

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:

CHRISTOPHER CISCO,

Respondent,

and

SELMA UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. 2015-0557

OAH No. 2015080602

PROPOSED DECISION

This matter was heard before Tiffany L. King, Administrative Law Judge, Office of Administrative Hearings, State of California, on March 22, 2016, in Fresno, California.

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

Christopher Cisco (respondent) was present and represented himself. There was no appearance by or on behalf of Selma Unified School District (District).

Evidence was received, the record was closed, and the matter was submitted for decision on March 22, 2016.

ISSUE

On the basis of an orthopedic (right ankle and foot) condition, is respondent permanently and substantially incapacitated from performing his usual duties as a Groundsperson for the District?

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED April 20 16
Kathy Hester

FACTUAL FINDINGS

1. Respondent was employed as a Groundsperson by the District. By virtue of his employment, he is a state miscellaneous member of CalPERS and subject to Government Code section 21150.¹ Respondent has the minimum service credit necessary to qualify for retirement.

2. On October 6, 2014, respondent filed an application for disability retirement with the Benefits Services Division of CalPERS. In his application, respondent indicated that he was retiring for service pending disability retirement, and designated January 1, 2015, as his service retirement date. Respondent described his disability as an "injury to right ankle and foot" which occurred on October 1, 2012, when he "stepped back into a space or hole around [a] storage drain." Respondent asserted he no longer has full mobility in his right foot, has instability, and cannot stand on it for more than an hour at a time.

3. After reviewing respondent's application, CalPERS retained Ghol Ha'Eri, M.D., to conduct an independent medical examination (IME) of respondent's asserted orthopedic conditions in his right foot and ankle. Dr. Ha'Eri examined respondent and prepared an IME report. After reviewing the IME report, CalPERS determined that respondent was not permanently and substantially incapacitated from performing his usual duties as a Groundsperson.

4. By letter dated March 18, 2015, CalPERS notified respondent of its determination and advised him of his appeal rights. Respondent filed an appeal and request for hearing on April 29, 2015. Accordingly, CalPERS filed the Statement of Issues in its official capacity on June 17, 2015.

Duties and Physical Requirements of a Groundsperson

5. At all relevant times, respondent was employed by the District as a Groundsperson. His last worked for the District in June 2013.²

¹ Government Code section 21150 provides: "Any member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076 or Section 21077."

² The specific period of respondent's employment with the District was unclear from the evidence. On his disability retirement application, respondent represented he was last on the District's payroll was between June 12 through 21, 2013. During the IME, respondent indicated his last day of work was June 16, 2013. Finally, at hearing, respondent testified that at the time of his injury in October 2012, he had approximately 12 years of qualifying service years.

6. In his disability retirement application, respondent described his primary duties as a Groundsperson as: “mowing school lawns, weed eating, blowing off sidewalks, fixing sprinklers, prepping for sports activit[ies], tree trimming, hedge trimming, [etc.].” The District’s Job Description for the position identifies further job responsibilities such as: watering lawns and fields; operating power mower and edger; setting up bait traps and spraying for pests; spading and preparing grounds for flowers and shrubs; operating, maintaining and repairing trucks and other heavy equipment; and, performing heavy physical labor including lifting in excess of 50 pounds.

7. CalPERS received a completed “Physical Requirements of Position/ Occupational Title” form signed by respondent and a District representative on October 21, 2014. According to this form, the Groundsperson position: (1) never requires running, crawling, climbing, using keyboard or mouse, lifting more than 76 pounds, working at heights, or working with bio-hazards; (2) occasionally (up to three hours a day) requires sitting, standing, walking, kneeling, squatting, bending and twisting at the neck and waist, lifting between 26 and 75 pounds, walking on uneven ground, and exposure to dust, gas, fumes, or chemicals; (3) frequently (three to six hours a day) requires reaching above and below the shoulder, pushing and pulling, fine manipulating, simple and power grasping, lifting between 1 and 25 pounds, working with heavy equipment, exposure to excessive noise, operating foot controls and repetitive movement, and using special visual or auditory protective equipment; and (4) constantly (over six hours a day) requires using hands repetitively and exposure to extreme temperature, humidity, and wetness.

IME by Ghol Ha’Eri, M.D.

8. On January 20, 2015, at CalPERS’s request, Ghol Ha’Eri, M.D. conducted an IME of respondent. Dr. Ha’Eri prepared an IME report and testified at hearing. Dr. Ha’Eri is a Diplomate of the American Board of Orthopaedic Surgery and the American Board of Neurological and Orthopaedic Surgery. Dr. Ha’Eri has been licensed to practice medicine for approximately 47 years. Until approximately 2010, Dr. Ha’Eri ran a private practice and treated orthopedic patients. For the last six years, he has primarily performed IMEs and Qualified Medical Evaluations (QMEs) for the workers compensation system.

9. As part of his IME of respondent, Dr. Ha’Eri interviewed respondent, obtained a personal and medical history, had respondent complete a questionnaire, conducted a physical examination, and reviewed respondent’s medical records related to his orthopedic condition.

10. Dr. Ha’Eri also reviewed respondent’s job description and the physical requirements of his position as Groundsperson.

BACKGROUND AND COMPLAINTS

11. During the evaluation, respondent explained that, on October 1, 2012, he was working on the school grounds when he stepped with his right foot into a storm drain and

twisted his right ankle and foot. On the same date, respondent went to the District's industrial clinic and was treated by Marc Johnson, M.D. X-rays were taken and were negative. Dr. Johnson diagnosed respondent with a sprain of the right ankle and foot, and prescribed an aircast, crutches, and Ibuprofen tablets. Dr. Johnson then referred respondent to Roy Kroeker, D.P.M, a podiatrist, for an MRI.

12. On October 10, 2012, Dr. Kroeker reviewed respondent's MRI and diagnosed him with degenerative joint disease of the right ankle and subtalar joints, and severe capsulitis of the right ankle and foot. Dr. Kroeker recommended placing respondent on temporary total disability.

13. On April 1, 2013, respondent was examined by S.S. Shantharam, M.D., an orthopedic surgeon. Dr. Shantharam recommended non-surgical treatment for respondent's right ankle and foot.

14. On July 9, 2013, Kevin Calhoun, M.D., performed a Function Capacity Evaluation on respondent. On October 31, 2013, respondent was examined by Peter Mandell, M.D., an orthopedic surgeon, in his capacity as an Agreed Medical Examiner. Dr. Mandell opined that respondent's condition had not reached "maximum medical improvement" and recommended surgery for his right ankle and foot, as well as his big toe.³

15. On October 21, 2013, respondent was seen by Francis Glasier, M.D., an orthopedic surgeon, who recommended arthroscopic surgery of respondent's right ankle and foot and subtalar joint for the purpose of debridement. On March 4, 2014, Dr. Glaser performed these procedures on respondent's right ankle and foot.

16. On August 22, 2014, Dr. Mandell declared respondent's right ankle and foot had reached maximum medical improvement and his condition was permanent and stationary.

17. On October 24, 2014, Dr. Johnson opined that respondent was permanently incapacitated from performing the occupation of Groundsperson.

18. On the date of the IME, respondent reported to Dr. Ha'Eri that he had mild swelling in his right ankle and foot, and right ankle discomfort with prolonged standing and walking.

PHYSICAL EXAMINATION

19. Dr. Ha'Eri conducted a physical examination of respondent. Respondent walked independently with a normal gait. His right ankle and foot had "well-healed scars from the arthroscopy and subtalar joint, as well as a scar from an anterior mini incision." Dr.

³ Respondent's big toe on his right foot was a pre-existing, degenerative condition.

Ha'Eri noted there was no swelling in respondent's right ankle or foot. Palpation of the right ankle and foot revealed no tenderness. Dr. Ha'Eri noted the right ankle joint was stable to manipulation, and there was no crepitus (grinding or cracking) with ankle and foot motion. Respondent's range of motion in his right ankle and foot measured normal: dorsiflexion – 30 degrees; plantar flexion – 40 degrees; eversion – 20 degrees; and inversion – 30 degrees.

20. Dr. Ha'Eri measured respondent's lower extremities. The circumferential measurements of respondent's thighs were 41 centimeters each. His right calf was 38 centimeters and his left calf was 38.5 centimeters. Dr. Ha'Eri testified that the measurements are significant in that they demonstrate respondent does not have atrophy in either leg. Dr. Ha'Eri found no abnormalities during the physical examination.

21. Dr. Ha'Eri also performed a neurological examination of the right ankle and foot and found no evidence of any nerve injury.⁴

DIAGNOSIS AND IMPRESSION

22. Dr. Ha'Eri diagnosed respondent with "right ankle and foot sprain/strain," and "status post right ankle and subtalar joint debridement (arthroscopic and open)." Dr. Ha'Eri opined that there are no specific duties of a Groundsperson that respondent cannot perform. He further opined that respondent was not substantially incapacitated from the performance of his duties, as a result of his orthopedic condition.

Respondent's Evidence

23. Respondent testified at hearing. On October 1, 2012, respondent was at work and driving a riding mower. He dismounted the mower to remove a trash can that had been overturned. After he picked up the trash can, respondent took one step backward and with his right foot stepped into a hole around a storage drain. Respondent heard his right ankle make a "popping" sound.

24. After treating respondent, Dr. Johnson took him off of work for two and a half months. Respondent was also restricted from climbing, lifting, or walking for extended periods of time. Respondent was released to return to work in January 2013. However, the District did not have a light duty position available for respondent. Respondent was directed to return to his normal duties as Groundsperson. Respondent re-aggravated his right ankle injury when the riding mower he was driving hit a pothole in the grass.

25. Respondent went off work again. After he exhausted his sick and vacation leave, he returned to work at the District. Respondent's return to work was short-lived, and

⁴ Dr. Ha'Eri's IME report states that he performed a neurological examination of respondent's "left ankle and foot." At hearing, Dr. Ha'eri testified this was a typographical error and should read "right ankle and foot."

he took a leave of absence to explore his legal options. Thereafter, respondent filed a workers' compensation claim. The District's workers' compensation insurer, TriStar, referred respondent to Dr. Mandell. On September 18, 2015, Dr. Mandell advised TriStar that respondent's medical condition prevented him from returning to his regular job duties.

26. Respondent did not call any health care providers to testify. Nor did he introduce any medical reports, records, or opinions to establish that he is substantially incapacitated for the performance of his duties as Groundsperson. Instead respondent offered two documents concerning his workers' compensation claim, and a September 16, 2015 letter from the Social Security Administration (SSA) which confirmed a finding of disability as of January 1, 2015.⁵

27. Respondent testified that he wished he could return to his Groundsperson position, but that he could not do so without risking "complete ankle immobilization" if he reinjured his right ankle and foot. He further testified that his right ankle and foot disability prevents him from enjoying normal life activities, such as riding a bicycle, standing for long periods of time, gardening, attending social activities, playing with his grandchildren, and coaching T-ball. Respondent used to care for his adult mentally retarded brother, but he can no longer drive his brother to his medical appointments.

Discussion

28. When all the medical evidence is considered, respondent did not meet his burden to demonstrate that he is substantially incapacitated for the performance of his usual duties as a Groundsperson. That is not to say he does not suffer from right ankle and foot pain or that such pain may make it more difficult for him to perform his 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* (1978) 77 Cal.App.3d 854, 862.) Similarly, an increased risk of further injury is insufficient to demonstrate a present disability. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

29. Respondent's workers' compensation claim has no bearing on the issue of his 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; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132.) The SSA's determination that respondent was "disabled" as defined by the Social Security Act,⁶ since January 1, 2015 is likewise unpersuasive. No evidence was offered to establish that the standard applied in the Social Security case is the same as the standard applied by CalPERS, or that the same medical

⁵ The SSA letter indicates that respondent's condition did not prevent all work activity until January 1, 2015, the month respondent turned age 55.

⁶ 42 U.S.C. § 301 et seq.

evidence, including Dr. Ha'Eri's IME report, was considered as part of the Social Security case. Therefore, the SSA decision on respondent's "disability" is not relevant in this case.

30. Respondent was required to produce a competent medical opinion to establish his substantial incapacity. (Gov. Code, § 21156, subd. (a)(2).) He introduced no expert medical testimony at hearing, and no medical reports, records, or opinions to demonstrate respondent is substantially incapacitated for the performance of his usual duties. Respondent's lay testimony concerning his disability was insufficient to establish his substantial incapacity. (*Peter Kiewitt Sons v. Industrial Accident Commission* (1965) 234 Cal.App.2d 831, 838 ["Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a commission finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence].)

31. When all the evidence is considered, respondent failed to meet his burden. Therefore, his disability retirement application must be denied.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Respondent has the burden of proving he qualifies for disability retirement, and he 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.) 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.)

Relevant Statutes

2. Government Code section 20026 provides:

"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. An application for disability retirement of a member may be made by the member's employer, the governing body of the contracting agency with whom a member is employed, or the member himself. (Gov. Code, § 21152, subds. (a), (c), and (d).)

4. An application for disability retirement must be made while a member is still in state service or within four months after the discontinuance of his state service. Upon

receiving the application, the board must order a medical evaluation of the member to determine if he is incapacitated for the performance of duty. (Gov. Code, § 21154.)

5. Government Code section 21156, subdivision (a), provides, in pertinent part:

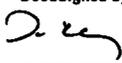
(1) If the medical examination and other available information show to the satisfaction of the board ... that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him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

6. The courts have interpreted the phrase “incapacitated for the performance of duty” to mean “the substantial inability of the applicant to perform his usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876.) Here, respondent failed to meet his burden of establishing, based upon competent medical opinion, that he is substantially incapacitated for the performance of his usual duties as a Groundsperson with the District due to an orthopedic condition. Therefore, his disability retirement application must be denied.

ORDER

The application of Christopher Cisco for disability retirement is DENIED.

DATED: April 19, 2016

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Tiffany L. King
Administrative Law Judge
Office of Administrative Hearings