

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Involuntary
Reinstatement from Industrial Disability
Retirement of:

ROBERT C. PACUINAS,

Respondent,

and

CALIFORNIA DEPARTMENT OF
HIGHWAY PATROL,

Respondent.

Case No. 2012-0773

OAH No. 2013010633

PROPOSED DECISION

This matter was heard before Ed Washington, Administrative Law Judge, Office of Administrative Hearings, State of California, on June 9, 2015, in Sacramento, California.

Senior Staff Counsel Rory J. Coffey represented complainant, the California Public Employees' Retirement System (CalPERS).

Supervising Deputy Attorney General Judith Recchio represented respondent, the California Department of Highway Patrol.

Attorney Amanda R. Gimbel represented respondent Robert C. Pacuinas, who was present at hearing.

Evidence was received, the record was closed, and the matter was submitted for decision on June 9, 2015.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED July 7, 2015
C. Bodily

FACTUAL FINDINGS

1. Mr. Pacuinas was employed by the California Department of Highway Patrol (Department or CHP) as a Traffic Officer. By virtue of his employment, Mr. Pacuinas was a state safety member of CalPERS subject to Government Code section 21151.¹

2. On October 24, 1999, Mr. Pacuinas applied for industrial disability retirement with the Benefits Services Division of CalPERS asserting that he was disabled or incapacitated for the performance of duty as the result of an industrial disability. For these purposes, "incapacitated for the performance of duty" means the substantial inability of an applicant for industrial disability retirement to perform his or her usual duties. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.)

3. Mr. Pacuinas' application for industrial disability retirement was approved and he retired for disability, effective June 1, 2000, due to a lower back condition.

4. Mr. Pacuinas was born August 3, 1962. As of the date of his disability retirement, he was under the minimum age for voluntary service retirement applicable to members of his classification. (Gov. Code, § 21060.)

5. CalPERS may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service to undergo a medical examination. (Gov. Code, § 21192.) In 2009, CalPERS requested that Mr. Pacuinas undergo such examination, which was completed by Daniel D'Amico, M.D., an orthopedic surgeon, on October 24, 2011.

6. CalPERS received an independent medical examination report dated October 24, 2011, and a supplemental report dated December 20, 2011, containing the results of Dr. D'Amico's examination. These reports were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).² After reviewing the reports, CalPERS determined that Mr. Pacuinas was no longer substantially incapacitated from performing the job duties of an "Officer" for CHP.

¹ 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."

² Government Code section 11513, subdivision (d), provides: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration."

7. By letter dated January 19, 2012, CalPERS notified both Mr. Pacuinas and CHP of its determination and advised him of his appeal rights.

8. On January 22, 2012, Mr. Pacuinas was involved in a traffic accident. He was “rear-ended” by another vehicle traveling at approximately 20 miles per hour. He was transported to the hospital by emergency personnel and immediately complained of back pain in the lower left area of his back.

9. As part of the reinstatement process, Mr. Pacuinas was required to successfully complete a Physical Performance Program Test (PPPT) to determine whether he could perform the minimum physical requirements for his position. Prior to completing the PPPT, Mr. Pacuinas had to obtain medical clearance from his personal physician, Stacey Nakano, M.D., certifying that he was fit to safely complete the test. Dr. Nakano did not provide the medical clearance for Mr. Pacuinas to complete the PPPT, which the CHP utilizes to assess an officer’s fitness for duty. On a CHP Physician Clearance for Reinstatement form, dated June 15, 2012, Dr. Nakano indicated that it was not safe for Mr. Pacuinas to participate in the PPPT.

10. On July 12, 2012, and September 19, 2012, CHP submitted two separate appeal letters to CalPERS requesting a review of its determination that Mr. Pacuinas was no longer substantially incapacitated from performing the job duties of a Traffic Officer for CHP, based on Dr. Nakano’s opinion that it was unsafe for Mr. Pacuinas to take the PPPT.

11. CalPERS filed an Accusation on or about May 9, 2013, requesting that a hearing be held on the appeal, and that Mr. Pacuinas be reinstated to his former usual job with CHP as a Traffic Officer. The Accusation specifies that Mr. Pacuinas’ appeal is limited to “whether respondent Pacuinas is disabled or incapacitated from performance of his usual duties.”

12. On August 16, 2013, Mr. Pacuinas was deposed in a civil action stemming from the January 2012 traffic accident. At deposition, Mr. Pacuinas testified that he agreed with Dr. Nakano’s assessment that he could not safely complete the PPPT. When asked how he felt about completing the test, Mr. Pacuinas replied: “I think my days of vaulting walls are over. . . . My back is just too . . . I think tender, sensitive I guess, fragile I guess at this point. I wouldn’t want to risk doing – jumping over walls and trying to do timed courses, and even running bothers it, so I don’t do any more running; I just do the elliptical or the bike.”

13. Dr. D’Amico was not available for hearing and was not subpoenaed to appear at hearing. As a result, CalPERS offered no evidence at hearing regarding whether Mr. Pacuinas is disabled or incapacitated from performance of his usual job duties, in light of his January 2012 car accident, and the opinion of his treating physician that he cannot safely complete the PPPT—a prerequisite to reinstatement to his former position with CHP as a Traffic Officer.

14. Dr. John Champlin was scheduled to testify as a medical expert at hearing on behalf of CHP. He is board certified in family practice and has been the primary treating physician for many injured CHP officers. In light of Dr. D'Amico's unavailability for hearing, all parties stipulated to the following offer of proof submitted by CHP:

John Champlin, M.D., is scheduled to testify on behalf of the Department. He is the medical expert who assisted CHP in developing the PPPT required of all cadets and candidates for reinstatement from disability. As part of this process, Dr. Champlin dedicated significant time studying the physical requirements of a CHP officer, reviewing officer job duties, and observing officers in the field. He is the most qualified person, from a medical standpoint, to testify as to what a CHP officer is expected to be able to do. If called to testify, Dr. Champlin would testify that he has reviewed all of the medical records related to Mr. Pacuinas' back injury, including records predating his June 2000 industrial disability retirement, the 2011 examination reports from Dr. D'Amico, the emergency room records from his January 2012 traffic accident, the records from his follow up visit with Dr. Nakano after his traffic accident, and his August 2013 deposition testimony relating to the 2012 traffic accident. Dr. Champlin would testify that, based on his review of those records, he does not believe Mr. Pacuinas can perform the essential critical tasks of a CHP officer, and he does not believe Mr. Pacuinas can safely complete the PPPT.

Discussion

15. CalPERS conceded that it has the burden of proving by a preponderance of the evidence that Mr. Pacuinas is no longer incapacitated from performance of his usual job duties as a Traffic Officer with CHP, and should be reinstated in his former position. The only evidence that supports this contention are the 2011 hearsay reports from Dr. D'Amico. As these reports were completed in 2011, they fail to address Mr. Pacuinas' level of incapacitation after his January 2012 traffic accident. Additionally, in the absence of any testimony from Dr. D'Amico, these reports would not be admissible over objection in a civil action and are insufficient, on their own, to support a finding that Mr. Pacuinas is no longer incapacitated from performing his usual job duties. Accordingly, CalPERS failed to meet its burden of establishing that Mr. Pacuinas is no longer incapacitated from performing his usual duties. Mr. Pacuinas' appeal from CalPERS' determination that he be reinstated to his former position as a Traffic Officer with CHP must be granted.

//

LEGAL CONCLUSIONS

Burden of Proof

1. Complainant has the burden of proving by a preponderance of the evidence that respondent is no longer substantially incapacitated for the performance of his usual job duties as a Traffic Officer for CHP, and should therefore be reinstated in his former position. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (January 22, 2000) CalPERS Precedential Dec. 99-03) <<https://www.calpers.ca.gov/docs/99-03-starnes-chp.pdf>> [as of July 2, 2015].)

Applicable Law

2. 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.”

3. Government Code section 20026 provides: “ ‘Disability’ and ‘incapacity for performance of duty’ as a basis of retirement, means disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion.”

4. Being “incapacitated for the performance of duty” within the meaning of Government Code section 21151 means the “*substantial* inability of the applicant to perform his usual duties.” (*Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, 875, italics original.)

5. Government Code section 21156 provides, in pertinent part:

(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 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.

[¶]...[¶]

6. Government Code section 21192 provides, in pertinent part:

The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, shall also cause the examination to be made upon application for reinstatement to the position held at retirement or any position in the same class, of a person who was incapacitated for performance of duty in the position at the time of a prior reinstatement to another position. The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

7. Government Code section 21193 provides, in pertinent part:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement

allowance shall be canceled immediately, and he or she shall become a member of this system.

If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position. However, in that case, acceptance of any other position shall immediately terminate any right to reinstatement. A recipient who is found to continue to be incapacitated for duty in his or her former position and class, but not incapacitated for duty in another position for which he or she has applied for reinstatement and who accepts employment in the other position, shall upon subsequent discontinuance of incapacity for service in his or her former position or a position in the same class, as determined by the board under Section 21192, be reinstated at his or her option to that position.

[¶] ... [¶]

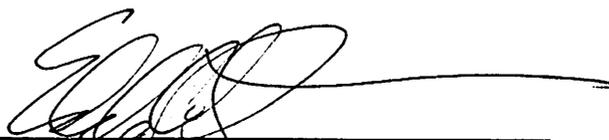
Cause for Involuntary Reinstatement

8. As set forth in Finding 15, and Legal Conclusion 1, CalPERS failed to establish that Mr. Pacuinas is no longer incapacitated from performance of his usual job duties as a Traffic Officer with CHP, and should be reinstated in his former position. Mr. Pacuinas' appeal from complainant's determination that he be reinstated to his former position must be granted.

ORDER

Respondent Robert C. Pacuinas' appeal from CalPERS' determination that he is no longer disabled or incapacitated from performance of his usual duties as a Traffic Officer for the California Department of Highway Patrol is GRANTED. The request of California Public Employees' Retirement System to involuntarily reinstate respondent Robert C. Pacuinas from disability retirement is DENIED.

DATED: July 3, 2015



ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings