

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues
Against:

VICTORIA L. WEDGEWORTH,

Respondent,

and

CALIFORNIA STATE PRISON-
LOS ANGELES COUNTY,
CALIFORNIA DEPARTMENT OF
CORRECTIONS,

Respondent.

PERS Case No. 2014-0582

OAH No. 2014070377

PROPOSED DECISION

This matter came on regularly for hearing on December 9, 2014, at Los Angeles, California, before David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California. Complainant California Public Employees' Retirement System (PERS) was represented by Christopher Phillips, Staff Counsel. Respondent Victoria L. Wedgeworth was present and represented herself. Respondent Department of Corrections did not appear, despite having been properly served with notice of the hearing.

Evidence was received by way of testimony and documents. The record was closed and the matter was submitted for decision on December 9, 2014.

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PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED January 8 2015
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FINDINGS OF FACT

The Administrative Law Judge finds the following facts:

Parties and Jurisdiction

1. The Statement of Issues was signed on behalf of PERS by complainant Anthony Suine in his official capacity as Chief, Benefits Services Division of PERS.

2. Respondent Wedgeworth was employed by the Department of Corrections (DOC). At the time of her application for retirement, she was employed as a Materials + Stores Supervisor I (M+SS I).¹ By virtue of her employment, respondent Wedgeworth is a state safety member of PERS subject to Government Code section 21151, under which a state member who is “incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability”

3. Due to the failure to appear at the hearing by respondent DOC after service of proper notice of the proceedings, its default is noted pursuant to Government Code section 11520. (All further references to respondent refer to respondent Wedgeworth.)

4. Respondent’s application for service pending industrial disability retirement was signed July 30, 2013. She claims disability on the basis of an orthopedic condition, specifically referring to her right ankle and foot. Respondent sustained injury to her foot and ankle while at work in August 2009 when she stepped on a piece of wood while moving heavy laundry carts. Respondent had surgery in November 2011 consisting of laproscopic debridement and posterior tibial tendon repair including a graft.

5. Based upon review of reports from Dr. Clive Segil, Dr. Taha Ahmad, and Dr. Jones Hormozi, PERS notified respondent by letter dated April 15, 2014 (exhibit 2), of its determination that respondent’s orthopedic condition was not disabling and the conclusion that she was not substantially incapacitated from performance of her duties as an Automotive Equipment Operator I (AEO I) (see footnote 1).

6. Respondent filed a letter of appeal dated April 28, 2014 (exhibit 3), and this hearing ensued. Because the PERS letter included reference to the AEO I position, respondent included information about her inability to perform the duties of that position, even though she had the job of M+SS I at the time she retired.

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¹ The Statement of Issues alleges incorrectly that at the time of her application respondent Wedgeworth was employed as an Automotive Equipment Operator I.

Respondent's Work History, Injury and Medical Condition

7. At the time of her injury in 2009, respondent worked for the DOC as an AEO I. Her duties generally involved driving a truck of the type that required a Class B driver's license, and picking up and delivering laundry and supplies. Laundry included regular institutional clothing and contaminated clothing from facility clinics. Clothing was transported in carts that weighed over 100 pounds empty, and usually weighed more than 500 pounds full. Dirty laundry was delivered to Prison Industries Authority (PIA), where inmates cleaned it and loaded it back into carts for pickup. Respondent's average per day weight of clean laundry in carts was 4000 pounds.

8. In August 2011, respondent began a training and development (T&D) assignment at PIA, the purpose of which was to receive training and then allow PIA to make an offer of employment if it chose to do so. Her first T&D assignment included driving a truck, and other duties that were not specified in the evidence. Respondent experienced increasing pain from her foot and ankle injury. She underwent surgery on November 15, 2011, as noted in Finding 4. She returned to work with a restriction that she not lift, pull or push more than 100 pounds.

9. With the work restriction, respondent could not perform some of the duties of her original T&D assignment at PIA. She worked modified duties until her T&D assignment at PIA ended in March 2013. PIA did not make a job offer to respondent, and she returned to DOC. According to respondent, PIA had lost a major contract and the position she worked in was no longer available.

10. Respondent and her supervisor, David Seitz, credibly testified that, upon her return to DOC respondent's position as an AEO I was still available, but that respondent could not perform the necessary duties due to her work restrictions. Seitz was instructed to find another position for her. Seitz assigned respondent to a recycling job that he described as an equipment operator, where respondent drove a pickup truck with a trailer to various locations where, with assistance from inmates, she would load and unload recyclable materials. On some occasions, such as during lockdowns, inmates would not be available to help and respondent could not complete her assignment. Seitz described one extreme situation where there was an extended lockdown on one prison yard of four months. In this recycling assignment respondent worked out of class as an M+SS I until she took and passed the exam for the M+SS I classification on July 1, 2013.

11. Respondent suffered continuing and increasing pain in her foot and ankle. She would wear a boot for support but was unable to perform some of her duties. Respondent described difficulties climbing in and out of the truck, opening gates, moving heavy loads, and in other activities. In addition to her recycling duties, due to employee shortages, she was required to drive the laundry truck one or two days per week. If inmates were helping, she could accomplish more. However, inmates were not always available. Respondent told her supervisor of the particular problem driving the laundry truck and was told there was no one else to do it. Respondent described her pain as worsening during the course of each

week. Her foot would be swollen by Wednesdays and she was in such pain by Fridays she could not engage in many activities over the weekends just to be able to return to work the following week. She occasionally left work early due to foot pain. Respondent used the word "incapacitated" to describe her condition during these weekends.

12. Respondent decided to retire. Respondent understood that it was necessary to give three months' notice to PERS of her retirement. Her application was dated July 31, 2013, and was effective October 31, 2013. She used her sick leave, which extended her last day of paid service by about one month.

13. Exhibit 9 contains a document covering the expectations of someone in the AEO I classification, and a duty statement for the AEO I position. Neither refers to the weight of any materials involved in required tasks. Exhibit 9 also includes the following with respect to the M+SS I position: Physical Requirements (including weight levels, described below), and a Duty Statement and sheet marked "Warehouse," neither of which refer to weight levels, although the Warehouse sheet notes that products can be heavy. The M+SS I Physical Requirements document lists numerous activities and the frequency of each. Lifting/carrying occurs "constantly: over 6 hours," and is broken down into the following weight levels and frequencies. Zero to 10 pounds, and 11 to 25 pounds, occur "constantly: over 6 hours." Twenty-six to 50 pounds, 51 to 75 pounds, and 75 to 100 pounds occurs "frequently: up to 3 hours." One hundred plus pounds occurs "never." (Exhibit 9.) Respondent credibly testified that this list of physical requirements was filled in by a return-to-work employee based largely on a written job description, and that she, respondent, was asked just a few questions.

14. Testimony from Seitz and respondent was consistent, in that as an M+SS I, respondent was required to drive a laundry truck and to pick up, transport and deliver supplies and laundry that was often more than 100 pounds. Carts of clean laundry are weighed at PIA and are usually in the 500 to 700 pound range. The only assistance for respondent and others is when inmates are available at PIA or at the prison sites. In her T&D assignment at PIA, respondent supervised numerous inmates, who could do the heavy work. Respondent testified credibly that, when laundry truck duties were added to her job as of July 1, 2013, she was often unable to find assistance and had great difficulty, and was often unable to complete her assigned duties. She informed her supervisor, who was unable to modify her duties. Soon thereafter, respondent decided to retire.

15. Respondent's surgery was performed by Dr. Jones Hormuz, D.P.M. Dr. Hormuz signed a Physician's Report on Disability on a PERS form (exhibit B) that supported respondent's application. He checked the portions of the form indicating that respondent was substantially incapacitated permanently from the performance of her usual duties. Where the form asked for information on the specific duties and work activities respondent was unable to perform, Dr. Jones wrote: "[Patient] can not tolerate high impact activities." Dr. Jones also checked the portions of the form indicating that he had not reviewed either a duty statement, job description, physical requirements form, or reviewed information that respondent had supplied.

16. Records prepared by Dr. Taha Ahmad, M.D., were also received in evidence, as was his testimony. Dr. Ahmad explained that Dr. Hormozi was the surgeon. Respondent's regular physician, Dr. Kumar, who he supervised, had moved and Dr. Ahmad therefore evaluated respondent on October 25, 2012, and November 6, 2013. Dr. Ahmad prepared the records of his two evaluations of respondent (exhibit A), and he prepared another Physician's Report on Disability on a PERS form (exhibit C).

17. By his education, training and experience, Dr. Ahmad is qualified to offer expert opinions in this matter. Dr. Ahmad noted that Dr. Kumar had limited respondent to a work restriction of no lifting, pushing and pulling of more than 100 pounds, and that he agreed with this limit. Dr. Ahmad thought that 50 pounds was the limit before respondent might experience pain and would present a risk of further injury, and that 100 pounds was her capacity. After his examination in November 2013, Dr. Ahmad repeated the same opinions and restrictions. He noted that he reviewed respondent's job duties. He commented respondent had a lot of arthritis and the surgery included a lot of scraping. The surgery was "not a complete fix." He hoped that respondent's symptoms would improve, but did not believe respondent would be back to 100 percent of her abilities, and there was at risk of worsening or reinjury. In the Physician's Report on Disability on a PERS form (exhibit C), he checked the portions of the form indicating that respondent was substantially incapacitated permanently from the performance of her usual duties, wrote she is "unable to lift/push/pull [greater than] 100 lbs even & 75-75 pounds occasionally," and checked the portions of the form indicating that he had reviewed either a duty statement or job description, the physical requirements form (he added the word "multiple" to the form), and reviewed information that respondent had supplied.

18. At the request of PERS, respondent was examined on January 13, 2014, by Clive M. Segil, M.D., orthopedic surgeon. By his education, training and experience, Dr. Segil is qualified to offer expert opinions in this matter. Dr. Segil prepared a report (exhibit 8), and testified at the hearing. At the conclusion of his report, Dr. Segil answered specific questions from PERS, including that respondent is not substantially incapacitated for the performance of her usual duties. Dr. Segil indicated he had reviewed the job description and the physical requirements of the position, specifically referencing the AEO I expectations (found in exhibit 9). The last medical records reviewed by Dr. Segil, as referenced in his report, are from January 2012, which are post-operative reports (six weeks after surgery) of Dr. Hormozi and Dr. Kumar. Dr. Hormozi indicated on January 25, 2012, the last record referenced, that respondent was temporarily totally disabled until January 30, 2012. At the conclusion of his record review, Dr. Segil noted there were "57 pages of miscellaneous forms, previously reviewed." (Exhibit 8, p. 8.) The meaning of this reference is uncertain.

19. Dr. Segil noted that the bases for his opinion that respondent is not substantially incapacitated for the performance of her usual duties are his physical examination and his review of the medical records, "which indicate that she was able to return to work following her surgery, which was successful. . . . She is able to perform the job duty notwithstanding the alleged disabling condition as she walks extremely well and has good function of her ankle and her foot. In support of this argument, she informed me that

the reason that she retired was that her position was not available to her.” (Exhibit 8, pp. 8-9.) This last information is repeated earlier in the report, where Dr. Segil wrote that respondent retired in October 2013 “because they had removed her work position.” (*Id.* at p. 2.)

20. Dr. Segil’s examination revealed limitations in right ankle motion, as follows:

	RIGHT	LEFT	NORMAL
Extension	10%	20%	30%
Flexion	20%	45%	45%
Inversion	20%	25%	25%
Eversion	20%	30%	30%

An x-ray showed a calcaneal spur over the plantar aspect of the calcaneus. Dr. Segil testified to his opinion that the surgery was successful because there was good range of motion, no weakness, the tendons seemed to be functioning, and respondent walked well. Although there was less range of motion, it was not sufficient such that respondent could not do her job. Respondent did not report to Dr. Segil that she could not do her job, and he did not discuss with her that she returned to work after her surgery. He obtained that information from the medical records. On cross-examination, respondent asked Dr. Segil if she told him she was required to push over 100 pounds. Dr. Segil replied that he did not believe so, and it would not hurt respondent’s foot if she was required to do so.

21. Respondent contends that she did not tell Dr. Segil she retired because her position at work had been removed. Rather, he asked why she had pain but could still work, and she told Dr. Segil about her T&D assignment and that no position was offered to her because the position was eliminated.

22. The totality of the evidence establishes that respondent is substantially incapacitated from performing her usual duties as an M+SS I for the DOC.

CONCLUSIONS OF LAW AND DISCUSSION

Based upon the foregoing findings of fact, the Administrative Law Judge makes the following conclusions of law.

Decisions on disability are governed by various sections of the Government Code, including:

Section 20026 defines “disability” and “incapacity for performance of duty” as meaning disability of permanent or extended and uncertain duration, as determined by the PERS’ board “on the basis of competent medical opinion. . . .”

Section 21154 provides that, if a member has applied for disability retirement, the PERS board may “order a medical examination of a member who is otherwise eligible to retire to determine whether the member is incapacitated for the performance of duty. . . .”

Section 21156 states that a member may be retired for disability if the medical examination and other available information show that the “member in the state service is incapacitated physically or mentally for the performance of his or her duties”

2. Respondent is seeking a benefit and therefore bears the burden of proof. When reviewing the denial of an application for disability benefits, the burden of proof is on the applicant. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) The standard of proof is by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

3. “Incapacitated for the performance of duty” has been interpreted as the “substantial inability of the applicant to perform his usual duties,” as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877 (*Mansperger*); *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854 (*Hosford*)). An increased risk of further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future injury are insufficient to support a finding of present disability. (*Hosford, supra*, 77 Cal.App.3d at 862-863.)

4. Some of the facts and legal reasoning in *Mansperger* and *Hosford* are illuminating. The applicant in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations by the public and to apprehend violators; issuing warnings and serving citations; and serving warrants and making arrests. He suffered an injury to his right arm while arresting a suspect, and medical evidence established reduced strength in his right arm. However, relative to his job duties, he could shoot a gun, drive a car, swim, row a boat (but with some difficulty), pilot a boat, pick up a bucket of clams, and apprehend a prisoner (with some difficulty). He could not lift heavy weights or carry a prisoner away. The court noted that “although the need for physical arrests do occur in petitioner’s job, they are not a common occurrence for a fish and game warden.” (*Id.* at p. 877.) Similarly the need to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding that the applicant was not incapacitated for the performance of his duties the *Mansperger* court noted that the activities he was unable to perform were not common occurrences and that he could otherwise “substantially carry out the normal duties of a fish and game warden.” (*Id.* at p. 876.)

5. The analysis from *Mansperger* was applied in *Hosford* to a state traffic officer, a sergeant for the California Highway Patrol. *Hosford* suffered a back injury lifting an unconscious victim, aggravating prior injuries. In determining whether an individual was substantially incapacitated from his usual duties, the court held it must look to the duties actually performed by the individual, and not exclusively at the duties as listed in the job

description. The actual and usual duties of the applicant must be the criteria upon which any impairment is judged. Generalized job descriptions and physical standards are not controlling. Neither are actual but infrequently performed duties.

6. The *Hosford* court rejected a contention frequently raised by disability applicants, i.e., many injuries or medical conditions create an increased risk that the person will suffer a further injury or aggravation at a later time. The court interpreted the medical opinion on a worker's limitations as indicating that the worker is presently capable of performing a certain task, but the task should be avoided as a prophylactic restriction. In rejecting Hosford's contention that his increased risk of future injury rendered him presently disabled, the court stated: "As the Board correctly points out, however, this assertion does little more than demonstrate his claimed disability is only prospective (and speculative), not presently in existence." (*Id.* at p. 863.) Thus, the disability must be presently existing and not prospective in nature. The person must be presently incapable of performing the usual duties of a position. Prophylactic restrictions that are imposed only because of risk of future injury are insufficient to warrant a grant of disability retirement. As to Hosford's present condition the court noted that officers in top physical condition may suffer injuries performing their customary tasks, and each officer must be aware of his own limitations. (*Id.* at p. 864.) Referring to *Mansperger*, the *Hosford* court concluded that Hosford was not disabled unless he was substantially unable to perform the usual duties of the job. He could sit in a patrol car, although it would bother his back; he could stop and exercise as needed; and he would spend less than half of his time in the field. He could run, probably with pain, and could apprehend persons escaping over rough terrain, again with pain. These strenuous activities were rare, supporting the medical opinion that he was not disabled. (*Id.* at p. 862.) Further, Hosford's fear of injury was not considered mentally disabling. (*Id.* at p. 865.)

7. Dr. Hormuzi and Dr. Ahmad opine that respondent is substantially and permanently incapacitated from the performance of her usual duties. Dr. Segil opines that respondent is not substantially incapacitated from the performance of her usual duties. Therefore the question is raised as to the weight to be given to the medical reports and opinions.

8. The doctors' diagnoses and opinions are as good as the information upon which they rely. (*White v. State of California* (1971) 21 Cal.App.3d 738; *Kennemur v. State of California* (1982) 133 Cal.App.3d 907.) "Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an 'expert opinion is worth no more than the reasons upon which it rests.' (Citation.)" (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1116.) Dr. Hormuzi's opinions are entitled to some weight, as he performed the surgery and gave post-operative care. However, he had little if any information about respondent's job duties, and his restriction that respondent could not tolerate high impact activities has no obvious application to the evidence about respondent's job duties. Dr. Segil is not clear about respondent's job duties either, as he specifically lists only the AEO I responsibilities and makes no reference to the job duties listed for the MS+S I position. More importantly, Dr.

Segil apparently misconstrued other information about respondent. He believed she was able to return to her full duties without pain or limitation, which is not correct. Dr. Segil believed that respondent retired because her position was no longer available, which is also incorrect, and is contradicted by evidence that respondent could no longer perform her regular job duties. Dr. Segil testified that his information about respondent's return to work came from his review of medical records; however, the last record listed in the "review of medical records" portion of his report is from January 25, 2013, six weeks post-operative, when respondent was totally temporarily disabled and off work for at least another week. Dr. Selig did not demonstrate sufficient knowledge of the job requirements or the basis of respondent's return to work or her retirement, and his opinion that respondent was not substantially incapacitated from performing his usual duties is based on incorrect or incomplete information and is entitled to little weight.

9. Dr. Ahmad's opinions are supported by examinations of respondent and his review of accurate information regarding respondent's job duties. Adding credibility is his distinction between a 50 pound weight restriction, which he agreed as prophylactic and designed to prevent the risk of further injury, and the 100 pound restriction he described as the extent of respondent's capacity. Although he was not familiar with PERS' requirements for "substantial incapacity" to perform usual job duties, he adequately and appropriately explained the reasoning supporting his conclusions and opinions. He signed the medical report supporting respondent's application, which stated that respondent was substantially incapacitated from the performance of her usual duties. In total, this is "other available information," as that phrase is used in Government Code section 21156, and "competent medical opinion," as that phrase is used in Government Code section 20026, that references the correct standard in these proceedings and lends credence to Dr. Ahmad's report and opinions.

10. Substantial evidence supports the conclusion that respondent is substantially incapacitated from the performance of her usual duties. She had the continuing duty to push and pull laundry carts well in excess of 100 pounds and was unable to do so when assistance was not available. Seitz confirmed respondent's responsibilities and limitations. Unlike the situations where a co-worker can be available for assistance, such as in *Hosford*, respondent cannot rely on the assistance of a co-worker or an inmate when she might be called upon to push or pull more than 100 pounds. Respondent's inability to handle the weight is a potential danger to herself, her co-workers, and inmates. The DOC could not accommodate the 100 pound weight restriction. Although the surgery may have repaired the arthritis and tendon damage in respondent's ankle and foot, the surgery was not successful in that respondent was not completely rehabilitated after the surgery, continued to experience pain, and was unable to handle the weight necessary to do her job.

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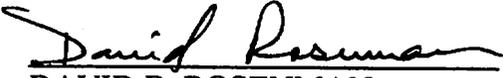
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11. Respondent has sustained her burden of establishing that she is incapacitated physically for the performance of duty, as required under Government Code sections 21154 and 21156, and is therefore entitled to disability retirement. See Findings 4, and 7 through 22, and Legal Conclusions 1 through 10.

ORDER

The application for disability retirement of respondent Victoria Wedgworth is granted.

DATED: January 6, 2015.



DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings