

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Involuntary
Reinstatement from Industrial Disability
Retirement of:

Case No. 2015-0977

OAH No. 2015110436

DARREN G. WADKINS,

Respondent.

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
CALIFORNIA SUBSTANCE ABUSE
TREATMENT FACILITY AND STATE
PRISON, CORCORAN,

Respondent.

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, State of California, Office of Administrative Hearings, on May 31, 2016, in Fresno, California.

The California Public Employees' Retirement System (CalPERS) was represented by Kevin Kreutz, Senior Staff Attorney.

Darren Wadkins (respondent) was present and represented himself.

There was no appearance by or on behalf of the California Department of Corrections and Rehabilitation (Department), California Substance Abuse Treatment Facility and State Prison, Corcoran (Prison). The Department was duly served with Notices of Hearing. The matter proceeded as a default against the Department, pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on May 31, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED June 16, 2016
Summer Daylott

ISSUE

1. Respondent was employed by the Department as a Correctional Officer. On or about March 26, 2012, respondent applied for industrial disability retirement, on the basis of a right foot condition (orthopedic condition). Respondent's application was approved. His disability retirement was effective on or about October 5, 2012. Because respondent was under the minimum age for voluntary service retirement, pursuant to Government Code section 21192, on June 2, 2015, CalPERS sent respondent for an independent medical examination (IME). After reviewing medical reports and other information, CalPERS determined that respondent was no longer substantially incapacitated from performing the duties of a Correctional Officer with the Department. Respondent appealed from CalPERS' determination.

2. The issue for Board determination is whether CalPERS established that respondent is no longer substantially incapacitated from performing the usual duties of a Correctional Officer on the basis of his orthopedic condition?

PROCEDURAL FINDINGS

1. On March 26, 2012, respondent submitted an application for industrial disability retirement (application) with CalPERS. At the time, respondent was employed as a Correctional Officer by the Department. By virtue of his employment, respondent is a state safety member of CalPERS.

2. In filing the application, respondent claimed that his specific disability was "right foot, left knee and stress." Respondent wrote that on October 28, 2009, while performing his duties as a Correctional Officer, he "suffered an injury to [his] right foot while descending a staircase." He further wrote that prior to this injury, he suffered an injury to his right foot on December 3, 2008, when he "stepped in a hole while running to an alarm." Respondent indicated that he underwent surgery to repair the injury to his right foot, but since the surgery his "condition has deteriorated."

3. On October 5, 2012, CalPERS notified respondent in writing that his application for industrial disability retirement was approved. The letter stated that respondent was found to be substantially incapacitated from the performance of his usual duties as a Correctional Officer for the Department, based upon his orthopedic condition. Respondent was informed that he may be reexamined periodically to determine his qualification for reinstatement if he was under the minimum age for service retirement. Respondent was 42 years old at the time of his retirement. He was under the minimum age for service retirement.

4. On February 11, 2015, CalPERS notified respondent that it would conduct a reexamination of his disability retirement. Part of the reexamination included an IME performed by Ghol B. Ha'Eri, M.D., on June 2, 2015.

5. On July 7, 2015, CalPERS notified respondent that based upon a review of "medical reports and other information," CalPERS determined that respondent was no longer substantially incapacitated from performing the job duties of a Correctional Officer for the Department. Respondent was informed that he would be reinstated to his former position. Respondent was advised of his appeal rights. Respondent filed an appeal and request for hearing by letter dated July 13, 2015.

6. On October 29, 2015, Anthony Suine, Chief, Benefit Services Division, Board of Administration, CalPERS, signed and thereafter filed the Accusation in his official capacity.

FACTUAL FINDINGS

Respondent's Employment History and Work Injury

1. On July 22, 1995, respondent was hired as a Correctional Officer for the Department. He worked for the Department until his disability retirement.

2. Respondent suffered two work-related orthopedic injuries. The first injury occurred on or about December 3, 2008, when respondent was responding to an alarm at the Prison. Respondent stepped in a hole and his right foot "rolled." He was seen by William Yale, M.D., a day after the incident. X-rays were taken of his right foot and ankle. He was diagnosed with a right ankle and foot sprain and referred to physical therapy. He was placed on modified duty for a period of time. He was returned to regular duty on or about May 29, 2009.

3. The second injury occurred on or about October 28, 2009. Respondent injured his right foot when he was descending stairs at the Prison. The injury caused pain to his right foot. He was placed on modified duty for a period of time. Ultimately, respondent underwent surgery on his right foot and was unable to return to work.

Physical Requirements of a Correctional Officer

4. A Correctional Officer for the Department provides "security to inmates in correctional institutions in accordance with established policies, regulations and procedures and observe[s] conduct and behavior of inmates to prevent disturbances and escapes." The essential functions of the Correctional Officer position included the following relevant physical requirements:

- Walk occasionally to continually
- Run occasionally, run in an all out effort while responding to alarms or serious incidents, distances vary from a few yards to

400 yards, running may take place over varying surfaces including uneven grass, dirt areas, pavement, cement, etc., running may include stairs or several flights of stairs maneuvering up or down.

- Climb occasionally to frequently, ascent/decend 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.
- Stand occasionally to continuously, stand continuously depending on the assignment.
- Sit occasionally to continuously, sit while performing record keeping or report writing activities observing designated areas.
- Lift and carry continuously to frequently, lift and carry in the light (20 pound maximum) to medium (50 pound maximum) range frequently throughout the workday and in the very heavy lifting rang (over 100 pounds) occasionally, lift and carry an inmate and physically restrain the inmate including wrestling an inmate to the floor, drag/carry an inmate out of a cell, perform lifting/carrying activities while working in very cramped spaces.

5. CalPERS received a completed "Physical Requirements of Position/ Occupational Title," (Physical Requirements) form signed by a representative of respondent's employer on April 3, 2015. According to the Physical Requirements, when working as a Correctional Officer, respondent: (1) constantly (over six hours per day) sat, stood, walked, bent and twisted his neck, pushed and pulled, used fine manipulation, power and simple grasped, repetitively used his hands, used a keyboard, lifted and carried up to 25 pounds, and was exposed to extreme temperature, humidity, and wetness; (2) frequently (three to six hours per day) climbed, bent and twisted his waist, reached below his shoulders, used a mouse, lifted between 26 and 50 pounds, walked on uneven ground, drove, worked with heavy equipment, was exposed to dust, gas, fumes, or chemicals, worked at heights, operated foots controls or engaged in repetitive movement; (3) occasionally (up to three hours a day) ran, crawled, kneeled, reached above his shoulder, carried between 51 and over 100 pounds, was exposed to excessive noise, used special visual or auditory protective equipment, and worked with bio hazards (e.g. blood borne pathogens, sewage, hospital waste, etc.).

Independent Medical Evaluation by Ghol Ha'Eri, M.D.

6. On June 2, 2015, at the request of CalPERS, Ghol Ha'Eri, M.D. conducted an IME of respondent. Dr. Ha'Eri prepared a report and testified at the hearing in this matter.

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. He currently has practices as an orthopaedic surgeon in several locations, including Fresno and Bakersfield, California.

7. As part of the 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. Dr. Ha'Eri also reviewed respondent's job description, the essential functions, and the physical requirements of his position as Correctional Officer.

BACKGROUND AND COMPLAINTS

8. During the evaluation, respondent provided an explanation of the work-related injuries that resulted in the injury to his right foot. Respondent stated that on December 23, 2008, he ran to respond to an alarm at work. Dr. Ha'Eri noted that respondent sustained an "inversion injury to his right foot and ankle." The injury caused respondent to have right foot pain. He re-injured his right foot on October 28, 2009 when he was walking down stairs at work. Dr. Ha'Eri noted that respondent aggravated the pre-existing injury to his right foot.

9. The day after respondent injured his right foot on December 23, 2008, he was seen by Dr. Yale. X-rays were obtained of respondent's right foot and ankle. Respondent was referred to physical therapy. Respondent continued to have right foot pain. Eventually, he was given a cortisone injection in his right foot.

10. Respondent continued to treat with Dr. Yale. An MRI was taken of respondent's right foot on December 14, 2009, which was normal. Respondent continued to have right foot pain. He was referred to Jeffrey Hagen, D.P.M., a podiatrist. On May 10, 2010, Dr. Hagen performed a partial resection of the plantar nerve in respondent's right foot. Respondent continued to experience right foot pain after the surgery.

11. In October 2010, he was referred to Francis Glaser, M.D., an orthopedic surgeon. An electro-diagnostic study of respondent's lower extremities was performed on December 9, 2010. The study showed that there was a "delay in the right medial plantar branch of the nerve." On January 13, 2011, Dr. Glaser performed surgery on respondent's right foot. Dr. Glaser found a "neuroma" in respondent's mid-foot. The neuroma was "excised and the end of the nerve was buried in respondent's foot." Dr. Glaser also performed a "right tarsal tunnel release for the diagnosis of tarsal tunnel syndrome." Thereafter, respondent was referred to physical therapy. Respondent did not have any treatment to his foot after approximately April 2013.

12. Respondent indicated to Dr. Ha'Eri that his present complaints were right foot pain following "prolonged walking, running and jumping." His right knee also occasionally "gives way and aches."

PHYSICAL EXAMINATION

13. Dr. Ha'Eri conducted a physical examination of respondent. Dr. Ha'Eri found that respondent's gait was normal. Dr. Ha'Eri examined respondent's right foot. He observed two scars, approximately two and half inches long. One was on the plantar aspect of respondent's right foot and the other was on the medial aspect. The first scar was a result of the resection of the plantar nerve. The second was from the tarsal tunnel decompression surgery. Palpation of respondent's right foot revealed no tenderness and no swelling. Range of motion for respondent's right ankle and foot were within normal limits. The ankle joint was stable to manipulation and there was no crepitus or cracking noise when Dr. Ha'Eri manipulated respondent's right foot.

14. Dr. Ha'Eri conducted a neurological examination, which demonstrated that respondent's right foot had decreased sensation in the second through fourth toes. Dr. Ha'Eri testified that decreased sensation was due to the cutting of the plantar nerve. Dr. Ha'Eri opined that the decreased sensation did not affect respondent's ability to use his foot or walk. His motor power was five out of five.

15. Dr. Ha'Eri measured respondent's lower extremities. The circumferential measurements of respondent's thighs bilaterally were 50 centimeters. His calves measured 40 degrees bilaterally. Dr. Ha'Eri testified that the measurements are significant in that they demonstrate respondent does not have atrophy of his right lower extremities.

REVIEW OF MEDICAL RECORDS

16. Dr. Ha'Eri reviewed respondent's medical records and reports from August 20, 2008, until May 2, 2013, including Agreed Medical Evaluation (AME) reports prepared relating to his workers compensation claim. Dr. Ha'Eri opined that the MRI study of respondent's foot conducted on December 14, 2009, was normal. Dr. Ha'Eri was perplexed as to why Dr. Hagan performed surgery on respondent's right foot, despite the normal MRI findings. Dr. Ha'Eri testified that Dr. Hagan cut the plantar nerve located in the bottom of respondent's right foot, under the arch of the foot. Thereafter, the cut nerve caused a "neuroma" which Dr. Ha'Eri described as a "mushroom" at the end of the nerve that caused respondent pain. Dr. Glaser performed surgery to bury the nerve into the deep tissue of respondent's right foot, so that the nerve would not cause him pain. Dr. Ha'Eri opined that cutting of the plantar nerve does not affect respondent's ability to use his foot or walk and that he could use his toes "100 percent" for walking and balance.

17. Dr. Ha'Eri was also perplexed that Dr. Glaser performed right tarsal tunnel release. When the ankle is traumatized on the inner aspect, the trauma can compress the plantar nerve. Dr. Ha'Eri opined that the inversion injury respondent sustained would not have caused tarsal tunnel compression.

DIAGNOSIS AND OPINION

18. Dr. Ha'Eri diagnosed respondent with:

1. Right ankle and foot lateral sprain.
2. Status post partial resection of right plantar nerve complicated by formation of plantar neuroma on 5/10/2010.
3. Status post right tarsal tunnel release and excision of plantar nerve neuroma in the right foot on 01/31/2011.

19. Dr. Ha'Eri opined that respondent's complaints of pain are subjective. Dr. Ha'Eri reviewed the physical requirements of respondent's job as a Correctional Officer and opined that there are no objective medical findings related to respondent's orthopedic condition that demonstrate he is unable to perform the duties. Dr. Ha'Eri opined that respondent may suffer from mild pain and numbness with prolonged standing or high impact activity such as running or jumping. However, the pain would not prevent respondent from performing his duties as a Correctional Officer.

20. Dr. Ha'Eri further opined that respondent was not disabled or substantially incapacitated from the performance of his usual duties as a Correctional Officer, as a result of his orthopedic condition.

Respondent's Evidence

21. Respondent is 45 years old. He testified that on a daily basis he must physically adapt his activity due to his orthopedic injury. Respondent walks on the outside portion of his right foot and tip toes due to the pain and discomfort. When he runs he loses his balance and falls. He often has to change positions to sitting, standing and lying down due to the pain and lack of circulation in his right foot. Respondent does not feel he can return to work as a Correctional Officer because he does not believe he can protect himself or others due to his orthopedic condition.

22. Since September 15, 2014, respondent has worked as a project manager for Solar City. He primarily works at a desk. From November 2013 through March 2014, respondent worked at a company building orthotics. He also worked at a company for six months building boxes. Respondent testified that his employment since he left the Department has been mostly sedentary.

23. Respondent did not call any health care providers to testify. He offered the April 2, 2012 AME report from Daniel Ovadia, M.D. and an April 26, 2016 letter from Joel Ramirez M.D. The report and letter were admitted as administrative hearsay, and have been considered to the extent permitted under Government Code section 11513, subdivision (d). Dr. Ovadia evaluated respondent related to his worker's compensation claim. Dr. Ovadia

opined that respondent was restricted from "prolonged weight bearing, walking on uneven ground or any running or jumping." Dr. Ovadia did not opine as to whether respondent was disabled or substantially incapacitated from the performance of his usual duties as a Correctional Officer.

24. Respondent saw Dr. Ramirez after he learned that CalPERS was re-evaluating his disability retirement. Prior to seeing Dr. Ramirez, respondent had not seen a doctor for his orthopedic condition for over two years. Dr. Ramirez wrote that he evaluated respondent in March 2016. He found that respondent had "extreme tenderness to the plantar surface of the right foot and also skin sensitivity to the right medial ankle. His gait is irregular and motion at his right ankle is limited." Dr. Ramirez opined that respondent is "unable to return to work" at the Department. He further opined that if respondent did return to work he should be given an "enclosed, protected, seated position." Dr. Ramirez did not explain his reason for the recommended restrictions. He also did not opine as to whether respondent was disabled or substantially incapacitated from the performance of his usual duties as a Correctional Officer.

Discussion

25. CalPERS established that respondent is no longer substantially incapacitated from performing the usual duties of a Correctional Officer for the Department. Dr. Ha'Eri persuasively testified that there is no objective medical evidence that respondent is unable to perform the usual duties of a Correctional Officer. Respondent's physical examination and the medical records reviewed by Dr. Ha'Eri revealed that respondent's work injury was a right foot and ankle sprain. The MRI findings were normal. Respondent underwent two surgeries. The first was a partial resection of the right plantar nerve. This surgery caused the formation of plantar neuroma, which was addressed in a second surgery performed by Dr. Glaser, who also performed a right tarsal tunnel release. Dr. Ha'Eri persuasively opined that while respondent may experience pain and numbness related to his orthopedic condition, the pain and numbness do not prevent him from performing the usual duties of a Correctional Officer.

26. Respondent submitted a letter from Dr. Ramirez and a report from Dr. Ovadia. The letter and report were not persuasive. Neither doctor opined that respondent was substantially incapacitated for the performance of his duties as a Correctional Officer due to his orthopedic condition. Nor did they provide an explanation as to why respondent was unable to performance the duties of a Correctional Officer. Additionally, because the authors of these reports and correspondence were not available at hearing for cross-examination, their opinions were admitted only as administrative hearsay and cannot be relied upon, standing alone, to support any findings as to respondent's orthopedic condition. (Gov. Code, § 11513, subd. (d).)

27. When all the evidence is considered, CalPERS submitted sufficient evidence to meet its burden. As a result, CalPERS' request that respondent be involuntarily reinstated from industrial disability retirement is granted.

LEGAL CONCLUSIONS

1. In accordance with Government Code section 21192, CalPERS re-evaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

The board ... may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination.... The examination shall be made by a physician or surgeon, appointed by the board.... Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency... where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

2. Government Code section 21193 governs the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty and, in relevant part, provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

3. Government Code section 20026 defines “disability” and “incapacity for performance of duty,” and, in relevant part, provides:

“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. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term “incapacity for performance of duty” as used in Government Code section 20026 (formerly section 21022) to mean “the *substantial* inability of the applicant to perform his usual duties.” (Italics in original.) The employee in *Mansperger* was a game warden with peace officer status. His duties included patrolling

specified areas to prevent violations and apprehend violators, issuing warnings and serving citations, and serving warrants and making arrests. He suffered an injury to his right arm while arresting a suspect. He could shoot a gun, drive a car, swim, row a boat (with some difficulty), pick up a bucket of clams, pilot a boat, and apprehend a prisoner (with some difficulty). He could not lift heavy weights or carry a prisoner away. The court noted that "although the need for physical arrests do occur in petitioner's job, they are not a common occurrence for a fish and game warden." (*Mansperger, supra*, 6 Cal.App.3d at p. 877.) Similarly, the need for him to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding that the game warden was not incapacitated for the performance of his duties, the *Mansperger* court noted that the activities he was unable to perform were not common occurrences and that he could otherwise "substantially carry out the normal duties of a fish and game warden." (*Id.* at p. 876.)

5. The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, reached a similar conclusion with respect to a state traffic sergeant employed by the CHP. The applicant in *Hosford* had suffered injuries to his left ankle and knee, and had strained his back. The court found that, while a sergeant should be physically able to make arrests and subdue prisoners, given the supervisory nature of the sergeant's position, such physical demands on him would be much less frequent than on traffic officers. The court noted that the sergeant "could sit for long periods of time but it would 'probably bother his back;' that he could run but not very adequately and that he would probably limp if he had to run because he had a bad ankle; that he could apprehend persons escaping on foot over rough terrain or around and over obstacles but he would have difficulty and he might hurt his back; and that he could make physical effort from the sedentary state but he would have to limber up a bit." (*Id.* at p. 862.) Following *Mansperger*, the court in *Hosford* found that the sergeant:

is not disabled unless he is substantially unable to perform the usual duties of the job. The fact that sitting for long periods of time in a patrol car would "probably hurt his back," does not mean that in fact he cannot so sit; ... [¶] As for the more strenuous activities, [a doctor] testified that Hosford could run, and could apprehend a person escaping over rough terrain. Physical abilities differ, even for officers without previous injuries. The rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the function, renders [the doctor's conclusion that Hosford was not disabled] well within reason. (*Ibid.*)

6. In *Hosford*, the sergeant argued that his condition increased his chances for further injury. The court rejected this argument, explaining that "this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently existing." (*Hosford, supra*, 77 Cal.App.3d at p. 863.) As the court explained, prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not

sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (*Ibid.*)

7. Furthermore, in *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff's subjective complaints alone, without competent medical evidence to substantiate the complaints, were insufficient to support a finding that he was permanently incapacitated for the performance of his duties.

8. Several CalPERS precedential decisions have applied and adopted the reasoning in *Mansperger, Hosford and Harmon*, which requires the presentation of competent medical evidence to support a finding that a respondent is disabled or substantially incapacitated from the performance of his usual duties. (see *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (Precedential Decision 00-01); *In the Matter of the Application for Disability Retirement of Theresa V. Hasan* (Precedential Decision 00-01); *In the Matter of the Application for Disability Retirement of Ruth Keck* (Precedential Decision 00-05).)¹

9. Findings issued for the purposes of worker's compensation are not evidence that respondent's injuries are substantially incapacitating for the purposes of disability retirement. (*Smith v. City of Napa*, (2004) 120 Cal.App.4th 194, 207; *English v. Board of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal.App.3d 839, 844; *Bianchi v. City of San Diego*, (1989) 214 Cal.App.3d 563.)

10. When all the evidence in is considered, CalPERS established that respondent is no longer substantially incapacitated for the performance of his usual duties as Correctional Officer for the Department, due to his orthopedic condition. Consequently, CalPERS' request that respondent be involuntarily reinstated from industrial disability retirement is granted.

ORDER

Respondent's appeal is DENIED. The request of California Public Employees' Retirement System to involuntarily reinstate respondent Darren Wadkins from industrial disability retirement is GRANTED.

DATED: June 14, 2016

DocuSigned by:
Marcie Larson
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MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings

¹ The *Starnes, Hasan, and Keck* decisions were designated by CalPERS as "precedential" pursuant to Government Code section 11425.60