

**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 the  
Disability Retirement of:

VALENTIN B. SUNICO,

Applicant/Respondent,

and

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION,  
R.J. DONOVAN CORRECTIONAL  
FACILITY,

Respondent.

Case No. 2011-0527

OAH No. 2014090028

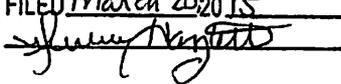
**PROPOSED DECISION**

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on February 18, 2015, in San Diego, California.

Renee Salazar, Senior Staff Attorney, California Public Employees' Retirement System (CalPERS), represented Anthony Suine, Chief, Benefit Services Division.

Valentin B. Sunico, applicant/respondent, represented himself.

No appearance was made by or on behalf of respondent, California Department of Corrections and Rehabilitation, R.J. Donovan Correctional Facility (department), and the matter proceed against them via default as authorized by California Code of Regulations, title 1, section 1254.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED March 20, 2015  


## ISSUE

When Mr. Sunico filed his application for a disability retirement, was he permanently disabled or incapacitated from performing the regular and customary duties of a Correctional Officer with the department due to a cardiovascular condition?

## FACTUAL FINDINGS

### *Preliminary Matters*

1. Mr. Sunico was employed by the department as a correctional officer. By virtue of his employment, Mr. Sunico was a state safety member of CalPERS subject to Government Code section 21151.
2. On May 10, 2010, Mr. Sunico signed a Disability Retirement Election Application with CalPERS. He claimed the right to receive a disability retirement because of a "heart attack on November 25, 2008, chest pressure and discomfort, and bilateral jaw numbness."
3. CalPERS obtained medical records and reports related to Mr. Sunico's medical condition. CalPERS selected a cardiovascular physician to perform a disability evaluation. That physician provided CalPERS with a report of his findings and conclusions. After reviewing the report, CalPERS determined that when Mr. Sunico filed his application for a disability retirement, he was not permanently disabled or incapacitated from performing the usual and customary duties of a correctional officer.
4. On March 7, 2011, CalPERS notified Mr. Sunico that his application was denied. CalPERS advised him of his right to appeal that adverse determination.
5. On March 29, 2011, Mr. Sunico filed his appeal. He cited to physician records and reports, his duty functions, and the Labor Code.
6. On August 12, 2014, complainant signed the statement of issues in his official capacity. The statement of issues and other jurisdictional documents were served on all respondents. Mr. Sunico requested a hearing. The department did not respond to the statement of issues or appear in this matter.

### *CalPERS Medical Evaluation*

7. Ajit Bhawan Raisinghani, M.D., M.P.H., a board-certified cardiovascular and internal medicine physician, performed an independent medical evaluation and testified in this hearing. Dr. Raisinghani examined Mr. Sunico on November 17, 2010. Dr. Raisinghani reviewed Mr. Sunico's medical records, interviewed Mr. Sunico and performed a physical exam. Dr. Raisinghani also reviewed documentation regarding the essential functions and physical requirements of a correctional officer.

Mr. Sunico stated that he had retired on June 17, 2010. Mr. Sunico reported a long-standing history of hypertension but did not know when it began. Mr. Sunico reported a two-year history of diabetes and a history of high cholesterol. Mr. Sunico also advised that he had atrial fibrillation that began before his myocardial infarction and continued to the present. Mr. Sunico had been a smoker for 20 years, smoking a pack of cigarettes a day, and reported a family history of cardiovascular problems.

The medical records revealed that on November 25, 2008, Mr. Sunico presented at the emergency room with complaints of chest pain. He had chest discomfort the day before, which he ignored. He awoke with severe chest pressure and discomfort. Mr. Sunico underwent stenting of his artery and later received two more stents in a staged procedure conducted over the next several months. Mr. Sunico advised that since the placement of the stents, he had no chest pain or pressure but still had atrial fibrillation.

Dr. Raisinghani performed an EKG which revealed that Mr. Sunico was in atrial fibrillation. Mr. Sunico had an irregular rhythm with normal sounding S1 and S2. Mr. Sunico's chest and neck were non-tender. His ranges of motion were within normal limits.

Dr. Raisinghani concluded that Mr. Sunico was "currently asymptomatic from a cardiac standpoint except for palpitations." Dr. Raisinghani opined that Mr. Sunico was able to return to his original duties and perform the job duties that were described in the duty statement. Mr. Sunico "does have atrial fibrillation but appears to be well rate controlled at this time." Dr. Raisinghani concluded that Mr. Sunico was currently not incapacitated from performing his job duties. Dr. Raisinghani acknowledged that Mr. Sunico "does have atrial fibrillation and hypertension. While performing his job as a correctional officer, he is under significant stress, and this may aggravate his atrial fibrillation as well as his hypertension." However, Dr. Raisinghani opined that "Mr. Sunico would have had hypertension. He has a strong family history of this, and I do not believe it is related to his job. Clearly, hypertension is a significant risk factor for patients to develop atrial fibrillation. Therefore, it is likely that [Mr. Sunico] would have had this diagnosis regardless of his job."

8. Dr. Raisinghani testified in this hearing consistent with his report. Dr. Raisinghani testified that during his examination, Mr. Sunico did not advise of any job duties he could not perform due to his condition. The medical records revealed that Mr. Sunico had fairly extensive cardiac disease at the time of his myocardial infarction. Mr. Sunico underwent stent placement, and his condition is fairly well controlled on medication. Nothing about his current condition should prevent him from performing his job duties. Although he still has atrial fibrillation, it is controlled with medications and does not prevent him from returning to work. On cross-examination Dr. Raisinghani explained that having stents does not equate to having a permanent disability. Dr. Raisinghani questioned any limitations being placed on Mr. Sunico's ability to return to work, as Dr. Raisinghani saw none during his examination or documented in the medical records.

Dr. Raisinghani's opinions were supported by his findings and appeared well reasoned. He made a credible and persuasive witness.

*Mr. Sunico's Medical Reports and Records*

9. Mr. Sunico introduced the report of the David G. Marsh, M.D., FACC, FAHA, QME, the cardiologist who performed the Panel Qualified Medical Evaluation for the Disability Evaluation Unit. Dr. Marsh reviewed medical records, interviewed Mr. Sunico and performed a physical examination. Dr. Marsh's impressions were: coronary artery disease manifested by inferior myocardial infarction and subsequent stenting, essential hypertension, hypercholesterolemia, and paroxysmal atrial fibrillation. Dr. Marsh opined that Mr. Sunico's coronary artery disease was multi-factorial in origin. Mr. Sunico had a 10 year history of hypertension and hyperlipidemia. As a correctional officer Mr. Sunico is subjected to significant stressor and was treated for anxiety in July 2008, four months before his myocardial infarction. Therefore, it is medically reasonable and probable that his myocardial infarction also arose out of his employment. Additionally, his paroxysmal atrial fibrillation may be related to the ischemia but seemed well controlled on medication. Dr. Marsh apportioned 50% of the current cardiac condition as industrial in origin and 50% due to nonindustrial factors. Mr. Sunico will require long-term medication and treatment with a cardiologist. Mr. Sunico was temporarily disabled from the date of his heart attack, October 25, 2008, until his return to work in late January 2009. Dr. Marsh opined that Mr. Sunico was 25 percent whole person impaired from his angina and 20 percent whole person impaired from his paroxysmal atrial fibrillation.

10. Alan T. Chang, M.D., an internal medicine physician, completed a CalPERS Physician's Report on Disability on July 27, 2010. Dr. Chang noted that the November 25, 2008, myocardial infarction was work related. Dr. Chang reviewed the job duties statement and physical requirements of the position. Dr. Chang opined that Mr. Sunico was permanently, substantially incapacitated from performing the following usual job duties: running, squatting, climbing and lifting more than 50 pounds.

11. Raghava R. Gollapudi, M.D., a cardiologist, completed a CalPERS Physician's Report on Disability on June 18, 2010. Dr. Gollapudi noted that the November 25, 2008, myocardial infarction was work related. Dr. Gollapudi reviewed the job duties statement and physical requirements of the position. Dr. Gollapudi opined that Mr. Sunico was not substantially incapacitated from performing his usual job duties.

12. Mr. Sunico introduced copies of the images of his stent placements.

13. Universal Health Records documented Mr. Sunico's numerous medications and diagnoses. The records corroborated Mr. Sunico's testimony and the physicians' medical reports.

*Labor Code Referenced by Mr. Sunico*

14. Mr. Sunico introduced Labor Code section 3212.2. That section provides that for correctional officers, an injury includes "heart trouble which develops or manifests itself during a period while such officer or employee is in the service" of the department. Furthermore the "heart trouble so developing or manifesting itself in such cases shall be

presumed to arise out of and in the course of the employment.” However, that “presumption is disputable and may be controverted by other evidence.”

### *Mr. Sunico's Testimony*

15. Mr. Sunico testified that all of his medical providers have stated that he is permanently disabled and that the stent placement has caused him to be unable to do the physical exertion he could do before his heart attack. He testified that his job is very stressful and that with his heart attack and three stents, the job jeopardizes his life. Mr. Sunico testified that his three medical providers who opined he is disabled should carry more weight than the one opinion of Dr. Raisinghani. This testimony was unclear because his three treaters did not render those opinions.

Mr. Sunico was a very credible witness. His testimony seemed sincere. He did not appear to be exaggerating his complaints. His concerns for his condition and how it interacts with his job duties was understandable. However, his concern did not translate into a finding that he was substantially incapacitated from performing his job duties as more fully explained below.

## 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 defines “disability” and “incapacity for performance of duty,” for purposes of a retirement, to mean “disability of permanent or extended and uncertain duration” based on “competent medical opinion.”

3. Government Code section 21151, subdivision (a), provides that a member who is “incapacitated for the performance of a duty” shall receive a disability retirement.

4. Government Code section 21156 provides that if the medical evaluation or other evidence demonstrates that an eligible member is incapacitated physically or mentally, then CalPERS shall immediately retire the member for disability.

### *Appellate Authority*

5. “Incapacitated” means the applicant for a disability retirement 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; *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1057.)

6. The fact that an injury increases an individual’s chances of further injury does little more than demonstrate that the injury is prospective, hence, speculative, and presently not in existence. It is insufficient to support a finding of disability. Prophylactic work restrictions that might be imposed because of Mr. Sunico’s reasonable fear of injury also are insufficient to justify granting him an industrial disability retirement. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863).

7. Mr. Sunico’s receipt of any type of disability in a related workers’ compensation proceeding is not binding in this proceeding. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697.) Determinations made in other proceedings regarding an injured employee do not apply to industrial disability retirement proceedings. (*English v. Board of Administration of the Los Angeles City Employees’ Retirement System* (1983) 148 Cal. App. 3d 839, 844-845.) A worker’s compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

#### *Precedential Decisions*

8. Government Code section 11425.60 authorizes agencies to designate decisions as precedential that contain “a significant legal or policy determination of general application that is likely to recur.” Precedential decisions may be expressly relied upon by the administrative law judge and the agency.

9. Complainant introduced three precedential decisions at hearing. *In The Matter of the Application for Reinstatement from Industrial Disability of Willie Starnes*, Case No. 2530, OAH No. L-1999060537, Precedential Board Decision No. 99-03, provides that there is a distinction between a person who suffers from some impairment and one who suffers a substantial impairment sufficient to become eligible for disability retirement.

10. *In The Matter of the Application for Disability Retirement of Theresa V. Hasan*, Case No. 2704, OAH No. N-1999100099, Precedential Board Decision No. 00-01, provides that prophylactic restrictions that are imposed only because of a risk of future injury are insufficient to support a finding of disability. Competent medical evidence is required to establish that an individual’s condition prevents him from currently performing his normal duties.

11. *In The Matter of the Application for Disability Retirement of Ruth A. Keck*, Case No. 3138, OAH No. L-1999120097, Precedential Board Decision No. 00-05 provides that difficulty performing certain tasks is not enough to support a finding of disability. A person must be substantially incapacitated from performing his or her usual duties. The disability must be presently existing and not prospective in nature.

*Evaluation*

12. Mr. Sunico's concern for his cardiac condition is understandable. However, in order to qualify for a disability retirement, Mr. Sunico must demonstrate that he was permanently disabled or incapacitated from performing the regular and customary duties of a Correctional Officer when he filed his application. The evidence did not demonstrate that he was permanently disabled or incapacitated from performing those duties. As such, his application must be denied.

The documents Mr. Sunico introduced were not persuasive. The reports from Mr. Sunico's worker's compensation case are irrelevant for purposes of determining his eligibility for a disability retirement. Labor Code section 3212.2 includes "heart trouble" as an injury but there was no issue in this case regarding whether Mr. Sunico's cardiac condition was work-related. The issue here was whether it incapacitated him from performing his job duties. Although Dr. Chang and Dr. Gollapudi completed CalPERS' disability reports, Dr. Chang simply placed restrictions on Mr. Sunico, but did not prohibit him from returning to work, and Dr. Gollapudi opined that Mr. Sunico was not substantially incapacitated from performing his usual job duties.

Dr. Raisinghani's report and testimony, on the other hand, was persuasive and established that Mr. Sunico is not permanently disabled and substantially incapacitated from performing his usual job duties. Mr. Sunico, who had the burden of proof, did not provide sufficient evidence to meet his burden or to rebut Dr. Raisinghani's well-founded opinions.

*Cause Exists to Deny the Application*

13. Cause exists to deny Mr. Sunico's application for a disability retirement. A preponderance of the evidence did not establish that Mr. Sunico became permanently disabled and incapacitated from performing the regular and customary duties of a Correctional Officer as a result of his cardiovascular condition.

**ORDER**

The application for a disability retirement signed by Valentin B. Sunico on May 10, 2010, is denied. CalPERS's denial of Mr. Sunico's application is affirmed.

DATED: 3/17/2014.

  
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MARY AGNES MATYSZEWSKI  
Administrative Law Judge  
Office of Administrative Hearings