

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 Disability Retirement of:

THOMAS H. WALTERS,
Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
MEN'S COLONY,

Respondent.

Case No. 2014-1286

OAH No. 2015020829

PROPOSED DECISION

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, on November 4, 2015, in Sacramento, California.

Wesley E. Kennedy, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Respondent Thomas H. Walters was present and represented by John A. Ferrone, Attorney at Law, of Adams, Ferrone & Ferrone.

There was no appearance by or on behalf of the California Department of Corrections and Rehabilitation (CDCR), Men's Colony (CMC).

Evidence was received, the record was closed, and the matter submitted for decision on November 4, 2015.

ISSUE

Was respondent's claim for disability vested and matured as of March 28, 2014, when he voluntarily resigned after being served with a notice of adverse action dismissing him from his position as a Correctional Officer with CDCR at CMC?

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Nov. 16 2015
[Signature]

STIPULATIONS

The legal and factual issues in this matter were narrowed by the following stipulations stated on the record at hearing, and hereby included in the Factual Findings and Legal Conclusions below.

1. There was a permanent and irrevocable severance of the employment relationship as of March 28, 2014.
2. The severance of the employment relationship was not the result of a disabling condition.
3. The only question before OAH is whether the claimed disability was vested and matured as of the date of the severance of the employment relationship.

FACTUAL FINDINGS

Jurisdictional and Preliminary Matters

1. Respondent was employed by CDCR as a Correctional Officer, effective August 7, 1989. By virtue of his employment, respondent became a state safety member of CalPERS subject to Government Code section 21154.
2. On March 21, 2014, CMC served respondent with a Notice of Adverse Action (NOAA) notifying him that he would be dismissed from his position as a Correctional Officer effective at the close of business on March 31, 2014. The NOAA stated that the adverse action was being taken under Government Code section 19572, subdivisions (d) (inexcusable neglect of duty); (f) (dishonesty); (o) (willful disobedience); (p) (misuse of state property); (r) (violations of the prohibitions set forth in accordance with section 19990); and (t) (other failure of good behavior). The factual allegations were essentially that respondent had confiscated a cell phone from an inmate, gave it to another inmate who had been serving as an informant, and made less than truthful statements to CMC personnel in an internal affairs investigation.
3. Respondent elected to have a *Skelly* meeting regarding the NOAA, which was held on March 26, 2014. On March 28, 2014, the CMC Warden signed a memorandum to respondent advising him that the NOAA had been upheld.
4. On March 28, 2014, respondent submitted a handwritten resignation letter to CMC by which respondent resigned for "personal reasons." On March 29, 2014, CMC sent a letter to respondent accepting his resignation effective March 28, 2014, and stating to respondent that "it is noted that you have resigned after being served a Notice of Adverse Action for on-duty misconduct, with a penalty of dismissal."

5. On July 22, 2014, respondent submitted a Disability Retirement Election Application to the CalPERS Fresno Regional Office. In his application, respondent described his disability as “chronic residuals, lumbar radiculopathy with atrophy of the left calf.”

6. Respondent stated in his application that his injury occurred on December 29, 2006 to June 11, 2013, as follows:

2006 / slipped on West concrete while responding to an alarm at Pelican Bay State Prison.

7. Respondent stated in his application that the injury affected his ability to perform his job in that he can “no longer run, jump or stoop.”

8. By letter dated October 3, 2014, CalPERS notified respondent that it was unable to accept his application for disability retirement because his separation from employment was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. On October 13, 2014, respondent filed an appeal of CalPERS’s determination and requested a hearing. This hearing followed.

Respondent's Evidence

9. Respondent testified as the sole witness on his own behalf. He injured his lower back on December 29, 2006, while on duty as a Correctional Officer when responding to an urgent situation at Pelican Bay State Prison. The injury resulted in work limitations including no stooping, bending, lifting over 50 pounds, or running. Respondent continued to work as a Correctional Officer, even though CDCR did not fully accommodate his work limitations.

10. Respondent’s symptoms included lower back pain, tingling in his leg, and the gradual atrophy of his calf because of a pinched sciatic nerve. The effects on his work performance included that he walked more slowly up and down stairs, began to hobble more noticeably when walking on level ground, and that his lower leg would “flop” laterally when running.

11. Throughout his employment at CDCR respondent did whatever was asked of him, regardless of his injuries. Respondent continued to perform the usual and customary duties of his position as a Correctional Officer up until his resignation.

12. Respondent introduced into evidence two hearsay exhibits to supplement and explain other direct evidence as permitted by Government Code section 11513, subdivision (d). CalPERS did not object. The documents include an Orthopedic Examination Report dated May 15, 2014, prepared by Alan Sanders, M.D. regarding a Workers’ Compensation evaluation; and a separate packet of documents comprising respondent’s Workers’ Compensation file with the State Compensation Insurance Fund. Dr. Sanders’ examination report corroborates respondent’s testimony that he was physically impaired, but that he

continued to perform the usual and customary duties of a Correctional Officer until he resigned.

13. At hearing, CalPERS challenged respondent's application, arguing that he was precluded from seeking disability retirement under the holdings of the court decisions in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*), and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*). Based on the stipulations between the parties at the hearing in this matter, CalPERS focused its argument on the sole question of whether respondent's claimed disability was vested and matured as of the severance of his employment relationship with CDCR.

CalPERS' Arguments

14. In its Prehearing Position Statement, CalPERS recited with partial attribution the following portions of the *Smith* decision:

A vested right matures when there is an unconditional right to immediate payment. [Citations omitted.] In the course of deciding when the limitations period commenced in a mandate action against a pension board, the Supreme Court noted that a duty to grant the disability pension (i.e., the reciprocal obligation to a right to immediate payment) did not arise at the time of the injury itself but when the pension board determined that the employee was no longer capable of performing his duties. (*Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671-672, 197 P.2d 710 ["the right has not come into existence until the commission has concluded that the condition of disability renders retirement necessary"].)

[¶] . . . [¶]

It is not as if the plaintiff had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal. Rather, he did not even initiate the process until after giving cause for his dismissal.

[¶] . . . [¶]

Nor, for that matter, is there undisputed evidence that the plaintiff was eligible for a CalPERS disability retirement, such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb). At best, the record contains medical opinions of a permanent disability for purposes of the prior and pending workers' compensation claims. But a workers' compensation ruling is not binding on

the issue of eligibility for disability retirement because the focus of the issues and the parties is different. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567, 262 Cal.Rptr. 566; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132, 139 Cal.Rptr. 814.) And for purposes of the standard for a disability retirement, the plaintiff's medical evidence is not unequivocal. The defendants would have a basis for litigating whether this evidence demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862, 143 Cal.Rptr. 760; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877, 86 Cal.Rptr. 450; *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.) Thus, an *entitlement* to a disability retirement cannot rest on the medical evidence of the plaintiff.

(*Smith, supra*, 120 Cal.App.4th at pp. 206-207.)

Discussion

15. CalPERS' arguments are persuasive. Respondent's right to a disability pension had not matured at the time he submitted his resignation. First, neither CalPERS nor CDCR had "determined that the [respondent] was no longer capable of performing his duties." (*Smith, supra*, 120 Cal.App.4th at p. 206.) Second, respondent did not present undisputed evidence of physical disability such that "a favorable decision on his claim would have been a foregone conclusion . . ." (*Id.* at p. 207.) Rather, the evidence is that respondent was able to perform his usual and customary duties as a Correctional Officer up to the date of his resignation. Because respondent's right to a disability pension had not matured, his resignation and permanent severance of the employment relationship extinguished his right to apply for a disability retirement. (*Haywood, supra*, 67 Cal.App.4th at p. 1297.)

LEGAL CONCLUSIONS

1. "As in ordinary civil actions, the party asserting the affirmative in an administrative hearing has the burden of proof going forward and the burden of persuasion by a preponderance of the evidence." (*McCoy v. Board of Retirement* (1980) 183 Cal.App.3d 1044, 1054.) As the applicant, respondent has the burden of proving by a preponderance of the evidence that he is eligible for the disability retirement benefit he seeks.

2. Government Code section 21151, subdivision (a), provides that "[a]ny 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 21152 provides in pertinent part that an application for disability retirement of a member may be made by: “. . . (d) [t]he member or any person in his or her behalf.”

4. Government Code section 21154 provides, in pertinent part, that “[t]he application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion.”

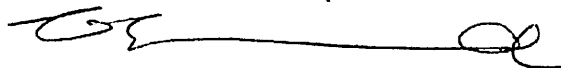
5. Pursuant to stipulation by the parties, as incorporated in the Factual Findings, the only question to be resolved in this matter is whether respondent’s right to disability retirement was vested and matured as of the permanent and the irrevocable severance of his employment relationship with CDCR on March 28, 2014.

6. As discussed in Factual Findings 5 through 15, this is not a case where there is undisputed evidence that respondent was eligible for a CalPERS disability retirement, such that a favorable decision on his claim would have been a “foregone conclusion.” Respondent’s right to a disability retirement had not matured prior to his resignation and permanent severance of his employment with CDCR. Pursuant to the holdings in *Haywood* and *Smith*, as discussed in Factual Finding 15, respondent is precluded from filing for disability retirement.

ORDER

The appeal of respondent Thomas Walters to be granted the right to file an application for disability retirement is denied.

DATED: November 12, 2015



TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings