

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for
Industrial Disability Retirement of

TIMOTEO CRUZ,

Applicant/Respondent

and

DEPARTMENT OF CORRECTIONS AND
REHABILITATION, CALIPATRIA STATE
PRISON,

Contracting Entity/Respondent

Case No. 2011-1050

OAH No. 2014100854

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on August 6, 2015.

Preet Kaur, Staff Counsel, represented petitioner, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

E. Earl Dove, Attorney at Law, represented respondent, Timoteo Cruz.

No appearance was made by or on behalf of the Department of Corrections and Rehabilitation.

The record was closed on August 6, 2015.

SUMMARY

In this decision, it is determined that, at the time Mr. Cruz applied for disability retirement, he did not have a cardiovascular condition that disabled or permanently

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RETIREMENT SYSTEM**

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incapacitated him for the performance of the usual duties of a correctional officer. Mr. Cruz's application for an industrial disability retirement is thus denied.

FACTUAL FINDINGS

Background

1. In 1993, Mr. Cruz began working for the Calipatria State Prison as a correctional officer. By virtue of his employment, Mr. Cruz is a state safety member of CalPERS subject to Government Code section 21151.

Mr. Cruz's Applications for Industrial Disability Retirement

2. By an application dated February 25, 2004, Mr. Cruz applied for industrial disability retirement. On May 17, 2005, Mr. Cruz notified CalPERS that he was cancelling his application. CalPERS acknowledged receipt of Mr. Cruz's cancellation on August 8, 2005.

3. By an application dated March 17, 2006, Mr. Cruz applied for service pending industrial disability retirement. By letter dated March 23, 2006, CalPERS notified Mr. Cruz that he was not eligible for service retirement but would continue to process his application for industrial disability retirement.

4. By an application dated December 1, 2009, Mr. Cruz again applied for industrial disability retirement. In response to a question concerning his claimed disability and when it occurred, Mr. Cruz wrote, "major depression, aggravation heart/hypertension, psyche an headaches, post traumatic stress symptoms cause by continuous stress and strain." In response to a question concerning how the illness affected his ability to perform his job, Mr. Cruz wrote, "lack of energy, major depression has affected my ability on [sic] be alert and concentrated on the job."

5. CalPERS staff evaluated medical evidence and concluded that, at the time Mr. Cruz filed his application for disability retirement, Mr. Cruz's cardiovascular condition was not disabling. As a result, CalPERS concluded that Mr. Cruz was not substantially incapacitated for performance of his usual duties. However, CalPERS determined that Mr. Cruz was substantially incapacitated for the performance of his job duties due to a non-industrial psychological condition. By a letter dated July 29, 2011, CalPERS denied Mr. Cruz's application for industrial disability retirement based on his cardiovascular condition but granted Mr. Cruz's disability retirement for a psychological condition. The letter advised Mr. Cruz that he may file a Petition for Finding of Fact for the non-industrial psychological condition, with the Workers' Compensation Appeals Board, for determination of industrial causation. The letter provided that Mr. Cruz could appeal CalPERS's finding that he had a non-disabling cardiovascular condition.

6. Mr. Cruz appealed CalPERS's denial of industrial disability retirement based upon cardiovascular conditions.

Job Description

7. Petitioner submitted a Department of Corrections list of essential functions of a correctional officer. Mr. Cruz stipulated as to the essential job function. The list includes the following:

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 restraint to an inmate.

Defend self against an inmate armed with a weapon.

Inspect inmates for contraband, conduct body searches.

[¶] . . . [¶]

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.

[¶] . . . [¶]

Lift and carry continuously to frequently: lift/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

Mr. Cruz's Testimony Regarding his Physical Condition

8. Mr. Cruz testified concerning his physical condition. He last worked at Calipatria State Prison in 2010. He said he left because he was experiencing dizziness, heart

palpitations, migraines, shortness of breath, and fainting spells, and his doctor would not allow him to return to work. He was originally diagnosed with high blood pressure by Dr.A.J. Botwin. Mr. Cruz said that Dr. Botwin was a psychiatrist. Dr. Botwin prescribed him medication for blood pressure as well as psychotropic medications. When Mr. Cruz returned to work he said his symptoms returned. Mr. Cruz did not remember when he was first diagnosed with hypertension or when he first began taking blood pressure medication. He testified that the dizziness and palpitations were the most frequent symptoms, occurring more than once a week.

9. Mr. Cruz found working in Calipatria to be very stressful. He said that it was a level four institution that housed the most violent offenders. He added that it was a very violent environment and he was present when there was rioting that caused injury to 25 officers. The prison was often understaffed and he was forced to work overtime. He had no particular job duty or assignment at Calipatria.

10. Mr. Cruz did not recall when his symptoms began. He stated that he began feeling weakness in his legs during the last five years he was at the prison. He believed that some of the symptoms began when he started working as a correctional officer, but he was a lot younger back then and could better deal with the symptoms. Mr. Cruz stated that because he would feel weak and would feel faint, he did not believe that he could subdue an inmate, an essential function of a correctional officer. Mr. Cruz stated that he was transferred to the mail room before he retired. Before that, he was assigned to a records department. He testified that he did not know why he was transferred to these departments. Mr. Cruz did not know how often he was on medical leave and how much time he missed from work.

Dr. Raisinghani's Testimony that Mr. Cruz was not Substantially Incapacitated

11. Akit Raisinghani, M.D., a board-certified cardiologist, is a professor of medicine at the University of California San Diego. He was board-certified in internal medicine in 1994 and cardiovascular medicine in 1998. Based on his training and experience, Dr. Raisinghani was well qualified to render an expert opinion in this matter.

12. Dr. Raisinghani testified that respondent was not substantially incapacitated for performance of the usual duties of a correctional officer from a cardiac standpoint. Dr. Raisinghani examined respondent on October 21, 2010, and wrote a report the same day. He performed a standard evaluation regarding cardiovascular diseases and reviewed respondent's medial records. This included a medical report prepared by Ernest Levister, M.D. dated February 25, 2010. Dr. Levister's report contained lab and stress tests results, and a detailed evaluation of Mr. Cruz's medical records. Dr. Raisinghani reviewed Dr. Levister's report as well as a detailed job description that CalPERS provided.

13. Dr. Raisinghani acknowledged that Mr. Cruz does have a known diagnosis of hypertension. Dr. Raisinghani's stated that the physical examination was only significant for elevated blood pressure. He concluded there were no other significant findings. Dr. Raisinghani believed that Mr. Cruz was able to perform the duties of a correctional officer

from a cardiac standpoint and as related to his hypertension. He recognized that although Mr. Cruz had symptoms of chest pain and pressure, there was no evidence that it was caused by cardiac ischemia. Rather, the symptoms were more likely related to Mr. Cruz's psychiatric issues. Thus, Dr. Raisinghani concluded that Mr. Cruz was not substantially incapacitated for the performance of his duties as a correctional officer from a cardiac standpoint.

14. On May 18, 2011, Dr. Raisinghani received additional medical records for Mr. Cruz, indicating Mr. Cruz was seen by Harris Effron, M.D., on January 26, 2011. Dr. Raisinghani reviewed these records, and noted that Mr. Cruz was found to be hypertensive. Mr. Cruz underwent an exercise treadmill test and was determined by Dr. Effron to have no evidence of ischemia. Dr. Raisinghani concluded that the supplemental information did not change his original assessment that Mr. Cruz did not have a disabling cardiac condition.

15. Dr. Raisinghani admitted that the symptoms Mr. Cruz complained of could be cardiac in origin. However, based on his assessment and evaluation of Mr. Cruz's records, Dr. Raisinghani was confident that Mr. Cruz's symptoms were not caused by heart disease or hypertension. Dr. Raisinghani did not believe Mr. Cruz's hypertension was uncontrollable. Dr. Raisinghani was questioned whether hypertension would be more difficult to control in a stressful environment, such as in a prison. Dr. Raisinghani stated that he did not see any evidence of uncontrolled hypertension in Mr. Cruz. Dr. Raisinghani stated that dizziness is not often associated with hypertension. In sum, Dr. Raisinghani believed that the symptoms Mr. Cruz claimed to have experienced were not because of Mr. Cruz's hypertension or a cardiac condition.

Hearsay Evidence Regarding Dr. Levister's Examination and Conclusions

16. Dr. Levister examined respondent on October 27, 2009, as part of an agreed medical examination for the State Compensation Insurance Fund. The evidence included a report that Dr. Levister wrote and a transcript of Dr. Levister's deposition. Dr. Levister did not testify. His report and deposition, however, are hearsay evidence, and pursuant to Government Code section 11513, subdivision (d), can be used to supplement or explain respondent's testimony and the testimony of Dr. Raisinghani. No evidence was presented regarding Dr. Levister's credentials or experience.

17. Dr. Levister's report included a review of Mr. Cruz's medical history, a physical examination, and results of static and stress echocardiograms. According to Dr. Levister, the static echocardiogram revealed Left Ventricular Hypertrophy (LVH) with preserved systolic function. Dr. Levister diagnosed Mr. Cruz with the following "Hypertension on treatment, controlled, with Left Ventricular Hypertrophy, Concentric in nature. Possible Patent Foramen Ovale. Mitral Valve Prolapse with some Myxomatous Changes."

18. Dr. Levister assigned a 35 percent impairment of the whole person. He concluded, "[s]trictly from an internal perspective, he could function in usual and customary

occupation. Because of the psychiatric issues and how this muddies the water, he probably should not return to his usual and customary occupation, and/or for that matter work in the prison system.”

19. Dr. Levister did not offer an opinion on whether Mr. Cruz was substantially incapacitated from the performance of his usual duties as a correctional officer because of his cardiac condition.

Evaluation

20. The competent medical evidence in this matter established that Mr. Cruz does was not substantially incapacitated from the performance of his usual and customer duties of a correctional officer. The competent medical evidence in this matter involved Dr. Raisinghani’s testimony. As a cardiologist, Dr. Raisinghani was educated, trained, and highly experienced in evaluating the cardiac conditions at issue in this proceeding and in determining the impact of such conditions on Mr. Cruz’s ability to perform his usual and customary duties. Dr. Raisinghani’s opinion was based upon his independent medical examination and a careful review of Mr. Cruz’s medical records. He reasonably relied on information Dr. Levister provided concerning Mr. Cruz’s medical history.

LEGAL CONCLUSIONS

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

2. 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.

3. Government Code section 21156 provides, in part:

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

4. Mr. Cruz testified credibly concerning his symptoms of dizziness, heart palpitations, migraines, weakness in the legs, and fainting spells. The symptoms he

identified were consistent with those he reported in medical examinations spanning approximately 15 years. But his testimony does not constitute competent medical evidence.

5. Dr. Raisinghani testified that Mr. Cruz was not substantially incapacitated for the performance of the usual duties of a correctional officer, because of a cardiovascular issue. Rather, in Dr. Raisinghani's opinion, the symptoms Mr. Cruz reported were likely associated with a psychological condition, rather than cardiac in origin. In reaching his conclusion, Dr. Raisinghani reviewed Mr. Cruz's prior medical history and Dr. Levister's report. Dr. Raisinghani considered the results of the 2009 echocardiogram, which revealed LVH with preserved systolic function. Dr. Raisinghani concluded that there was no objective evidence that Mr. Cruz was substantially incapacitated from the performance of his usual duties as a correctional officer from a cardiac standpoint. Dr. Raisinghani's testimony constitutes competent medical evidence that Mr. Cruz was not substantially incapacitated.

6. Mr. Cruz failed to prove by a preponderance of the evidence by competent medical opinion that, at the time he applied for disability retirement, he had a cardiovascular disability that was permanent or of an extended and uncertain duration and that substantially incapacitated him for performance of the usual duties of a correctional officer.

ORDER

The application for industrial disability retirement filed by Timoteo Cruz with the California Public Employees Retirement System is denied.

DATED: September 2, 2015

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ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings