

ATTACHMENT A
THE PROPOSED DECISION

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

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

DAVID E. EMLER,

Respondent,

and

SUBSTANCE ABUSE TREATMENT
FACILITY AND STATE PRISON –
CORCORAN, CALIFORNIA
DEPARTMENT OF CORRECTIONS
AND REHABILITATION,

Respondent.

Case No. 2013-0495

OAH No. 2013090056

PROPOSED DECISION

This matter was heard before Administrative Law Judge Wilbert E. Bennett, Office of Administrative Hearings, State of California, on June 24, 2014, in Sacramento, California.

Cynthia Rodriguez, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

David E. Emler (respondent) appeared on his own behalf. There was no appearance on behalf of respondent Substance Abuse Treatment Facility and State Prison – Corcoran, California Department of Corrections and Rehabilitation.

Evidence was received, the record was closed, and the matter was submitted for decision on June 24, 2014. Respondent presented no evidence and stipulated to the introduction of all of the CalPERS' exhibits into evidence.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED July 18, 2014
C. Boddy

FACTUAL FINDINGS

1. Respondent was employed by the Substance Abuse Treatment Facility and State Prison – Corcoran, California Department of Corrections and Rehabilitation. At the time respondent filed his application for industrial disability retirement, he was employed as a Licensed Vocational Nurse. By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151, subdivision (a), which provides, in pertinent part, that any state safety member “incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability ... regardless of age or amount of service.”

2. On July 13, 2012, respondent filed an application for industrial disability retirement with the Benefit Services Division of CalPERS. In filing the application, respondent claimed disability on the basis of an orthopedic (right shoulder, right knee) condition.

3. CalPERS obtained medical reports concerning respondent's orthopedic condition from competent medical professionals. After review of the reports, CalPERS determined that respondent was not permanently disabled or incapacitated from performance of his duties as a Licensed Vocational Nurse at the time the application for industrial disability retirement was filed.

4. CalPERS notified respondent of its determination and advised him of his appeal rights, by letter dated April 4, 2013. Respondent filed a timely appeal and requested a hearing, by letter dated May 9, 2013. The appeal is limited to the issue of whether, on the basis of an orthopedic (right shoulder, right knee) condition, respondent is permanently disabled or incapacitated from performance of his duties as a Licensed Vocational Nurse for the Substance Abuse Treatment Facility and State Prison – Corcoran, California Department of Corrections and Rehabilitation.

5. Respondent is approximately 47 years old. He was employed with the Department of Corrections' Substance Abuse Treatment Facility between March 2007, and April 16, 2010. On the latter date, he sustained injuries while engaged in his regular duties when he tripped over a rug and fell to the ground, thereby injuring his right shoulder and right knee. Since then, he has not returned to work. Respondent stated, in his application for industrial disability retirement, that due to his knee condition he has the following limitations/preclusions: No ascending or descending stairs, kneeling, prolonged standing or walking, and no lifting over 25 pounds, and therefore is unable to perform his work duties as an LVN. He further stated that his condition has not improved and that he continues to have limited range of motion, pain, loss of strength, swelling, and instability.

6. On February 27, 2013, respondent was seen by Mohinder Nijjar, M.D., for an independent orthopedic medical evaluation. Dr. Nijjar is a qualified medical evaluator and is a Board-certified orthopedic surgeon. After obtaining a detailed medical history, conducting a medical examination, and reviewing respondent's medical records, Dr. Nijjar prepared a

written report of his findings. That written report was received in evidence by stipulation and constitutes the only competent medical opinion considered in this case.

7. In his report, Dr. Nijjar noted an evaluation by Agreed Medical Examiner, James L. Strait, M.D., who recommended preclusion from prolonged walking and from more than rare kneeling and squatting. Dr. Nijjar also noted an opinion from a treating physician, Amarjit S. Mangat, M.D., that respondent is unable to return to his regular work without the following permanent restrictions: no lifting or carrying above 20 pounds, no squatting or kneeling on the right knee, and no prolonged walking/standing. Dr. Nijjar further noted that respondent's current complaints included constant pain in the right knee and that kneeling and squatting reportedly caused him discomfort. After orthopedic examination of respondent, he made the following diagnoses: 1) sprain/strain, right shoulder; 2) sprain/strain, right knee, and 3) status post-arthroscopic debridement of the right knee.

8. Dr. Nijjar, in his evaluation report, reviewed respondent's job duties and the physical requirements of his position. He opined as follows regarding respondent's ability to perform his duties as a Licensed Vocational Nurse:

From review of this gentleman's job description and his physical examination it is essentially normal, and his MRI scan ... and arthroscopic examination showed minimal degenerative changes that required mild debridement of the patellofemoral and tibiofemoral joint. With that consideration, at this time there is [sic] no specific duties that he is unable to perform because of his physical condition.

Dr. Nijjar's report further noted that, in his professional opinion, respondent "is presently not substantially incapacitated for performance of his duties." Despite the recommendations of the Agreed Medical Examiner and respondent's treating physician that he cannot return to his regular work without preclusions/restrictions, Dr. Nijjar determined that these recommendations were prophylactic and did not find that respondent was unable to perform any essential job duties.

9. Respondent has not demonstrated through competent medical evidence that he is permanently disabled or incapacitated from performance of his duties as a Licensed Vocational Nurse with the Department of Corrections' Substance Abuse Treatment Facility.

Dr. Nijjar's evaluation report is persuasive that respondent's orthopedic (right shoulder, right knee) condition is not disabling. Respondent's application for industrial disability retirement should be denied.

LEGAL CONCLUSIONS

1. Under Government Code section 21150, subdivision (a), a member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability. 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.” In *Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, the court construed the term “incapacitated for the performance of duties” to mean 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 that 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.

2. 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.)

3. Respondent has the burden of proving entitlement to disability retirement. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691; *Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.3d 234, 238.) It is well accepted that CalPERS may rely on decisions affecting other pension plans when the laws are similar, and since Government Code section 31724 (County Employees’ Retirement Law) is similar to Government Code section 21151 (California Public Employees’ Retirement Law), the rule concerning burden of proof shall be applied to cases under CalPERS law. (*Bowman v. Board of Pension Commissioners for the City of Los Angeles* (1984) 155 Cal.App.3d 937, 947.)

4. The matters set forth in Findings 5 through 9 have been considered. It was not established through competent medical evidence that respondent's orthopedic (right shoulder, right knee) condition permanently disabled or incapacitated him from the performance of his usual and regular duties as a Licensed Vocational Nurse with the Department of Corrections’ Substance Abuse Treatment Facility.

ORDER

The application of David E. Emler for industrial disability retirement is DENIED.

Dated: July 14, 2014

A handwritten signature in black ink that reads "Wilbert E. Bennett". The signature is written in a cursive style with a horizontal line drawn through the middle of the text.

WILBERT E. BENNETT

Administrative Law Judge

Office of Administrative Hearings