

ATTACHMENT A
THE PROPOSED DECISION

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

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

KRISTINA M. CHAVEZ,

Respondent,

and

VALLEY STATE PRISON,
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,

Respondent.

Case No. 2016-0134

OAH No. 2016061250

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on August 4, 2016, in Sacramento, California.

Austa Wakily, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Christina M. Chavez represented herself.

No one appeared for or on behalf of respondent Valley State Prison, California Department of Corrections and Rehabilitation, its default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to that respondent only.

Evidence was received, the record was closed, and the matter was submitted for decision on August 4, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED 19 Aug 20 16

Ally M. [Signature]

SUMMARY

The sole issue on appeal is whether Ms. Chavez continues to be substantially incapacitated for the performance of her usual duties as a Correctional Officer with Valley State Prison, California Department of Corrections and Rehabilitation, due to an orthopedic (back) condition. CalPERS did not produce persuasive medical evidence demonstrating she is no longer substantially incapacitated. Therefore, Ms. Chavez's appeal from CalPERS's determination that she is no longer substantially incapacitated and should be reinstated to her former position as a Correctional Officer with Valley State Prison, California Department of Corrections and Rehabilitation, should be granted.

FACTUAL FINDINGS

Procedural Background

1. Ms. Chavez is a state safety member of CalPERS by virtue of her former employment as a Correctional Officer with Valley State Prison, California Department of Corrections and Rehabilitation, and is subject to Government Code section 21151, subdivision (a).¹ She is 36 years old.
2. Ms. Chavez submitted an application for industrial disability retirement on the basis of an orthopedic (back) condition on July 8, 2011. CalPERS approved her application, and she has been receiving disability retirement benefits since September 16, 2011.
3. CalPERS subsequently received and reviewed medical reports regarding Ms. Chavez's orthopedic (back) condition and determined based thereon that she is no longer substantially incapacitated for the performance of her usual duties as a Correctional Officer. CalPERS sent her correspondence notifying her of its determination, her need to contact Valley State Prison, California Department of Corrections and Rehabilitation, to arrange for her return to her position as a Correctional Officer, and her right to appeal its determination. Ms. Chavez filed an appeal, and Anthony Suine signed the Accusation on June 9, 2016, solely in his official capacity as Chief of CalPERS's Benefits Services Division.

History of Injury

4. Ms. Chavez was lifting boxes off of shelves, placing them onto carts, and then pushing the carts to a different location in the receiving and release area of Valley State Prison, California Department of Corrections and Rehabilitation, on November 21, 2009, when she experienced a sharp pain in her lower back. She reported her injury to her

¹ That statute provides: "Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service."

supervisor, and obtained medical treatment through the workers' compensation system two days later. Ms. Chavez's treating physician diagnosed her with an acute lumbar strain. He prescribed a muscle relaxant and a short course of physical therapy, encouraged her to participate in a home exercise program, and took her off of work. She has continued to receive conservative treatment, as described further below.

Usual Duties of a Correctional Officer

5. The Physical Requirements of Position/Occupational Title for the position of Correctional Officer identifies the following physical activities as being performed for the following durations during an eight-hour shift:

Constantly:² Sitting,³ standing, running, walking, squatting, bending (neck), bending (waist), twisting (neck), twisting (waist), reaching (above shoulder), pushing & pulling, fine manipulation, power grasping, simple grasping, repetitive use of hand(s), lifting/carrying up to 50 pounds, walking on uneven ground, driving, and working with bio-hazards.

Frequently: Climbing, reaching (below shoulder), lifting/carrying between 51 and 75 pounds, operation of foot controls or repetitive movement, and use of special visual or auditory protective equipment.

Occasionally: Crawling, kneeling, lifting/carrying greater than 75 pounds, exposure to excessive noise, exposure to extreme temperature, humidity, wetness, exposure to dust, gas, fumes, or chemicals, and working at heights.

Never: Working with heavy equipment.

A Job Analysis prepared by the California Department of Corrections and Rehabilitation for the position of Correctional Officer provides the following about the position:

Correctional institutions in the State of California are divided into four levels with Level 1 as a minimum security correctional

² "Constantly" is more than six hours, "frequently" is three to six hours, and "occasionally" is up to three hours.

³ A range of duration is specified for several activities. For instance, sitting is described as being performed occasionally to constantly. The most frequent duration for each activity for which a range is specified is noted above.

institution and Level 4 as a maximum security institution, as well as male and female facilities.

Correctional Officers may be assigned to different correctional institutions in the State of California, ranging from minimum to maximum security institutions. Correctional Officers must be able to work in both minimum and maximum security institutions as well as male and female institutions.

There are many different posts which Correctional Officers may be assigned to work in a correctional institution, such as guard tower, control room/booth, dining room, housing unit/dorm, kitchen, bakery, hospital, gymnasium, classroom, visiting room, entrance gate, plaza area, library, community service crew, administrative segregation, transportation, outside patrol, range/arsenal, truck sally port, receiving and release, etc. Correctional Officers must be able to perform the duties of all the various posts.

The California Department of Corrections and Rehabilitation identifies the ability to work overtime as an essential duty of a Correctional Officer, and provides: "overtime is mandatory and could be 8 hours at one time, and on very rare occasions up to 16 hours in situations such as a riot." It also identifies the ability to "lift and carry an inmate and physically restrain the inmate including wrestling an inmate to the floor" and the ability to "drag/carry an inmate out of a cell" as essential duties of the position.

Medical Evidence

Arthur Auerbach, M.D.

6. At CalPERS's request, Dr. Auerbach, a board-certified orthopedic surgeon, performed an independent medical examination (IME) of Ms. Chavez on October 27, 2015. He prepared a report documenting his IME, and that report was admitted into evidence. He also testified at hearing.

7. At hearing, Dr. Auerbach described his findings upon physical examination of Ms. Chavez as unremarkable, except she is overweight and has degenerative disc disease at L3-L4. In particular, her vital signs and general appearance were normal, except for her weight. The circumference measurements of her thighs and calves were within normal limits.

8. Ms. Chavez had a normal range of motion of her thoracolumbar spine upon flexion, lateral flexion, and lateral rotation, but range of motion upon extension was significantly reduced. Dr. Auerbach explained that such finding was consistent with degenerative disc disease and facet joint disease because pain and stiffness limit a person's

ability to extend her back. He also explained Ms. Chavez's ability to perform the straight leg test without pain while sitting but her ability to lift her leg to only 45 degrees, bilaterally, before feeling pain while lying on her back on an examination table was consistent with her suffering from low back pain – a symptom of degenerative disc disease at L3-L4.

9. Dr. Auerbach provided the following summary of his examination in his written report:

Chronic lumbar strain/sprain with 2/21/2013 MRI evidence of a degree of degenerative disc disease at L3-4 with a diffuse bulge of the L3-4 disc causing mild narrowing of central canal neural foraminal, bilateral[ly], mild diffuse bulge L4-5 and L5-S1 without significant central canal or neural foraminal narrowing. 9/6/2011 EMG/nerve conduction studies of the lower extremities were normal without clinical evidence of active or chronic nerve root irritation from the back into either lower extremity, without clinical evidence of neurogenic claudication from the back into either lower extremity.

After review of the medical records, discussion with the claimant and performing the evaluation, something is wrong here. The test results in the examination do not fit with her description of her back problem. I believe she needs further workup to rule out a spondyloarthropathy and she should be seen by a rheumatologist who then would order the appropriate tests rheumatologically to rule out that condition. If that condition is ruled out then orthopedically I cannot find any reason for her problem and her degree of decreased ability to function as described to me. However, I cannot state that she can return to her substantial duties until she is cleared rheumatologically.

He then opined Ms. Chavez is not substantially incapacitated for the performance of her usual duties as a Correctional Officer.

10. At hearing, Dr. Auerbach reviewed Ms. Chavez's February 19, 2016 MRI, and explained the results did not change his opinion. He then explained that degenerative disc disease is often caused by the natural degeneration of a person's spine as she ages. In Ms. Chavez's case, however, he stated she is too young for the degree of degeneration she has at L3-L4 to be caused by the normal aging process. Instead, he opined she has "traumatic disc disease, secondary to injury." And when questioned further, he admitted, "yes, [Ms. Chavez] probably can't do every single job, but can do most of them." He went on to explain Ms. Chavez is "not normal," has "a problem," "but it's not the end of the world" because the duties she may not be able to perform at work do not rise to the level of a substantial incapacity. When asked what specific duties she cannot perform, Dr. Auerbach explained

she cannot drag “real heavy people out of cells,” and can sit for a total of four hours in an eight-hour shift.

Marshall Lewis, M.D.

11. Ms. Chavez offered medical reports from Dr. Lewis at hearing, which were received and considered pursuant to Government Code section 11513, subdivision (d).⁴ Dr. Lewis is her primary treating physician in the workers’ compensation system, and his reports reflect findings upon physical examination consistent with Ms. Chavez’s history of degenerative disc disease at L3-L4. He also reviewed the February 19, 2016 x-rays of her lumbar spine, which show degenerative changes in the lumbar and lower thoracic spine, and sacroiliac joints, which show calcifications in the pelvic area. Dr. Lewis deferred physical examination on April 29, 2016, and placed a hold on any further treatment on June 10, 2016, due to Ms. Chavez having a high-risk pregnancy because she is over 35 years of age and is pregnant with twins. He intends to resume treatment after Ms. Chavez gives birth to her twins.

Dr. Lewis did not testify at hearing

12. Ms. Chavez did not offer any other medical records. However, Dr. Auerbach’s IME report included a review of the records of her treatment through the workers’ compensation system. That review showed the following:

a. Ms. Chavez has received conservative treatment, which has included medication, physical therapy, facet joint injections, epidural steroid injections, medial branch blocks, massage therapy, and chiropractic treatment. She has a history of diagnoses of degenerative disc disease at L3-L4. On November 30, 2009, Michael Robinette, M.D., diagnosed her with a history of existing degenerative disc disease at L3-L4, with the possibility she was developing radiculopathy. Danilo Martinez, M.D., diagnosed her with degenerative disc disease at L3-L4, with mild to moderate facet arthropathy on February 24, 2010, and Ernest Miller, M.D., gave the same diagnosis on April 21, 2011. Sanjay Deshmukh, M.D., found degenerative disc disease at L3-L4 with facet disease and radiculopathy on February 21, 2012, and February 25, 2013. On April 10, 2014, Mark Hellner, M.D., diagnosed her with degenerative disc disease with spinal stenosis and neurogenic claudication at L3-L4.

⁴ That statute 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.”

b. Numerous diagnostic studies of Ms. Chavez's lumbar spine show a history of degenerative disc disease at L3-L4. A January 21, 2010 MRI report shows advanced degenerative disc disease at L3-L4 with disc space narrowing, but no evidence of disc protrusion. There is multilevel facet arthropathy. An MRI performed the following year shows mild degenerative disc disease with disc space narrowing and a two to three millimeter disc bulge at L3-L4. A February 21, 2013 MRI shows that the disc bulge is causing mild narrowing of the central canal and neural foramina at L3-L4, bilaterally. The bulge is approximately three millimeter in size. The most recent MRI taken on February 19, 2016, shows moderate degenerative disc disease with mild disc space height loss. There is no change in size of the disc bulge, and there are no signs of foraminal or canal stenosis. There is mild bilateral arthropathy.

Discussion

13. Ms. Chavez's application for industrial disability retirement was approved on the basis of an orthopedic (back) condition. The evidence introduced at hearing clearly establishes a history of degenerative disc disease at L3-L4, with varying degrees of disc bulging, facet arthropathy, radiculopathy, and narrowing of the canals. Dr. Auerbach's October 27, 2015 physical examination revealed objective signs she continues to suffer from degenerative disc disease at L3-L4. He reviewed the February 9, 2016 MRI report at hearing and confirmed it shows "moderate disc disease" at L3-L4. He also opined she is physically incapable of dragging "real heavy people out of cells" or from sitting for longer than four hours in an eight-hour shift, two essential functions of her former position as a Correctional Officer, due to degenerative disc disease.

While Dr. Auerbach opined in his report and at hearing that Ms. Chavez is no longer substantially incapacitated, he also explained in his IME report "I cannot state that she can return to her substantial duties until she is cleared rheumatologically." There is no evidence Ms. Chavez was "cleared rheumatologically," and Dr. Auerbach did not adequately explain how he is able to opine she is no longer substantially incapacitated without such evidence.

14. As explained below, CalPERS has the burden of demonstrating, based upon persuasive medical evidence, Ms. Chavez is no longer substantially incapacitated for the performance of her usual job duties as a Correctional Officer with Valley State Prison, California Department of Corrections and Rehabilitation, and should be reinstated to her former position. When considering all the evidence, CalPERS did not meet its burden for the reasons explained above. Therefore, Ms. Chavez's appeal should be granted.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. CalPERS has the burden of proving Ms. Chavez is no longer substantially incapacitated for the performance of her usual job duties as a Correctional Officer with Valley State Prison, California Department of Corrections and Rehabilitation, and it must do so by a preponderance of the evidence. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (January 22, 2000, Precedential Decision 99-03) <<http://www.calpers.ca.gov/eip-docs/about/leg-reg-statutes/board-decisions/past/99-03-starnes.pdf>>.) Evidence that is deemed to preponderate must amount to “substantial evidence.” (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be “substantial,” evidence must be reasonable in nature, credible, and of solid value. (*In re Teed’s Estate* (1952) 112 Cal.App.2d 638, 644.)

Applicable Statutes

2. Respondent is a safety member of CalPERS by virtue of her employment as a Correctional Officer by Valley State Prison, California Department of Corrections and Rehabilitation. She was granted an industrial disability retirement, based on an orthopedic (back) condition pursuant to Government Code section 21151, subdivision (a). That statute provides:

Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or the amount of service.

3. “Disability” and “incapacity for performance of duty” are defined in Government Code section 20026, which provides, in part:

“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. The courts have interpreted the phrase “incapacitated for the performance of duty” to mean “the substantial inability of the applicant to perform [her] usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.) It is not necessary that the person be able to perform any and all duties since public policy supports employment and utilization of the disabled. (*Schrier v. San Mateo County Employees’ Retirement Association* (1983) 142 Cal.App.3d 957, 961.) And the frequency with which a particular duty is performed does not determine whether the particular duty is one of the “usual duties” of the position. (*Thelander v. City of El Monte* (1983) 147

Cal.App.3d 736 [completing the police training academy is one of the “usual duties” of a full time police officer because a city ordinance requires all officers to complete the academy upon obtaining full time status]; see, *Beckley v. Board of Administration of California Public Employees' Retirement System* (2013) 222 Cal.App.4th 691, 700-701 [the “usual duties” of a particular position are to be determined based on the employee’s job classification, not her most recent job assignment].)

5. Discomfort, which may make it difficult for one to perform her duties, is insufficient to establish permanent incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207 [mere discomfort which makes it difficult to perform one’s job does not constitute a permanent incapacity]; 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 v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

6. When a member has been retired for disability prior to the minimum age at which she can voluntarily retire for service, CalPERS may require the member to undergo a medical examination to determine if she is still disabled. (Gov. Code, § 21192.) If the member is determined to no longer be substantially incapacitated for performing her usual duties, she shall be reinstated to her former position. (Gov. Code, § 21193.)

7. The minimum age for service retirement for a state safety member of CalPERS is 50 years old. (Gov. Code, § 21060, subd. (a).) Respondent is 36 years old, and has not met the minimum age for voluntary service retirement.

Conclusion

8. Complainant did not meet its burden of producing persuasive medical evidence demonstrating Ms. Chavez is no longer permanently and substantially incapacitated for the performance of her usual duties as a Correctional Officer with Valley State Prison, California Department of Corrections and Rehabilitation for the reasons discussed in Factual Findings 13 and 14. Therefore, Ms. Chavez’s appeal from CalPERS’s determination that she is no longer permanently and substantially incapacitated for the performance of her usual duties due to an orthopedic (back) condition and should be reinstated to her former position as a Correctional Officer should be granted.

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ORDER

Respondent Kristina M. Chavez's appeal from CalPERS's determination that she is no longer substantially incapacitated for the performance of the usual duties of a Correctional Officer with Valley State Prison, California Department of Corrections and Rehabilitation, and should be reinstated to her former position is GRANTED. CalPERS's request that she be involuntarily reinstated to her former position is therefore DENIED.

DATED: August 18, 2016

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Coren D. Wong
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COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings