

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

JOHN R. PENAFLOR,

Respondent

and

STOCKTON UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. 2013-0639

OAH No. 2013080158

PROPOSED DECISION

This matter was heard before Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, on July 15, 2014, in Sacramento, California.

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

Respondent John R. Penaflor represented himself.

Attorney Sidney L. Lamb of the law firm Laughlin, Falbo, Levy & Moresi represented respondent Stockton Unified School District (District).

Evidence was received, and the record was left open for the parties to submit simultaneous closing briefs. On August 8, 2014, complainant filed its Closing Brief, which is marked as Exhibit 33. The District filed its Memorandum of Points and Authorities on August 15, 2014, which is marked as Exhibit T. The District also filed correspondence explaining that Mr. Penaflor represented to a District representative that he would not be filing a closing brief. That correspondence is marked as Exhibit U. The record was closed, and the matter was submitted for decision on August 15, 2014.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED Sept 12 20 14

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SUMMARY

Mr. Penaflor was employed by Stockton Unified School District as a Police Officer II. Both he and the District applied for disability retirement on the basis of injuries he sustained as a result of a car accident he was involved in while on duty. The persuasive medical evidence established that he is not permanently and substantially incapacitated for the performance of his usual job duties due to the injuries he sustained in that accident. Therefore, Mr. Penaflor's application for disability retirement benefits should be denied.

FACTUAL FINDINGS

Procedural History

1. On December 1, 2000, the Board of Administration for CalPERS entered into a contract with the Board of Education for the District, whereby the District's employees, including those employed in the classification "Police Officer II," became members of CalPERS.

2. On November 28, 2011, a representative for the District signed a Disability Retirement Election Application on behalf of Mr. Penaflor and submitted it to CalPERS. The application identified Mr. Penaflor as a "Police Officer 2" with the "Stockton Unified School District." His stated disability was "Low back strain, Degenerative disc disease, lumbosacral spine, status post lumbar radiculopathy/left shoulder sprain. Occurred on 04/05/2011 in MVA." Mr. Penaflor's last day on the District's payroll was November 17, 2011, and he retired the following day.¹

3. Mr. Penaflor signed and submitted to CalPERS a Disability Retirement Election Application on December 2, 2011, that was substantially similar to that which was submitted by the District. He wrote "no prolonged standing or sitting" and "no lifting greater than 20 lbs." as the limitations or preclusions due to his injuries. He also indicated that he is "unable to perform the essential functions of Police Officer 2 position" as a result of his injuries. Mr. Penaflor was 40 years old when he signed his application.

4. CalPERS obtained or received medical reports concerning Mr. Penaflor's disability from competent medical professionals. After review of those documents, CalPERS determined that Mr. Penaflor was not permanently disabled or incapacitated for the performance of his normal duties as a Police Officer II with the District.

¹ The District's governing board believed that it was responsible for determining whether Mr. Penaflor qualified for disability retirement pursuant to Government Code section 21156, subdivision (a)(1), and approved his application with an effective date of November 17, 2011. But the Board of Administration for CalPERS is the body responsible for making that determination as discussed in Legal Conclusions 6 through 8.

5. Mr. Penaflor and the District were notified of CalPERS's determination and advised of their appeal rights by letter dated June 18, 2013.

6. Mr. Penaflor and the District filed timely appeals from the denial of disability retirement by letters dated July 15, 2013, and requested a hearing.

7. Anthony Suine, Chief of the Benefit Services Division of CalPERS, filed the Statement of Issues in his official capacity on August 14, 2013.

Job Duties of a Police Officer II

8. A job description for the position of Police Officer II identifies the "essential duties" as follows:

Patrol District properties, facilities and adjacent areas; protect students, personnel, equipment and property by performing inspections on foot and in patrol vehicles of unsafe conditions, illegal acts and unauthorized persons on and around District properties.

Maintain security of District grounds and facilities; responds to calls involving alarms, thefts, disturbances, vandalism and malicious mischief in, or around District grounds and facilities; investigate situations and disturbances; pursue, apprehend, search and detain suspects according to established laws and guidelines; collect and document evidence; take statements.

Identify and investigate suspicious people or activities; prevent entry and report presence of unauthorized persons on District grounds or facilities; escort unauthorized visitors off District grounds or facilities as necessary.

Prepare, audit and make corrections to formal descriptive reports of potentially, suspected, or actually harmful or illegal conditions or activities, and other actions taken in response to such conditions or activities, for use by the District, attorneys and other public agencies as assigned; submit reports and corrections to appropriate officer, administrator or outside agencies; prepare and audit a variety of statistical reports related to criminal activities.

Maintain a variety of logs and records related to incidents and assigned activities; establish, maintain and purge files of police records, reports and related documents for use in court cases; seal police records and modify reports in response to court

order; prepare related correspondence; process a variety of forms and duplicate materials as necessary.

Communicate with other officers and District staff, administrators, teachers, visitors, police departments and other outside agencies to exchange information, coordinate activities and resolve issues or concerns.

Drive a District vehicle to conduct work; operate a variety of police and safety equipment including a hand-held radio; operate a variety of office equipment including the computer and assigned software as assigned.

Collaborate with local law enforcement agencies in the prevention, control and investigation of illegal activities.

Testify in court concerning investigations, incidents and illegal activities as needed.

Train and provide work direction and guidance to assigned personnel.

The job description also identifies the following “physical demands” of the position:

Dexterity of hands and fingers to operate a computer keyboard and various police equipment.

Hearing and speaking to exchange information.

Reaching overhead, above the shoulders and horizontally.

Walking and running over rough or uneven surfaces.

Climbing stairs, fences, hills and other slopes.

Bending at the waist, kneeling or crouching.

Lifting, carrying, pushing or pulling heavy objects or individuals as assigned by the position.

Physical agility and stamina.

Sitting for extended periods of time.

A description of the physical requirements of the position describes the activities of sitting, standing, and walking as being performed “Frequently 3-6 hours.” For bending (neck), bending (waist) and twisting (waist), the frequency is “Occasionally Up to 3 hours,” and for twisting (neck) it is “Constantly Over 6 hours.” Mr. Penaflor must also be capable of lifting/carrying 11 to 25 pounds “Frequently 3-6 hours” and 26 to 50 pounds “Occasionally Up to 3 hours.”

Mr. Penaflor’s Employment History and Injury

9. Mr. Penaflor joined the Stockton Unified School District Police Department in May or June 1999. He previously worked as a patrol officer for the Stockton Police Department.

10. On April 5, 2011, Mr. Penaflor was responding to a call about an unauthorized person having picked up a student from school when the patrol car he was driving was hit by another car. While he did not lose consciousness, he was unable to get out of his car on his own because of the damage it had sustained, and he had to be extricated by the fire department. He was transported to Dameron Hospital by ambulance, and was released later that day with a diagnosis of multiple contusions, cervical strain, head injury, and shoulder contusion and a recommendation for Motrin, Soma, and Vicodin. X-rays taken of Mr. Penaflor’s cervical spine that day revealed mild degenerative changes, and x-rays of his left shoulder were negative for fracture. A CT scan of his head was negative for evidence of intracranial bleeding.

11. Mr. Penaflor immediately filed a claim for workers’ compensation benefits, and began treatment with the Dameron Occupational Health Clinic the following day. He was diagnosed with a contusion to his shoulder and a sprain/strain of the lumbosacral and thoracic regions of his back. Mr. Penaflor was placed on modified duty, but the District was unable to accommodate his work restrictions and he never returned to work after the accident. His diagnosis has remained the same throughout his treatment at Dameron Occupational Health Clinic, which was still continuing as of the date of hearing.

Sub Rosa Investigation

12. Chad Sandry, a Supervising Special Investigator with CalPERS, was assigned to investigate Mr. Penaflor’s claim of disability. He conducted a sub rosa investigation of Mr. Penaflor over the course of one day in August 2012 and five days in September 2012. The following is a summary of the pertinent tasks Supervising Special Investigator Sandry saw Mr. Penaflor performing on those days:

- a. Wednesday, August 29, 2012: No pertinent activities observed.
- b. Tuesday, September 4, 2012: Mr. Penaflor drove his son to school and then returned home. The trip took no more than 30 minutes.

c. **Thursday, September 6, 2012:** Mr. Penaflor drove his son to school and then dropped his wife off at Lodi Memorial Hospital. He waited in the car for his wife for about 1 hour and 40 minutes, and then she returned and they drove home. They were gone from their home for a total of about four hours.

d. **Monday, September 17, 2012:** Mr. Penaflor moved items around in his garage intermittently, including an Aquafina vending machine and shelving unit, over the course of approximately 3 hours and 20 minutes. Later, he drove his wife and son to a high school sporting event, where he was observed standing around for about 40 minutes. They were gone for a total of approximately three hours.

e. **Tuesday, September 18, 2012:** Mr. Penaflor drove his son to school. He was gone for about 25 minutes.

f. **Monday, September 24, 2012:** Mr. Penaflor drove his son to school. He was gone for about 28 minutes. Later, he drove to various errands, including going to Lowe's. He was gone for approximately 1 hour and 10 minutes. Five minutes later, Mr. Penaflor drove to St. Joseph's Hospital, waited in his car for about 15 minutes, spoke to a woman who approached his car, and then drove away. He was gone for about one hour.

13. At hearing, Mr. Penaflor recalled the events of September 17, 2012. He admitted to moving an Aquafina vending machine, a large refrigerator with shelving for bottled water, but explained that it was sitting on wood slats, which made it easier to move the vending machine across the concrete floor. He described the vending machine as being about five feet tall and about two feet wide. Mr. Penaflor also recalled the following day, and explained that he "took it easy" because of his activities the previous day.

Medical Evidence

14. At CalPERS's request, Mr. Penaflor underwent an independent medical examination by Arun Mehta, M.D., a board-certified orthopedic surgeon, on February 28, 2013. Dr. Mehta prepared a written report of that examination. In forming his opinions about Mr. Penaflor, Dr. Mehta indicated in his report that he relied on his interview and examination of Mr. Penaflor, review of pertinent medical records, and his understanding of the usual duties of a Police Officer II.

15. Dr. Mehta noted in his report that an examination of Mr. Penaflor's left shoulder revealed tenderness in the supraspinatus region. The following reflects the range of motion of Mr. Penaflor's left shoulder:

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| | Actual ROM | Normal ROM |
|--------------------------------|-------------|-------------|
| Flexion | 150 degrees | 180 degrees |
| Extension | 40 degrees | 50 degrees |
| Abduction | 150 degrees | 180 degrees |
| Adduction | 40 degrees | 50 degrees |
| Internal and external rotation | 70 degrees | 90 degrees |

16. An examination of Mr. Penaflor's low back and lower extremities revealed tenderness in the left paravertebral region and the left sacroiliac region. The following reflects the range of motion of that area:

| | Actual ROM | Normal ROM |
|----------------------------------|------------|---------------------------|
| Flexion | 40 degrees | 60 degrees |
| Extension | 15 degrees | 25 degrees |
| Right and left lateral rotation | 15 degrees | 25 degrees |
| Straight leg raising bilaterally | 45 degrees | Between 80 and 90 degrees |

17. Dr. Mehta diagnosed Mr. Penaflor with a left shoulder contusion, supraspinatus tendinosis, and acute lumbosacral strain with degenerative changes with left radiculitis.

18. With regard to his review of Mr. Penaflor's pertinent medical records, Dr. Mehta noted that x-rays of the cervical spine were taken on April 5, 2011, and showed mild degenerative changes. X-rays of Mr. Penaflor's left shoulder taken on the same day revealed no fractures.

19. Dr. Mehta wrote the following summary of CalPERS's video surveillance of Mr. Penaflor on September 17, 2012, in his report:²

1:51 pm Claimant is seen inside a residential garage. Claimant is seen walking then stands against the counter in the garage. Claimant is seen looking down and with slight bending at the waist.

02:07-4:52 pm Claimant is seen standing and bending and stooping at the waist while reaching for an object with his left hand in a box located at knee level. Claimant is holding an object with his right hand at the same time. Claimant then places the object from his right hand down then bends again at the waist to lift the board from about knee level then turns to his

² Dr. Mehta noted in his report that the entire surveillance video was 1 hour and 45 minutes in length.

right to place the board overhead. Claimant raises both arms overhead while holding the board and raises his calves to reach for a certain area of placement. Claimant is looking up in the process of placing the board overhead. Claimant is next seen holding onto a two level step ladder. Claimant has both hands placed on the top railing of the ladder and bends at the waist to what appears to be stretching. Claimant then climbs up the top step of the ladder then reaches overhead with both arms fully extended. While on the ladder and with both arms overhead, he is seen slightly bending laterally by the waist and neck to his right. Claimant then steps then slightly bends laterally at the waist to his left and opens a drawer located at about knee level with his left hand. Claimant is looking down at the door. Claimant then opens another door at about mid waist level and slightly forward bends at the waist while looking down into the drawer. Claimant is seen a few times forward bending at that [sic] waist and opening doors of a tool chest with his left hand, and using both hands to retrieve items from the doors. Claimant then maneuvers the step ladder with his left hand and then climbs to the second top step. While on top of the top step, he is looking down. Claimant is seen holding onto the top rail with both hands, slightly bends forward at the waist, then climbs down from the step ladder. Claimant is seen again climbing to the top step of the ladder. Claimant displays full motion of the upper extremities as he lifts and rearrange [sic] items. Claimant is also seen standing, bending at the waist, and wiping the cabinet with his left hand. After bending at the waist, he squats and continues wiping while looking down (obscured view). Claimant is seen bending at the waist, squatting, and using both upper extremities while wiping down the cabinet. Claimant is seen moving large items using both hands at the same time bending at the waist. Claimant is also seen leaning on the cabinet with both elbows with his waist slightly bent. Claimant is also seen standing, bent at the waist, and lifting and rearranging with his right hand gardening tools located on the floor.

Note: Claimant is seen inside a residential garage for almost three hours without the use of any orthopedic devices or evident physical pain and/or discomfort. Claimant is seen performing numerous physical activity [sic] including neck and waist bending and twisting, standing, squatting, stooping, climbing step ladder, neck motion, above and below shoulder motion, reaching, hand use, carrying, and lifting.

20. Dr. Mehta opined that Mr. Penaflor was limited in his ability to lift, pull, and push to no more than 25 pounds. Additionally, he was limited in stooping and bending, and was limited to standing and walking for a total of four hours in an eight-hour period. Therefore, Dr. Mehta concluded that Mr. Penaflor was substantially incapacitated for the performance of his regular and customary job duties as a Police Officer II, and his incapacity was permanent.

21. Dr. Mehta testified at hearing in a manner consistent with his written report, except he explained that he did not personally review Mr. Penaflor's medical records or the video surveillance of CalPERS's sub rosa investigation as his written report implied. Instead, he relied on other nonmedical staff to summarize the pertinent medical records and the relevant portions of the video surveillance, and he relied on those summaries. Dr. Mehta did, however, personally examine Mr. Penaflor.

22. On April 4, 2013, CalPERS forwarded x-rays of Mr. Penaflor's lumbar spine and an MRI of his lumbosacral spine to Dr. Mehta for his review and preparation of a supplemental report.

23. Dr. Mehta wrote the following in his April 12, 2013 supplemental report:

1. X-ray [*sic*] of the lumbar spine, May 18, 2011, showed mild degenerative changes at L1-L2 space and mild degenerative changes visualized in the lower thoracic spine.

2. May 23, 2011 MRI of the lumbosacral spine done by Dr. Daniel Dietrich, M.D., of Valley MRI Center. Mild lower lumbar and lumbosacral hyperlordosis. Early disc endplanted degeneration, minimal lower lumbar facet arthropathy. No acquired neuropathic impingement.

24. Dr. Mehta also wrote:

I have reviewed member video summary on Page 16 of IME report and although the video does display his bending at the waist and wiping a cabinet as well as using both upper arms.
[*Sic*]

The claimant was seen performing numerous physical activities and bending and stooping and reaching for an object. However, this does not show the weight of the object.

The job would require a police officer to have physical confrontation with heavy weight lifting as well as involving in a chase to apprehend people.

25. Dr. Mehta concluded: "Because of all the above, I felt that the member is permanently and substantially incapacitated for the performance of his job duties."

26. CalPERS sent Dr. Mehta correspondence dated April 4, 2013,³ which stated:

CalPERS is in receipt of your IME clarification report dated April 12, 2013. On Page 5 you noted that you reviewed the member's surveillance videos, acknowledging the member performing numerous physical activities, which include bending, stooping, and reaching for an object, but that the video does not show the weight of the object(s). We ask that you re-review specific parts (referenced by date and time) of the video surveillance and answer the question below:

- Date: September 17, 2012. Time 2:43 pm. Member seen moving/picking up a large angle 90 degree shelf from garage floor and placing it on a waist high work bench.

- Date: September 17, 2012. Time 3:55 pm. Member seen sliding, pushing, moving, and positioning, a vending machine with bottles and/or cans inside within member's garage.

- Date: September 17, 2012. Time 3:57 pm. Member seen sliding, pushing, moving, and positioning a six shelf high storage unit with height of unit taller than member.

Please answer the following question:

- How do you rationalize this specific activity seen on the surveillance video and summarized in your report that the member is permanently substantially incapacitated for the performance of his job duties? Please explain in detail.

27. Dr. Mehta wrote in his May 14, 2013 supplemental report:

I have reviewed my previous discussion and summary as well as the reports which were submitted and review of records was done as noted including surveillance footage by CalPERS Investigative Unit.

I have now reviewed a complete video which we received on May 6, 2013 and dated September 4, 2012, September 6,

³ The correspondence was erroneously dated, as it refers to Dr. Mehta's *April 12, 2013* supplemental report.

2012, September 17, 2012, September 18, 2012, September 24, 2012.

After review and noting down the various activities which he has done in his garage on September 17, 2012, I feel that this claimant will be able to continue his regular and customary occupation as noted in records.

My conclusion after all the above is that the claimant will be able to do his regular activities and the member is not permanently and substantially incapacitated for performance of his duties.

(Bold in original.)

28. At hearing, Dr. Mehta said he never watched the video of CalPERS's sub rosa investigation of Mr. Penaflor until after he received CalPERS's April 4, 2013 letter. Nor did he personally review any of the medical records mentioned in his first two reports. Instead, Dr. Mehta explained, he relied on summaries prepared by nonmedical staff. He further explained that having actually watched the surveillance video and seeing Mr. Penaflor "wiggle" the Aquafina vending machine and the shelving unit caused him to change his opinion about Mr. Penaflor's substantial incapacity.

29. Corky Hull, M.D., is the Medical Director for Dameron Occupational Health Clinic. He is board-certified in occupational medicine.

30. Dr. Hull's name appears on all Primary Treating Physician's Progress Reports issued to patients of Dameron Occupational Health Clinic, even if he did not actually treat them, because he is the Medical Director. However, he has a general understanding of every patient's injury and treatment plan. And Dr. Hull directly supervises all treatment provided by a physician assistant or nurse practitioner. Some of Mr. Penaflor's treatment was provided by a physician assistant or nurse practitioner.

31. Dr. Hull treated Mr. Penaflor on August 19, 2013, and June 18, 2014. At hearing, Dr. Hull stated that August 19, 2013, was the first date he recalled treating Mr. Penaflor, but left open the possibility that he provided treatment on a prior date. He also explained, however, that Donald Rossman, M.D., another physician at Dameron Occupational Health Clinic who treated Mr. Penaflor, had consulted him about such treatment. Therefore, Dr. Hull explained he had a better understanding of Mr. Penaflor's injuries and treatment than he might otherwise for patients he does not regularly treat.

32. At hearing, Dr. Hull opined that Mr. Penaflor is physically incapable of performing the usual duties of his position as a Police Officer II for the District because he still has significant residuals from the injuries he suffered as a result of the April 5, 2011 car accident. In particular, Mr. Penaflor awakes each morning with low back pain. He continues

to experience intermittent low back pain throughout the day, which is precipitated by increased physical activities.

33. Dr. Hull explained that the physical activities Mr. Penaflor performed in his garage on September 17, 2012, were “entirely” consistent with his opinion that Mr. Penaflor is substantially incapacitated. He clarified that Mr. Penaflor is not incapable of performing all physical activities, but rather is limited to performing such activities on an “intermittent” basis and then must stop to allow his body to recover.

34. Dr. Hull described Mr. Penaflor’s activities depicted in CalPERS’s video as “essentially” walking around for three hours and performing “light activities.” While he agreed the video showed Mr. Penaflor moving some “large items,” Dr. Hull explained that he did so while using “proper body mechanics,” and the video did not reflect Mr. Penaflor as having to use “excessive force” to move any of the items. Dr. Hull distinguished such activities from “physical altercations,” explaining that the latter cause physical stress to the body differently than the former because the latter is unplanned and uncontrolled, whereas the former is planned and the body can physically prepare itself beforehand. Therefore, he explained, moving the Aquafina vending machine is very different than physically restraining a combatant, and the fact that Mr. Penaflor was able to perform the former does not discredit his (Dr. Hull’s) opinion that he is physically incapable of performing the latter.

35. Dr. Hull’s characterization of Mr. Penaflor’s activities depicted in CalPERS’s video was consistent with Dr. Rossman’s, who wrote the following in a report about Mr. Penaflor’s treatment:

In addition, although Mr. Penaflor is seen lifting the top of the cabinet onto a rolling cart as well as moving an Aquafina display as well as pulling a wheeled cabinet in the garage, there is no indication of the weight of these objects. Furthermore, it is my understanding that the essential job requirements of a Police Officer are potentially physically extreme. No such extreme physical activity is demonstrated on the current DVD surveillance.

Discussion

36. The persuasive evidence established that Mr. Penaflor was involved in a relatively minor car accident on April 5, 2011, after which he never lost consciousness. He had to be extricated by the fire department only because the damage to his car prevented him from exiting on his own. He was taken to the hospital by ambulance, but x-rays and a CT scan showed no serious injuries. Mr. Penaflor was released later that day with a diagnosis of multiple contusions, cervical strain, head injury, and shoulder contusion and a recommendation that he take muscle relaxants, anti-inflammatories, and pain medication. Mr. Penaflor began treatment at Dameron Occupational Health Clinic the day after the

accident, and his diagnosis has remained the same throughout his treatment – contusion to his shoulder and a sprain/strain of the lumbosacral and thoracic regions of his back.

37. Dr. Mehta initially found Mr. Penaflor to be permanently and substantially incapacitated due to his limited ability to lift, pull, and push items; stoop and bend; and stand and walk. However, that opinion was formed without the benefit of Dr. Mehta having watched the video depicting Mr. Penaflor’s September 17, 2012 activities. That video showed Mr. Penaflor “performing numerous physical activity [*sic*] including neck and waist bending and twisting, standing, squatting, stooping, climbing stepladder, neck motion, above and below shoulder motion, reaching, hand use, carrying, and lifting.” Most significantly, he was seen moving a five foot tall by two foot wide Aquafina vending machine without assistance. While there was no direct evidence of the weight of that machine, a reasonable inference is drawn from Mr. Penaflor’s description that it weighed more than 25 pounds.

Dr. Mehta changed his opinion after watching the video, and no longer believes Mr. Penaflor is permanently and substantially incapacitated. That revised opinion is persuasive.

38. Dr. Hull’s opinion that Mr. Penaflor’s September 17, 2012 activities were “entirely” consistent with the opinion that he is permanently and substantially incapacitated is not persuasive. Dr. Hull’s explanation that Mr. Penaflor is physically capable of performing physical activities on an “intermittent” basis followed by a period of recovery supports the conclusion that Mr. Penaflor is not substantially incapacitated, as does the explanation that Mr. Penaflor was able to move the Aquafina machine by using “proper body mechanics.” Discomfort, which may make it difficult to perform one’s duties, is insufficient to establish permanent incapacity for the performance of his 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 determination. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

39. When all the medical evidence is considered, the persuasive evidence established that Mr. Penaflor is not permanently and substantially incapacitated for the performance of his usual job duties as a Police Officer II with the District. Therefore, his application for disability retirement benefits should be denied.

LEGAL CONCLUSIONS

Applicable Law

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 21150 provides: "A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076, 21076.5, or 21077."⁴ But "any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member" who is incapacitated for the performance of duty is entitled to disability retirement regardless of years of service. (Gov. Code, § 21151, subd. (a).)

3. An application for disability retirement may be made by:

(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

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

(Gov. Code, § 21152.)

4. Government Code section 21154 provides, in pertinent part:

On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety 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. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

5. And Government Code section 21156 provides:

(a)(1) If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, that the member in the state service is incapacitated physically or mentally for the performance of his or her duties

⁴ Government Code sections 21076, 21076.5, and 21077 pertain to state miscellaneous and state industrial members, neither of which Mr. Penaflor is.

and is eligible to retire for disability, the board shall immediately retire him or her for disability, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.

(2) In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

Jurisdictional Challenge

6. The District argued at hearing that the Board of Education for the Stockton Unified School District has the sole and exclusive jurisdiction to determine whether Mr. Penaflor is permanently and substantially incapacitated for the performance of his usual job duties because he is a local safety member of CalPERS. CalPERS, on the other hand, argued that the Board of Administration for CalPERS is the entity responsible for making that determination because Mr. Penaflor is a school safety member of CalPERS.

7. Government Code section 20444 defines "school safety member" as follows:

"School safety member" includes any officer or employee of a school district or a community college district which has established a police department pursuant to Section 39670 or 72330 of the Education Code, whose principal duties consist of active law enforcement service, except persons whose principal duties are clerical or otherwise clearly do not fall within the scope of active law enforcement, even though the person is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active law enforcement.

This section shall only apply to a school district or a community college district that, pursuant to subdivision (i) of Section 20057, entered into a contract with the board on or after January 1, 1990.

Government Code section 20420 defines "local safety member" as: "'Local safety member' includes all local police officers, local sheriffs, firefighters, safety officers, county peace officers, and school safety members, employed by a contracting agency who have by contract been included within this system."

8. Mr. Penaflor is a school safety member of CalPERS by virtue of his employment by the District as a Police Officer II and the December 1, 2000 contract between the Board of Administration for CalPERS and the Board of Education for the District. (Gov. Code, § 20444.) He is also a local safety member pursuant to Government Code section 20420. Because Mr. Penaflor is a school safety member and a local safety member, the Board of Administration for CalPERS has the sole and exclusive jurisdiction to determine whether he is permanently and substantially incapacitated for the performance of his usual job duties. (Gov. Code, § 21156, subd. (a)(1).)

Burden of Proof and Legal Standards for Determining Disability

9. Respondent has the burden of proof to establish by a preponderance of evidence that he is “incapacitated from 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.) A particular function of a job classification that all those employed in that classification must be able to perform is a usual duty of that job, regardless of how infrequently that function may actually be performed. (*Thelander v. City of El Monte* (1983) 147 Cal.App.3d 736 742.)

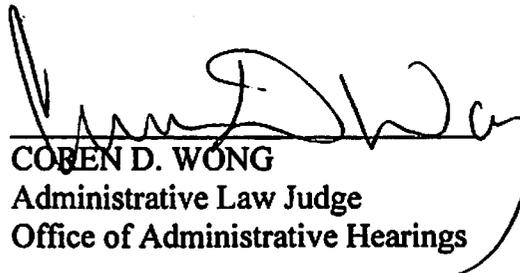
Conclusion

10. As set forth in Factual Findings 36 through 39, the persuasive medical evidence established that Mr. Penaflor is not substantially incapacitated for the performance of his usual duties as a Police Office II due to the injuries he sustained as a result of the April 5, 2011 car accident.

ORDER

The Application of John R. Penaflor for disability retirement benefits is DENIED.

DATED: September 9, 2014


COBEN D. WONG
Administrative Law Judge
Office of Administrative Hearings