

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:

JEFFERY G. HYMER,

Respondent,

and

CALIFORNIA DEPARTMENT OF
TRANSPORTATION,

Respondent.

Case No. 2013-0491

OAH No. 2015040709

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter on September 10, 2015, and May 5, 2016, in Oakland, California.

Senior Staff Attorney Renee Salazar represented petitioner California Public Employees' Retirement System.

Respondent Jeffery G. Hymer represented himself.

There was no appearance by or on behalf of respondent California Department of Transportation.

The record closed and the matter was submitted on May 5, 2016. The record was re-opened by the administrative law judge on June 2, 2016, when two CD's of medical records proffered by respondent, Exhibits L and M, could not be opened due to password protection. The exhibits were remanded to respondent to determine how to open the discs. Respondent returned Exhibits L and M on July 1, 2016, with the information necessary to open them. The record closed, and the matter was resubmitted on July 1, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

August 2, 2016
Reay

FACTUAL FINDINGS

1. Respondent Jeffery G. Hymer is a former toll sergeant for the California Department of Transportation. By virtue of his employment, respondent was a member of the California Public Employees' Retirement System (CalPERS). On October 11, 2011, respondent submitted to CalPERS an application for disability retirement. On the application form, respondent stated the nature of his disability as "Deterioration of spine. Bone spurs on my spine, swollen discs and arthritis in my spine. It has occurred over the course of my lifetime." The application also referred to injuries to respondent's hands, arms and right knee. CalPERS denied the application on April 22, 2013. Respondent filed a timely appeal. On January 29, 2015, Diane Alsup, Interim Chief of the Benefit Services Division of CalPERS, filed a statement of issues, and this hearing followed.

Respondent's job duties

2. Respondent was a toll sergeant at the Antioch Bridge. In essence, the toll sergeant supervises activities of toll collectors and is responsible for various toll collection activities. The Duty Statement for toll sergeant identifies the following typical duties of a toll sergeant: operates and controls an intercom to the toll lanes directing traffic, communicates with toll collectors and patrons and directs toll lane operations; prepares and maintains a computer-generated daily log of events; answers questions from toll collectors and patrons regarding proper toll assessment and vehicle classification; prepares cash for pick-up by armored cars; conducts random audits; counsels employees; assists the toll lieutenant in the registration of bag numbers used by collectors for their daily collection drops; maintains records of certain toll violations, "turn-around" vehicles and wide load vehicles; resolves complaints; issues refunds to patrons as needed; answers telephone calls; and assists with toll collection in the lanes during emergencies.

3. The physical requirements of a toll sergeant are varied and depend heavily on which shift the individual is assigned to. (The Antioch Bridge operates day, swing and graveyard shifts.) Day and swing shifts impose the greatest physical demands on a toll sergeant, especially the day shift. On day shifts, the toll sergeant performs the armored car service, which involves opening the vault door and lifting six to 12 bags of coins and currency; this may require lifting up to 100 pounds. If a toll sergeant has to assist with toll collection in the lanes, then he or she must carry a tray with bills and coins to the toll lane. On graveyard the tray may weigh around 15 pounds, but on the day and swing shifts the tray may weigh 30 to 45 pounds. When a toll sergeant performs an audit of a toll collector, the sergeant has to kneel down and pick up a stainless steel box containing currency, about \$300 in coins, and other items, and then lift the box to shoulder height to put it on a stand; the boxes weigh from three to five pounds. Respondent states he was expected to perform at least two audits per month.

4. CalPERS has created a form titled "Physical Requirements of Position" that identifies certain activities, such as sitting, standing, walking, bending, lifting/carrying, walking on uneven ground, and exposure to extreme temperature, and asks whether those

activities are "never" required, "occasionally" required for up to three hours, "frequently" required for three to six hours, or "constantly" required for over six hours. Respondent's supervisor, Toll Lieutenant Marilyn Irvin, completed such a form for respondent's position. She reported that a toll sergeant may be required to sit constantly, bend and twist at the neck and waist occasionally, push and pull occasionally, lift/carry up to 25 pounds, walk on uneven ground occasionally, and be exposed to extreme temperatures occasionally.

Respondent's medical and employment history

5. Respondent joined the Department of Transportation in September 1994 as an intermittent toll collector. He worked at the Carquinez, Benicia and Antioch bridges as a toll collector and at times as a temporary supervisor, until he was promoted to toll sergeant and assigned permanently to the Antioch Bridge. In a letter dated February 3, 2012, respondent resigned from state service effective February 2, 2012.

6. Respondent injured his wrists and right elbow in June 2006, and underwent ulnar nerve transposition surgery on April 18, 2007, and right carpal tunnel release on January 16, 2008. Respondent injured his back, neck and right knee in January 2009. He underwent a right knee arthroscopy on August 27, 2009 and right total knee replacement on May 29, 2014. Between 2009 and 2016 respondent had from two to six epidural cortisone injections in his back, leading up to an L4-5 fusion and L1-5 laminectomy on February 17, 2016.

7. In or around 2009, respondent was assigned permanently to the graveyard shift on the Antioch Bridge. Although the record is not clear on this point, it appears that respondent was given this assignment as an accommodation, to relieve him of the lifting requirements on the swing shift. He continued to be assigned to the graveyard shift until he resigned in February 2012.

8. There is conflicting evidence on the events leading up to respondent's October 2011 application for disability retirement, and his resignation four months later.

9. According to respondent, in or around August 2011 his primary care physician, Lilly Chen, M.D., restricted him from lifting more than 20 pounds. At that point, respondent testified, Dr. Chen put him on light duty. Respondent states that he was subsequently informed that there was no light duty available within his classification, and he was sent home. He testified that he was off work when he applied for disability retirement in October of that year, and he seemed to state that he remained off work until he resigned the following February.¹

10. The contemporaneous medical and employment records tell a more complex story.

¹ Respondent also describes himself as retired from service. His date of retirement was not established.

11. Respondent was working at his usual assignment in August 2011 when he emailed the following message to Dr. Chen on August 18:

Good afternoon I have questions as to my work status? Mainly I am required to be able to [lift] up to #100, this is stated in my job description as well as other possible problems related to my current health with the shape my back is in. My questions are: 1) am I able to do this job requirement? 2) Would you be willing to help complete a "Reasonable Accommodation Request" for me. [Sic.]

Respondent's job duties did not require him to lift up to 100 pounds. While toll sergeants on the day shift had to lift up to 100 pounds, respondent was not required to do so on the graveyard shift.

12. Respondent followed up with another email to Dr. Chen on August 23, 2011:

. . . I am not feeling as if I can keep up with the physical demands of my job at this time due to my pain levels that I am currently experiencing. I am requesting that you please put some paperwork together to put me on light or limited duty at my current job while I am getting my other paper work together for reasonable accommodation into your office. Your letter should state that I may lift no weight greater than 20# so that I may turn this in to my employer.

13. The next day, August 24, 2011, Dr. Chen reported that respondent was evaluated in the spine clinic and that "Due to his medical condition, he should lift no more than 20 lbs at a time. This restriction should remain in place permanently."

14. Respondent prepared a reasonable accommodation request that he signed on August 26, 2011. The form asks the employee to state the "limitation requiring accommodation." Respondent wrote:

Unable to work graveyard shift due to complications resulting from medical condition, "sleep apnea". Also graveyard shift is causing me excessive stress & aggravation & is negatively impacting my health.

Respondent requested that he be assigned to either the day shift or the swing shift. He wrote that "changing to a different shift will relieve my health problems associated with sleep apnea & reduce my medical stress & aggravations." Sleep apnea and stress are not elements of respondent's disability retirement application.

15. A few days later, on August 30, 2011, respondent emailed Dr. Chen and told her that he had sent her his request for reasonable accommodation, and asked her to fill it out and sign it "based [upon] my current health situation of sleep apnea & stress preventing me from working on the graveyard shift."

16. On September 6, 2011, Claudia Alvarado, M.D., signed a Physician's Report Regarding Request for Reasonable Accommodation. Under "work restrictions," Dr. Alvarado wrote: "Due to medical conditions patient cannot perform job duties at night. Able to function during day shifts."

17. Respondent's manager, Toll Captain Carl Crosby, replied to respondent's accommodation request in a memorandum dated September 26, 2011. It appears from Crosby's memorandum that, in addition to asking to be reassigned to day or swing shift, respondent requested light duty that would involve lifting no more than 20 pounds, and no toll collecting. In response to those requests, Crosby informed respondent that his request for accommodation

... is granted. The shift you currently work is "light duty". Your physician's report for RA [reasonable accommodation] clearly states no lifting over 20 pounds and no toll collecting. As a day shift or swing shift Sergeant you would be required to do armored car pickups as well as some Toll Collecting in emergency situations. You cannot do either of these based on the paperwork you submitted. While on graveyard shift if an emergency arose where you were short staffed, you would place the lane in ETC [electronic toll collection] mode to prevent you from having to take toll in the lane.

Crosby denied respondent's request to move to day or swing shift.

18. The next day, respondent wrote to Dr. Chen and informed her that he intended to apply for disability retirement "due to the fact that my job requires me to be able to lift up to 100 pounds which I cannot do." He asked Dr. Chen to complete a Physician's Report of Disability to CalPERS stating that he could not lift 100 pounds, and Dr. Chen did so.

19. Respondent's work status thereafter is not clear. While respondent states he was off work when he applied for disability retirement, a note from Dr. Chen signed on October 27 states respondent's work status as "working night shifts full-time." And on November 30, 2011, Dr. Chen wrote a note stating that respondent "is ill and unable to work from 11/30/2011 to 12/31/11," suggesting that he was working but was unable to do so after November 30.

20. The evidence establishes that respondent's employer was able to accommodate the orthopedic limitations imposed by Dr. Chen. Dr. Chen and respondent felt that

respondent could not lift more than 20 pounds and should not take tolls, and respondent's employer was willing to accommodate those restrictions on his graveyard shift assignment.

21. At hearing, respondent acknowledged that his supervisor told him that if he was short-handed, he did not have to collect tolls himself and could put the lane on ETC. Respondent, however, did not feel comfortable accepting that advice. He worried that a motorist who had only cash would be fined and the State of California would lose revenue:

This put me in a position of high stress for the simple fact that the documentation to close the bridge and then the repercussions from [the Bay Area Transportation Authority] coming back, because of the bridge being closed would weigh on me because I was not allowed to lift more than 20 pounds or risk injury. I was, to put plainly, stuck between a rock and a hard spot. That was my career in the State of California.

Respondent reiterated later in his testimony that he resigned because he felt he would be "put in a position of exceeding his doctor's limits or closing the bridge and being fired. I'd rather resign and be less stressed."

22. The evidence does not establish that respondent's supervisor, Crosby, acted in bad faith when he told respondent that he could put a lane on ETC if respondent was shorthanded. There is no evidence, and no reason to believe, that respondent would have been disciplined if he had acted in accordance with what Crosby told him.

23. Respondent testified that he was often required to continue working into the day shift after his graveyard shift ended, and there were some occasions when he had to continue working into the swing shift. Although it is clear that respondent worked long hours on these occasions, the evidence does not establish that his employer refused to honor his restriction against lifting more than 20 pounds, or collecting tolls.

Medical evidence

24. No medical expert was called to testify by either party.

25. Extensive medical records were introduced into evidence. CalPERS introduced reports of evaluations performed by neurologist A.K. Bhattacharyya, M.D., and orthopedist Arun Mehta, M.D. Respondent introduced his treatment records from Kaiser Permanente, voluminous records consisting of many hundreds of pages. All of these documents were admitted as hearsay, with the exception of the reports of Dr. Mehta.

26. In 2016, after the first day of hearing in this matter, CalPERS referred respondent to Dr. Mehta for evaluation. Dr. Mehta examined respondent on January 28, 2016. He took a medical and employment history from respondent, performed a physical examination, reviewed the numerous medical records provided to him, and reached

diagnoses and opinions on the issue of disability. Dr. Mehta's initial report is dated January 28, 2016. At the request of CalPERS, he wrote supplemental reports dated March 15 and April 13, 2016.

27. In his January 28, 2016 report, Dr. Mehta concluded that respondent "is presently substantially incapacitated for the performance of his duties," and that his disability is permanent. Dr. Mehta's conclusion rests on his finding that there are specific physical requirements of the position, as set forth in Toll Lieutenant Irwin's "Physical Requirements" document, that respondent is unable to do. Dr. Mehta writes:

1. The claimant will only be able to sit up to occasionally 3 hours.
2. The claimant will only be able to stand occasionally up to 3 hours.
3. The claimant will only be able to walk occasionally up to 3 hours.
4. The claimant will not be able [to] bend at the neck, bend at the waist, turning or twisting at waist or the neck.
5. The claimant will not be able to power grasp with hands.
6. The claimant will not be able to use bilateral hands on [sic] a repetitive fashion.
7. The claimant will have limited pulling, pushing, and carrying capacity of 15 pounds.
8. The claimant will not be able to walk on uneven ground occasionally up to 3 hours.
9. The claimant will not be able to be exposed to extreme temperature, humidity and wetness.

Dr. Mehta's findings on items 1 through 3 are unclear, as they are not inconsistent with the Physical Requirements of the position identified by Toll Lieutenant Irwin. Dr. Mehta did not offer an opinion on whether respondent was disabled for the performance of duty at the time he resigned in February 2012. And the phrasing of his conclusions was ambiguous, as he left it unclear whether he felt that respondent cannot presently meet those requirements, or whether he will be unable to do so in the future.

28. CalPERS wrote to Dr. Mehta and asked for a supplemental report to address (among other things), whether he believes that respondent's restrictions are existing or prophylactic, and when he believes respondent's incapacity began.

29. In a supplemental report dated March 15, 2016, Dr. Mehta clarified that his restrictions were not prophylactic, and restated his restrictions as follows:

1. The claimant is not able to sit up occasionally up to 3 hours.
2. The claimant is not able to stand occasionally up to 3 hours.
3. The claimant is not able to walk occasionally up to 3 hours.
4. The claimant is not able to bend at the neck, bend at the neck, turning or twisting at waist or the neck.
5. The claimant is not able to power grasp with hands.
6. The claimant is not able to use bilateral hands on [sic] a repetitive fashion.
7. The claimant is limited to pulling, pushing, and carrying capacity of 15 pounds.
8. The claimant is not able to walk on uneven ground occasionally up to 3 hours.
9. The claimant is not able to be exposed to extreme temperature, humidity and wetness.

Dr. Mehta restated his conclusion that respondent is incapacitated from performing the "actual duties which are noted in Physical Requirements," the document written by Toll Lieutenant Irwin. He reported that, in his opinion, applicant's disability began on February 28, 2011.

30. On March 25, 2016, a CalPERS program specialist wrote to Dr. Mehta and informed him that his opinion on the onset of respondent's disability

is in clear conflict with the actual report of Dr. Hughes who found no impairment of the lumbar spine on 2/28/11. While the back condition was present, there is no evidence that the member was disabled at that time. There is evidence that he

was not disabled due to his low back condition as of physical therapy assessment at Kaiser on 11/30/11 (member had been working on night shift beginning 7/2010) indicated that his condition was better than it had been in the preceding several years. Lifting of heavy objects was not required of the member when working the night shift (per member in discussion with IME Dr. Nord) and he was not substantially incapacitated by any internal medicine conditions per Dr. Nord.

I've attached the records I am referencing for your review. If you still feel that the member is substantially incapacitated, please provide objective findings that support this finding.

(Emphasis in original.)

31. In a supplemental report dated April 13, 2016, Dr. Mehta concluded that “[w]ith reasonable medical probability, my revised date as to when the disability began is May 23, 2014 at the time of right total knee replacement.” (Emphasis in original.)

32. The efforts of CalPERS staff to influence the conclusion of its independent evaluator are regrettable. Still, even when those efforts are taken into account, Dr. Mehta's reports do not persuasively establish that respondent was incapacitated for the performance of his usual duties at the time he left state service. Plainly, respondent was not incapacitated for the performance of duty in February 2011, as Dr. Mehta opined in his first supplemental report. Respondent was performing his usual duties until at least August 2011, when he wrote to his physician and asked her to support his request for accommodations. Dr. Mehta does not address the fact that respondent's duties were modified by his employer, at respondent's request. Dr. Mehta does not address whether, in his opinion, respondent was incapacitated from performing his modified duty assignment – he does not state what job duties, in his opinion, respondent is unable to perform. And there were other factors unrelated to respondent's orthopedic condition – notably sleep apnea and stress – that prompted him to resign from state service even though his orthopedic limitations were accommodated. Dr. Mehta's reports do not address these issues.

33. The hearsay medical records are legally insufficient to support a finding that respondent was incapacitated for the performance of his modified duty assignment when he separated from state service. (Gov. Code, §11513, subd. (d).) But, regardless of their hearsay status, respondent did not identify any narrative report that persuasively states he was incapacitated for the performance of duty when he resigned, and no such report was found.

34. It was not established by competent medical evidence that respondent was incapacitated for the performance of his usual duties at the time he applied for disability retirement in October 2011, or when he resigned from state service in February 2012.

LEGAL CONCLUSIONS

1. A miscellaneous member of CalPERS who becomes “incapacitated for the performance of duty,” and who has sufficient service credit, shall be retired. (Gov. Code, § 21150.) The term “incapacitated for the performance of duty” is defined by the Public Employees’ Retirement Law to mean “disability of permanent or extended and uncertain duration . . . on the basis of competent medical opinion.” (Gov. Code, § 20026.) To determine whether an applicant is “incapacitated for the performance of duty,” the courts look to whether the applicant is substantially disabled from performing her usual duties. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876; accord *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.) An employee may not retire for disability if a modified duty assignment is available consistent with his limitations. (*O’Toole v. Retirement Board* (1983) 139 Cal.App.3d 600.)

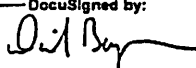
2. The burden of proving incapacity is on the applicant. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691.)

3. Respondent did not establish, by competent medical evidence, that he was incapacitated for the performance of duty when he applied for disability retirement in October 2011, or when he resigned from state service in February 2012. With the exception of Dr. Mehta’s reports, all of the medical records were admitted as hearsay and are insufficient in themselves to support a finding on the issue of incapacity. Although, at least at one time, Dr. Mehta felt that respondent was incapacitated for the performance of duty in February 2011, his opinion on that point is not consistent with the contemporaneous evidence. Moreover, Dr. Mehta does not address the modified duty assignment that respondent’s employer made available to him, or the factors unrelated to respondent’s orthopedic conditions that influenced his decision to stop working in February 2012.

ORDER

The application for disability retirement of respondent Jeffery G. Hymer is denied.

DATED: August 1, 2016

DocuSigned by:

44D8D8AE55194F9...

DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings