

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:

SONIA D. GARVIN,

Respondent,

and

CALIFORNIA INSTITUTION FOR
WOMEN, CALIFORNIA DEPARTMENT
OF CORRECTIONS AND
REHABILITATION,

Employer.

Case No. 2015-0891

OAH No. 2016061064

PROPOSED DECISION

Roy W. Hewitt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on September 1, 2016.

Senior Staff Attorney Austa Wakily represented Anthony Suine, Chief of the Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Respondent, Sonia D. Garvin, represented herself.

No one appeared on behalf of the California Institution for Women, California Department of Corrections and Rehabilitation.

The matter was submitted on September 1, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

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ISSUE

Is respondent Garvin currently incapacitated for performance of duty as a Correctional Officer with the California Institution for Women, California Department of Corrections and Rehabilitation?

SUMMARY

The only competent medical evidence presented concerning respondent's current condition established that respondent is not substantially incapacitated from performing the usual and customary duties of a Correctional Officer with the California Institution for Women, California Department of Corrections and Rehabilitation.

FACTUAL FINDINGS

Jurisdictional Matters

1. On April 19, 1999, respondent began working for the California Institution for Women, California Department of Corrections and Rehabilitation as a Correctional Officer. By virtue of her employment, respondent was a local safety member of CalPERS subject to Government Code section 21151.

2. On August 6, 2013, respondent signed, and thereafter submitted to CalPERS, an application for disability retirement. On May 27, 2014, CalPERS notified respondent of the following. "Your application for industrial disability retirement has been approved. You have been found substantially incapacitated from the performance of your usual duties as a Correctional Officer with the Department of Corrections Institution for Women, based upon your orthopedic (bilateral knee) condition." (Exh. 6.) The effective date of respondent's disability retirement was the date she was notified, May 27, 2014.

3. By letter, dated January 16, 2015, CalPERS notified respondent of the following:

Your file is under review to determine if you continue to qualify for industrial disability retirement.

CalPERS must have sufficient medical information to make a determination as to whether or not you continue to be substantially incapacitated for you usual job duties with your previous employer. In order to make this determination, CalPERS has arranged an orthopedic appointment for an Independent Medical Examination (IME). You will be

examined by Michael Einbund, on February 12, 2015, at 2:30 PM. . . . (Exh. 7.)

4. On February 12, 2015, Dr. Einbund, a Diplomate of the American Board of Orthopaedic Surgery, performed an IME of respondent. On March 10, 2015, based on the results of Dr. Einbund's IME of respondent, CalPERS notified respondent that she was "no longer substantially incapacitated from performing the job duties of [a] Correctional Officer for the Department of Corrections Institution for Women based upon [her] disabling condition. In accordance with Government Code section 21192, you will be reinstated to your former position. . . . (Exh. 8.)

5. By letter, dated March 23, 2015, respondent timely appealed CalPERS' determination and the instant hearing ensued.

Evidence Regarding Respondent's Current Ability to be Reinstated to Her Former Position as a Correctional Officer With the Department of Corrections, Institution for Women.

Respondent's Medical Records and Testimony

6. Respondent presented her own testimony and past medical records from her Workers' Compensation case. The records consisted of the following: The results of a September 10, 2012, evaluation concerning a 2008 injury to her shoulders; a June 5, 2014, Agreed Medical Evaluation focused on her 2008 shoulder injuries; and several medical reports concerning her knee injuries, the most recent of which is dated June 1, 2016.¹ In addition to the medical records, respondent also testified about her current, subjective complaints concerning her overall ability to return to work. Her testimony is paraphrased as follows: Her knees are "really bad"; she cannot kneel and get back up quickly which is required when she qualifies on the shooting range (she is only required to qualify once a year); she cannot subdue an inmate (due to the current condition of her knees and shoulders²), or run to assist other correctional officers in need of help; if she could return to

¹ The reports did not address respondent's ability to return to work based on the medical standards that apply to CalPERS' disability retirement matters.

² Although respondent mentioned her shoulder injuries in her application for disability retirement, she did so as "other information," not as part of her claimed disability. When asked on the disability retirement application, "What is your specific disability?" she responded: "Bilateral knees' Damage to the ACL in the left knee that resulted in an ACL reconstruction. It should also be noted that I have had three (3) surgeries to my left knee to date. At this point I suffer from arthritis in the right knee and surgery may be necessary in the future." (Exh. 5.) Additionally, the most recent medical records provided by respondent dated November 17, 2015, through June 1, 2016, only focus on her complaint of left and right knee pain. (Exh. C.) Consequently, her shoulder issues did not form the basis of her CalPERS disability retirement and were not considered in the instant proceedings.

work, she would; she is willing to work in another job “they could give me”; and she opined, without presenting any corroborating evidence, that a correctional officer “must be able to work without restrictions.”

Dr. Einbund’s Testimony and Reports

7. CalPERS presented the testimony of Dr. Einbund along with his initial, February 12, 2015, IME report and two supplemental reports, dated April 28, 2015, and June 1, 2015. Dr. Einbund’s February 12, 2015, IME consisted of the following: Taking a complete history of respondent’s injuries; consideration of respondent’s then, current complaints³; a discussion about respondent’s work status; consideration of respondent’s job duties and responsibilities; discussion about respondent’s social status; an examination of respondent’s left and right knees and hips; taking and interpreting X-rays of respondent’s knees; and an extensive and complete review of respondent’s medical records.

8. After performing the IME, Dr. Einbund answered several questions posed to him by CalPERS. The pertinent questions and Dr. Einbund’s answers were as follows:

1. Are there specific job duties that you feel the member [respondent] is unable to perform because of a physical or mental condition? If so, please explain.

It would be my opinion that she should avoid standing more than 6 hours in an 8 hour day. She should avoid repetitive squatting and kneeling with her left lower extremity. These work restrictions are due to her left knee.

2. In your professional opinion, is the member substantially incapacitated for performance of his/her duties: . . .

In my opinion, in all probability, she is not substantially incapacitated from performance of her duties. After reviewing her job analysis, it does appear that she is able to do the job as described in the job analysis. As stated above, she should avoid standing more than 6 hours in an 8 hour day and avoid repetitive squatting and kneeling. In my opinion this work restriction would likely be permanent. My opinion is based on the fact that the physical requirements of her position include frequent standing, walking, squatting and kneeling, with frequent being 3 to 6 hours a day, and thus she would be able to perform her regular job duties within the restrictions indicated. . . . (Exh. 13.)

³ At the February 12, 2015, IME, respondent complained about the following: Her left knee (grinding sensation when bending and straightening her legs, a popping in the left knee, and a feeling of weakness and instability when bending or standing after sitting); right knee pain which is always present (walks with an “awkward” gait and feels “popping” in her knee); and nagging, aching pain in her right hip, with a burning , tingling sensation extending down to her right thigh. (Exh. 13.)

Dr. Einbund considered respondent's subjective complaints, in addition to his objective findings, when answering the foregoing questions.

9. Dr. Einbund authored two supplemental reports after he reviewed subsequent medical records concerning respondent's then current medical condition; one dated April 28, 2015, and another dated June 1, 2015. Dr. Einbund concluded that:

Based on the evidence, I do feel that the member [respondent] would be able to perform the duties of her job. On physical examination, there was full range of motion of both knees. There was no swelling or instability noted for either knee. She was able to ambulate with a normal gait and there was no obvious motor weakness noted. Her physical examination was essentially within normal limits. . . . (Exh. 15.)

Evaluation

10. Respondent presented no competent medical evidence concerning her current condition and ability to return to work; the only competent medical opinion concerning respondent's ability to return to work was expressed by Dr. Einbund, during his testimony. Dr. Einbund testified that respondent is not currently incapacitated for performance of duty as a Correctional Officer with the California Institution for Women, California Department of Corrections and Rehabilitation.

LEGAL CONCLUSIONS

1. Pursuant to Government Code section 20026:

"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.

2. Government Code section 21156, subdivision (a), provides in part:

(a)(1) If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability . . .

(2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion

3. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his or her customary duties, *even though doing so may be difficult or painful*, the employee is not incapacitated and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887 [emphasis added].) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854.) Further, respondent must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Id.* at 863.)

4. CalPERS unequivocally established, through competent medical opinion, that respondent is not currently incapacitated for performance of duty as a Correctional Officer with the California Institution for Women, California Department of Corrections and Rehabilitation.

ORDER

Respondent's appeal is denied. CalPERS properly reinstated respondent to her former position with the California Institution for Women, California Department of Corrections and Rehabilitation.

DATED: September 19, 2016

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Roy Hewitt
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ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings