

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:

BRYAN BOYLE,

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION, FOLSOM STATE
PRISON,

Respondent.

CalPERS No. 2014-0024

OAH No. 2014100813

PROPOSED DECISION

This matter was heard before Erin R. Koch-Goodman, Administrative Law Judge, Office of Administrative Hearings, State of California, on March 14, 2015, in Sacramento, California.

The California Public Employees' Retirement System (CalPERS) was represented by Preet Kaur, Senior Staff Counsel.

Bryan Boyle (respondent) was present and was represented Richard Elder, Jr., Attorney at Law.

There was no appearance by or on behalf of respondent California Department of Corrections and Rehabilitation (CDCR). The matter proceeded as a default against CDCR pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on March 14, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED April 13 20 16

Maureen Deegan

ISSUE

Is respondent permanently disabled or substantially incapacitated from the performance of his usual and customary job duties as a Correctional Officer (CO) for CDCR, Folsom State Prison (Folsom), based upon his orthopedic (left knee and right ankle) conditions?

FACTUAL FINDINGS

1. Anthony Suine, Chief, Benefit Services Division, CalPERS, made and filed the Accusation in his official capacity.

2. Respondent was employed by CDCR, Folsom, as a CO at the time that he filed his application for industrial disability retirement. By virtue of his employment, respondent was a state safety member of CalPERS subject to Government Code section 21151, subdivision (a).

3. On January 15, 2013, respondent filed an application for disability retirement (Application), claiming a disability on the basis of his orthopedic conditions. CalPERS reviewed respondent's medical documentation regarding his orthopedic conditions as well as sent an investigator to survey and video respondent during his activities of daily living. On May 10, 2013, Troy Shinpaugh, CalPERS Investigator, submitted a Report of Investigation, along with five DVDs, running approximately nine hours, detailing nine days and approximately 42 hours of surveillance of respondent. The sub rosa DVDs show respondent driving a car, getting gas, and shopping at Sam's Club; helping coach his son's youth baseball league, throwing and hitting a baseball; as well as watching his son participate in a competitive baseball game while sitting in the bleachers, standing, and walking intermittently. On one occasion, respondent carried his youngest son for a short distance. Considering the above, CalPERS determined respondent's conditions were not disabling; and respondent was not substantially incapacitated from the performance of his job duties as a CO with CDCR. By letter dated August 27, 2013, CalPERS notified respondent of its decision to deny his Application and advised him of his appeal rights. Respondent filed an appeal on September 26, 2013.

Job Duties

4. With his Application, respondent submitted several CO duty statements: a job analysis of the CO classification, dated June 1990, listing 193 tasks for the position; a CDCR Essential Functions list for a CO; and the California State Personnel Board (SPB) specifications for the classification of a CO. The 1990 job analysis tasks affecting respondent's physical conditions include:

Escort inmates individually to and from locations within facility.
Conduct thorough search of living units and their contents.

Move restrained resistant inmates to his/her room or other place of detention, individually or with assistance. Walk occasionally too continuously. Participate in controlling riot situations. Confiscate inmate possessions considered contraband on your own authority. Patrol areas, corridors and other security areas inside the facility and observe inmate behavior. Respond to, dispatch or request help in emergencies or disturbances within the facility. Pursue inmates on foot (running). Walk or stand for long periods of time. Run to the scene of a disturbance or emergency. Physically subdue or restrain a violent inmate with the help of another staff member. As a last resort, attempt to physically subdue a violent inmate by yourself until help arrives. Physically separate two fighting inmates with the help of other staff members. Defend yourself against an inmate armed with a weapon; disarm and subdue inmate. Search areas for contraband that are not easily accessible (e.g., beds, in, behind, and around large equipment, vehicles). Lift, carry, or drag heavy objects (e.g., disabled or unconscious inmate or piece of equipment). Push hard-to-move objects by hand. Jump over obstacles. Use body force to gain entrance through barriers. Climb up to elevated surfaces. Balance yourself on uneven surfaces. Crawl in confined areas. Climb straight up as on a truck or building. Physically prevent escape attempts. Run up and down stairs. Tackle fleeing inmate. Perform duties while wearing heavy equipment (e.g., air pack). Help carry people on a stretcher. Confront and control hostile groups.

5. The CDCR Essential Functions list includes the following items affecting respondent's physical condition:

- Walk occasionally too continuously.
- Run occasionally, run in an all-out effort while responding to alarms or serious incidents, distances vary from a few yards up to 400 yards, running may take place over varying surfaces including uneven grass, dirt areas, pavement, cement, etc., running can include stairs or several flights of stairs maneuvering up or down.
- Climb occasionally too frequently, ascent/descent or climb a series of steps/stairs, several tiers of stairs or ladders as well as climb onto bunks/beds while involved in cell searches, must be able to carry items while climbing stairs.
- Crawl and crouch occasionally, crawl or crouch under inmate's bed or restroom facility while involved in cell searches, crouch while firing a weapon while involved in

- property searches.
- Stand occasionally too continuously, stand continuously depending on the assignment.
- Stoop and bend occasionally too frequently, stoop and bend while inspecting cells, physically sear[ch]ing inmates from head to toe.

6. The SPB specifications includes the following items affecting respondent's physical conditions:

Disarms, subdues and applies restraints to an inmate; runs to the scene of a disturbance or emergency; escorts inmates to and from activities; walks and stands for long periods of time; runs up and down stairs; defends self against an inmate armed with a weapon; and carries, lifts, or drags heavy objects such as a disabled or unconscious inmate/staff.

7. Taken from the CalPERS Physical Requirements of Position/Occupational Title form, Folsom provided the following information about the physical requirements of the CO position.

- a. Occasional tasks, up to three hours of the shift, include: sitting, standing, running when responding to alarms, walking up to 1.5 miles at one time and up to 12 miles in a day, crawling up to 50 yards, kneeling, climbing up to 150 steps, squatting, bending (waist), reaching (above and below shoulder), pulling & pushing up to 25 miles, keyboard use, mouse use, lifting/carrying 51 to 100 plus pounds for 200 yards, driving up to 8 hours, exposure to excessive noises, exposure to extreme temperature and humidity wetness, exposure to dust gas, fumes or chemicals, working at heights up to 5 stories, operation of foot controls or repetitive movement, use of special visual or auditory protective equipment, and working with bio-hazards (e.g. blood borne pathogens, sewage, hospital waste.).
- b. Frequent tasks, for three to six hours of the shift, include: sitting, standing, walking up to 1.5 miles, climbing up to 150 steps, bending (neck and waist), twisting (neck and waist), reaching (below shoulder), pushing & pulling up to 25 miles, fine manipulation, power grasping, simple grasping, repetitive use of hands, lifting 26 to 50 pounds for 200 yards, walking on uneven ground, driving up to 8

hours, exposure to extreme temperature and humidity wetness, exposure to dust gas, fumes or chemicals, and working at heights up to 5 stories.

- c. Constant tasks, over six hours of the shift, include: sitting, standing, walking up to 1.5 miles, bending (neck), twisting (neck and waist), fine manipulation, power grasping, simple grasping, repetitive use of hands, lifting 0 to 25 pounds for up to 1.5 miles, driving up to 8 hours, exposure to extreme temperature and humidity wetness.

Respondent's Medical History

8. On February 23, 2009, while at work, an alarm sounded and respondent ran up a flight of stairs and around a pole twisting his left knee. He felt a sudden sharp pain in his left knee. Respondent reported the injury to CDCR, but did not seek medical attention for the injury until November 1, 2009. Respondent was evaluated by Occupational Medicine, Kaiser Industrial Medical Department. Respondent received an MRI, revealing a medial meniscus tear. Respondent was referred to Dr. T. MacDonald for a surgical consultation. On February 1, 2010, Dr. MacDonald performed a debridement of a partial tear, medial meniscus on respondent's left knee. Respondent was off work until May 1, 2010.

9. On August 5, 2010, while at work, an alarm sounded and respondent ran down stairs and rolled his right ankle. Respondent reported the injury to CDCR. On August 9, 2010, respondent was evaluated by Dr. Scholey. Respondent received an x-ray and was diagnosed with an ankle sprain and referred to a podiatrist. Micheal Scatena, D.P.M. ordered additional x-rays and diagnosed respondent with a closed fracture and right posterolateral process with a non-union. On May 23, 2011, Dr. Scatena operated on respondent's right ankle and removed a loose bone fragment. On October 26, 2011, Yi Yi Myint, M.D., occupational medicine, evaluated respondent for his worker's compensation permanent and stationary determination concluding: "Mr. Boyle has permanent work restrictions that include . . . avoid prolonged weight bearing physical activities including running, jogging, and responding to alarms. In my opinion, Mr. Boyle's current level of disability precludes his return to his pre-injury occupation. The tasks that are problematic for him include prolonged standing, running, jogging, and responding to alarms." With his Application, respondent submitted a Physician's Report on Disability signed by Dr. Myint.

Independent Medical Evaluation – Daniel M. D'Amico, M.D

10. On July 8, 2013, CalPERS directed respondent to see Daniel M. D'Amico, M.D., an orthopedic surgeon, for an Independent Medical Evaluation (IME). Dr. D'Amico is a board certified orthopedic surgeon, for 50 years, currently practicing at the Kern Medical Center, as well as working as an Assistant Clinical Professor of orthopedic surgery at University of California, San Diego. Dr. D'Amico saw respondent, took a medical history from respondent, including an accounting of respondent's current medical complaints,

conducted a physical examination of respondent, and reviewed respondent's medical and non-medical (e.g., job duty statement) records, as well as viewed approximately two hours of surveillance of respondent on DVD. Dr. D'Amico then drafted an IME Report. On March 7, 2016, CalPERS asked Dr. D'Amico to review additional documents and draft a Supplemental Report. Both reports were admitted into evidence.

11. Dr. D'Amico completed a thorough orthopedic physical examination of respondent and diagnosed respondent with:

- (1) Status post partial meniscectomy left knee, healed with no residual disability to the left knee.
- (2) Status post lateral ligament reconstruction left ankle, nonindustrial, stable. Some slight loss of motion.
- (3) Postop injury surgery left wrist, nonindustrial.
- (4) Status post injury right ankle, initially diagnosed as chronic sprain without gross ligamentous instability and later diagnosed as a posterior fracture, which was not documented actively as such in the operative note. The [Qualified Medical Examination] QME indicates there was posttraumatic arthritis not only of the knee but also of the ankle, neither of which was documented in any of the medical records or operative notes.

Dr. D'Amico opined:

I do not feel that he [respondent] is unable to perform his usual job duties as a Correctional Officer. There are no specific job duties that I feel he is unable to perform. The member is not substantially incapacitated for the performance of his duties.

12. Dr. D'Amico testified at hearing. He recounted his directive from CalPERS; overall assessment must be based on objective findings only. In the past, Dr. D'Amico has "been castigated [by CalPERS] for adding additional information that was not objective. Whatever that means?" Dr. D'Amico feels frustrated because he "cannot explain things in his reports, medically or orthopedically." Here, respondent's Application identified his orthopedic conditions as left knee and right ankle, but Dr. D'Amico found nothing objectively limiting respondent but his subjective complaints of pain. As a result, Dr. D'Amico found respondent not disabled or substantially incapacitated. However, Dr. D'Amico admitted, if he was respondent's primary care doctor, he would find respondent unable to do any activity causing him pain.

Dr. D'Amico reviewed Dr. Andrew Burt's 2016 IME report and agrees with most of Dr. Burt's assessments of respondent, but disagrees with Dr. Burt's diagnosis of arthritis. Dr. D'Amico could find no diagnosis of arthritis in respondent's medical files or any imaging to support such a diagnosis (e.g. narrowing of the joint), and did not find objective signs of

arthritis during his physical examination of respondent. Dr. D'Amico also disagrees with the diagnosis of closed fracture and loose bone fragment for the right ankle made by Dr. Scatena because Dr. D'Amico found neither condition described on the radiology report for x-rays taken on August 9, 2010. In sum, Dr. D'Amico could find no objective finding to support incapacity based on respondent's orthopedic conditions.

Panel Qualified Medical Evaluation & Independent Medical Examination (Orthopedics) – Andrew K. Burt, M.D.

13. On April 12, 2012, respondent was evaluated by Andrew K. Burt, M.D., orthopedist, for a Panel Qualified Medical Evaluation (QME) for his worker's compensation claims. Dr. Burt has 18 years of experience as an orthopedic surgeon. Ten years ago, Dr. Burt began a practice of medical evaluations as an orthopedist. In this case, Dr. Burt wrote a QME report, dated May 9, 2012. On February 4, 2016, respondent was again evaluated by Dr. Burt for an IME. Dr. Burt wrote an IME report, dated February 26, 2016. To write his reports, Dr. Burt took a medical history from respondent, as well as an accounting of respondent's current medical complaints, conducted a thorough orthopedic physical examination of respondent, and reviewed respondent's medical and non-medical (e.g., job duty statement) records, as well as all of the sub rosa DVDs. Both reports were admitted into evidence.

14. Dr. Burt's diagnosed respondent as follows:

- (1) Post-operative status arthroscopic debridement, partial medial meniscectomy, left knee.
- (2) Post-traumatic degenerative osteoarthritis, left knee.
- (3) Status post talar process excision, right ankle, secondary to fracture.
- (4) Intra-articular fracture, right ankle.
- (5) Post-traumatic degenerative osteoarthritis, right ankle.

In his QME report, Dr. Burt opined:

Mr. Boyle cannot continue working as a correctional officer because of the heavy physical demands of that job and the sudden violent joint stresses encountered. He will be restricted in a work situation to lifting under 30 pounds and no impact, such as squatting, kneeling, running, jumping, and climbing. The work will be limited to even surfaces.

In his IME report, Dr. Burt opined further:

The orthopedic disability at the left knee and right ankle is permanent and stable. The diagnosis of post-surgical and posttraumatic degenerative osteoarthritis at those joints is

supported by the history of surgery for internal derangement at the knee and a fracture involving joint surfaces at the ankle. In addition, almost 5-1/2 years after the employment exposure ended, there are signs and symptoms of osteoarthritis including a joint effusion, intra-articular crepitus, unilateral atrophy of the musculature of one lower extremity, and increased pain with exposure to cold.

Mr. Boyle is left with ongoing symptoms at both lower extremities which leave him substantially incapacitated from performing his usual duties as a correctional officer.

15. Dr. Burt testified at hearing consistent with his QME and IME reports, finding respondent to be permanently disabled and substantially incapacitated from the usual and customary duties of a CO. Dr. Burt feels secure in his findings and diagnosis of respondent to a medical certainty. Dr. Burt found x-ray reports to support a diagnosis of a right ankle fracture and bone fragment. Respondent's medical file included three radiology reports of respondent's right ankle, including x-rays from August 9, 2010 (four days post injury - no acute fracture or subluxation), November 9, 2010 (posterior lateral talar process fracture), and May 23, 2011 (post surgical - single lateral view without visualized acute fracture, dislocation, or aggressive osseous lesion), and Dr. Scatena's May 23, 2011 surgical note (removal of bone fragment). In addition, Dr. Burt indicated an x-ray taken close in time to an injury will not always show the full extent of the injury, so while the August 9, 2010 x-ray did not show a fracture, the November 9, 2010 x-ray did show a fracture and Dr. D'Amico's IME did not indicate he reviewed the November 9, 2010 or May 23, 2011 x-rays. In addition, Dr. Burt indicated, it is medically probable a fracture to the joint surface will lead to osteoarthritis, but even still, Dr. Burt found objective signs of arthritis during his physical examination of respondent.

Dr. Burt also acknowledges considering respondent's subjective complaints in making his overall determination, because the continued complaints of pain indicate respondent never fully recovered from his surgical procedures. Dr. Burt saw respondent in 2012 and again in 2016 and respondent's complaints of pain remained the same; respondent's continued pain, more than four years after surgical repair, also strongly support a diagnosis of arthritis. Given respondent's physical limitations, Dr. Burt determined respondent is unable to run, go up and down stairs, jump, or squat thereby precluding his ability to work as a CO with CDCR.

Discussion

16. Considering all the medical evidence, Dr. Burt's testimony is credited. Like Dr. D'Amico, Dr. Burt is a qualified orthopedic surgeon. Like Dr. D'Amico, Dr. Burt has experience making disability evaluations. Unlike Dr. D'Amico, Dr. Burt's testimony was clear and straightforward. Dr. Burt's opinion was not restricted to objective findings alone, like Dr. D'Amico. He reviewed more diagnostic images than Dr. D'Amico, including the x-rays on November 9, 2010 and May 23, 2011. He reviewed all of the sub rosa DVDs, unlike

Dr. D'Amico, but both doctors agreed the DVDs revealed nothing inconsistent with respondent's claim of disability. He did not dismiss the diagnosis made by respondent's treating or surgical doctors and he had the opportunity to examine respondent twice over a four year period, adding further support to his objective findings and diagnosis of respondent. Lastly, Dr. Burt provided testimony on what usual job duties respondent would be unable to complete based upon his medical limitations. For all the above reasons, respondent has established through competent medical evidence that his orthopedic conditions substantially disables him from performing his usual job duties as a CO at Folsom.

LEGAL CONCLUSIONS

Applicable Laws and Statutes

1. Disability as a basis of retirement, means disability of permanent or extended and uncertain duration. (Gov. Code, § 20026.) According to Government Code section 21156, subdivision (a)(1), "[i]f 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. Any state safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability. (Gov. Code, § 21151, subd. (a).) An applicant must demonstrate their substantial inability to perform their usual duties on the basis of competent medical evidence. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.)

Determination

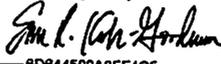
3. Respondent established his Application should be granted within the meaning of Government Code sections 21151, 21156, and applicable case law. Competent medical evidence established that respondent is permanently disabled or substantially incapacitated from the performance of his usual and customary duties as a CO on the basis of his orthopedic conditions. (Factual Findings 13 through 16.) Dr. Burt's testimony was clear and persuasive and is relied upon here.

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ORDER

The application of Bryan Boyle for CalPERS Industrial Disability Retirement is GRANTED.

DATED: April 12, 2016

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ERIN R. KOCH-GOODMAN
Administrative Law Judge
Office of Administrative Hearings