

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
 BOARD OF ADMINISTRATION
 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues
 Against:

BRENT M. JOHNSTON,

Respondent,

and

CALIFORNIA DEPARTMENT OF STATE
 HOSPITALS, ATASCADERO,

Respondent.

Case No. 2015-0020

OAH No. 2015071260

PROPOSED DECISION

The hearing in the above-captioned matter took place on January 20, 2016, at San Luis Obispo, 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 Brent M. Johnston (Respondent) did not appear; neither did the other respondent in the case, the California Department of State Hospitals, Atascadero (Atascadero SH).

At the hearing it was established that the Notice of Hearing was served on Respondent and Atascadero SH by mail and electronic mail on September 23, 2016, at the address Respondent had used in his application for disability.¹

¹ Official notice is taken of the Notice of Assigned Hearing Dates, found in the OAH file. It was served on the parties on July 29, 2015. It informed them of the hearing date and location. The Notice of Assigned Hearing Dates was sent to the address Respondent used in his disability application, and that the document was not returned to OAH by the post office. While that notice from OAH 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 of Hearing served by Complainant approximately two months later.

Documentary evidence was received from Complainant, and brief testimony from a physician who had examined Respondent. The case is deemed submitted for decision as of January 20, 2016. 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 psychiatric technician at Atascadero SH. In January 2014, Respondent submitted a disability retirement application (Application) to PERS. The application stated he could not do his job because of problems with his back. After reviewing medical evidence and having a doctor examine Respondent, PERS denied his application, asserting he is not disabled within the meaning of the statutes and cases that govern disability retirement claims for PERS. The decision by PERS denying disability retirement is upheld.

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 was previously employed by the Atascadero SH as a psychiatric technician.² He is a state safety member of PERS within the meaning of Government Code section 21151.³
3. On January 16, 2014, Respondent's Application was received by PERS. The Application listed Respondent's effective retirement date as December 17, 2013.
4. The application stated that Respondent was disabled because his thoracic discs numbers 5 and 6 were herniated, and numbers 1 through 4 bulged. He stated he injured his back on June 26, 2012, when he fell in a stairwell at Atascadero SH. Respondent further stated that as a result of his injury, he could not engage in prolonged sitting or standing, and could not engage in "red light response" nor patient containment. (Ex. 1, p. 2.) Respondent further stated in the Application that he could not bend or stoop, twist, or lift more than 20 pounds, and this meant he could not provide direct patient care.

² In August 2014, Respondent told Dr. McAdams, who examined Respondent at the request of PERS, he had been a psychiatric technician for eight years. (Ex. 8, p. 3.)

³ All statutory references will be to the Government Code unless otherwise noted.

5. Thereafter, on September 25, 2014, PERS wrote to Respondent, denying the Application. PERS asserted that a review of the medical evidence, including evidence obtained from an independent medical exam (IME), led to the determination that Respondent's 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, asserting he was disabled, and was appealing the denial of benefits. That letter was received by PERS on October 27, 2014. This proceeding then ensued. As noted in the preamble, PERS served both Respondents with notice of the hearing in this matter, but neither one appeared. All jurisdictional requirements have been satisfied.

Respondent's Usual Duties as a Psychiatric Technician at Atascadero SH

7. A written description of the essential functions of a psychiatric technician employed at Atascadero SH was received in evidence as exhibit 10. Among the most relevant matters was the need to walk, at a brisk pace, up to two miles per shift, and to run a quarter mile in an emergency. A technician was required to lift up to 50 pounds, in situations where four people would lift another person from the ground. There was a requirement to carry 50 pounds of materials for 100 feet, and to push and pull heavy objects. Bending, crouching, kneeling and other movement was necessary.

8. A job duty analysis was received in evidence as exhibit 11. One of the job requirements was to restrain, lift, and/or carry combative patients; it might be necessary to take the patient down. Respondent would be expected to stand up to 60 per cent of a shift, and would be expected to walk from 34 percent to 66 per cent of the time. Lifting things weighing 11 to 25 pounds could be expected to occur up to 33 per cent of the shift. Heavier lifting was required on an infrequent basis.

The IME

8. On August 21, 2014, Brendan V. McAdams, Jr., M.D., conducted an IME of Respondent, at the request of PERS. Dr. McAdams has practiced orthopedic medicine for approximately 48 years, most of that time in the area of San Luis Obispo. He issued a written report of IME, found at exhibit 8. As part of his exam process, Dr. McAdams reviewed medical reports for Respondent, and an MRI of Respondent's spine.

9. Dr. McAdams stated in his report that he could not find significant pressure on the C4 and C5 areas of the spine, which pressure was purportedly indicated in the MRI, nor could he find any significant disc bulge at any level. (Ex. 8, p. 4.) He likewise disagreed with the opinions of prior treating physicians, such as Dr. Cannon. (*Id.*) He stated Respondent's examination was "totally negative" and that he was not disabled from any of his job duties. Dr. McAdams also opined that Respondent was not substantially handicapped. (*Id.*, p. 5.) He found no evidence of any disability. (*Id.*, p. 6.)

Other Matters

10. An investigation revealed that Respondent failed to maintain his certification as a psychiatric technician while he was on medical leave following the incident in June 2012.

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. He 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 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. A qualified physician concluded, after examining Respondent, that he is not disabled from the usual duties of a psychiatric technician at Atascadero SH. There is no reason to doubt the credibility of Dr. McAdams, given his years of experience. Without positive medical evidence and opinion in his favor, Respondent cannot carry his burden of proving he is substantially disabled and eligible for retirement disability. His claim for disability retirement must therefore be denied.

//

//

//

ORDER

The appeal of Respondent Brent M. Johnston is denied, and he shall not receive disability retirement benefits from PERS.

February 10, 2016

DocuSigned by:
Joseph D. Montoya
F077568D88CB41E...

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings