

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:

KRISTEN J. DEL CARLO,

Respondent

and

DEPARTMENT OF CALIFORNIA
HIGHWAY PATROL,

Respondent.

Case No. 2015-0201

OAH No. 2015070340

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on October 26, 2015, in Sacramento, California.

Jeanlaurie Ainsworth, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Attorney Christopher C. Dehner of the law firm Jones, Clifford, Johnson, Dehner, Wong, Morrison, Sheppard & Bell represented respondent Kristen J. Del Carlo, who was present throughout the hearing.

No one appeared for or on behalf of respondent Department of California Highway Patrol (CHP), its default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to that respondent only.

Evidence was received, and the record was left open for CalPERS to submit evidence of proper service of the Statement of Issues and Notice of Hearing on the CHP and for Ms. Del Carlo to respond to such evidence. The declaration of Odessa Moore was marked as Exhibit 15 and admitted for jurisdictional purposes, without objection. Ms. Del Carlo did not respond to that evidence, and the record was closed and the matter submitted for decision on November 13, 2015.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

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SUMMARY

This appeal is limited to determining whether Ms. Del Carlo is permanently and substantially incapacitated for the performance of her usual job duties as a Traffic Officer with the CHP due to an orthopedic (back) condition. Ms. Del Carlo did not introduce persuasive medical evidence demonstrating her substantial incapacity. Therefore, her application for industrial disability retirement benefits should be denied.

FACTUAL FINDINGS

Ms. Del Carlo's Employment History

1. Ms. Del Carlo was hired by the CHP as a Traffic Officer on July 17, 2001. She is a patrol member of CalPERS as a result of such employment. (Gov. Code, § 20390, subd. (a).) Her initial assignment was to the Los Angeles area, but she subsequently worked throughout the State of California. She has been assigned to the Susanville area since at least 2005. Ms. Del Carlo has performed various assignments as a Traffic Officer, including working road patrol, serving as a public information officer, and working as a recruitment officer. She has been assigned to road patrol since approximately 2008 or 2009, although she has been working on "limited duty" due to a back injury for close to three years as of the date of hearing. Her duties have included general office work, filing documents, answering phones, typing documents, looking for tickets, and "other duties as assigned regarding office work."

Ms. Del Carlo's Disability

2. On August 4, 2006, Ms. Del Carlo was working as the public information officer in the CHP's Susanville office and demonstrating how to install a child car seat when she heard a "pop" and immediately felt pain in her low back area. Later that evening, she was unable to stand fully erect. She sought medical treatment from George Barakat, M.D., an orthopedic surgeon, three days later. Dr. Barakat's treatment is discussed further below.

3. Ms. Del Carlo explained at hearing that the symptoms of her 2006 back injury never completely resolved, although they did improve for a period of time. As she recalls, her symptoms were noticeably worse by July 17, 2011, and consisted of low back pain and some left leg pain with numbness. She explained that getting out of her patrol vehicle "was very difficult at times, depending on the day." Ms. Del Carlo returned to Dr. Barakat for treatment, and was eventually referred to other physicians as discussed further below. She has been performing limited duty since at least May 15, 2013.

Ms. Del Carlo's Application for Industrial Disability Retirement

4. On March 21, 2014, Ms. Del Carlo signed a Disability Retirement Election Application seeking industrial disability retirement benefits. She identified her specific

disability as, “CONSTANT LOW BACK PAIN, HERNIATED DISC, BULGING DISCS, PAIN IN LEGS & FEET ADDRESSED IN RECENT SURGERY (LAMINECTOMY) ON DEC 11th, 2013.” (Capitalization original.) She identified the disability as having occurred on “07/17/2013.”¹ Ms. Del Carlo wrote that she cannot lift items heavier than 50 pounds, cannot sit for more than eight hours, and cannot wear her duty belt without experiencing pain in her low back.

5. On November 14, 2014, CalPERS denied Ms. Del Carlo’s application based on its review of medical records from Steven Isono, M.D., Lali Sekhon, M.D., and Daniel D’Amico, M.D. Ms. Del Carlo timely appealed the denial. Diane Alsup signed the Statement of issues on March 20, 2015, solely in her official capacity as the Interim Chief of the Benefit Services Division of CalPERS.

Job Duties of a Traffic Officer

6. Ms. Del Carlo’s usual job duties for purposes of determining whether she is substantially incapacitated are to be determined with regard to her job classification of “Traffic Officer,” as opposed to any particular assignment she held as a Traffic Officer (e.g., road patrol, public information officer, recruitment officer, etc.). (*Beckley v. Board of Administration of California Public Employees’ Retirement System* (2013) 222 Cal.App.4th 691, 699.) That is because all Traffic Officers employed by the CHP are generally required to be physically “capable of fulfilling the complete range of official duties administered by the Commissioner pursuant to Section 2400 and other official duties that may be necessary for the preservation of life and property.” (*Ibid.*; citing, Veh. Code, § 2268, subd., (a).)

The usual duties of a Traffic Officer have been identified in a document entitled California Highway Patrol Officer 14 Critical Physical Activities. (*Beckley v. Board of Administration of California Public Employees’ Retirement System, supra*, 222 Cal.App.4th at pp. 700-701.) Those duties include: lifting/carrying, pushing/pulling, sitting, standing, squatting/bending/kneeling, walking, running, climbing, jumping, manual dexterity/firearms, driving, visual acuity, color vision, and hearing. The frequency and duration for which some of those physical tasks are performed are as follows:

Lifting and carrying, without assistance, items weighing 30 to 50 pounds: one to three times per month for one minute

Sitting in a patrol vehicle during patrol or surveillance: one to three times per day for one to two hours

Driving a patrol vehicle while on patrol: one to three times per day for 30 to 45 minutes

¹ This date appears to be a typographical error, as evidence indicates a date of August 4, 2006.

Additionally, a CalPERS form entitled Physical Requirements of Position/Occupational Title completed by Ms. Del Carlo and her sergeant identified the task of lifting or carrying an object greater than 50 pounds as being performed for up to three hours each day.

Medical Evidence

Ms. Del Carlo's evidence

7. Ms. Del Carlo did not call any medical experts to testify at hearing. However, Dr. D'Amico, CalPERS's medical expert, summarized some of her medical records in his report, which was admitted into evidence. Additionally, she offered a February 3, 2014 letter written by Dr. Sekhon and an August 29, 2014 report authored by Dr. Isono.

Dr. Barakat

8. Ms. Del Carlo first treated with Dr. Barakat relative to her back injury on August 7, 2006. He treated her conservatively, which included prescriptions for a muscle relaxant, an anti-inflammatory, and pain medication; physical therapy with ultrasound muscle stimulation and stretching exercises, and a brief period of light duty. Dr. Barakat's diagnosis was disc derangement of the lumbar spine, and he recommended an MRI. According to progress notes reviewed by Dr. D'Amico, Dr. Barakat released Ms. Del Carlo to full duty on September 15, 2006. There was no evidence of whether she had the recommended MRI.

9. Dr. Barakat's next progress note indicated Ms. Del Carlo presented on July 2, 2012, complaining of low back pain that radiated to both legs and tingling down her left leg. A physical examination revealed tenderness over the low back and the right sciatic notch and sacroiliac joint. She had a significantly reduced range of motion when bending forward at the waist. Subsequent notes indicated a July 17, 2012 MRI of the lumbosacral spine revealed "probable degenerative disc disease and facet osteoarthritis, small central disc protrusion at L4 L5 with mild to moderate canal narrowing also at L3 L4." A repeat MRI one year later showed "no significant change." Dr. Barakat last put Ms. Del Carlo on light duty work on May 15, 2013, and there was no evidence of him having released her to return to full duty.

Dr. Sekhon

10. Ms. Del Carlo first treated with Dr. Sekhon on September 7, 2012. His physical exam of her revealed no tenderness in the lumbar spine. He discussed the possibility of conservative treatment versus possible compression/laminectomy surgery. A subsequent physical examination one month later revealed some pain on extension, but a neurologic examination of Ms. Del Carlo's lower extremities revealed normal tone, power, reflexes, and sensation. Dr. Sekhon again discussed conservative treatment versus possible decompression/laminectomy surgery. Ms. Del Carlo returned on July 9, 2013, complaining of pain bilaterally in the buttocks, with the right greater than the left, and pain, numbness,

and tingling in both lower extremities. Physical examination revealed no tenderness in the lumbar spine, but some pain with extension.

Dr. Sekhon's December 11, 2013 operative note reflected a diagnosis of "degenerative disc disease at L3 L4 and L4 L5, annular tear at L4 L5, and moderate to severe spinal stenosis at L3 L4 and L4 L5." He performed a partial laminectomy of the under surface of L3 and almost a complete laminectomy of L4 and superior L5. He also decompressed the neural foramen bilaterally at L3 L4 and L4 L5.

11. On February 3, 2014, Dr. Sekhon wrote the following letter to a claims representative with the State Compensation Insurance Fund:

I am in receipt of your communication on January 22, 2014. I have reviewed the fourteen critical tasks that you have listed and I am concerned with several. Task #1 involves lifting an individual resisting arrest. I would suggest trying to avoid this. Task 2E involves pulling or dragging heavy objects off the roadway. I would avoid this. There are several activities under #2 that involve lifting 160 to 200 pounds, I would avoid this. #3 sitting for prolonged period should be avoided; ideally she should get up and walk for five to ten minutes every hour or so. #9. Jumping over obstacles and down from elevated surfaces in the face of previous back injury is best avoided. In short, as previously outlined in my communications I would avoid any activities that involve bending, lifting, or twisting in a repetitive fashion or lifting more than 50 pounds. I would classify her as permanent and stationary right now.

Dr. Isono

12. Ms. Del Carlo first saw Dr. Isono, a board-certified orthopedic surgeon, on April 8, 2013, for a Qualified Medical Examination in her workers' compensation matter. His physical examination revealed normal gait and a decreased range of motion of the low back due to discomfort.

13. Ms. Del Carlo returned to Dr. Isono on August 29, 2014, for an Agreed Medical Evaluation. Physical examination revealed that she continued to have reduced range of motion of her low back, with persistent moderate pain at the base of the lumbar spine and loss of lordosis. Her sciatic notch was tender, bilaterally. She had no tenderness in her ischial tuberosities or sacroiliac joints.

Dr. Isono concluded Ms. Del Carlo's "lumbar spine condition has achieved a position of Maximum Medical Improvement at today's evaluation, as she did not wish to proceed with further diagnostic studies or invasive treatment at this time." With regard to future medical care, he wrote:

Provisions for future medical care for Ms. Del Carlo's lumbar spine would be appropriate. Medical followup for acute exacerbations of her symptoms would be appropriate. Conservative avenues would include office visits, consultations, medications, physical therapy, temporary bracing, and selective cortisone injections.

Trigger point injections for muscle spasms would also be appropriate.

A trial of a TENS unit, interferential stimulator, or H-wave unit would be appropriate. If one of these devices produced symptomatic relief noted by a decrease in the use of medications or an increase in her function, the purchase of one of these devices would be appropriate.

Epidural injections, selective nerve root blocks, and facet injections for the lumbar spine could also be utilized for an acute exacerbation. Radiofrequency ablation of the facet joints would be appropriate if the facet injections prove to be beneficial.

Further diagnostic studies would also be appropriate should her symptoms increase in intensity or frequency.

For the sake of completeness, given the findings from today's evaluation, a surgical provision for her lumbar spine would be appropriate including a lumbar fusion.

14. There was no evidence that Drs. Barakat, Sekhon, or Isono ever opined that Ms. Del Carlo is substantially incapacitated for the performance of her normal job duties as a Traffic Officer. While Drs. Barakat and Sekhon each placed Ms. Del Carlo on light duty during their respective treatment of her, there was no evidence of the specific restrictions either physician placed on her ability to work. There was no evidence of whether the limitations Ms. Del Carlo identified in her application were self-imposed or ordered by one or more of her physicians. Furthermore, the limitations Dr. Sekhon identified in his February 3, 2014 letter were couched in terms of prophylactic restrictions, rather than his opinion that she was physically incapable of performing any of the particular tasks. (See, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863 [an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability determination].)

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CalPERS's evidence

Dr. D'Amico

15. CalPERS called Dr. D'Amico as its medical expert at hearing. He is a board-certified orthopedic surgeon who was retained by CalPERS to perform an independent medical evaluation (IME) of Ms. Del Carlo on July 30, 2014. Dr. D'Amico prepared a report documenting his IME, and that report was introduced into evidence. His hearing testimony was consistent with his report.

16. Upon physical examination, Dr. D'Amico observed that the range of motion of Ms. Del Carlo's back was within acceptable limits, although she had some tenderness and stiffness or soreness in the low back upon extension. She also had some tenderness upon palpation of the low back lumbosacral region, over the posterior superior spine, and over the area just below the posterior superior spine of the iliac crest to the left of the midline. She had no sacrosciatic notch pain or tenderness and no sacroiliac tenderness to palpation.

17. Based upon his physical examination of Ms. Del Carlo and review of her medical records as discussed above, Dr. D'Amico opined that she is not substantially incapacitated for the performance of her normal duties as a Traffic Officer with the CHP due to an orthopedic (back) condition. He explained:

If you look at those [14 Critical Physical Activities], some are done one to three times per month or one to two times per year. Pushing and pulling may occur one to two times per year for one minute and standing and sitting are done up to eight hours but not on a continual basis. There are opportunities to stand, get up, and move out of the car. Also, there are limitations that can be imposed in her work duties, for instance, not working overtime in a vehicle and not continuously lifting up to 50 or 100 pounds. My interpretation of the two issues with the 14 activities is that they are done infrequently and there is no reason that she cannot do them for any short period of time.

The fact that she may strain her back of course is always a possibility, but that is a possibility with anyone, even someone who does not have degenerative disc disease or has had surgery. So basing this on the fact that she has had remedial surgery, the body will heal. The degenerative changes tend to be slow and progressive, but these are in some sort of healing following the surgery. She is well toned. She has good muscles in her back, and her physical findings do not suggest any significant permanent [sic] of neurologic dysfunction, loss of strength, or even significant loss of low back mobility. So my conclusion is that based on her age, her fit condition, she is definitely not

substantially incapacitated nor does she have serious bodily injury.

I noted in the records that by most of her physicians the physical findings were not greatly significant, except for the QME evaluator. I believe that the findings by the QME doctor probably are not presently accurate based upon my examination, the records of Dr. Barakat and Dr. Sekhon, who performed the surgery. I believe the surgery was indicated based on her complaints of pain. I believe the surgery was done well. I believe that the minimal surgery was the best decision, and she has had a good result.

18. Dr. D'Amico wrote the following regarding Dr. Sekhon's February 3, 2014 letter:

My comment regarding the above suggestions by Dr. Sekhon is that avoiding these activities and not being able to perform them are two different things. My interpretation is that she could do them, but it would be best for her to avoid them. He also says that jumping would be best avoided in the face of back surgery. Her back surgery is curative according to the indication for which it was done. It did not do anything but decompress the nerves. It did not change the anatomy of the back. It did not remove a disc, and it did not change the anatomic function of the facets, the discs, the support mechanisms, etc. I believe the operation was performed in an excellent manner. I believe it was beneficial and as I have interpreted all of the symptoms and records, she is much better following the surgery. As a result of the improvement of the conditions and my interpretation of occasionally up to three hours, she is capable of performing all of the 14 Critical Physical Activities as presented in the records.

19. Dr. D'Amico was provided a copy of Dr. Isono's August 29, 2014 Agreed Medical Evaluation report (Exhibit B) after he completed his July 30, 2014 IME report. Dr. D'Amico wrote a supplemental report, in which he stated the following about Dr. Isono's report:

I reviewed all of the history which is fairly accurate, and I reviewed all of the ratings by Dr. Isono. I disagree with some of his findings. For instance, I did not find a Grade 3 sensory loss on examination, and I did not find weakness to be significant in the course of my evaluation, either. He did rate her permanent and stationary with a 21 percent whole person disability rating. I have no objection to this rating, although I believe that some of

the issues that he has claimed in his physical findings were not present in July 2014, therefore, I cannot agree with some of his physical findings.

I noted that in Dr. Isono's report, he does not indicate in the review of records of the surgeon, Dr. Sekhon (2012), that Dr. Sekhon had quoted that there was a normal neurological examination. Also, in 7/9/2013 by Dr. Sekhon, there was normal neurologic examination, and on 9/13/2013 by Dr. Sekhon, no tenderness in the lumbar spine and some pain with extension. Again, this was the surgeon who performed the surgery, and I feel that the surgery was well performed, with good result.

My opinion is that the findings and opinions given in my report of 7/30/2014 are accurate, and would most probably be unchanged if I were to re-evaluate Ms. Del Carlo again. The review of Dr. Isono's QME [*sic*] does not change my previously stated opinions.

Discussion

20. When all the medical evidence is considered, Ms. Del Carlo did not meet her burden to introduce medical evidence that she is substantially incapacitated for the performance of her usual duties as a Traffic Officer with the CHP due to an orthopedic (back) condition. That is not to say she does not suffer from low back pain, pain in other parts of her body, or that such pain will not make it more difficult for her to perform her job duties. But discomfort alone, even if it makes performance of one's duties more difficult, is insufficient to establish a substantial incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; citing, *Hosford v. Board of Administration, supra*, 77 Cal.App.3d 854, 862.)

Ms. Del Carlo was required to produce a competent medical opinion to establish her substantial incapacity. (Gov. Code, § 21156, subd. (a)(2).) She offered no expert medical testimony at hearing, and none of the medical records introduced contained a physician's opinion that Ms. Del Carlo is substantially incapacitated for the performance of her usual duties. Therefore, her application for industrial disability retirement should be denied.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Ms. Del Carlo has the burden of proving she qualifies for an industrial disability retirement, and she must do so by a preponderance of the evidence. (*McCoy v.*

Board of Retirement (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) Evidence that is deemed to preponderate must amount to “substantial evidence.” (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be “substantial,” evidence must be reasonable in nature, credible, and of solid value. (*In re Teed’s Estate* (1952) 112 Cal.App.2d 638, 644.)

Applicable Statutes

2. Government Code section 20026 provides, in pertinent part:

“Disability” and “incapacity for performance of duty” as the 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 21151, subdivision (a), provides: “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.” And the employer of such a member may not terminate the member’s employment based on his disability, but instead must apply for a disability retirement on the member’s behalf. (Gov. Code, § 21153.)
4. Government Code section 21156, subdivision (a), provides, in pertinent part:
 - (1) If the medical examination and other available information show to the satisfaction of the board ... that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her 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 and shall not use disability retirement as a substitute for the disciplinary process.
5. The courts have interpreted the phrase “incapacitated for the performance of duty” to mean “the substantial inability of the applicant to perform [her] usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.)

Conclusion

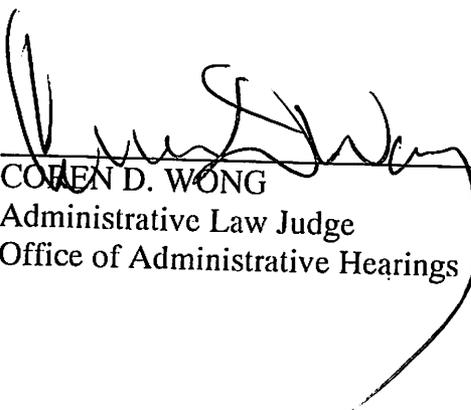
6. Ms. Del Carlo did not meet her burden of producing persuasive medical evidence demonstrating she is substantially incapacitated for the performance of her usual

duties as a Traffic Officer with the CHP due to an orthopedic (back) condition. Therefore, her application for industrial disability retirement should be denied.

ORDER

Respondent Kristen J. Del Carlo's application for industrial disability retirement is DENIED.

DATED: December 3, 2015



COHEN D. WONG
Administrative Law Judge
Office of Administrative Hearings