

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:

NILA J. JOB,

and

WASCO STATE PRISON, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Respondents.

Case No. 2014-1260

OAH No. 2015041220

PROPOSED DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on November 17, 2015, in Bakersfield, California. The California Public Employees' Retirement System (CalPERS) was represented by Staff Attorney John Shipley. No appearance was made on behalf of Respondent Nila J. Job (Respondent) or Wasco State Prison, California Department of Corrections and Rehabilitation (Wasco).

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on November 17, 2015.

FACTUAL FINDINGS

1. Anthony Suine, Chief of the Benefits Services Division of CalPERS, filed the Statement of Issues while acting in his official capacity.
2. On October 15, 2015, a Notice of Hearing, setting forth the date, time and place of hearing, was served by certified mail on Respondent and Wasco at their addresses of record.
3. Service of the Notice of Hearing conformed to the requirements of Government Code sections 11505 and 11509.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED December 3, 2015

Ruthie L. Schatz

4. Respondent and Wasco did not appear at the November 17, 2015 hearing. At Complainant's request, the matter proceeded as a default, pursuant to Government Code section 11520.

5. At the time she filed her application for industrial disability retirement, Respondent was employed as a Correctional Supervising Cook at Wasco. By virtue of her employment, Respondent is a "state safety member" of CalPERS.

6. Respondent retired for service effective October 1, 2013.

7. On November 4, 2013, Respondent signed, and subsequently filed, an application for "service pending disability retirement" (application), claiming disability on the basis of an orthopedic condition (bilateral shoulder and back), which arose at work on October 6, 2011, when she attempted to open a stuck freezer door.

8. After review of medical reports, CalPERS determined that Respondent was not substantially incapacitated for performance of her duties as a Correctional Supervising Cook at the time the application was filed.

9. In a letter dated August 13, 2014, CalPERS notified Respondent of its determination.

10. Respondent appealed the denial and requested a hearing.

11. The issue on appeal is whether, at the time of the application, on the basis of an orthopedic condition (bilateral shoulder and back), Respondent was permanently disabled or substantially incapacitated from the performance of her usual duties as a Correctional Supervising Cook for Wasco.

12. The evidence presented at the hearing included the testimony and report from Ghol Ha'Eri, M.D., who conducted the Independent Medical Evaluation of Respondent. Dr. Ha'Eri is a board certified orthopedic surgeon. His evaluation included an examination of Respondent and a review of Respondent's prior medical records and the job descriptions of a Correctional Supervising Cook. Dr. Ha'Eri's credible testimony and his report established that: (1) although Respondent sustained an injury from the October 6, 2011 incident on the job, that injury has resolved, and Respondent has no residual permanent incapacity; (2) there are no job duties of Correctional Supervising Cook which Respondent is unable to perform due to a back/shoulder condition; and (3) Respondent is not substantially incapacitated for performance of her usual duties as a Correctional Supervising Cook based on her asserted conditions.

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LEGAL CONCLUSIONS

1. Respondent has not established that she is entitled to retirement for disability, as set forth in Factual Findings 5 through 12, and Legal Conclusions 2 through 5.

2. Government Code section 21151 provides, in pertinent 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.

3. Government Code section 20026, states, in pertinent 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.

4. “Incapacitated for the performance of duty,” means the “substantial inability of the applicant to perform his usual duties,” as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) The increased risk of further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future injury are insufficient to support a finding of disability. (*Hosford, supra*, 77 Cal.App.3d 854, 862 - 863.)

5. In this case, respondent asserted in her application that she suffered from an orthopedic condition (bilateral shoulder and back) which was the basis for her seeking disability retirement. However, the evidence did not establish that Respondent’s condition rendered her substantially incapacitated for the performance of her usual duties as a Correctional Supervising Cook.

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ORDER

The appeal of Respondent Nila J. Job, seeking retirement for disability as a state safety member of CalPERS, is denied.

DATED: November 30, 2015

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Julie Cabos-Owen
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JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings