

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Accusation (Involuntary
Reinstatement from Industrial Disability
Retirement) of:

Case No. 2013-0817

MARION P. BANNISTER,

OAH NO. 2013100882

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION, DEUEL
VOCATIONAL INSTITUTION,

Respondent.

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings,
State of California, heard this matter in Sacramento, California, on July 17, 2014.

Preet Kaur, Staff Attorney, represented complainant Anthony Suine, Chief, Benefit
Services Division, California Public Employees' Retirement System (CalPERS).

Respondent Marion P. Barrister appeared and represented herself.

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

Evidence was received and the matter was submitted on July 17, 2014.

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PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

August 20, 2014
Ruthie E. Schreyer

ISSUE PRESENTED

Whether respondent Marion P. Bannister remains substantially incapacitated for the performance of her usual duties as a Stationary Engineer?

FACTUAL FINDINGS

1. Complainant Anthony Suine filed the Accusation solely in his official capacity as Chief of the CalPERS Benefits Services Division.

2. Respondent Marion P. Bannister (respondent Bannister) was employed by respondent California Department of Corrections and Rehabilitation, Deuel Vocational Institution (respondent CDCR) as a Stationary Engineer. By virtue of her employment, respondent Bannister was a state safety member of CalPERS subject to Government Code section 21151.

3. On or about October 27, 2008, respondent Bannister submitted an application for industrial disability retirement. Industrial disability retirement was approved by CalPERS and respondent Bannister was retired for disability effective September 16, 2009, on the basis of an orthopedic (left shoulder) condition. Respondent Bannister, born on March 18, 1965, was under the minimum age for voluntary retirement applicable to members of her classification when she underwent the medical examination supporting her application.

4. In or about May of 2013, complainant ordered respondent Bannister to undergo a medical examination to determine if she was still substantially incapacitated. Following the examination on June 4, 2013, complainant obtained medical reports concerning respondent Bannister's orthopedic condition from a competent medical professional. After review of the report, complainant determined that respondent Bannister is no longer substantially incapacitated for the performance of her usual duties as a Stationary Engineer.

5. Respondent Bannister was notified of complainant's determination and was advised of her appeal rights by letter dated July 30, 2013.

6. Respondent Bannister filed a timely appeal by letter dated August 2, 2013.

Usual Duties of a Stationary Engineer at Respondent CDCR

7. Two documents describing the usual duties required of a Stationary Engineer at Deuel Vocational Institution were received in evidence. Complainant submitted a job description prepared by the Chief Engineer in March of 2006 and a document entitled Physical Requirements of Position/Occupational Title for respondent Bannister's position dated May 20, 2009, and signed by both respondent Bannister and the Chief Engineer at the time.

8. The job description summarizes the Stationary Engineer's duties as maintaining, repairing and installing the heating, ventilation, air conditioning, refrigeration, and mechanical/electrical systems throughout the prison. Additional duties include operation, maintenance and repair of electrical circuitry up to 550 volts, compressed air systems, natural gas distribution piping, water lines, plumbing, high pressurized air systems, laundry equipment, HVAC, refrigeration, lighting, security locking devices, and food service equipment.

9. Relevant essential duties listed in the job description include working in confined spaces such as crawl spaces, using a large pipe wrench to open and close steam valves, and cleaning or patching fire brick. In the section titled "PHYSICAL DEMANDS," relevant tasks include lifting and carrying tools weighing approximately 20 pounds (although a hand truck may be available) and carrying other heavy objects such as mortar mix, motors, pumps, or air conditioning units (typically with inmate or other engineers to assist). The position requires reaching overhead while standing on a ladder to perform tasks such as removing steel security door covers, installing conduit, and performing plumbing or electrical repairs. Pushing and pulling are frequently required during repair and installation activities. Inmates may assist when available and if the work is not performed in a restricted area. A stationary engineer uses basic hand tools and, occasionally, large pipe wrenches, pipe threaders, pipe cutters, electric drills, welding torches, and reciprocating saws.

10. The relevant portions of the physical requirements document include occasional reaching above the shoulders, frequent pushing and pulling, power grasping, lifting and carrying up to 25 pounds frequently and up to 100 pounds or more occasionally. Working at heights is occasionally required and working with heavy equipment is frequently required.

