

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

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

LEONARD B. DETERS,

Respondent,

and

PELICAN BAY STATE PRISON,
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,

Respondent.

Case No. 2014-0982

OAH No. 2016051037

PROPOSED DECISION

Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, heard this matter on July 20, 2016, in Sacramento, California.

Senior Staff Attorney Cynthia A. Rodriguez represented the California Public Employees' Retirement System (CalPERS).

Leonard B. Deters (respondent) was present and represented himself.

CalPERS properly served Pelican Bay State Prison, California Department of Corrections and Rehabilitation (CDCR) with the Notice of Hearing. CDCR made no appearance. This matter proceeded as a default against CDCR pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on July 20, 2016.

ISSUE

Is respondent no longer substantially incapacitated from performing the usual duties of a Correctional Lieutenant for CDCR?

FACTUAL FINDINGS

Procedural History

1. Respondent is 47 years old. He worked for CDCR as a Correctional Lieutenant. On or April 23, 2010, respondent applied for industrial disability retirement. According to his application, his last day on payroll for CDCR was April 28, 2010. Respondent's application was approved based on an orthopedic condition (low back). His industrial disability retirement was effective September 1, 2010.

2. In July 2013, CalPERS initiated a re-examination of respondent to assess his ability to perform his former job duties pursuant to Government Code section 21192, because respondent was under the minimum age for voluntary service retirement. The re-examination involved a review of information obtained from medical providers, and information obtained from respondent regarding the scope, nature, and earnings of any employment.

3. After reviewing respondent's medical and employment information, CalPERS determined that respondent was no longer substantially incapacitated from performing the duties of a Correctional Lieutenant. Respondent appealed from CalPERS' determination.

Respondent's Disability Retirement Application

4. In his disability retirement application, respondent described his disability, as "Rupture of Disk Between L-5-S1 (Annular Disk Tear)." In response to the question asking what limitations or preclusions resulted from his injury or illness, respondent stated "No heavy lifting, avoid back stressing activities such as bending, twisting, pushing and pulling." In response to the question asking how his injury or illness affected his ability to perform his job, respondent stated "Main Concern – Potential of inmate contact." In response to the question asking whether he was currently working in any capacity, respondent stated "Medically taken off work."

Duties, Essential Functions, and Physical Requirements of a Correctional Lieutenant

5. The job specification for Correctional Lieutenant, provides, in part, as follows:

The Correctional Lieutenant is a second level supervisor who (1) may have charge for an assigned watch or major area in a correctional facility, and supervises the work of subordinates in

the safe custody, discipline, and welfare of inmates; (2) act as a staff assistant to a custodial manager responsible for performing complex and sensitive staff functions requiring supervisory custodial expertise; or (3) act as a staff consultant to headquarters management performing complex consultative assignments that require a thorough knowledge of institution security and program operations.

Incumbents ... are in charge of an assigned watch or of an assigned major area or function or as a supervisor of a conservation camp. These assignments involve supervision of Correctional Sergeants, who in turn directly supervise Correctional Officers, and have the responsibility for planning and supervising the feeding, clothing, housing, transportation, custody and discipline of inmates.

[A Correctional Lieutenant] ... assigns duties of subordinate Correctional Sergeants, gives instructions, provides on-the-job training, maintains discipline and makes inspections, to see that the Correctional Sergeants are alert and diligent in the performance of their duties, supervises the custodial functions during movement of inmates to and from their assignments, recreation and meals, supervises the maintenance of proper physical and sanitary conditions, and otherwise sees to the well-being of inmates, prepares procedures and posts orders, supervises the inspection of incoming and outgoing vehicles, materials, and supplies, for the presence of contraband, directs inspections for contraband, supervises the necessary procedures in the admission and release of inmates, supervises period counts of inmates, reports infractions of rules and regulations, and irregular or suspicious occurrences, and takes or recommends appropriate action

6. The Correctional Lieutenant Essential Functions form lists 55 essential job functions a Correctional Lieutenant must perform, including the following:

General Duties

- Must be able to work in both minimum and maximum security institutions as well as male and female institutions.
- Must be able to work long hours as required.

Peace Officer Duties

- Must be able to perform the duties of all the various posts.
- Disarm, subdue and apply restraints to an inmate.

- Defend self against inmate armed with a weapon.
- Run occasionally; run in an all-out effort while responding to alarms or serious incidents, distances varying from a few yards to 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 to frequently ascent/descent or climb a series of steps/stairs, several tiers of stairs or ladders, must be able to carry items while climbing stairs.
- Crouch while firing a weapon.
- 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, and driving activities.
- Bend occasionally to frequently. Stoop and bend while inspecting cells, buses or vans, physically searching inmates from head to toe.
- 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 range (over 100 pounds) occasionally. Lift and carry an inmate and physically restrain an inmate, including wrestling an inmate to the floor. Drag/carry an inmate out of the cell. Perform lifting/carrying activities while working in very cramped space.
- Pushing and pulling occasionally to frequently. Push and pull while opening and closing locked gates and cell door throughout the workday. Pushing and pulling may also occur during the altercation or the restraint of an inmate.
- Reaching occasionally to continuously reach overhead while performing cell or body searches, etc.
- Bracing occasionally. Bracewell restraining inmate, during altercation, or while performing a body search.

Supervisory Duties.

- Direct the daily operations of custodial as well as CDC staff.
- Enforce rules and regulations relating to promoting acceptable attitudes and behavior among inmates and staff.
- Ability to think and act quickly in emergencies.
- Document and investigate complaints against employees. Direct and coordinate internal affairs and other administrative investigations and respond to inmate appeals.

- Provide supervision and training to unit personnel.
- Ensure proper training of all staff relating to proper use of equipment, emergency training drills, cross training, and on-the-job training.
- Responsible for the coordination and receipt and transfer of inmates.

7. On April 19, 2010, a CDCR representative completed a Physical Requirements of Position/Occupational Title form for respondent's position. According to that form, a Correctional Lieutenant must be able to engage in the following physical activities:

- Running: Occasionally (up to 3 hours).
- Crawling: Up to 50 yards.
- Kneeling: Occasionally (up to 3 hours).
- Climbing: Frequently (up to 6 hours) up to 150 steps.
- Squatting: Occasionally (up to 3 hours).
- Reaching (below shoulder): Frequently (up to 3 hours).
- Lifting up to 25 lbs.: Constantly (over 6 hours).
- Lifting 26 to 50 lbs.: Frequently (up to 6 hours).
- Lifting between 51 and 100 lbs.: Occasionally (up to 3 hours).
- Lifting in excess of 100 lbs.: Occasionally (up to 3 hours).

Respondent's Evidence

RESPONDENT'S TESTIMONY

8. Respondent worked for CDCR for approximately 16 years in various capacities, including Correctional Officer, Correctional Sergeant, and Correctional Lieutenant. He filled a variety of special assignments while working for CDCR, including assignments to the SWAT Team, the honor guard, and as a hostage negotiator. He co-owns an automotive body repair business, which he described as a hobby to keep him active.

9. Respondent testified that he was injured in November 2007, when he was assaulted by an inmate who attacked him and one of the correctional officers. He immediately felt an injury to his back, but tried to cope with it and work through it. Initially, respondent did not think the injury was very serious and he did not report it. Approximately two weeks later, during one of his scheduled days off, his back began to tighten up and the pain increased. He decided to take a couple of extra days off to allow his back to heal. When respondent returned to work, the CDCR Return to Work Coordinator directed him to be evaluated by Kevin Caldwell, M.D. Dr. Caldwell placed respondent on a regimen of prescription pain medication and periodic physical therapy and also took him off work to allow his back to heal. According to respondent, the pain medication and physical therapy did not lessen his pain. On one occasion his leg "gave out" while jogging, causing him to collapse to the ground. Respondent was reluctant to take prescription medication because of

concerns with addiction. He saw several doctors in an attempt to find alternative methods to relieve his pain. He was eventually referred to James Tate, M.D., a neurosurgeon.

10. About October 2008, Dr. Tate performed a foraminotomy on respondent's lower back and also removed some degenerative disc material. Post-surgery, respondent still experienced intermittent pain in his lower back and right leg to varying degrees. Respondent testified that the pain "can be debilitating ... because of an inherent weakness that exists" once he pushes past the pain threshold. He stated that sometimes he "cannot start [his] day without a hot soaking shower and a bunch of ibuprofen." He stated that at the end of the day he will sometimes use a marijuana salve on his back to reduce the pain sufficiently to allow him to sleep.

11. Respondent saw Dr. Tate approximately six months after surgery and reported that the intermittent pain continued. He was told that the intermittent pain would subside over time, but respondent asserted that it did not. Eventually respondent was reevaluated by Guy Corkill, M.D., as part of his workers' compensation case. Respondent testified that Dr. Corkill told him his back condition "was as good as it was going to get" and asked "why don't you just retire?" Respondent asserted that he wanted to "hold out longer" to see if he could still return to work, "but the pain was not going away." He was concerned that his condition would jeopardize his safety, the safety of his coworkers, and the safety of inmates. Respondent asserted that although he is a Correctional Lieutenant, a Correctional Sergeant, or Correctional Officer is not always present when he interacts with inmates. He characterized those circumstances, as follows:

In a correctional setting, I don't get escorted around. I walk the yard just like anyone else. How can I supervise someone if I'm not willing to do what they are willing to do? It's in my job classification that I will be with inmates, and that's what I do ... Sometimes others are with me, sometimes not. That's the way it is in a prison. It is what it is and you just deal with it.

12. Respondent also stated that he cannot perform several of the job functions of a Correctional Lieutenant. He testified that he cannot lift and carry an inmate and physically restrain the inmate including wrestling an inmate to the floor. Respondent also asserted that he cannot bend or twist at the waist frequently for three to six hours in an eight-hour day. He added that his auto body repair business is something he does at his leisure. Respondent's brother does most of the physical labor and respondent is mainly responsible for painting. He stated that owning the auto body repair business allows him to accommodate his physical limitations because "when [he is] hurting, [he will] stop" and take a break. He emphasized that he "can't do that in a prison"

QUALIFIED MEDICAL EVALUATION REPORTS SUBMITTED BY RESPONDENT

13. Respondent submitted a 15-page Qualified Medical Evaluation (QME) report from Mark T. McBride, M.D., and two two-page supplemental reports Dr. McBride prepared

in response to questions from representatives of the State Compensation Insurance Fund. These reports were admitted as administrative hearsay, and have been considered to the extent permitted under Government Code section 11513, subdivision (d).¹ Respondent, however, did not call a medical expert to testify on his behalf or offer any non-hearsay medial evidence to support his claimed incapacity.

14. Dr. McBride's report reflects that he evaluated respondent on October 8, 2015, as part of respondent's ongoing workers' compensation case. This report includes a summary of respondent's stated injury, medical treatment, present complaints, work history and surgical history, as well as a list of the medical records reviewed as part of the evaluation. This report also includes four diagnoses related to respondent's lower back and right leg pain at L4-5 and L5-S1. Dr. McBride's report specifies that respondent remains permanent and stationary as of October 13, 2009.

15. None of the reports from Dr. McBride provide any opinion as to whether respondent is substantially incapacitated from the performance of his former job duties. However, the report does specify that respondent "would benefit from permanent work restrictions, precluding him from lifting greater than 70 pounds and avoiding repetitive bending, twisting, pushing and pulling."

CalPERS' Expert

ROBERT HENRICHSEN, M.D.

16. Robert Henrichsen, M.D., testified at hearing. Dr. Henrichsen is a board-certified orthopedic surgeon and a certified Fellow of the American Academy of Orthopaedic Surgeons. On January 21, 2014, he evaluated respondent, reviewed his job functions and medical records, and prepared a 12-page report.

17. Respondent told Dr. Henrichsen that he was experiencing pain in his back and buttocks, with burning symptoms and dull aching pains. He also reported occasional hip pain and leg aches with tingling. Respondent told Dr. Henrichsen that he treated his pain with ibuprofen, Aleve, and sometimes medical marijuana.

18. Dr. Henrichsen examined respondent's spine and lower extremities and found the results to be largely normal. However, he noted that during the supine examination respondent felt some right knee pain with ankle extension and right hip pain with left ankle

¹ Government Code section 11513, subdivision (d), in relevant part, provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

extension. Respondent also experienced pain in his right buttock with hip rotation and had a small level of nerve irritation for both knees. After completing the physical examination and reviewing respondent's medical records, Dr. Henrichsen reached the following diagnostic impressions:

1. History of low back injury.
2. Degenerative disc disease, lumbar spine.

19. In his report, Dr. Henrichsen responds to a series of question related to respondent's disability retirement status. In response to the question asking whether there were specific job duties that respondent was unable to perform because of a physical or mental condition, Dr. Henrichsen stated the following: "He is precluded from unaccompanied individual fighting and wrestling with an inmate, although this preclusion is not a substantial duty for a [Correctional Lieutenant]. He may assist other officers in inmate cooperation." In response to the question that asks if respondent was presently substantially incapacitated for the performance of his duties, Dr. Henrichsen replied "No." Dr. Henrichsen prepared a supplemental report, on April 16, 2014, in response to a request for additional information from CalPERS. In that report, in response to the question asking whether respondent had an actual and present inability to fight and wrestle with an inmate, Dr. Henrichsen stated that respondent did "not have an actual present inability to fight and wrestle with inmates."

20. Dr. Henrichsen's testimony at hearing was consistent with his January 2014 report. He explained his examination process and reiterated the diagnoses in his report, noting there were no objective exam findings or abnormalities that indicated respondent could not perform his job duties. His review of respondent's job duties indicated that as a Correctional Lieutenant, respondent's primary job function was to supervise Correctional Sergeants, who in turn supervised Correctional Officers. Respondent's position requires little inmate contact without another officer having custody of the inmate.

21. Though respondent reported incidents of pain, Dr. Henrichsen did not find objective medical evidence to support respondent's claimed incapacity. Dr. Henrichsen also reviewed Dr. McBride's reports and found nothing that supported respondent's claimed incapacity. That respondent's low back injury was deemed "permanent and stationary" by the qualified medical evaluator in his workers' compensation action, did not alter Dr. Henrichsen's opinion that respondent was not substantially incapacitated for the performance of his former job duties as a Correctional Lieutenant. Dr. Henrichsen noted that an injury being considered "permanent and stationary" in a QME report indicates that the injury has reached a point where additional medical treatment is not likely to improve the condition, but is not, in and of itself, indicative of substantial incapacity to perform the duties of a particular job.

Discussion

22. Incapacity for performance of duty must be based on competent medical evidence. (Gov. Code § 20026.) Dr. Henrichsen opined that respondent is not substantially incapacitated from performing his job duties. He reached this opinion based on his medical training and expertise, examination of respondent, and review of respondent's medical records. While he did not dispute that respondent's lower back condition may cause pain when respondent engages in certain activities, there was no competent medical evidence this condition prohibits respondent from performing his job.

23. Additionally, Dr. Henrichsen's restriction that respondent be "precluded from unaccompanied individual fighting and wrestling with an inmate," is prophylactic in nature. Dr. Henrichsen opined that respondent has the present ability to fight and wrestle with inmates. The restriction was imposed to prevent the risk of future injury. Prophylactic restrictions are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, 863.)

24. Respondent did not call a medical expert to testify in support of his claimed incapacity. His medical evidence was provided entirely through the hearsay QME reports of Dr. McBride. Those reports alone cannot support a finding in an administrative hearing.¹ Moreover, because those reports appear to reflect the results of a QME in a workers' compensation proceeding, they are generated to determine the causation, apportionment, and level of impairment of certain injuries, rather than whether respondent is substantially incapacitated for the performance of his former job duties as a Correctional Lieutenant. Findings issued for the purposes of a workers' compensation claim are not evidence that respondent's injuries are substantially incapacitating for the purposes of disability retirement. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567.)

25. When all the evidence is considered, CalPERS submitted sufficient evidence to meet its burden. Dr. Henrichsen's opinion was persuasive and respondent did not present competent medical evidence to support his claimed incapacity. As a result, CalPERS' request that respondent be involuntarily reinstated from 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. Findings issued for the purposes of workers’ compensation are not evidence that respondent’s injuries are substantially incapacitating for the purposes of disability retirement. (*Bianchi v. City of San Diego*, (1989) 214 Cal.App.3d 563.)

5. 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.) In *Hosford v. Board of Administration of the Public Employees’ Retirement System* (1978) 77 Cal.App.3d 854, 862 the court held that a disability or incapacity must currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient. 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.

6. 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 Lieutenant for CDCR. 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 Leonard B. Deters from industrial disability retirement is GRANTED.

DATED: August 18, 2016

DocuSigned by:
Ed Washington
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ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings