

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

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

ELIAS MENDEZ,

Respondent

and

CALIFORNIA STATE PRISON –
CORCORAN, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Respondent.

Case No. 2014-0581

OAH No. 2014061179

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on March 25, 2015, in Fresno, California.

Christopher C. Phillips, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Elias Mendez represented himself.

No one appeared on behalf of respondent California State Prison – Corcoran, California Department of Corrections and Rehabilitation.

Evidence was received, and the record was kept open to allow Mr. Mendez to submit a report on a recent MRI of his right knee and progress reports for recent visits to his physician and to allow CalPERS to respond to those submissions. The progress reports are marked as Exhibit A, and the MRI report is marked as Exhibit B. CalPERS did not object to Exhibits A or B, and both are admitted for all purposes.

The record was closed, and the matter was submitted for written decision on April 15, 2015.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED April 28 2015

Lisa Kurnis

SUMMARY

This appeal is limited to determining whether Mr. Mendez is permanently and substantially incapacitated for the performance of his usual job duties as a Correctional Officer with the California State Prison – Corcoran, California Department of Corrections and Rehabilitation due to an orthopedic (right knee) condition. He did not present persuasive medical evidence demonstrating his substantial incapacity. Therefore, his application for industrial disability retirement benefits should be denied.

FACTUAL FINDINGS

Procedural History

1. On June 18, 2013, Mr. Mendez signed, and CalPERS received, a Disability Retirement Election Application seeking Industrial Disability Retirement (Application) based on a claimed disability of “(Right knee) Damaged cartilage and chondromalacia in the right knee joint.”
2. Mr. Mendez is employed by the California State Prison – Corcoran, California Department of Corrections and Rehabilitation. By virtue of such employment, he is a state safety member of CalPERS subject to Government Code section 21151, subdivision (a).¹
3. CalPERS obtained or received medical reports concerning Mr. Mendez’s claimed disability from competent medical professionals. After review of those documents, CalPERS determined that Mr. Mendez was not permanently disabled or incapacitated from performance of his duties as a Correctional Officer at the time he filed the Application.
4. Mr. Mendez was notified of CalPERS’s determination and advised of his appeal rights by letter dated December 26, 2013.
5. Mr. Mendez filed a timely appeal from the denial of disability retirement by letter dated January 9, 2014, and requested a hearing.
6. Anthony Suine, Chief of the Benefit Services Division of CalPERS, filed the Statement of Issues in his official capacity.
7. On February 12, 2015, CalPERS served the jurisdictional documents, including a Notice of Hearing, on Mr. Mendez and California State Prison – Corcoran, California Department of Corrections and Rehabilitation.

¹ Government Code section 21151, subdivision (a), states: “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.”

8. This matter was called for hearing on the date and at the time and location stated in the Notice of Hearing. No one appeared on behalf of respondent California State Prison – Corcoran, California Department of Corrections and Rehabilitation, and an evidentiary hearing was conducted as a default proceeding pursuant to Government Code section 11520 as to that party only.

Job Duties of a Correctional Officer

9. The relevant essential functions of Mr. Mendez’s job as a Correctional Officer include the following:

- Must be able to perform the duties of all the various posts
- Must be able to work overtime. Overtime is mandatory and could be 8 hours at one time and on very rare occasions up to 16 hours in situations such as a riot
[¶] ... [¶]
- Disarm, subdue and apply restraints to an inmate
- Defend itself against an inmate armed with a weapon
[¶] ... [¶]
- Walk occasionally to continuously
- Run occasionally. Run in an all out effort while responding to alarms or serious incidents. Distances vary from a few yards up to 400 yards. Running may take place over varying surfaces including uneven grass, dirt areas, pavement, cement, etc. Running can include stairs or several flights of stairs maneuvering up or down
- Climb occasionally to frequently. Ascent/descent or climb a series of steps/stairs, several tiers of stairs or ladders as well as climb onto bunks/beds while involved in cell searches. Must be able to carry items while climbing stairs
- Crawl or crouch occasionally. Crawl or crouch under an inmate’s bed or restroom facility while involved in cell searches. Crouch while firing a weapon or while involved in property searches
- Stand occasionally to continuously. Stand continuously depending on the assignment
[¶] ... [¶]
- Stoop and bend occasionally to frequently. Stoop and bend while inspecting cells, physically searching inmates from head to toe, and while performing janitorial work including mopping and cleaning
- Lift and carry continuously to frequently. Lift and carry in the light (20 pound maximum) to medium (50 pound maximum) range frequently throughout the workday and in the very heavy lifting range (over 100 pounds) occasionally. Lift and carry an

inmate and physically restrain the inmate including wrestling an inmate to the floor. Drag/carry an inmate out of a cell. Perform lifting/carrying activities while working in very cramped space

10. Mr. Mendez explained at hearing that he has great difficulty squatting, climbing up and down stairs, walking, standing, running, and carrying inmates. He estimated that when he “works the floor” he climbs stairs 16 times in an eight-hour shift, and is “on the yard” for hours at a time standing, walking, and running in response to alarms. He further explained that as a correctional officer he needs to be “100%” for his own safety and that of his coworkers.

11. Mr. Mendez’s assigned position for the last 11 months has been in the control booth. As such, he is not responsible for “working the floor” or the yard.² His concern, however, is his physical ability to work mandatory overtime, which he explained could be in a position anywhere in the prison. When a particular shift is in need of additional correctional officers, management notifies the prior shift of the number of positions that need to be filled and solicits volunteers. If there are more positions to fill than there are volunteers, mandatory overtime is implemented based on seniority. And while Mr. Mendez has more seniority than many of his coworkers on his shift, his shift includes the fewest number of correctional officers so all of them are often needed to fill vacancies on the next shift.

12. Mr. Mendez estimated that he is required to work overtime a minimum of once or twice each week. In one month, he said he had to work overtime six or seven times. He gave an overall rough estimate of 40 overtime shifts over the last 11 months.

History of Mr. Mendez’s Injury

13. Mr. Mendez first injured his right knee on May 18, 2012, when he was running in response to an alarm at work. He felt a “pop” in his right knee as he was running and immediately began experiencing severe pain. He explained at hearing that his condition has since deteriorated and his symptoms have intensified.

14. Mr. Mendez initially sought treatment from his primary care physician, David Tenn, M.D., who provided an initial diagnosis of “sprain/strain right knee and leg, pain in joint right lower leg, possible internal derangement of the right knee.”³ Dr. Tenn prescribed

² Mr. Mendez described at hearing a process whereby he and his colleagues are able to “bid” for various positions throughout the prison. The correctional officer who submits the winning bid, he explained, is given a three-year contract guaranteeing him or her the particular position. And because he is one of the more senior officers, Mr. Mendez believes his chances of submitting the winning bid are great. The contract, however, does not apply to overtime shifts.

³ None of Mr. Mendez’s medical records were admitted into evidence, except those marked as Exhibits A and B. Mr. Mendez’s medical information was derived largely from

conservative treatment, including physical therapy and an MRI of Mr. Mendez's right knee. He eventually requested an orthopedic consultation.

15. Mr. Mendez had an initial evaluation by Dr. Lancy Allyn, M.D., an orthopedic surgeon, on August 1, 2012. Notes of a follow-up visit indicated that Dr. Allyn was awaiting approval for arthroscopic surgery. However, no objective findings justifying arthroscopic surgery were included in the notes. Dr. Allyn wrote that one interpretation of the MRI scan stated that the patellofemoral groove was normal in the joint was normal. The ACL was normal. The medial meniscus showed "minimal degenerative changes posteriorly." But he also wrote that the other interpretation stated that meniscus minimal degenerative changes were present posteriorly.

16. Dr. Allyn performed arthroscopic surgery on Mr. Mendez's right knee on September 27, 2012. His post-operative notes included a diagnosis of chondromalacia medial femoral condyle. Under "arthroscopic findings," Dr. Allyn had written "medial femoral condyle grade II chondromalacia measuring 3 cm in diameter, covered the most lateral and distal portion of the medial femoral condyle." None of the chondromalacia was unstable.

17. At hearing, Mr. Mendez explained that he filed a worker's compensation claim with regard to his injury, and treated with Dr. Silverman. But he did not state when in relation to his treatment with Drs. Tenn and Allyn he treated with Dr. Silverman, and Dr. D'Amico's record review indicated that Mr. Mendez treated with Dr. Tenn at least through August 12, 2013. None of Dr. Silverman's records were included in the record review.

18. Mr. Mendez also explained that Dr. Tenn had placed him on modified duty, but did not explain what his limitations were. He said Dr. Silverman released him to work without restrictions, while Dr. Tenn left him on modified duty.

19. Recently, Mr. Mendez has been treating with Dennis Miller, M.D., with regard to his worker's compensation claim. The three most recent Primary Treating Physician's Progress Reports are largely illegible, but indicate that Dr. Miller returned Mr. Mendez to full duty "with no limitations or restrictions" after each visit. Those visits occurred on December 31, 2014, January 27, 2015, and February 23, 2015.

20. The radiologist's report of a November 19, 2014 MRI of Mr. Mendez's right knee included the following impressions:

1. Minimal right knee joint effusion
2. Mild sprain of the right anterior cruciate ligament

Daniel D'Amico, M.D.'s, record review, which was summarized in his written report of his Independent Medical Examination (IME) of Mr. Mendez. That IME is discussed further below.

3. **Meniscal tear in the posterior horn of the right medial meniscus**
4. **Meniscal degeneration in the posterior horn of the right lateral meniscus**
5. **Tiny focal subcentimeter cystic change in the proximal end of the right tibia without otherwise acute bone MR abnormality of**

Medical Evidence

21. **Mr. Mendez did not call any medical experts to testify at hearing, and, as previously explained, did not introduce any medical records other than those discussed in Factual Findings 19 and 20.**

22. **CalPERS, on the other hand, called Dr. D'Amico as its medical expert at hearing. As previously discussed, he performed an IME of Mr. Mendez on November 4, 2013, which was limited to the lower extremities. Dr. D'Amico prepared a report documenting his IME, and that report was introduced into evidence.**

23. **Dr. D'Amico wrote the following in his report about Mr. Mendez's description of his symptoms at the time of the IME:**

Pain in the right knee. He states the pain is aggravated by long periods of standing, running, walking long distances, going up and down stairs, and walking on uneven ground. He denies catching, locking, or giving out or recurrent swelling. He states he has taken ibuprofen and presently takes one or two Lortab a day if his pain becomes significant. In the course of his examination, by my observation, he does not appear to be in any pain.

24. **Dr. D'Amico also documented his physical examination of Mr. Mendez, which did not reveal any pathological basis for the knee pain Mr. Mendez said he was experiencing. Dr. D'Amico wrote the following about his physical examination:**

Based on my physical examination, the findings are that both the right and left knees are equal. He has tenderness on the medial aspect of the right knee just below the joint line and just at the joint line and he has no specific point tenderness laterally. He has no patellofemoral crepitation with flexion and extension of the knee. He has no loss of extension or hyperextension of either knee and there is no pain with patellar pressure and no

crepitation of patellar pressure. There is no lateral laxity of the patellofemoral mechanism with pressure laterally as from extended to the semiflexed position of the knee. The meniscal findings on both the right and left knees at this examination are negative, although he has tenderness over the medial side of the knee joint just below as indicated to palpation and to subjectivity where he indicates the pain.

25. Dr. D'Amico included the following discussion in his IME report:

Based on the review of the medical records that are very confusing, the initial examination of the knee strain is very minimal. The history given by Dr. Allyn of a three-year history of knee problems is not documented anywhere in the records or claimed by Mr. Mendez. The findings that were reviewed by Dr. Allyn of the MRI of lateral and medial meniscus problems were not documented in the MRI. The chondromalacia problems were not documented in the MRI. The description given at the time of the surgery by Dr. Allyn himself states that these were mild chondromalacia changes if at all present and they were stable. Based on all the above and based on the lack of documentation on MRI or true objective pathology on the arthroscopic surgery and the last note that I quoted from Dr. David Tenn about the normal knee examination and the essentially normal knee by Dr. Allyn himself and the fact that he has a normal functioning knee at the time of my examination, I can only conclude that at the present time, Mr. Mendez has pain that is not explained on the basis of anything that is objectively pathologic or abnormal in his knee at this time.

I noted on examination, however, ridging of the medial tibia. This could be due to the fact that Mr. Mendez is not very thick and does not have a lot of subcutaneous tissue but this could be an indication of some medial joint compartment problems that will occur as a genetic problem in the future, but I cannot state this with any degree of reasonable medical probability. Based on my finding and review of the records as I indicated them and as I reviewed them, there is no real clear-cut problem that exists in the right knee and there is no disabling condition that exists in the right knee at this time based on all the physical findings in my review of the records. I do not feel that Mr. Mendez is disabled from returning to his work as a correctional officer.

26. Dr. D'Amico testified at hearing in a manner consistent with his written report. Additionally, he explained that he did not doubt or question Mr. Mendez's subjective complaints of pain. But, as Dr. D'Amico further explained, "pain" is a symptom, and he was

not able to find any pathological basis, at least from an orthopedic basis, for that symptom. Therefore, he had no medical basis for concluding Mr. Mendez is substantially incapacitated from performing the usual duties of his job as a Correctional Officer.

Discussion

27. As discussed above, Mr. Mendez did not present any competent medical evidence that he is permanently and substantially incapacitated for the performance of his normal duties as a Correctional Officer with the California State Prison – Corcoran, California Department of Corrections and Rehabilitation. He is currently performing his usual duties as a Correctional Officer in the control booth. That he may not be able to perform those duties while working overtime does not render him substantially incapacitated because his employer is obligated to abide by any prophylactic restrictions imposed by his physician. (See, *Raygoza v. County of Los Angeles* (1993) 17 Cal.App.4th 1240; *Leili v. County of Los Angeles* (1983) 148 Cal.App.3d 985, 988-989.) Therefore, Mr. Mendez failed to meet his burden of establishing his entitlement to disability retirement benefits, and the Application should be denied.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Mr. Mendez has the burden of proving his eligibility for disability retirement benefits by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) Evidence that is deemed to preponderate must amount to “substantial evidence.” (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be “substantial,” evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

Applicable Statutes

2. 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.

3. Government Code section 21151, subdivision (a), provides: “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 21156, subdivision (a), provides, in pertinent part:

(1) If the medical examination and other available information show to the satisfaction of the board ... that the member in the state service is incapacitated physically or mentally 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

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

5. The issue of whether Mr. Mendez is substantially incapacitated for the performance of his usual job duties as a result of a disability is the sole issue for determination on appeal. If he is found to be substantially incapacitated, the issue of causation shall be determined as provided in Government Code section 21166, which states:

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, and this section shall not be construed to authorize the Workers' Compensation Appeals Board to award costs against this system pursuant to Section 4600, 5811, or any other provision of the Labor Code.

6. An employer may not separate a member because of disability if the member is otherwise eligible to retire for disability. Government Code section 21153 provides:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.

7. An opinion by the Attorney General interpreting former Government Code section 21023.5, the predecessor to Government Code section 21153, concluded:

As emphasized, Government Code section 21023.5 is to supersede “any other provisions of law” and provides that the employer may not separate an employee for a disability. Rather, the employer “shall apply for disability retirement of any member believed to be so disabled....” The employer must follow prescribed procedures to separate an employee for disability. The decision of the Public Employees’ Retirement System (PERS) is determinative in the employer’s subsequent effort to terminate the employee for medical reasons. A contrary decision would create a severe financial consequence to an employee resulting from inconsistent decisions between an employer and the Board of Administrators of the Public Employees’ Retirement System as to whether a particular employee is incapacitated and unable to perform the duties of his position. The employee could find himself without a job or retirement income. See *McGriff v. County of Los Angeles*, 33 Cal.App.3d 394, 399 (1973), set out *infra*. The State Personnel Board did not intend such result. (Footnote omitted.)

The employer is bound by the PERS decision. To conclude otherwise would render the procedures outlined by Government Code section 21023.5 meaningless. It is not reasonable for the employee to go through the PERS hearing if the employer is not bound by said decision. The employer cannot terminate an employee for medical reasons after the PERS has denied disability retirement to the member upon a finding that the employee can perform the duties of the position. This conclusion is supported by the recent decision in *McGriff v. County of Los Angeles*, *supra*, 33 Cal.App.3d 394 (1973), where the Civil Service Commission of Los Angeles County terminated a business machine operator for medical incapacity. The employee then applied to the Board of Retirement of the Los Angeles County Employees Association and was denied disability retirement upon the finding that the employee “Was not permanently disabled from performing the duties of her position.” The county disregarded the retirement board decision and refused to reinstate the employee to her former position. The trial court ordered reinstatement. The Court of Appeal affirmed that reinstatement upon the determination by the retirement board that the former employee was not incapacitated. The court cited the following legislative history (at page 399 of 33 Cal.App.3d):

According to the Report of the Assembly Committee on Public Employment and Retirement contained in volume 1 Appendix to Journal of the Assembly (Reg. Sess. 1970) pages 11-13, the purpose of amending the Retirement Act was to eliminate severe financial consequences to an employee resulting from inconsistent decisions between employer and the Retirement Board as to whether a particular employee is incapacitated and unable to perform the duties of his position. Prior to the 1970 amendment of section 31725, a local government employer could release an employee under rule 10.07(c) and the Retirement Board could deny the employee a disability pension on the ground he was not disabled. The Assembly committee found that, 'As a result of such disputes, approximately 1% of the applicants for a disability retirement pension have found themselves in the position of having neither a job, nor a retirement income.'"

We therefore conclude that upon a determination by the Public Employees' Retirement System that a member *can* perform the duties of this position, the employer of said member cannot thereafter terminate the employee on the grounds that he *cannot* perform such duties under Government Code section 19253.5.

(57 Ops.Cal.Atty.Gen. 86 (1974), italics in original; cited by, *Leili v. County of Los Angeles* (1983) 148 Cal.App.3d 985, 988-989 [interpreting a statute under the County Employees Retirement Law of 1937 analogous to Gov. Code, § 21153 and concluding that the employer must reinstate an employee who is subsequently determined to not be eligible for disability retirement]; accord, *Raygoza v. County of Los Angeles* (1993) 17 Cal.App.4th 1240 [concluding that a county employer's only recourse with regard to an employee terminated for disability who is subsequently denied a disability retirement is to seek judicial review of the decision denying disability retirement or retroactively reinstate him].)

Legal Standards for Determining Disability

8. The courts have interpreted the phrase "incapacitated for the performance of duty" to mean "the substantial inability of the applicant to perform [her] usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) Discomfort, which may make it difficult to perform one's duties, is insufficient to establish permanent incapacity for the performance of her 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 determined. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

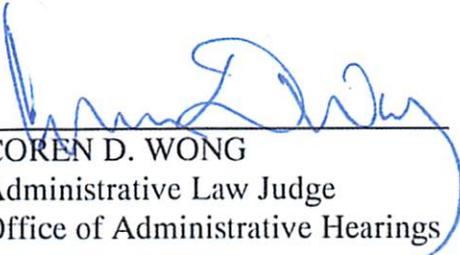
Conclusion

9. As set forth in Factual Finding 27, Mr. Mendez did not meet his burden of proving that he is permanently and substantially incapacitated for the performance of his usual duties as a Correctional Officer with the California State Prison – Corcoran, California Department of Corrections and Rehabilitation due to an orthopedic (right knee) condition. Therefore, Mr. Mendez’s Disability Retirement Election Application seeking Industrial Disability Retirement should be denied.

ORDER

The Disability Retirement Election Application seeking Industrial Disability Retirement of Elias Mendez is DENIED.

DATED: April 24, 2015


COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings