

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
Disability Retirement of:

JONATHAN S. DRUCKER,
Respondent,

and

DEPARTMENT OF PARKS AND
RECREATION,

Respondent.

CalPERS Case No. 2014-0367

OAH No. 2014050147

PROPOSED DECISION

Heidi R. Weisbaum, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in San Diego, California, on August 7, 2014.

Christopher C. Phillips, Staff Attorney, represented petitioner, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System.

Respondent Jonathan S. Drucker represented himself in these proceedings.

No appearance was made by or on behalf of respondent Department of Parks and Recreation.

The record was closed and the matter submitted on August 7, 2014.

DEFAULT

As to respondent Department of Parks and Recreation, on proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default pursuant to section 11520.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED Aug 5 2014
[Signature]

ISSUE

Was respondent Drucker permanently disabled from performing the usual and customary duties of a State Park Peace Officer Supervisor I /Lifeguard (limited term), as a result of orthopedic conditions (lumbar spine disc displacement with radiculitis), at the time he applied for disability retirement?

FACTUAL FINDINGS

Preliminary Matters

1. Respondent Jonathan S. Drucker (respondent) was employed by respondent Department of Parks and Recreation as a State Park Peace Officer Supervisor I /Lifeguard, Limited Term (LT). By reason of his employment, respondent is a state safety member of the California Public Employees' Retirement System (CalPERS) subject to Government Code section 21151.

2. On May 30, 2012, respondent signed a Disability Retirement Election Application that he filed with CalPERS. In his application, respondent claimed the right to receive a disability retirement on the basis of an orthopedic condition, specifically lumbar spine disc displacement with radiculitis, stemming from a 2009 injury.

3. CalPERS obtained medical records and reports related to respondent's condition. CalPERS selected a physician to conduct an independent medical exam (IME). The physician provided two narrative reports containing findings and conclusions related to respondent's asserted eligibility for a disability retirement.

4. After reviewing the various records and reports, CalPERS determined that respondent's orthopedic back condition was not disabling and that he was not substantially incapacitated from the performance of his job duties as a State Park Peace Officer Supervisor I/Lifeguard LT.

5. By letter dated October 30, 2013, CalPERS notified respondent of its denial of his application and of his right to appeal.

6. By letter dated November 15, 2013, respondent timely appealed CalPERS' denial.

7. On May 1, 2014, petitioner filed the statement of issues in his official capacity. The statement of issues and other jurisdictional documents were served on all respondents. The Department of Parks and Recreation did not respond to the statement of issues or appear in this matter.

Respondent's Background

8. Respondent was born on September 26, 1960. He has a bachelor's degree in physics from the University of California at Irvine. He currently lives with his wife and young son in New Zealand.

9. Respondent began working as a seasonal lifeguard in southern California in 1978. In 1989, he took the training for and subsequently became a permanent State Park Peace Officer/Lifeguard and began working full-time. From about March 1991 until July 2012, when he retired, respondent worked the Western Malibu Sector of the Angeles District of the California State Parks.

10. In 2004 and 2008, respondent injured his lower back during aquatic rescues. He recovered from those injuries.

The 2009 Injury

11. On August 5, 2009, respondent was injured while removing first aid equipment from his rescue truck. The equipment weighed approximately 20 pounds. He bent to take it out of the truck and started to walk away when a strap on the equipment got caught on the truck causing him to twist his body around. He was in some discomfort, but the pain was not severe at the time. The next morning he awoke and felt his back seize up. He could not move very well, took some Ibuprofen, and lay around his home. He did not go to work, as he had been scheduled to have 10 days off for vacation. After three to four days, the pain had decreased to a more manageable level. Respondent knew some stretching exercises that had helped with his earlier injuries and believed this new injury would respond to the exercise regimen as well. It did not.

12. Over the next three years respondent continued to be in pain, sought medical attention, and received different types of treatment for the injury. He continued to work despite the injury until July 5, 2012, when he retired from state service.

Respondent's Normal and Usual Duties

13. Petitioner submitted the Duty Statement for a State Park Peace Officer Supervisor I/ Lifeguard LT. The duties are divided into six groups. Two groups, Aquatic Safety (30%) and Patrol and Protection (20%), involve responding to lifesaving emergencies, both aquatic and non-aquatic. Aquatic Safety also includes supervising and providing information and training to lower-level seasonal lifeguards, as well as investigating major water hazards and recommending action for their removal.

14. The remaining 50% of the job duties are divided into the following groupings: Management/Supervision (25%), Administration (10%), Information and Interpretation (10%), and Facility/Equipment Maintenance (5%). These duties include supervising seasonal lifeguards, planning and participating in staff meetings, coordinating

aquatic programs, ensuring personnel conform to policies and procedures, scheduling of staff, preparation of necessary reports, disseminating information to the public, and facilitating the maintenance of all emergency equipment from the vehicles to the resuscitators.

Dr. Peter Gleiberman, M.D.

15. Dr. Gleiberman is a Board certified orthopedic surgeon who specializes in sports medicine, arthritis and adult reconstruction, and total joint replacement. He was the physician selected by CalPERS to perform the IME. He conducted the examination on August 14, 2013, and wrote a report with his findings and conclusions.

16. Dr. Gleiberman's report described his examination of respondent, which consisted of taking a history, conducting a physical examination, and getting x-rays of the lumbar spine. Respondent reported having back and right-sided leg pain, but said he was more troubled by the low back pain than the leg pain. The pain was not daily, but respondent had stiffness daily. When the back pain was bad, it was about an eight on a scale of one to ten. The pain was worse with extension movements of the lumbar spine and with pushing, pulling or lifting more than 25 pounds. Some days respondent could lift 25 pounds; some days he could not because of the pain. Respondent said he could walk without difficulty, but prolonged sitting or standing in one position caused more pain. Respondent described his job as one of public safety that required him to rescue swimmers, climb over rocks, lift 100 pounds, and wear a gun. Respondent experienced back spasms during the exam, which Dr. Gleiberman was able to palpate. The x-rays showed underlying spasm, significant disc space narrowing at L5-S1 and L1-2, and widespread osteophytes¹ throughout the lumbar spine indicating degenerative changes.

17. Respondent informed Dr. Gleiberman that an MRI showed significant degenerative disc disease, and that electrodiagnostic studies showed some type of nerve deficit in his right leg.

18. Based on his examination and the representations from respondent regarding the MRI and the electrodiagnostic studies, Dr. Gleiberman concluded that respondent was not able to function as a true lifeguard because he could not respond to emergency situations. He believed respondent should be restricted from pulling someone out of the water, from any heavy lifting or forceful pushing or pulling, from subduing a suspect, from any dangerous situations, from lifting over 25 pounds, and from carrying a gun. He did not think respondent should be responsible for public safety because of the possibility of his back seizing up. He believed respondent was substantially incapacitated from the performance of his duties and that his incapacity was permanent. But Dr. Gleiberman also opined that respondent could do administrative work, as long as he was "not put in a position where he has to run, jump or try to take someone out of the water."

19. Dr. Gleiberman found respondent to be fully cooperative and forthright. He did not see any signs of embellishment on respondent's part.

¹ Osteophytes are small abnormal bony outgrowths.

20. Dr. Gleiberman was subsequently provided with respondent's medical records, the Duty Statement for respondent's position, and respondent's disability retirement election application. Dr. Gleiberman quoted the following information from the records in his supplemental report:

In January 2010, respondent sought medical attention because of persistent pain. He was treated with Ibuprofen and pain medications, and was referred for heat and electrical stimulation.

In February 2011, respondent had electrodiagnostic studies done, which were reported as negative for lumbar radiculopathy.

In April 2011, respondent had an MRI, which showed bulging discs, disc space narrowing, disc desiccation, anterior spurring, and adjacent end-plate degenerative changes at the L3-4, L4-5, and L5-S1 levels. There was also mild right and mild to moderate left neural foraminal stenosis at L3-4; mild to moderate right and mild left neural foraminal stenosis at L4-5, and mild to moderate bilateral neural foraminal stenosis at L5-S1.

In September 2011, respondent was considered permanently disabled for workers' compensation purposes.² He was also considered to need continuing medical care and to have a permanent disability of 17%. The determination was made by an agreed medical examiner (AME) following a comprehensive medical evaluation.

In November 2011, respondent received epidural injections at the L3-5 levels.

21. Two reports in particular caused Dr. Gleiberman to revise his original opinion. Dr. Gleiberman agreed the MRI showed multi-level disease. But, he explained that he expected to see a positive electrodiagnostic study when, in fact, it was negative for lumbar radiculopathy. And the AME done for the worker's compensation claim gave respondent a diagnosis related estimate lumbar category II 7% impairment, which he stated was low. He was expecting to see a category III rating, which implies impairment.

22. After reviewing all the newly-provided reports, Dr. Gleiberman focused on the supervisory aspects of the Aquatic Safety category of the Duty Statement and found that respondent could do more than 50% of this category. He then concluded that respondent could

² The State Compensation Insurance Fund is the workers' compensation claims administrator for respondent Department of Parks and Recreation.

do most of the overall job duties, even though he continued to believe that he should be restricted from any rescue operations, Patrol and Protection responsibilities, heavy lifting, and carrying a gun. His opinion was that respondent could continue to work with the above restrictions.

Respondent's Testimony

DESCRIPTION OF THE WESTERN MALIBU SECTOR AND THE LIFEGUARD STAFFING

23. Respondent testified that understanding the regular duties of his position required knowledge of the Western Malibu Sector. He described the Western Malibu Sector as covering approximately 12 miles of coastline from the Santa Monica Mountains to the Pacific Ocean, and from El Matador State Beach to Mugu Beach. It includes 10 sandy state beaches, five beaches in the zone of impact³ separated by rocky outcroppings and headlands, three coastal campgrounds and a fourth non-coastal campground for a total of 325 campsites, as well as 40 square miles of backcountry. Vehicle access to many of the beaches is impossible, so the lifeguards are required to scramble over rocky areas or up and down cliffs to respond to both emergency and non-emergency situations. There is also a stretch of coastline where the mountains end precipitously at the ocean's edge. This area has been the scene of numerous incidents involving cars careening off the highway into the ocean, fishermen and waders being washed off the rocks, and suicides.

24. The Western Malibu Sector is covered by State Park Peace Officer/Rangers, as well as Peace Officer/Lifeguards. The primary difference between Park Rangers and Park Lifeguards is that the lifeguard skill set is designed for incidents in and around water, although lifeguards are also expected to respond to emergencies in the backcountry, if needed.

25. Peak season for the Western Malibu Sector is from May to October. Respondent stated that staffing during the peak season included approximately 19 to 21 employees - one permanent lifeguard supervisor, three permanent lifeguards, and the remainder intermittent and seasonal lifeguards. By contrast, during the off-season, October to May, staffing consists of the four permanent employees, only. Occasionally, there would be additional staff in the off-season if there was funding.

26. During the peak season, one of the permanent lifeguards would be upgraded to a limited term supervisor position to assist the full-time supervisor with the seasonal staff. In April 2011, respondent was upgraded to the limited term supervisor position. He remained in that position until he retired.

27. During the off-season, the schedule would be designed with two qualified lifeguards on duty per day, so that there was always a qualified person to provide backup in an emergency. The need for qualified backup was particularly important for the Western Malibu Sector because it is an inter-tidal zone. Respondent explained that an inter-tidal zone is an area

³ A zone of impact is a non-state park property adjacent to a state park property that the state park peace officer lifeguards cover. Non-state park property is usually covered by Cal-Trans.

where the ocean conditions constantly change due to the tide, swell size and direction, wind, and sand configurations. He stated that a routine response at low tide could change into something more extreme and dangerous at high tide. The tide conditions, precipitous cliffs and rocky abutments significantly increased the potential risks in the Western Malibu Sector, as compared to a sandy beach with a sandy bottom.

28. Another factor in the Western Malibu Sector was the nature of the beach-going population. The northernmost beach was closest to a non-swimming population - a population consisting of either non-swimmers or people unfamiliar with the beach/ocean or both. This population was more likely to fish on the slippery rocks, to be surprised by the waves and swept off the rocks, and to underestimate the depth of the ocean. This population was therefore more susceptible to emergency situations.

29. Dr. Gleiberman did not ask respondent about his working conditions, staffing, or the nature of the Western Malibu Sector.

RESPONDENT'S DESCRIPTION OF HIS NORMAL AND USUAL DUTIES

30. Respondent was a very credible witness. He testified in a straightforward manner, made eye contact, and did not exaggerate his physical complaints. His affect was appropriate at all times. He presented an organized statement of the history of his position, the topography of the Western Malibu Sector, the lifeguard job duties and responsibilities, and the working conditions at the time of his application for disability retirement benefits. He also expressed how much he had enjoyed his duties as a lifeguard.

31. Respondent did not dispute the Duty Statement description of the normal and usual duties. But he disagreed with the conclusion that he could continue in his position because he could still perform the managerial and administrative duties. Respondent asserted instead, that because of the nature of the lifeguard job, an employee must be able to perform *all* the duties, not just the administrative ones.

32. For example, respondent stated that if he were on duty in a lifeguard station and his backup lifeguard was not present, he would be duty-bound to respond to an emergency without waiting for his backup to return. Respondent described one situation where he was required to climb over rocks, dive into 53 degree water, swim to a person who was drowning, and get a float under the person to save him. Respondent stated that the person passed out as he positioned the float. Had respondent been a few seconds later, he would not have arrived in time to save the person. Respondent testified that he no longer is capable of performing such a rescue. He stated it was only luck that prevented him from being in that situation the last few years he worked.

33. Respondent agreed that it was possible for him to adjust his duties during the peak-season because of the number of additional employees. During the off-season, however, the staffing did not allow him to shield himself from the life-saving duties.

34. During respondent's last year, the off-season staffing decreased from the usual four employees to two, respondent and the full-time supervisor. Respondent presented staffing schedules and statistics showing the number of times the Sector was understaffed from October 2011 through June 2012. The statistics included the park rangers' staffing, as well, because rangers and lifeguards provide backup for each other at various times. Respondent was the only aquatic officer on duty 57 times during that time period. On two occasions, he had no peace officer backup at all. As a letter from his supervisor recounts:

During the end of his time with us, [respondent] was working in a modified status due to a medical issue. On many days, [he] would be in obvious discomfort at work, yet could still find himself on the 'front line' in either an aquatic emergency, or in response to an enforcement issue in his capacity as a Peace Officer. His ability to complete the myriad of administrative tasks required by the State Park Peace Officer/Lifeguard meant that he was still able to do valuable work, but his ability to respond to emergency situations could often have been compromised by his medical issue. Fortunately for all of us, [he] was not put in situation where a life was lost due to an inability to respond, and he finished his career without incident.

Arguments

35. Petitioner did not dispute respondent's injury or the gravity of it. Rather, petitioner argued that respondent was able to work for three years following the injury without incident. Petitioner asserted that most of respondent's duties were managerial, and he was able to perform them despite any staffing issues. There were only a few instances when he had either limited or no backup. Dr. Gleiberman's opinion that respondent could have continued working with the recommended restrictions established that respondent was not substantially incapacitated from his normal and usual duties.

36. Respondent agreed that the Duty Statement provided a good overview of the job duties. But he maintained that the percentages described for the various duties had no significance in relation to what might be required of a lifeguard on any given day. He argued his usual and customary duties encompassed not just the managerial tasks, but the entirety of the duties described in the Duty Statement, including, most importantly, the lifesaving duties. And, he maintained, the geographic nature of the Western Malibu Sector made these lifesaving duties more essential.

Evaluation

37. A preponderance of the evidence established respondent's right to receive a CalPERS disability retirement. Respondent suffered a low back injury that resulted in his being unable to perform the usual and customary duties of a lifeguard supervisor, namely saving lives.

38. Dr. Gleiberman’s opinion that respondent could perform most of the duties of the job description but not the lifesaving aspects ignores the simple fact that responding to emergencies and lifesaving are the essential functions of a lifeguard. The CalPERS cover letter to Dr. Gleiberman regarding the IME included an attachment describing the medical qualifications for a disability retirement. It states:

To qualify for a disability retirement, a CalPERS member must be substantially incapacitated for the performance of his usual duties.

[¶] . . . [¶]

. . . Difficulty in performing certain tasks alone is not enough to support a finding of disability. *It is the inability to perform the essential functions of the actual and present job duties that determines whether the member is substantially incapacitated for the performance of his duties.* Disability is not necessarily an inability to perform fully every function of a given position. Rather the courts have concluded that the test is whether the member has a substantially [*sic*] inability to perform the usual duties of the position.” (Italics added.)

39. The usual duty of any lifeguard, be it an ordinary lifeguard, a limited term supervisor, or a fulltime supervisor, is to respond to lifesaving emergencies, aquatic or non-aquatic. Respondent can no longer perform those essential duties and is entitled to disability retirement benefits.

LEGAL CONCLUSIONS

Burden And Standard Of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Applicable Statutes

2. Government Code section 20026 provides in 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.

3. Government Code section 21151, subdivision (a) provides in part:

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.

4. Government Code section 21152 provides in part:

Application to the board for retirement of a member for disability may be made by:

[¶] . . . [¶]

(d) The member or any person in his or her behalf.

5. Government Code section 21154 provides in part:

The application shall be made only (a) while the member is in state service . . . On receipt of an application for disability retirement of a member . . . the board shall, or of its own motion it may, 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. . . .

6. Government Code section 21156, subdivision (a)(1) provides in part:

If the medical examination and other available information show . . . that the member in the state service is incapacitated physically . . . 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

7. Government Code section 21166 provides in part:

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.

The jurisdiction of the Workers' Compensation Appeals Board shall be limited solely to the issue of industrial causation. . . .

Appellate Authority

8. “Incapacitated” means the applicant has a substantial inability to perform his or her usual duties. When an applicant can perform his or her customary duties, even though doing so may be difficult or painful, the public employee is not “incapacitated” and does not qualify for a disability retirement. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 886-887.)

9. Mere difficulty in performing tasks is not enough to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.)

10. *Mansperger* and *Hosford* do not stand for the proposition that a public employee is entitled to disability retirement only when he or she is substantially unable to perform the usual duties of the position most recently held. The usual duties of a job should be measured in terms of the job classification the applicant held. Tying an applicant’s entitlement to disability retirement to his last specific assignment would tend to lead to highly inconsistent results for persons in identical job categories who suffer from identical disabilities. (*Beckley v. Board of Administration of California Public Employees’ Retirement System* (2013) 222 Cal.App.4th 691, 699.)

11. A public employee who suffers a disability that reaches a medically determinable state of severity does not have a prospective disability but a medically certain condition. The employee’s unsuccessful attempt to continue employment, despite increased symptoms, does not require the employee to return to employment. A chronic disease or condition that prevents the employee from performing his or her duties constitutes a condition sufficient to grant a disability retirement. The provisions for disability retirement are also designed to prevent the hardship that might result when an employee who, for reasons of survival, is forced to attempt performance of his or her duties when physically unable to do so. (*Wolfman v. Board of Trustees* (1983) 148 Cal.App.3d 787, 791.)

12. Respondent’s medical condition is not in dispute. Instead, it is the scope of his duties as a lifeguard/supervisor and the effect of his medical condition on the performance of those duties that is at issue. Respondent proved by a preponderance of the evidence that he cannot perform the usual and customary duty of a lifeguard, namely lifesaving. The evidence showed he is no longer physically capable of responding in an emergency situation. He can no longer lift, pull or push any heavy weight, particularly a person in trouble in the ocean. He can no longer climb over the rocky outcroppings or up and down the steep cliffs of the Western Malibu Sector to reach a person in trouble. He can no longer carry a gun.

13. In *Hosford*, a sergeant with the highway patrol suffered a back injury while lifting an unconscious victim. The court held that, in determining whether a person is substantially incapacitated for the performance of his or her usual duties, one must look to the duties the person actually and usually performs – not just a job description or an employer’s list of typical physical demands. Additionally, in *Hosford*, there was evidence that enforcement was “a secondary duty of a sergeant; [the] primary responsibility [was]

supervision, and in particular, field supervision, and to a large extent [the sergeant could] pick and choose the stops [to] mak[e]. . . .The [sergeant was expected, if he or she observed] a violation, to take some action, but there [was] some leeway there . . . since [the sergeant was] not evaluated on the enforcement activities he [or she] produces.” (77 Cal.App.3d at 861.)

14. By contrast, the primary responsibility of a lifeguard supervisor is saving lives. Lifesaving is not secondary to the management or supervisory aspects of the position; it is the opposite. While the administrative tasks are necessary for maintaining the organized functioning of the lifeguard station, none is as essential as the lifesaving duties. Although respondent was a supervisor, he did not have any “leeway” to ignore an emergency situation of any type. As he testified, and as corroborated by his supervisor’s letter, it was only fortuitous that in respondent’s last few years, and particularly the last year, he was not put in a situation where he was unable to respond.

15. The fact that emergency situations may not occur everyday does not mean a lifeguard/supervisor does not need to be physically capable of responding to one every day. Respondent’s inability to perform the essential duties of a lifeguard/supervisor entitles him to a disability retirement.

Cause Exists to Grant the Application

16. By reason of the evidence set forth above, it is determined that, at the time respondent applied for disability retirement, he was incapacitated for the performance of the usual duties of a State Park Peace Officer Supervisor I/Lifeguard (Limited Term).

17. If there is a dispute concerning the industrial origin of respondent’s disability, this matter shall be referred to the Worker’s Compensation Appeals Board for resolution of that dispute. The jurisdiction of the Workers’ Compensation Appeals Board shall be limited to the issue of industrial causation and the matter shall be resolved by using the same procedure used in workers’ compensation hearings.

ORDER

The application for a disability retirement filed by Jonathan S. Drucker is granted.

DATED: September 4, 2014


HEIDI R. WEISBAUM
Administrative Law Judge
Office of Administrative Hearings