11. In her application for industrial disability retirement, respondent Bannister described her physical limitations as "limited use of left arm, in lifting, pulling, torqueing, and carrying." She stated that she was unable to use hand tools, reach overhead, lift heavy objects, and push or pull rolling carts. She added that any use of her left arm created pain in her left shoulder lasting up to three days.

12. Respondent Bannister testified at the administrative hearing and said that she could not carry wrenches or tool boxes and she could not climb a ladder.

Competent Medical Opinion

13. Respondent Bannister did not call any medical expert to support her claim of continued disability. She did submit a report authored by Edward Tapper, M.D., a board certified orthopedic surgeon, dated January 25, 2008, the findings of which are addressed in the summary of Dr. Serra's testimony below.

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Joseph Serra, M.D.

14. Dr. Serra is a board certified orthopedic surgeon. He examined respondent Bannister at the request of CalPERS on June 4, 2013, and authored a report on the same day. The report was received in evidence and Dr. Serra testified about his examination of respondent Bannister and his conclusions relating to her continued disability.

15. Dr. Serra asked respondent Bannister to complete a multi-page health history questionnaire and discussed her responses with her as part of her history. Respondent first injured her left shoulder in March of 2001. She was up on a ladder removing a steel cover from a cell door. She underwent arthroscopic surgery for repair of a SLAP tear (labral tear). She reported that she did not quite recover her full range of motion, but she returned to full duty in November of 2001. Respondent Bannister suffered a second on-the-job injury to her left shoulder in October of 2004 caused by pulling a heavy object. She did not seek medical treatment until December of 2006. An MRI was performed in March of 2007 followed by an orthopedic consultation. A second arthroscopy was recommended and was performed on June 26, 2007. The post-operative diagnosis was impingement syndrome, labral tear, chondromalacia glenohumeral joint. The surgical procedures were subacromial decompression, labral debridement, chondroplasty, and removal of loose bodies in the glenohumeral joint of the left shoulder. On a follow-up visit on August 30, 2007, respondent Bannister was pleased with her overall progress, but experienced persistent discomfort with overhead reaching. A short course of physical therapy was recommended and the orthopedic surgeon declared respondent Bannister eligible for modified work, if such work was available.

16. Respondent Bannister told Dr. Serra that her physical complaints included continual pain in her left shoulder which she described as a dull ache with occasional stabbing pain that can last for seconds. The pain increased with activity and when lying on her shoulder at night. Her symptoms are aggravated by attempting to lift overhead. The level of continual pain was quantified by respondent Bannister as a one to two on a ten point scale, and a two to five level of pain about once a week.

17. Dr. Serra's physical examination of respondent Bannister revealed no atrophy in her upper extremities which showed that she was regularly using both her shoulders and arms. There was tenderness to the touch in the left shoulder and occasional clicking sounds when her left arm was abducted 90 degrees and rotated. She had good range of motion in both shoulders with flexion (arms raised up in front of body), to 170 degrees for both. The right shoulder range of motion in abduction (arms raised to side of body) was 170, while the left was 100 degrees, or a bit above shoulder level. Respondent Bannister complained of pain at that level. Respondent Bannister could reach behind her with the right arm to the thoracic level of her spine, but only to the lumbar level with her left. She had excellent active strength in her biceps, triceps, wrists, and hands. There was mild sensory loss in the upper left arm.

18. Dr. Serra also reviewed available past medical treatment reports. The report submitted into evidence by respondent was prepared by Dr. Tapper, an agreed medical examiner and board certified orthopedic surgeon. Dr. Tapper's January 25, 2008 report related to respondent Bannister worker's compensation claim for the 2004 injury to her left shoulder. Dr. Tapper did not consider respondent Bannister "permanent and stationary" because she was only four months post-surgery when he saw her. Dr. Tapper later prepared a permanent and stationary report dated April 3, 2008. Dr. Tapper concluded that respondent Bannister could no longer do her job. An orthopedic independent medical examiner report dated July 10, 2009, authored by Dr. Roy Pottinger described respondent as permanently incapacitated. An August 11, 2011 consultation report prepared by Dr. Erin Forest of Hand Surgery Associates included Dr. Forest's impressions of respondent Bannister's left shoulder as: biceps tendinosis, history of glenohumeral arthritis, and possible irritation of the surgical site. Dr. Forest gave respondent Bannister a cortisone injection in the affected area.

19. Dr. Serra concluded that there were no specific job duties among those listed in the documents described above that respondent Bannister could not perform. He felt that she is not substantially incapacitated for the usual and customary duties of a stationary engineer. He found no incapacity of any significance. In response to a question posed by CalPERS in its letter of engagement about respondent Bannister's cooperation and whether she exaggerated her complaints, Dr. Serra stated that his orthopedic opinion was that there was "significant exaggeration of complaints." He explained that the lack of atrophy showed that respondent Bannister was using her left shoulder "quite efficiently." He also noted she had not sought treatment for the shoulder since the cortisone injection by Dr. Forest in August of 2011, suggesting that it was not serious enough to warrant seeing a physician. In his testimony at the administrative hearing, Dr. Serra acknowledged that respondent Bannister's ability to raise her left shoulder to the side is limited. He added that she is capable of reaching to the side and using tools (respondent was born left handed and described herself as ambidextrous), although it might hurt to do so. He noted that she has no problem reaching above shoulder level to the front and could perform her tasks in that manner. On cross examination, Dr. Serra confirmed that respondent Bannister has grade 4 chondromalacia in her left shoulder joint (deterioration of the cartilage in the shoulder joint), but explained that the wear was not in all spheres of the joint, leaving her cartilage in other areas of the joint. He emphasized that symptomology was the important consideration.

Respondent Bannister's Testimony

20. Respondent Bannister last worked for respondent CDCR on May 1, 2007. She explained that she did not see a physician until 2006 for her 2004 injury because as a female in a male work environment, she felt the need to work through the pain. However, her condition got worse. She feels she can no longer carry heavy wrenches or a tool box and she cannot climb ladders. She has changed the ways in which she goes about her life to maintain strength in her left shoulder. She described her pain as "real" and feels it is physically impossible to return to her job as a stationary engineer.

Ultimate Factual Conclusion

21. The only "competent medical opinion" received in evidence was that of Dr. Serra who concluded that respondent Bannister is no longer physically incapacitated for the performance of her usual duties as a Stationary Engineer. The one report submitted by respondent Bannister related to a worker's compensation claim and, as the author acknowledged, respondent Bannister was only four months past surgery and not yet stationary and permanent. Dr. Serra considered all of the reports mentioned, but relied principally on his own examination of respondent Bannister when concluding that she could perform the usual tasks of her former position, although some might cause temporary discomfort or pain. Thus, complainant established through competent medical evidence, that respondent Bannister is no longer substantially incapacitated for the performance of her usual duties as a Stationary Engineer at Deuel Vocational Institution.

LEGAL CONCLUSIONS

1. Government Code section 21192 reads:

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.

2. Government Code section 21193 reads:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position. However, in that case, acceptance of any other position shall immediately terminate any right to reinstatement. A recipient who is found to continue to be incapacitated for duty in his or her former position and class, but not incapacitated for duty in another position for which he or she has applied for reinstatement and who accepts employment in the other position, shall upon subsequent discontinuance of incapacity for service in his or her former position or a position in the same class, as determined by the board under Section 21192, be reinstated at his or her option to that position.

If the recipient was an employee of a contracting agency other than a local safety member, with the exception of a school safety member, the board shall notify it that his or her disability has terminated and that he or she is eligible for reinstatement to duty. The fact that he or she was retired for disability does not prejudice any right to reinstatement to duty which he or she may claim.

3. 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....

4. 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; *Hosford v Board of Administration* (1978) 77 Cal. App.3d 854, 856-857.)

5. Respondent Bannister is no longer physically incapacitated for duty as a Stationary Engineer with respondent CDCR, and is subject to reinstatement and cancellation of her retirement allowance pursuant to Government Code sections 21192 and 21193.

ORDER

Respondent Bannister's appeal from CalPERS' determination that she is no longer permanently disabled or incapacitated from performance of her usual duties as a Stationary Engineer with respondent CDCR, is DENIED.

Dated: August 13, 2014



KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings