

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:

JOSEFINA A. MIRAMONTES,

Respondent,

and,

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
VALLEY STATE PRISON FOR WOMEN,

Respondent.

Case No. 2013-0844

OAH No. 2014041257

PROPOSED DECISION

This matter was heard before Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings, State of California, on June 30, 2016, in Fresno, California.

John A. Mikita, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Josefina A. Miramontes (respondent) appeared and was represented by Barry J. Bennett, with the law firm Bennett and Sharpe, Inc.

No appearance was made by or on behalf of respondent Department of Corrections and Rehabilitation (CDCR), Valley State Prison for Women (VSPW).¹ The matter proceeded as a default against respondent VSPW, pursuant to Government Code section 11520.

Evidence was received, the record was closed, and the matter was submitted for decision on June 30, 2016.

¹ Valley State Prison for Women is now known as Valley State Prison.

ISSUE

Based upon respondent's orthopedic (low back) condition, is respondent permanently disabled or incapacitated from performing the usual duties of a Correctional Officer for VSPW?

FACTUAL FINDINGS

Duties of a Correctional Officer

1. At the time of her application for industrial disability retirement, respondent was employed as a Correctional Officer for VSPW. The Correctional Officer Job Analysis describes the essential duties and responsibilities of the job. In general, Correctional Officers are sworn Public Safety Officers and must be qualified under the Penal Code in the use of firearms. They provide security and direct inmates during work assignments and patrols. They employ weapons or force to maintain inmate discipline and order. They provide security for access to the prison by visitors and others. They provide transportation for inmates outside of prison. They inspect locks, windows, bars, grills, doors and gates for tampering, and conduct routine searches of cells and inmates.

2. The physical demands of the job include: (1) occasional to continuous walking; (2) occasional running at various distances on various surfaces; (3) occasional to frequent climbing; (4) occasional crawling and crouching; (5) occasional to continuous standing; (6) occasional to continuous sitting; (7) occasional to frequent stooping and bending; (8) occasional to frequent lifting and carrying from 20 to 100 pounds; (9) occasional to frequent pushing and pulling; (10) occasional to continuous reaching; (11) occasional overhead reaching; (12) frequent to continuous head and neck movement; (13) occasional to continuous arm movement; (14) frequent to continuous hand and wrist movement; (15) occasional bracing and pressing against an inmate; and (16) frequent to continuous twisting of the body.

3. The essential functions of the job include, but are not limited to: (1) working in both minimum and maximum security institutions; (2) performing the duties of all the various posts; (3) working overtime; range qualifying with department-approved weapons; (4) swinging a baton with force to strike an inmate; (5) disarming, subduing and applying restraints to an inmate; (6) using self-defense against an inmate armed with a weapon; and (7) inspecting inmates for contraband and conducting body searches.

Respondent's Employment History

4. Respondent began her employment as a Correctional Officer at VSPW in July 2007. She was employed in the same position at the time she filed her application for disability retirement. By virtue of her employment, respondent is a state safety member of

CalPERS subject to Government Code section 21151. Respondent's last day of work was June 24, 2011.

Respondent's Disability Retirement Application

5. On October 27, 2011, CalPERS received respondent's Disability Retirement Election Application (application). In response to the application's question about her specific disability, and when and how it occurred, respondent wrote:

On 05/27/09 while responding to an alarm I lost my footing while ascending a staircase and suffered injury to my lower back. I have since been diagnosed with a bulge, approximately 3mm in size to my L5/S1 disc. At this point, surgery has not been scheduled, however, may be necessary at my discretion. I am currently receiving epidural injections, which seem to help, but I still experience problems. I have been sent to an Agreed Medical Examiner, Dr. Sanders in Encino, who indicated that I should no longer perform the duties of a Correctional Officer.

6. On July 1, 2013, Anthony Suine, Chief of the Benefit Services Division, notified respondent that her application had been denied based upon a finding that her orthopedic (low back) condition was not substantially disabling. Respondent timely appealed the denial.

Respondent's Injuries, Treatment and Assistance

7. On May 27, 2009, while responding to an alarm, respondent ran up some stairs, lost her footing, grabbed the rail with her right hand, and pulled herself up. She proceeded to respond to the alarm and handcuff the inmate. She did not feel any pain at the time. Approximately one hour later, she felt pain in her lower back. She stayed at work and completed her shift. The following day, respondent went to Kaiser Permanente in Fresno because she was still experiencing pain. She was seen by Shahzad Jahromi, M.D., who examined respondent and diagnosed her with a lumbar sprain and "right wrist DeQuirvain syndrome." Dr. Jahromi prescribed a muscle relaxant and Tylenol as needed. He referred respondent to physical therapy and placed her on modified duty, limiting her lifting to 10 pounds, and limited her bending, squatting and twisting. Dr. Jahromi noted that respondent was six weeks pregnant at the time.

8. Respondent returned to work in approximately September 2009. Her job consisted of checking identification at the prison entrance. Respondent was five months pregnant, and could not perform her job without experiencing back pain. She stopped working. On December 14, 2009, respondent saw Peter Mendelsohn, M.D., a pain management specialist. He examined respondent for purposes of her worker's compensation claim. Dr. Mendelsohn diagnosed respondent with:

- a. Lumbago (Pain in Lumbar Spine)
- b. Sciatica
- c. Lumbar Radiculitis/Neuritis (NOS)
- d. Lumbar Sprain/Strain
- e. Asthma
- f. Intrauterine Pregnancy

9. Dr. Mendelsohn requested a magnetic resonance image (MRI) of respondent's lumbar spine and determined that respondent was able to return to work with modified restrictions on bending, lifting and standing. Respondent delivered her child in January 2010. She gained 30 pounds with her pregnancy.

10. On June 2, 2010, respondent saw Alan Sanders, M.D., an orthopedic surgeon for purposes of her worker's compensation claim. Dr. Sanders reviewed respondent's medical records and performed a physical examination. Dr. Sanders noted that respondent's MRI scan, performed on February 12, 2010, showed two to three millimeters of disc bulging at L5-S1, with some mild left neural foraminal narrowing. He further noted that respondent had not been able to return to work.

11. At the end of 2010, respondent testified that she convinced her doctor to allow her return to work because she needed to provide financial support for her family. In January 2011, respondent returned to work, and was required to perform her full duties. She still had back pain. She tried as best she could to perform her duties with the help of her coworkers, however, she was not able to climb stairs, respond to alarms, or lift objects.

12. On June 24, 2011, respondent sustained another injury at work. Respondent was working in the control booth and squatted down to talk to a nurse on the floor below. As she stood up, she felt a pop associated with severe pain across her lower back. The pain was so severe that she could hardly walk. Respondent was taken to Kaiser Emergency Department, was given two pain shots and released. Respondent was taken off work, and returned to Kaiser to see Dr. Jahromi. Respondent met with Dr. Jahromi for 30 minutes. Dr. Jahromi performed a physical examination, finding tenderness in respondent's lumbar spine. He noted that respondent was in no apparent distress, healthy-appearing, in an appropriate mood and affect, and obese. He recommended continued physical therapy with a focus on pain and inflammatory control. He noted, "In my opinion the underlying cause of the patient's symptoms is obesity and deconditioning ..."

13. On December 8, 2011, respondent saw Dr. Sanders for purposes of her worker's compensation claim. He noted that respondent received epidural injections in August 2010 and October 2010, but they were of no help or benefit to respondent. Dr.

Sanders characterized respondent's second injury as "not really a new injury as nothing really happened." He further stated in his report:

She simply had the same problem that she has always had. A new injury would be if she had lifted something, fallen, or something hit her and caused further problems, but all she did was squat and get up. She had pain in her back which had been ongoing since the last injury. This was just another flare-up...

14. Respondent underwent surgery to her lumbar spine on February 13, 2014. She continued to experience lower back pain. A February 11, 2015 MRI revealed that the "facet joints were unremarkable." The MRI showed "postoperative edema and fatty atrophy of the paraspinal muscles in the lumbosacral region." A June 20, 2016 X-ray showed "Stable appearance of L5-S1 fusion. No compression deformity with no spondylolisthesis."

Video Surveillance Activity

13. CalPERS investigator Sean Espley conducted surveillance of respondent's activities for five days in March 2013, for a total of approximately 35 hours. Investigator Espley primarily videotaped respondent's activities as she entered and exited her sports utility vehicle (SUV) at her residence and multiple business locations. The video showed respondent having no difficulties in entering and exiting her vehicle, or walking to and from various establishments, carrying objects, opening and closing the doors of her vehicle, and placing objects into her vehicle.

IME by CalPERS' Expert, Joseph Serra, M.D., on May 13, 2013

14. Dr. Serra is a board certified orthopedic surgeon. He testified at hearing. On May 13, 2013, Dr. Serra conducted an independent medical examination of respondent at the request of CalPERS due to her injuries on May 27, 2009, and June 24, 2011. Dr. Serra reviewed respondent's medical, social, occupational and treatment history, performed a physical examination and prepared a report dated May 13, 2013. Dr. Serra described respondent's current complaints as follows:

She states that she has constant sharp pain in her lower back which is increased with motion. There is radiation of the pain into her left buttock, thigh, and lower leg to the left foot. She also has numbness in the left calf, but there is no numbness in her foot. Her pain does continue at night. She occasionally has to get up and walk around to relief [*sic*] the pain to some degree, and then return to bed.

She also states that she has an occasional pain from the lower back which radiates up into the left posterior thoracic area. She rates her pain as an 8/10. Her symptoms are aggravated by any

types of activity. [She] states that she has a live-in lady to help with her 3-year old child, and also to do domestic chores. [She] states that she is unable to play with her daughter, and therefore, the live-in lady takes her daughter to the park and plays with her in addition to the other activities at home.

15. On physical examination, Dr. Serra noted that respondent is a morbidly obese female who is able to move about quite easily. Respondent had extreme sensitivity to light touch over the lumbosacral area of her spine. With a deeper palpation, respondent indicated that the pain was very severe. Her range of motion in the lower back showed 25 percent of normal in flexion, and 50 percent of normal in lateral bending and rotation on both sides. She could not touch her fingertips to her toes by 22 inches.

16. Dr. Serra also conducted a neurologic examination of respondent's lower extremities. Respondent demonstrated motor weakness in her left lower extremity which made it difficult for her to "toe walk" on her left leg. She complained of pain radiating to her lower back. The pain did not subside with active flexion of her knee to 90 degrees. Respondent's gait pattern was within normal limits. Respondent complained of pain when getting up from the examining table, and when straightening up to ambulate.

17. Dr. Serra reviewed the surveillance video. He noted that at no time did respondent have any difficulty stepping into an SUV and exiting from the vehicle. Respondent's gait pattern and her body movements, including flexion of her lumbosacral spine, appeared within normal limits.

18. Dr. Serra provided the following diagnoses after his independent medical examination:

- a. Apparent musculoligamentous strain, lumbosacral spine.
- b. Spondylosis, L5, with very mild anterolisthesis.
- c. Morbid obesity.
- d. Functional overlay.

19. Dr. Serra opined that there is a significant exaggeration of complaints. He noted:

In spite of the fact that she is grossly overweight, she is able to move about the examining room and on and off the table quite easily. Also, straight leg raising in the sitting posture is negative to 90 degrees on the left leg, however, when the same test is done while supine, she states that she is having pain at 10 to 15 degrees of elevation. This is not a valid finding. In addition,

when straight leg raise on the left is continued and the knee is flexed to 90 degrees, she complains of the same pain in her lower back.

20. Dr. Serra concluded that there are no specific job duties that respondent is unable to perform because of a physical or mental condition. In his professional opinion, respondent is not presently substantially incapacitated from the performance of her duties, and there is no disability. Dr. Serra further concluded that respondent's chronic low back symptoms are due to her obesity.

IME by Respondent's Expert, Valerie Gibson, D.O., on June 23, 2016

21. Dr. Gibson is a Doctor of Osteopathic Medicine in private practice. Her duties include providing physician services to military veterans for QTC Lockheed Martin. Prior to her private practice, Dr. Gibson served as Center Medical Director for Concentra Downtown Fresno Urgent Care, and as a worker's compensation doctor at Palm Medical Group, Inc., in Fresno. Dr. Gibson testified at hearing.

22. Dr. Gibson performed an independent medical examination of respondent on June 23, 2016. Dr. Gibson reviewed respondent's medical, social, occupational and treatment history, performed a physical examination and prepared a report.

23. Dr. Gibson noted that respondent had lumbar spine surgery as recommended by neurosurgeon Ali Najafi, M.D. The surgery took place on February 13, 2014. Despite the time that had elapsed since respondent's surgery, Dr. Gibson noted that respondent continued to have pain. Respondent eventually had sacroiliac injections to try to alleviate her symptoms in 2015, but they failed to relieve her complaints of back pain and difficulties with exercise.

24. During the physical examination, respondent complained of a constant ache in her low back which worsened throughout the day. She reported a pain intensity of 7/10 which radiated across her waist. She had numbness and tingling in her left leg and foot, but stated that the pain "comes and goes." Respondent had severe tenderness to palpation of the entire lumbar region. She guarded her spine to prevent Dr. Gibson from touching her lumbar region. Respondent stated that Tramadol and Flexeril help to control the pain. Respondent reported pain with exercise and was fearful that exercising like she used to prior to her injury and surgery will make her worse. Respondent also reported weight gain since her back injury. Respondent felt somewhat anxious and saddened by the entire situation and not being able to return to work as a Correctional Officer. She has found part time employment doing office work which she feels she can tolerate.

25. Dr. Gibson diagnosed respondent with the following:

- a. Status post Lumbar fusion at L5/S1 with failed back surgery syndrome/post laminectomy syndrome.

- b. Morbid obesity.
- c. Stress reaction and possible underlying anxiety and depression for which will be deferred to psychologist for evaluation.
- d. Left lower extremity lumbar radiculopathy.

26. Dr. Gibson opined that after her review of the medical records, history and physical examination, respondent is not currently fit for duty as a correctional officer. The reasons that she cannot perform her duties are due to her lumbar spine pain, radiculopathy and obesity. Respondent's obesity has worsened, despite having a lap band placed in 2007. When she was 34 weeks pregnant in 2009, she weighed 248 pounds. On June 24, 2011, respondent was noted to weigh 240 pounds. Since her lumbar spine surgery, respondent now weighs 270 pounds, and attributes her weight gain to her inability to exercise due pain and fear she has of further injuring her spine or causing more pain. In many ways, Dr. Gibson agreed with Dr. Serra's May 13, 2013 report where he noted that a lot of respondent's difficulty with activities is due to her obesity. Dr. Gibson asserted, however, that Dr. Serra failed to mention that respondent's current obesity is directly related to her lumbar spine condition for which she failed to recover from her surgery. Unlike Dr. Serra, Dr. Gibson noted that respondent did not appear to be exaggerating her symptoms during the examination.

27. In respondent's most recent MRI, dated February 11, 2015, there was noted scar tissue at the left side of the L5/S1 thecal sac. The thecal sac surrounds the spinal cord and nerve roots, and contains fluid in which the spinal cord floats. Dr. Gibson also noted post-operative edema and fatty atrophy of the paraspinal muscles of the lumbar sacral region. Dr. Gibson opined that it would be reasonable to think that scar tissue in the region of the thecal sac could cause pain and would explain why respondent felt unable to exercise due to her back condition. Dr. Gibson noted that essentially, respondent has been guarding her activities to such an extent that now she has weakened and atrophied muscles of the lumbar spine. Dr. Gibson opined that the atrophied muscles may never recover, and if they did, it would likely take a few years for respondent to develop her core muscles again. Dr. Gibson further opined that respondent's weakness in her left leg was consistent with the MRI finding of the scar tissue in and around the left side of the lumbar spine specifically at this level.

28. Dr. Gibson also addressed the surveillance video. She concluded that respondent was not found to be doing anything unusual or out of the ordinary for her injury. Respondent was seen going on errands, getting in and out of her vehicle, and walking. Most of the time, she was observed to be moving in and out of the car slowly, which is consistent with her complaints of back pain at the time.

29. Dr. Gibson identified specific duties that respondent is unable to perform due to physical or mental conditions. Respondent is unable to carry more than 25 pounds. She is unable to work at heights due to her left leg radiculopathy and left leg weakness. Respondent has not been able to perform these specific job requirements since the date of her

surgery on February 13, 2014, "as she never recovered since the surgery." Prior to her surgery, Dr. Gibson opined that there may have been a possibility of respondent returning to work after rehabilitation. Dr. Gibson described respondent's disability as permanent, as she has permanent scar tissue within the thecal sac since surgery, and she has permanent atrophy of her paraspinal muscles. Respondent may be able to lose weight but that will not take away the scar tissue within the thecal sac. Dr. Gibson felt respondent was cooperative, and honest in her history and during the examination. Respondent put forth great effort as was shown in the examination by her range of motion which was only limited in flexion.

30. Dr. Gibson opined that some of respondent's obesity was pre-existing as she was noted to weigh 240 pounds on June 27, 2011, after childbirth and prior to her lumbar spine surgery in 2014.

31. Dr. Gibson further opined that respondent's lumbar spine injury and subsequent surgery was caused by the May 2009 incident. Respondent's obesity was aggravated by the incident.

32. In response to Dr. Serra's conclusion that respondent's lumbar spine pain is caused by her obesity, Dr. Gibson asserted that obesity would not cause the pain that respondent is experiencing. Furthermore, the surveillance video made her opinion stronger, in that respondent was not shown to be doing anything extreme. In most instances, respondent was guarded and slow-moving, which could have been attributed to her weight. Dr. Gibson also asserted that there were new MRI findings (Finding 27) that Dr. Serra did not review.

33. Dr. Gibson acknowledged that she is not familiar with the CalPERS standards when determining a disability. She further acknowledged that her findings were very similar to Dr. Serra's, and the only difference was that she examined respondent post-surgery. Dr. Gibson also testified that she has seen only two cases of fatty atrophy in her life.

Dr. Serra's Testimony in Response to Dr. Gibson's Opinion

34. Dr. Serra found during his neurological examination of motor function, that, despite some weakness in bringing her foot up, and bending at the ankle, and difficulty walking on her toes, particularly on her right foot, he found no atrophy. He stated that respondent's thigh measurements on both sides were exactly the same, and her leg measurements were the same. If there is weakness, muscles tend to get smaller. He stated that "you'll see a difference if there is atrophy." He found that respondent had some weakness in her lower extremities, but no atrophy. He asserted that respondent was using her lower extremities quite well. Dr. Serra also checked respondent's reflexes with a rubber hammer, which gives an indication of a problem in the lower back. Respondent's reflexes were normal.

35. Dr. Serra testified that respondent's pain was due to musculoligamental strain, not atrophy. He stated, "If you are going up a stairway and miss a step, you grab for

something. You have a pain. It is described as an injury to a muscle and ligaments. That to me meant she did not have a sudden acute rupture of a disc.” He further stated that respondent’s injury “happens to all of us,” and that it is not unusual. “Your body knows now to respond to these things. A day or two or a week and it’s over.” Objectively, Dr. Serra found minor “slippage” in respondent’s vertebrae, which was present before respondent’s injury. He also objectively found obesity, which is significant, because it can cause back pain. He described his “functional overlay” diagnosis as objective findings in conflict with respondent’s subjective pain.

36. Dr. Serra testified that respondent may have had back pain, but she did her job. Respondent had already proven that she could do the work. With regard to respondent’s second injury in 2011, Dr. Serra testified that “the back can pop but it would not have prevented her from indefinitely returning to work. One week or two, but eventually it would go away.” Dr. Serra believed that respondent could lift over 25 pounds, and walk upstairs.

Respondent's Testimony

37. Respondent testified that after her first injury, she tried working out, but it caused more pain. She took medications for pain when she was off of work. After her second injury, she had a lot of physical therapy and also had acupuncture, both of which did not provide her relief. Respondent had a second child on March 8, 2013, and gained weight. Later, surgery was recommended, and she underwent surgery on February 13, 2014, on her lower back. After surgery, the pain was still there, and the only immediate benefit that respondent felt was that the numbness and tingling in her left leg went away. Pain in her lower back continued. Physical therapy increased the intensity of her pain. Respondent stopped going to physical therapy. Respondent cannot work out, and takes pain medication.

38. Respondent asserted that her daily activities are limited. She has a cleaning lady, but she can do some dishwashing and laundry. She cannot make the bed. She cannot climb the stairs unless she has to. She cannot engage with her children, such as picking them up or playing with them. She cannot do yard work.

39. Respondent also asserted that she cannot go back to work if ordered to do so. She must wear a utility belt with handcuffs, keys and pepper spray. The belt itself weighs 20 pounds. She cannot climb the stairs at work or respond to alarms. She cannot engage in combat with uncooperative inmates. Her work now is sedentary. She cannot sit for an entire day. Sitting in the same position causes her pain to flare up. She sometimes goes home if the pain is too severe.

Discussion

40. Two evaluating physicians, Dr. Serra and Dr. Gibson, agree that respondent is morbidly obese. However Dr. Serra indicated that respondent’s back pain was the result of a common muscle and ligament injury, which should have gone away after a short period of time. In addition, Dr. Serra found that respondent had a preexisting minor disc slippage,

along with obesity, which caused her back pain. He found respondent exaggerated her complaints.

On the other hand, Dr. Gibson found that respondent's back pain was the result of fatty atrophy in the spine muscles, along with thecal sac scar tissue. Dr. Gibson asserted that respondent's obesity would not cause respondent's pain.

41. Despite respondent's complaints of lower back pain and her inability to perform basic chores, playing with her children, or climbing stairs, respondent was observed on numerous occasions climbing into and stepping down from her SUV, carrying objects and placing them into the SUV, and generally going about town without any indication that she was in pain.

Dr. Gibson observed respondent to be moving in and out of the car slowly, consistent with respondent's complaints of back pain. However, respondent's characterization of her back pain was much more severe, which would have precluded her from doing even the most basic tasks, such as climbing into and out of an SUV, and carrying items.

42. Dr. Serra's opinion that there was a significant exaggeration of complaints is persuasive. Respondent's obesity is a large factor contributing to her back pain. Respondent should have experienced some relief, after multiple epidural injections, physical therapy, acupuncture, and surgery. Yet, according to respondent, her subjective pain persisted. Respondent does not want to participate in physical therapy or exercise due to pain. However, such activities could allow respondent to lose weight and relieve the pain in her lower back.

43. Dr. Gibson attributed respondent's pain to failed lumbar spine surgery, and fatty atrophy of the paraspinal muscles of the lumbar sacral region, as shown in respondent's February 11, 2015 MRI. However, a follow-up X-ray in June 20, 2016, did not indicate such atrophy, and it was noted that respondent had a stable appearance of the L5-S1 fusion. Moreover, by her statement, "It would be reasonable to think that scar tissue in the region of the thecal sac could cause pain," Dr. Gibson merely speculated that fatty atrophy was the reason for respondent's continued pain, without further evidence.

44. Dr. Serra persuasively concluded that respondent is not permanently disabled or incapacitated from performing the usual duties of a Correctional Officer. The above matters as well the medical record having been considered, respondent has not established through competent medical evidence that, at the time of application, she was permanently disabled or incapacitated from performing the usual duties of her position as a Correctional Officer.

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LEGAL CONCLUSIONS

1. Respondent has the burden of proof to establish by a preponderance of evidence that she is “incapacitated for the performance of duty,”² which courts have interpreted 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, 877.) Discomfort, which may make it difficult to perform one’s duties, is insufficient to establish permanent incapacity from performance of one’s position. (*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.) Furthermore, 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 retirement. (*Hosford, supra*, 77 Cal.App.3d at p. 863.)

2. Pursuant to Government Code section 21150, members incapacitated for the performance of duty shall be retired for disability. Government Code section 20026 provides that “‘Disability’ and ‘incapacity for performance of duty’ as a basis of retirement, means disability of permanent or extended and uncertain duration, as determined by the board... on the basis of competent medical opinion.”

An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697 [finding that a deputy sheriff was not permanently incapacitated from the performance of his duties, because “aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the [the sheriff’s] condition are dependent on his subjective symptoms”].)

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*

² Although no court construing CalPERS law has ruled on this issue, courts applying the County Employees’ Retirement Law have held that the applicant has the burden of proof. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691.) CalPERS may rely on decisions affecting other pension plans when the laws are similar. (*Bowman v. Board of Pension Commissioners for the City of Los Angeles* (1984) 155 Cal.App.3d 937, 947.) In this case, Government Code section 31724 (County Employees’ Retirement Law) is similar to Government Code section 21151 (California Public Employees’ Retirement Law), and the rule concerning the burden of proof is therefore applicable. Furthermore, Evidence Code section 664 creates the general presumption that a public agency has performed its official duty. Here, CalPERS has fulfilled its duty to determine respondent’s eligibility for disability retirement, and the burden falls on respondent to rebut the presumption of Evidence Code section 664 by proving incapacitating disability.

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.)


3. *Mansperger, Hosford and Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date she applied for disability retirement, she was substantially unable to perform the usual duties of a Correctional Officer due to her orthopedic (low back) condition. Respondent did not present sufficient evidence to meet this burden.

4. In sum, respondent failed to show that, when she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual and customary duties of a Correctional Officer for VSPW. Her application for industrial disability retirement must, therefore, be denied.

ORDER

The application for industrial disability retirement filed by respondent Josefina Miramontes is DENIED.

DATED: July 25, 2016

DocuSigned by:

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DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings