

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues
Against:

JAMELA L. BONNER,

Respondent,

and

DEPARTMENT OF CORRECTIONS
CALIFORNIA STATE PRISON, LOS
ANGELES COUNTY,

Respondent.

Case No. 2014-0937

OAH No. 2014110910

PROPOSED DECISION

The hearing in the above-captioned matter took place on June 17, 2015, at Glendale, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by Rory J. Coffey, Senior Staff Counsel, California Public Employees' Retirement System (PERS). Respondent Jamela L. Bonner (Respondent) did not appear; neither did the other respondent in the case, the California Department of Corrections (DOC).

At the hearing Complainant's counsel noted that the Notice of Hearing was served on Respondent and DOC by mail on April 23, 2015, at the address she had used in her application for disability, and in her letter responding the PERS' initial written notice denying her disability application. Complainant's counsel noted that he did not have the return receipt cards—the Notice of Hearing had been served “return receipt requested”—and so the record was held open 10 days so that he might locate those documents and submit them to the ALJ. Since the tenth day fell on a Saturday, counsel had until June 29, 2015, to deliver the documents.

Complainant has not submitted the return receipt cards. However, the Administrative Procedure Act does not require that a notice of hearing be served

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED July 23, 2015

C. Bodily

return receipt requested, so the failure to produce such documents does not establish a lack of service.¹

Documentary evidence was received from Complainant, and the case is deemed submitted for decision as of June 29, 2015. The ALJ hereby makes the following Proposed Decision.

STATEMENT OF THE CASE AND ISSUE PRESENTED

Respondent seeks disability retirement from PERS. Respondent was employed as a correctional officer for approximately 10 years by the DOC. In September 2013, Respondent submitted a disability retirement application (application) to PERS. The application stated she could not do her job because of problems with her right hand. After reviewing medical evidence and having a doctor examine Respondent, PERS denied her application, asserting she is not disabled within the meaning of the statutes and cases that govern disability retirement claims for PERS.

FACTUAL FINDINGS

The Parties and Jurisdiction:

1. Complainant Anthony Suine filed the Statement of Issues in the above-captioned matter while acting in his official capacity as Chief of the Benefits Services Division of PERS.
2. Respondent Bonner was previously employed by the Department of Corrections as a correctional officer. She is a state safety member of PERS within the meaning of Government Code section 21151.²

¹ Government Code section 11509. Official notice is taken of a the Notice of Assigned Hearing Dates, found in the OAH file. It was served on the parties on December 5, 2014. It informed them of the hearing date. While that does not provide a substitute for the Notice of Hearing, (Cal. Code Regs., tit. 1, § 1018, subd. (c)), it provides some notice to Respondent, which would have been corroborated by the formal notice sent by Complainant. The Notice of Assigned Hearing Dates was sent to the address Respondent used in her application, and that the document was not returned to OAH by the post office.

² All statutory references will be to the Government Code unless otherwise noted.

3. On September 27, 2013, Respondent's Disability Retirement Election Application (Application) was received by PERS. The Application listed Respondent's effective retirement date as being "upon expiration of benefits." (Ex. 3, p. 1.) This may be a reference to workers' compensation benefits that Respondent had been receiving; a workers compensation claim is referenced in exhibit 7, where medical history is discussed.

4. The application stated that Respondent was disabled because she had injured her hand, and was therefore unable to shoot a firearm or swing her baton if necessary to subdue an inmate. She stated she injured her hand on January 27, 2012, and that she had carpal tunnel and tendonitis of the wrist on her dominant hand.

5. Thereafter, on April 11, 2014, PERS wrote to Respondent, denying the disability retirement application. It was asserted that after reviewing medical evidence, including evidence obtained from an Independent Medical Exam (IME), PERS had determined that her conditions were not disabling, and therefore grounds for disability retirement had not been established. The letter set out various alternatives Respondent might pursue, including an appeal of the PERS denial of disability retirement.

6. Respondent wrote to PERS on April 21, 2014, asserting that she was disabled, and she attached the medical report of another physician to her letter. She stated that she was appealing the denial of benefits. This proceeding ensued. All jurisdictional requirements have been satisfied.

Respondent's Usual Duties as a Correctional Officer

7. There was no direct evidence of what exactly were Respondent's usual job duties. While Dr. Fell, who examined Respondent for PERS, opined that she was not disabled from performing her usual duties, it is difficult to ascertain what information he relied on. However, Respondent in her application pointed to one of her usual duties, and her problems with performing it. That was the duty to use a firearm or a baton. Dr. Fell addressed that claim, stating his opinion that Respondent was physically capable of performing those tasks. (Ex. 7, p. 17.) Dr. Fell also stated in one report that he had treated other correctional officers prior to seeing Respondent, which may have provided an understanding of the job duties of a correctional officer.

The IME

8. On February 18, 2014, Thomas W. Fell, Jr., M.D., conducted an IME of Respondent for PERS. Dr. Fell has practiced orthopedic medicine in Southern California for over 40 years. He issued a written report the day of the examination. As part of his exam process, Dr. Fell reviewed a number of medical reports generated by other medical professionals who had treated Respondent. Dr. Fell issued

supplemental reports thereafter, after more records or pertinent information was obtained. Such reports were issued on June 2, 2014 and July 25, 2014.

9. Dr. Fell opined that Respondent is not disabled from performing her job duties. He found some non-specific tenderness over the right wrist, but no swelling. The range of motion in both wrists was the same. While her left wrist appeared slightly stronger in terms of grip strength, the difference was not perceived as significant. Dr. Fell stated that “clinically she does not have much in the way of findings. The subjective complaints do tend to outweigh the objective findings. This is not to say she is not having any problems.” (Ex. 7, p. 16.)

10. Dr. Fell reported that an MRI of Respondent’s right wrist showed minor findings of none to minimal clinical significance, and would not explain the complaints she had.

11. Dr. Fell stated that Respondent’s subjective complaints might get in the way of her using a firearm or baton. Dr. Fell stated that based on his exam, Respondent could physically yield a baton or operate a firearm. But, he was concerned that the way she tended to guard her right wrist and her concern about pain there might make her hesitant to use the weapons.

12. PERS conducted subrosa surveillance of Respondent, and shared the results with Dr. Fell. The video he reviewed confirmed his opinion that Respondent was not substantially disabled. However, the video only showed Respondent in some daily activity, such as driving, holding a bag, or a cell phone.

LEGAL CONCLUSIONS

1. Respondent is a state safety member of PERS within the meaning of section 21151, and is credited with sufficient service to retire. She is thereby qualified for disability retirement upon the appropriate showing. Further, PERS has jurisdiction to determine whether Respondent is entitled to such disability retirement. This conclusion is based on section 21151 and Factual Findings 1 through 6.

2. A person seeking disability retirement bears the burden of establishing the right to that benefit. (Evid. Code, § 500; *Lindsay v. County of San Diego Ret. Bd.* (1964) 231 Cal.App.2d 156, 160-61.) The standard of proof is preponderance of the evidence. (Evid. Code, § 115.)

3. A disability, within the meaning of the public employees retirement law, is a condition that is permanent or of extended and uncertain duration, as determined by the Board on the basis of competent medical opinion. (§ 20026.)

4. Whether a person is incapacitated or disabled must be judged based upon an examination of the regular and customary duties assigned to that person. (*Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, 876.) The applicant must establish that he or she is substantially unable to perform her usual duties. (*Mansperger, supra*, 6 Cal.App.3d at 876; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.) The cases hold that written job descriptions alone do not control the analysis of what a member's usual job duties are; other evidence may be examined as well. (*Hosford, supra*, 77 Cal.App.3d at 861-862.)

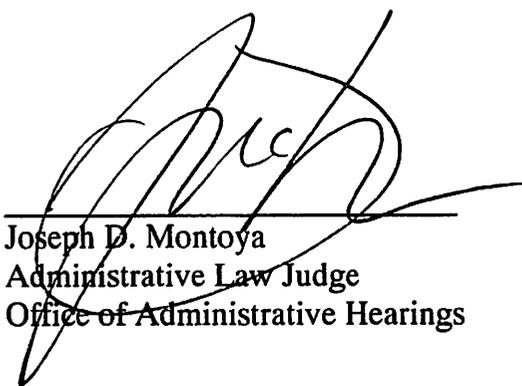
5. While a complete statement of Respondent's job duties was not made available, the key duty cited by Respondent in her application was the subject of Dr. Fell's analysis. He concluded that she is physically capable of using a weapon, obviously of paramount importance to a correctional officer and the Department of Corrections, and he determined Respondent is not substantially disabled. (Factual Findings 8-11.) While he supported his opinion with subsequent evidence, the ALJ is not relying on the surveillance material in this case. That Respondent was seen carrying a bag in her right hand, or holding a cell phone in it, is not dispositive. Wielding a cell phone around town is not the same thing as wielding a baton in a violent encounter with a prisoner or prisoners.

6. Without positive medical evidence and opinion in her favor, Respondent cannot carry her burden proving she is substantially disabled and eligible for retirement disability. Her claim for disability retirement must therefore be denied.

ORDER

The appeal of Claimant Jamela L. Bonner is denied, and she shall not receive disability retirement benefits from PERS.

July 17, 2015



Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings