included in the record as Exhibits 12 and 13. Exhibit 12 is one hour and 55 minutes, and was taken over July 13 and 14, 2011. Exhibit 13 is 53 minutes and spans over July 14, 26 and 27, 2011.

8. Upon orthopedic and physical examination, Dr. Nijjar noted that respondent was in no acute distress, and that she ambulated without any limp. He made the following findings upon examination of her left hip:

Left hip examination shows the claimant has no deformity and has no tenderness over the anterior aspect of the hip at the joint line. There is no tenderness over the greater trochanteric area, no tenderness is noted over the posterior joint line, and no tenderness noted over the inner aspect of the hip joint in the abductor area.

She has no tenderness or pain associated with stretching of the iliopsoas tendon, thus to rule out any iliopsoas tendonitis or bursitis.

She has no tenderness, which could be elicited with hyperflexion of the hip and with internal or external rotation in hyperflexed position, indicating no labral impingement signs.

Her range of motion in the left hip was flexion 110°/110°, extension 30°/30°, abduction 40°/40°, adduction 30°/30°, internal rotation 30°/30°, and external rotation 30°/30°.

All range of motion accomplished did not have any pain associated with range of motion.

9. Dr. Nijjar's diagnosis was "Trochanteric bursitis, resolved." He found no signs of this condition on physical examination and noted that once resolved, it is not a condition that is likely to recur. Dr. Nijjar opined that respondent is not substantially incapacitated at this time from performance of her duties as a Correctional Officer. He explained: "After review of job description, medical records, total work up, tests done on her, and evaluation of the surveillance videos, in my medical opinion, there are no specific job duties that this claimant cannot perform at this time."

10. Dr. Nijjar further indicated that respondent cooperated with the examination, although he believes that she exaggerated her complaints of pain. He noted, for example, that "the examination was normal, but complained of 4 to 9 out of 10 pain, which is moderate to severe pain in the hip and that she could not walk for more than 10 minutes at a time. This was inconsistent with the exam findings."

Other Medical Evidence

11. Respondent submitted documentation related to a December 4, 2012 visit with her primary care provider, Kenneth Melashenko, M.D. It appears that she was diagnosed with "bursitis of hip" and referred for physical therapy. Respondent was provided physical

therapy through All Sports Therapy Athletic Rehabilitation, Inc., in Hanford, California. By letter dated January 13, 2013, Richard Bebout, P.T., C.E.A.S., confirmed that respondent had been seen for eight treatments, consisting of “moist heat packs to the back, soft tissue massage and mobilization of the back, myofascial stretching of the lower quadrant, instructions in a lower quadrant stretching and strengthening exercise program, and low level laser therapy to the sacroiliac joint.” Mr. Bebout prepared a second letter dated February 13, 2013, indicating that respondent had received an additional seven treatments by that time.

Respondent's Testimony

12. Respondent last received treatment through All Sports Therapy Athletic Rehabilitation, Inc. in November 2013. She continues to engage in stretching exercises, and sometimes takes over the counter medications to manage any pain. She averred that she did not ask to be retired, and that if CalPERS determines that she is able to return to work she will go back and perform “as best as can.”

Discussion

13. CalPERS has demonstrated through competent medical evidence that respondent is not permanently disabled or incapacitated from performance of her duties as a Correctional Officer with the Department of Corrections and Rehabilitation. Competent medical evidence in the form of Dr. Nijjar's medical report and testimony following medical orthopedic evaluation support a finding that respondent's left hip trochanteric bursitis is resolved. This condition no longer substantially incapacitates respondent from performing her Correctional Officer duties. There was no competent medical evidence to the contrary in the record that could be considered as direct evidence in this case.

14. Dr. Nijjar engaged in a thorough review of respondent's case history and medical records. He observed video surveillance video taken as recently as July 2011. His summary of the surveillance video is accurate. It is apparent that respondent can perform normal activities of life without any limitation, including “walking pretty briskly, running, boating, bending, and squatting.” Dr. Nijjar's findings on orthopedic and physical examination are not in dispute, and are consistent with his opinion that her trochanteric bursitis is resolved. After consideration of the medical evidence relating to respondent's orthopedic hip condition, CalPERS's request that respondent be reinstated to her former usual duties as a Correctional Officer should be granted.

LEGAL CONCLUSIONS

1. 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.”

Government Code section 20026 provides that “ ‘Disability’ and ‘incapacity for performance of duty’ as a basis of retirement, means disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion.”

2. Being “incapacitated for the performance of duty” means the “*substantial* inability of the applicant to perform his usual duties.” (*Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, 875, italics original; *Curtis v. Board of Retirement of Los Angeles County Employees Retirement Association* (1986) 177 Cal.App.3d 293, 297-298 [applying the *Mansperger* standard for “incapacitated for the performance of duty” to the County Employees Retirement Law of 1937].) The inability to perform some of the duties of a position does not render one disabled. (*Mansperger v. Public Employees Retirement System, supra*, at pp. 876-877 [fish and game warden’s inability to carry heavy items did not render him substantially incapacitated because the need to perform such task without help from others was a remote occurrence].)

In *Mansperger*, the court explained that the term “incapacitated for the performance of duties” meant a substantial inability to perform the employee’s usual duties. (*Id.* at p. 876.) The applicant in *Mansperger* was a warden with the Department of Fish and Game whose physician opined that he could no longer perform heavy lifting and carrying. The evidence established that such tasks were an infrequent occurrence, and the applicant’s customary activities were the supervision of hunting and fishing. The *Mansperger* court found that the applicant was not entitled to disability retirement because, although he suffered some physical impairment, he could perform most of his usual job duties.

3. Subsequently, in *Hosford v. Board of Administration of the Public Employees’ Retirement System* (1978) 77 Cal.App.3d 854, the Court of Appeal applied the *Mansperger* test to the disability retirement claim of a California Highway Patrol sergeant who sustained injuries to his back and leg, which restricted his ability to carry out some of the functions of a patrol officer, including driving a patrol car for lengthy periods. Regarding whether there must be actual present disability or whether fear or possibility of future injury is sufficient to find disability, the court noted that “Hosford relied and relies heavily on the fact that his condition increases his chances for further injury . . . this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently in existence.” The *Hosford* court held that the disability or incapacity must presently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient. (*Id.* at p. 862.)

4. Evidence of the employee’s permanent incapacity must be based on competent medical evidence. (Gov. Code, § 31720.3.)

5. Government Code section 21192 provides as follows:

The board, or in case of a local safety member, other than a

school safety member, the governing body of the employer from whose employment the person was retired, may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, shall also cause the examination to be made upon application for reinstatement to the position held at retirement or any position in the same class, of a person who was incapacitated for performance of duty in the position at the time of a prior reinstatement to another position. The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

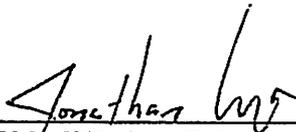
6. The matters set forth in Findings 3 through 14 have been considered. It was established through competent medical evidence that respondent's orthopedic left hip condition no longer substantially incapacitates her from the performance of her usual and regular duties as a Correctional Officer with the California Department of Corrections and Rehabilitation, State Prison - Corcoran. Dr. Nijjar's report and testimony comprised the only competent and direct medical evidence in this case. He opined that there are no job duties that respondent could not perform because of her physical condition, and that she is not substantially incapacitated for the performance of her duties. Respondent presented no competent medical evidence to the contrary.

ORDER

CalPERS's determination that Mellody M. Wilson is no longer disabled or incapacitated from performance of her duties as a Correctional Officer is **AFFIRMED**.

CalPERS's request that respondent be reinstated to her former usual job duties as a Correctional Officer with the Department of Corrections and Rehabilitation is GRANTED.

DATED: February 20, 2014



JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings