

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

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

DAVID GALLOWAY,

Employee/Respondent,

and

CALIFORNIA HIGHWAY PATROL,

Employer/Respondent.

Case No. 2013-0055

OAH No. 2014080125

PROPOSED DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, heard this matter on March 6 and April 3, 2015, in Sacramento, California, and on March 18 and April 27, 2015 in San Diego, California.

Rory J. Coffey, Senior Staff Counsel, represented petitioner, Anthony Suine, Chief of the Benefits Services Division, California Public Employees' Retirement System (CalPERS).

Susan Slager, Supervising Deputy Attorney General, and Simerdip Khangura, Deputy Attorney General, Department of Justice, State of California, represented the California Highway Patrol (CHP), employer/respondent.

David Galloway, employee/respondent, appeared and represented himself.

The record was left open until June 26, 2015, to permit the parties to submit closing and reply briefs. Petitioner and respondents timely submitted post-hearing briefs. Petitioner's Post-Hearing Brief was marked as Exhibit 16; Mr. Galloway's Post-Hearing Brief and Reply Brief were marked as Exhibits 17 and 18 respectively; and the CHP's Post-Hearing Brief was marked as Exhibit Z. The matter was submitted on June 26, 2015.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED July 13, 2015
C. Bobbitt

ISSUE

The issue in this proceeding is whether Mr. Galloway is presently capable of performing the usual job duties of a CHP Officer.

FACTUAL FINDINGS

Procedural Background

1. On April 16, 2014, Anthony Suine, Chief of CalPERS's Benefits Services Division, filed Case No. 2013-0055 in his official capacity.
2. David Galloway was employed by the CHP as a CHP Officer from 2002 until 2006. By virtue of his employment, Mr. Galloway was and is subject to Government Code section 21151, subdivision (a), which mandates that any patrol officer or state safety officer incapacitated for the performance of duty as the result of an industrial disability be retired for disability regardless of age or amount of service.
3. On May 2, 2006, Mr. Galloway signed, and subsequently filed, an application for an industrial disability retirement based on a disabling orthopedic condition related to his right knee. CalPERS approved Mr. Galloway's application, and granted Mr. Galloway an industrial disability retirement effective July 14, 2006.
4. On October 2, 2011, Mr. Galloway applied to CalPERS for reinstatement to his previous employment as a CHP Officer.
5. On October 19, 2011, CalPERS sent a letter to the CHP advising CHP that Mr. Galloway had requested reinstatement. CalPERS further advised:

The medical condition we are aware of and plan to evaluate is the orthopedic (right knee) condition. If you are aware of any other medical condition which should be reviewed, please notify us within 30 days and provide a copy of any historical medical reports you have on the condition. Our medical evaluation will address any factors which would prevent the retiree's full performance of the duties held at the time of retirement.
6. After reviewing various medical reports, CalPERS sent a letter to Mr. Galloway, dated January 27, 2012, stating that Mr. Galloway was capable of performing the usual duties of a CHP Officer; he was no longer substantially incapacitated from the performance of his usual duties as a CHP Officer; and he was eligible for reinstatement.
7. By letter dated January 27, 2012, CalPERS notified the CHP that Mr. Galloway's application for reinstatement had been approved. But, before Mr. Galloway

could return to active employment and CalPERS membership, the CHP needed to inform CalPERS of Mr. Galloway's hire date. CalPERS also advised the CHP of its right to appeal CalPERS's decision to reinstate Mr. Galloway. CalPERS advised the CHP that the CHP was required to file a written appeal from CalPERS's decision within 30 days of the mailing of its letter.

8. On February 6, 2012, the CHP sent a memorandum to CalPERS, captioned "Informal Appeal of Reinstatement for David Galloway," that advised that the CHP was requiring Mr. Galloway to submit to a testing process and was conducting a background investigation. The letter advised that the CHP would inform CalPERS of its position regarding Mr. Galloway's proposed reinstatement at the conclusion of this process and that the process might take longer than 30 days.

9. On February 6, 2012, the CHP sent a letter to Mr. Galloway that advised him that the CHP was going to conduct an "internal reinstatement process" to assess his ability to return to work. The letter advised Mr. Galloway that, to be reinstated, he must successfully complete a physical performance test, pass a background investigation, and successfully complete a psychological interview required by Government Code section 1031 [Peace Officer Standards and Training ("POST" standards)]. The letter directed Mr. Galloway to complete and return seven forms regarding his general health and other information.

10. On December 5, 2012, the CHP sent a memorandum advising that the CHP could not reinstate Mr. Galloway because he was deemed disqualified from service under Government Code section 10312, subdivision (f), as a result of a psychological screening conducted by the CHP's Acting Chief Psychologist, Jo Danti, Ph.D.

11. By letter dated December 27, 2012, CalPERS acknowledged that the CHP appealed CalPERS's reinstatement determination.

12. By letter dated January 24, 2013, CalPERS acknowledged the CHP's position related to Mr. Galloway's reinstatement and indicated that an appeal would be initiated with the Office of Administrative Hearings. As noted, a statement of issues was filed on April 16, 2014, and a hearing was set.

Motion in Limine and Order Excluding Evidence Relating to Mr. Galloway's Psychological Condition

13. CalPERS filed a motion in limine, dated February 13, 2015, seeking to exclude any evidence and/or argument relating to Government Code Section 1031, subdivision (f) (POST standards), and David Galloway's psychological condition.¹ The CHP opposed this motion.

¹ Government Code section 1031, subdivision (f), provides that, as a minimum standard, a peace officer must be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer.

In an order dated February 25, 2015, Administrative Law Judge Mary Agnes Matyszewski granted CalPERS's motion and ordered that, "All evidence and/or argument relating to Government Code section 1031, POST Standards, and Respondent David Galloway's psychological condition, as it pertains to whether he is substantially incapacitated from performing the usual and customary duties of a California Highway Patrol Officer, are excluded and may not be introduced in this proceeding."²

At the hearing on March 6, 2015, CHP requested that the order granting CalPERS's motion in limine be reconsidered. That request was denied.

The Usual Duties of a CHP Patrol Officer

14. Multiple documents were received that described the usual duties required of a California Highway Patrol Officer. Petitioner introduced a document entitled "California Highway Patrol Officer 14 Critical Physical Activities" that was revised in April of 2010. The CHP submitted a January 3, 2012, revision of the California State Personnel Board Specification that described the duties of a CHP Patrol Officer.

15. CHP officers must be able to perform all of the critical physical tasks listed in the described documents. The required tasks that are relevant to this matter, based on the testimony and reports of medical experts called by the parties, are: Pushing/pulling a non-resistive object five to twenty feet in an emergency; dragging an individual resisting arrest five to twenty feet; separating uncooperative persons by pushing, pulling, using locks, grips, or holds and physically restraining or subduing a resistive individual using reasonable force; stooping/squatting/kneeling for physical evidence under the seats or dash of a vehicle, in the trunk, and under the hood of a vehicle; looking under a vehicle for evidence, suspects, defects, or violations; looking under furniture for physical evidence at a crime/accident scene; stooping/squatting/ bending to set a flare pattern and ignite flares; setting cones at accident/crime scenes, and using a tape measure to measure skid marks, or taking measurements at an accident crime scene; continuously walking while on patrol; walking around obstacles over uneven ground, up hills and embankments, in loose dirt, gravel, mud, ice, or snow; running 5 to 100 yards to get to an emergency or crime scene to assist other officers, or to pursue a fleeing suspect; the ability to climb over chain link or wooden fences and over walls or climb steep embankments, hills, or gullies; and jumping across and/or over obstacles.

² In the February 25, 2015 order, Judge Matyszewski noted that, assuming Mr. Galloway was reinstated to his employment pursuant to Government Code section 21193, as part of Mr. Galloway's re-employment process the CHP could still require Mr. Galloway to meet the POST standards before returning him to active duty. If Mr. Galloway was unable to meet the POST standards, the CHP was entitled to pursue other avenues preventing Mr. Galloway's employment as a CHP Officer apart from this reinstatement proceeding under the Government Code.

History of Mr. Galloway's Disability and Application for Reinstatement

16. Mr. Galloway worked for the CHP as a Patrol Officer from 2002 until 2006, when he was granted an industrial disability retirement.

17. On May 5, 2005, following a high-speed chase that occurred when he was working as a CHP Officer, Mr. Galloway was crushed between his patrol vehicle and an SUV. As a result, he sustained a compound fracture to his right lower extremity. From May 2005 to September 2006, Mr. Galloway underwent five surgeries to repair the damage to his leg. First, he underwent separate surgeries on May 5, 9, and 11, 2005. On February 1, 2006, Mr. Galloway underwent arthroscopic surgery of the right knee and the removal of a plate, screws and other metallic devices. On September 27, 2006, Mr. Galloway underwent an additional surgery to his right knee.

18. On or about September 2005, Mr. Galloway returned to work on light duty status. In this capacity, he reviewed traffic reports and citations. But, because Mr. Galloway had used all of his accrued sick leave, a CHP supervisor encouraged him to apply for an industrial disability retirement, which he did. Effective July 14, 2006, Mr. Galloway was granted an industrial disability retirement.

19. Mr. Galloway treated with an orthopedic surgeon, James McSweeney, M.D., from September 2005. Dr. McSweeney performed the February 1, 2006, and the September 27, 2006, knee surgeries. In December 2006, Dr. McSweeney released Mr. Galloway from his active care. Subsequently, on March 28, 2011, Dr. McSweeney examined Mr. Galloway following Mr. Galloway's application for reinstatement. As part of his assessment, Dr. McSweeney had Mr. Galloway undergo a functional capacity evaluation on October 3, 2011.

20. In July 2014, Dr. McSweeney performed a cartilage shaving surgery on Mr. Galloway's right knee to remove torn cartilage. Mr. Galloway underwent this surgery because he was experiencing snapping and popping in his knee. In addition to the surgeries he performed, Dr. McSweeney administered a plasma protein injection for Mr. Galloway in 2015, who understood that this procedure might help rebuild the lost cartilage in his right knee.

21. Mr. Galloway testified that he believes he could perform the 14 critical activities required of a CHP Officer and that he could safely return to work as a CHP Officer. After he was injured, he returned to Montana, where he grew up, and strengthened his knee through hiking and hunting. He testified that in the summer of 2011, he carried a 200 pound deer that his father had killed about 750 yards over uneven terrain. He said that he had been able to participate in vigorous activities with his two young children and that he has been able to participate fully as an Assistant Boy Scout Leader. These scouting activities have included camping and hiking.

Examination by Mark Mikulics, M.D.

22. CalPERS requested Mark Mikulics, M.D., to examine Mr. Galloway to determine whether he could perform the usual duties of a CHP Officer. Dr. Mikulics is Board Certified in Orthopedic Surgery. He has been licensed as a medical doctor in California since 1988 and he is certified by the American Board of Orthopedic Surgery. He has conducted numerous evaluations for CalPERS for more than a decade to determine whether an employee was substantially incapacitated from performing his or her usual duties.

As part of his assessment, Dr. Mikulics reviewed the CHP Patrol Officer 14 Critical Physical Activities; operative notes from the May 5 and May 9, 2005 surgeries; a functional capacity evaluation dated October 3, 2011; and a report written by Dr. McSweeney dated October 25, 2011.³

On December 19, 2011, Dr. Mikulics conducted an Independent Medical Evaluation. He spent about an hour with Mr. Galloway. Mr. Galloway told Dr. Mikulics that he did not have any physical complaints. He denied right lower extremity pain, right hip pain, back pain, left knee pain, and left hip pain. Based on his physical examination, Dr. Mikulics found that Mr. Galloway had full range of motion, from 0 to 140 degrees, in both knees; full range of motion in his back; and normal motor sensory reflexes. Aside from a scar on his right knee, Mr. Galloway's physical examination was normal. Dr. Galloway commented that Mr. Galloway had engaged in activities that exceeded the 14-critical physical CHP activities. Dr. Mikulics diagnosed Mr. Galloway with "Status post open reduction/internal fixation of right tibial plateau fracture."

Based on his examination of Mr. Galloway, Dr. Mikulics concluded there were no specific job duties under the 14 Critical Physical Activities that Mr. Galloway could not perform.

When asked to explain how Mr. Galloway was able to recover from the traumatic injury to his knee, Dr. Mikulics said that Mr. Galloway returned to his home in Montana and "got well" by hiking and hunting. Dr. Mikulics found it noteworthy that in the summer of 2011, Mr. Galloway was able to drag a two hundred pound deer a distance of 750 yards and that Mr. Galloway wanted to return to work. Dr. Mikulics testified that Mr. Galloway's desire to return to work went to "the heart" and "veracity" of the question of whether he was able to return to work.

Dr. Mikulics observed that Dr. McSweeney made similar findings in his report following his examination of Mr. Galloway. He noted that Dr. McSweeney's reports and the functional capacity evaluation report contained objective findings that supported his conclusion that there was no specific job duty Mr. Galloway could not perform.

³ Dr. Mikulics testified that Dr. McSweeney was a well-qualified orthopedic surgeon with an excellent reputation.

23. On cross-examination, Dr. Mikulics was asked about a report from orthopedic surgeon Richard Siebold, M.D., dated May 7, 2008. As an Agreed Medical Examiner, Dr. Siebold had evaluated Mr. Galloway in connection with his workers' compensation claim. In that report, Dr. Siebold noted that Mr. Galloway had very limited cartilage in his right knee with a 2 mm cartilage interval. The report stated that Mr. Galloway told Dr. Siebold that he had fallen several times because his right knee gave out and locked, and that he had weakness in the right leg. In response, Dr. Mikulics conceded that Mr. Galloway may have lost knee cartilage in his right knee as mentioned in Dr. Siebold's report and that Mr. Galloway may have overcompensated for his right knee condition and hurt his left knee. Dr. Mikulics emphasized that, based upon the examination that he conducted, the flexion in Mr. Galloway's knees was normal.

Dr. McSweeney's Evaluation and Assessment of Mr. Galloway and Documentary Evidence

24. James McSweeney, M.D., is a board certified orthopedic surgeon who has practiced general orthopedic surgery in San Diego since 1986. About 90 percent of his practice is devoted to shoulder and knee surgeries. Dr. McSweeney estimated that he has performed six to eight knee surgeries a month for the past decade.

Dr. McSweeney has treated Mr. Galloway since 2006 for the injuries he suffered in 2005. He first evaluated Mr. Galloway on January 16, 2006. He has performed three surgeries on Mr. Galloway's right knee, including a July 2014 surgical procedure to shave dead cartilage from the knee. In addition to these surgical procedures, in 2015, Dr. McSweeney administered to Mr. Galloway a plasma protein injection to his right knee.

Dr. McSweeney deemed Mr. Galloway was permanent and stationary in a 2006 report relating to Mr. Galloway's workers' compensation claim. At the time, Dr. McSweeney noted that Mr. Galloway would need a knee replacement.

25. In 2011, Mr. Galloway wanted to return to work; he saw Dr. McSweeney for treatment and evaluation in this regard. Dr. McSweeney examined Mr. Galloway and recorded the results of his examination in a note dated March 28, 2011. In this note, Dr. McSweeney documented that Mr. Galloway felt that the strength to his right knee had improved; that he was "better able to do stairs", but his right knee was tender to kneel on.⁴ Mr. Galloway told Dr. McSweeney he was walking about 4 miles a day, even on uneven terrain.

In his March 28, 2011, examination, Dr. McSweeney noted that Mr. Galloway's right knee was "nontender" but that it was positive for "crepitus", or a grinding noise, which is an

⁴ It is noteworthy that Mr. Galloway did not tell Dr. Mikulics in December 2011 that his right knee was "tender to kneel on", as he told Dr. McSweeney in March 2011. He told Dr. Mikulics that he had no pain, and Dr. Mikulics described his knee condition as normal. This inconsistency suggests that Mr. Galloway wanted to convince Dr. Mikulics that he had no problems with the right knee when, in fact, he was experiencing pain in the knee.

objective finding of possible knee damage. Dr. McSweeney noted Mr. Galloway's range of motion in the right knee was 0 to 120 degrees and that Mr. Galloway was able to squat. In his report, Dr. McSweeney referenced an x-ray that showed that Mr. Galloway's right knee had joint space irregularity and narrowing. He diagnosed Mr. Galloway with right knee degenerative joint disease, a right knee compound fracture, status post right knee arthroscopy with removal of hardware on February 1, 2006. Regarding his treatment plan, Dr. McSweeney wrote that Mr. Galloway "may be able to perform critical tasks," but he recommended that Mr. Galloway undergo a functional capacity evaluation to help him determine whether he could return to work.

A functional capacity evaluation was completed and a report of that evaluation was dated October 3, 2011. The evaluation measured Mr. Galloway's capacity to perform a number of physical tasks including lifting, carrying, pushing and pulling. The evaluation also measured Mr. Galloway's aerobic capacity. Dr. McSweeney concluded that Mr. Galloway did "reasonably well" in this evaluation, but he added that testing showed that Mr. Galloway had experienced a 20% reduction in his aerobic capacity. Dr. McSweeney testified that this reduction was due to a lack of exercise.

Based on the functional capacity evaluation, Dr. McSweeney concluded, in a report dated October 25, 2011, that Mr. Galloway had sufficiently rehabilitated himself to the extent that he should have "the opportunity" to return to work as a CHP Officer.

26. Between October 2011, when Dr. McSweeney first saw Mr. Galloway, and 2014, when Dr. McSweeney performed the cartilage shaving procedure, Dr. McSweeney changed his mind and concluded that Mr. Galloway was not able to return to work as a CHP Officer because Mr. Galloway could not perform the duties detailed in the 14 Critical Task list. During the cartilage shaving procedure, Dr. McSweeney observed that Mr. Galloway's knee cartilage was completely "destroyed."

27. Due to the damage to Mr. Galloway's knee, Dr. McSweeney believed that Mr. Galloway was not able to perform Activities Nos. 2, 3, 4, 5, 6, 7, 8, and 9 as set forth in the CHP's "14 Critical Physical Activities."

Specifically, Dr. McSweeney felt that Mr. Galloway was precluded from pushing/pulling a non-resistive object five to twenty feet in an emergency; he would be unable to pull drag an individual resisting arrest five to twenty feet; he would be unable to pull/drag an individual resisting arrest 5 to 20 feet; he would be unable to separate uncooperative persons by pushing, pulling, using locks, grips, or holds and physically restrain or subdue a resistive individual using reasonable force, and pull/drag heavy objects off the roadway 5 to 35 feet. Dr. McSweeney also testified that Mr. Galloway would be unable to sit in a patrol car for an extended time during patrol or surveillance; he would be precluded from standing or directing traffic; he would be unable to stoop/squat/kneel for physical evidence under the seats or dash of a vehicle, in the trunk, and under the hood of a vehicle; he would be unable to look under a vehicle for evidence, suspects, defects, or violations; or to look under furniture for physical evidence at a crime/accident scene; Mr.

Galloway would be unable to stoop/squat/bend to set a flare pattern and ignite flares, to set cones at accident/crime scene, to use a tape measure to measure skid marks, or take measurements at an accident crime scene. Further, Mr. Galloway would be, according to Dr. McSweeney, unable to continuously walk while on patrol; walk around obstacles; walk over uneven ground; walk up hills and embankments, in loose dirt, gravel, mud, ice, or snow; or walk to and from a violator's vehicle, to place flares or cones in traffic, or to keep an eye on a suspect. Dr. McSweeney said that Mr. Galloway "most assuredly" would not be able to run 5 to 100 yards to get to an emergency or crime scene, to assist other officers, or to pursue a fleeing suspect; and Mr. Galloway would not be able to climb over chain link or wooden fences and over walls or climb steep embankments, hills, or gullies. Dr. McSweeney added that Mr. Galloway would be precluded from jumping across and/or over obstacles.

Dr. Champlin's Evaluation and Assessment Regarding Mr. Galloway's Ability to Perform the Duties of a CHP Officer

28. John J. Champlin, M.D., was called as a witness by respondent CHP. He is a Board Certified Diplomate of the American Board of Family Practice and Diplomat of the American Board of Disability Evaluators. The CHP asked Dr. Champlin to review Mr. Galloway's medical records to assess whether Mr. Galloway remained substantially incapacitated. Dr. Champlin reviewed numerous medical documents prepared by Mr. Galloway's treating doctors, diagnostic studies, workers' compensation evaluation reports, and other medical evidence. He prepared a report dated February 13, 2015.

Based on his review of the medical evidence, Dr. Champlin opined that Mr. Galloway remained substantially disabled due, in part, to his orthopedic condition.⁵ Dr. Champlin found support for his opinion regarding Mr. Galloway's disabling orthopedic condition in Dr. Siebold's May 7, 2008 report. As previously noted, Dr. Siebold assessed Mr. Galloway for workers' compensation benefits in his role as an Agreed Medical Examiner. Dr. Champlin found it significant that, as documented in Dr. Siebold's report, Mr. Galloway had very limited cartilage, a 2 mm cartilage interval, in his right knee. According to Dr. Champlin, this 2 mm cartilage interval would be reduced to a 0 cartilage interval over time and, as a result, Mr. Galloway would incur micro fractures and bruising to the boney surfaces in his knee. He added that cartilage does not regrow. In Dr. Champlin's opinion, this condition would necessitate a knee replacement surgery. Dr. Champlin commented that Dr. McSweeney's reports were consistent with Dr. Siebold's reports.

⁵ Dr. Champlin considered non-orthopedic physical conditions as a basis in reaching the opinion that Mr. Galloway remained substantially disabled. Because the evidence of record proved that Mr. Galloway remains substantially incapacitated from the performance of his duties as a CHP Officer as a result of his right knee disability, it is not necessary to address Dr. Champlin's conclusions with respect Mr. Galloway's non-orthopedic medical complications. Dr. Champlin's opinion regarding Mr. Galloway's orthopedic condition has been considered to the extent it substantiates Dr. McSweeney's opinions and conclusions.

Dr. Champlin also found it significant that Mr. Galloway had a 3 cm atrophy of the right thigh and a 2 cm atrophy of his right calf. Dr. Champlin believed that the atrophy present in Mr. Galloway's right lower extremity was due to either disuse or injury.

In Dr. Champlin's opinion, Mr. Galloway cannot perform the 14 critical tasks required of a CHP Officer. Dr. Champlin believed that Mr. Galloway could not engage in prolonged weight bearing; he would have difficulty running 100 yards due to poor aerobic capacity; he would have difficulty jumping, or squatting; and he doubted that Mr. Galloway could pull and drag, or separate uncooperative persons, subdue individuals, squat or knee under the car dash, climb a chain link fence, or climb steep embankments. As a result of Mr. Galloway's inability to perform these tasks, Dr. Champlin did not believe that Mr. Galloway could return to work as a CHP Officer without putting people at risk.

Evaluation

29. A preponderance of the evidence established that Mr. Galloway remains incapacitated from the performance of the usual job duties required of a CHP Officer as a result of his disabling right knee condition. This conclusion is based upon Dr. McSweeney's credible opinion that the damage to Mr. Galloway's right knee precludes him from being able to perform the usual duties of a CHP Officer, as those duties are defined under the 14 critical tasks.

Dr. McSweeney's opinion is given great weight. He was Mr. Galloway's treating doctor from 2006 through 2015, and in this capacity he had the opportunity to directly observe the condition of Mr. Galloway's right knee during the surgery in 2014 and was able to compare the right knee's condition at that time with its condition in 2006 when he performed the initial surgery. Based on his observations of Mr. Galloway's right knee, he credibly testified that Mr. Galloway's knee cartilage was completely destroyed and Mr. Galloway could not perform the 14 critical tasks required of a CHP Officer without this cartilage. Dr. McSweeney's testimony was supported and substantiated by Dr. Champlin's expert testimony. Both Dr. McSweeney and Dr. Champlin opined that Mr. Galloway had limited cartilage in his right knee and that he would need to undergo knee replacement surgery in the future as a result of the degenerative condition of his right knee.

Dr. Mikulics's opinion that Mr. Galloway could perform the duties of a CHP Officer is given minimal weight for several reasons.

First, Dr. Mikulics had a limited opportunity to examine Mr. Galloway and did not review the medical information regarding the damage to Mr. Galloway's right knee that Dr. McSweeney and Dr. Champlin had reviewed. He examined Mr. Galloway once in 2011 for about an hour, and he did not review Dr. Siebold's 2008 report or an x-ray report that showed Mr. Galloway's right knee had limited cartilage.

Second, Dr. Mikulics's opinion was given little weight because Dr. Mikulics was not aware of the actual nature and extent of Mr. Galloway's right knee problems. Notably, in

December 2011, Mr. Galloway told Dr. Mikulics that he did not have any knee pain. But, in March 2011, Mr. Galloway told Dr. McSweeney that he had pain when he leaned on his right knee and that he was “doing better” when he climbed stairs. This comment indicated that Mr. Galloway was continuing to have problems climbing stairs due to pain in his knee.

Also, between 2011 and 2014, Dr. Mikulics did not have the opportunity to examine Mr. Galloway after his one visit with him in 2011 and much medical information regarding Mr. Galloway’s knee condition was developed after that visit. Between 2011 and 2014 Mr. Galloway experienced pain and problems in his right knee and he sought Dr. McSweeney’s help to address those problems. In March 2011, Dr. McSweeney found crepitus in Mr. Galloway’s right knee. In March 2014, Dr. McSweeney again found crepitus and that Mr. Galloway’s patella tendon was tender. In 2014, Mr. Galloway underwent additional surgery to his knee. In 2015, Mr. Galloway underwent an injection to his right knee in the hope that this procedure would increase the cartilage in his knee.

Third, Dr. Mikulics’s medical judgment was impacted by Mr. Galloway’s desire to return to work. To Dr. Mikulics, Mr. Galloway’s desire to return to work went to the “heart” and “veracity” of his ability to work, as he stressed at the hearing. As a result, he ignored objective medical evidence that supported a finding that Mr. Galloway was not physically capable of performing the usual duties of a CHP Officer.

In fact, Mr. Galloway’s genuine desire to return to work as a CHP Officer conflicted with the objective medical evidence of record and Dr. McSweeney’s credible opinion that Mr. Galloway’s loss of knee cartilage currently precludes him from performing the usual duties required of a CHP Officer.

LEGAL CONCLUSIONS

Burden of Proof

1. CalPERS had the burden of producing evidence to support its determination that Mr. Galloway was no longer incapacitated for performance of his duties as a CHP Officer. (Evid. Code, § 500.) Once CalPERS provided prima facie evidence to establish that matter, the CHP had the burden of proof to establish that CalPERS’s determination was incorrect and Mr. Galloway remained incapacitated for performance of his duties as a CHP Officer as a result of an orthopedic condition involving his right knee. CalPERS did not meet its burden of establishing that respondent Galloway is no longer incapacitated.

2. The Public Employees’ Retirement Law (Retirement Law) governs disability retirement and reinstatements, and CalPERS has sole jurisdiction to make such determinations. (Gov. Code, §§ 20026, 20125, 21154, 21156, 21190, 21192 and 21193.)

The Nature of Industrial Disability Retirement

3. Disability retirement is considered a temporary separation from state service. (Gov. Code § 19143; Cal. Code Regs., tit. 2, section 446.) As a temporary separation from state service, disability retirement does not result in the loss of permanent civil service status. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes, Respondent, and the California Highway Patrol, Respondent*, (December 15, 1999) CalPERS Precedential Dec., 99-03, at p. 10.) A state civil service member is entitled to reinstatement once the disability ends. (Gov. Code § 21193.)

Applicable Statutes Regarding Applications for Disability Retirement

4. Government Code section 20026 provides in part:

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

5. Government Code section 21151 provides in part:

(a) 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. . . .

6. Government Code section 21152 provides in part:

Application to the board for retirement of a member for disability 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.

7. Under Government Code section 21153, an employer may not separate an employee who is disabled and otherwise eligible for disability retirement, “but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability” and takes other steps listed in the statute.

8. Government Code section 21154 provides in part:

The application shall be made only (a) while the member is in state service . . . On receipt of an application for disability retirement of a 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. . . .

9. Government Code section 21156 provides in part:

(a)(1) If the medical examination and other available information show . . . that the member in the state service is incapacitated physically . . . for the performance of his . . . duties and is eligible to retire for disability, the board shall immediately retire him . . . 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

10. Vehicle Code section 2268 requires that a CHP Officer must be “capable of fulfilling the complete range of official duties.” “The California Highway Patrol Officer 14 Critical Physical Activities” statement identifies the official duties of a CHP Officer.

Case Law Defining Disability Retirement

11. “Incapacitated for the performance of duty . . . means the substantial inability of the applicant to perform his usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876.)

Reinstatement from Disability Retirement

12. Government Code section 21192 provides in part:

The [CalPERS] 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 . . . 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 . . . at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board . . . 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.

13. Government Code section 21193 provides in 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 . . . 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. . . .

Cause Does Not Exist to Conclude That Mr. Galloway Is No Longer Disabled

14. David Galloway is not presently capable of performing the usual duties of a CHP Officer pursuant to Government Code section 21192. A preponderance of the competent medical evidence did not establish that Mr. Galloway is no longer incapacitated from performing the usual duties of a CHP Officer. To the contrary, a preponderance of the competent medical evidence established that Mr. Galloway remains incapacitated and is presently incapable of performing the usual job duties of a CHP Officer.

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ORDER

CalPERS's determination that David Galloway is no longer disabled or incapacitated from performance of his duties as a CHP Patrol Officer is not affirmed. CalPERS's request that David Galloway be reinstated to his former employment as a CHP Patrol Officer with the California Highway Patrol is denied.

DATED: July 10, 2015



ABRAHAM M. LEVY
Administrative Law Judge
Office of Administrative Hearings