

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:

JERRI CLAY,

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
CENTRAL CALIFORNIA WOMEN'S
FACILITY,

Respondent.

Case No. 2015-1157

OAH No. 2016040283

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, State of California, Office of Administrative Hearings, on August 30, 2016, in Fresno, California.

The California Public Employees' Retirement System (CalPERS) was represented by Kevin Kreutz, Senior Staff Attorney.

Thomas Tusan, Attorney at Law, represented Jerri Clay (respondent) who was present at the hearing.

There was no appearance by or on behalf of the California Department of Corrections and Rehabilitation, (Department), Central California Women's Facility (Facility). The Department was duly served with Notices of Hearing. The matter proceeded as a default against the Department, pursuant to California Government Code section 11520, subdivision (a).

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

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED 9/21 120110

Sumner D. Taylor

ISSUE

The issue on appeal is whether, on the basis of a podiatric condition (left foot condition), respondent is substantially incapacitated from the performance of her usual and customary duties as a Correctional Officer (CO) for the Department?

PROCEDURAL FINDINGS

1. Respondent was employed by the Department as a CO from approximately December 7, 2007, until January 2014. On April 13, 2014, respondent signed and thereafter filed an application for industrial disability retirement (application) with CalPERS. By virtue of her employment respondent is a state safety member of CalPERS subject to Government Code section 21151. Respondent was 39 years old when she filed her application.

2. In filing the application, respondent claimed disability on the basis of chronic plantar fasciitis. Respondent wrote that the condition occurred as a result of "cumulative, repetitive standing and walking duties, running, responding to alarms and stair climbing."

3. CalPERS obtained medical records and reports, including reports prepared by Michael J. Runge, D.O., Merlin C. Smith M.D., Roy O. Kroeker, D.P.M. and Ekta Shah, D.P.M., who conducted an Independent Medical Evaluation (IME) of respondent concerning respondent's left foot condition. After reviewing the reports, CalPERS determined that respondent was not substantially incapacitated from the performance of her job duties as a CO for the Department.

4. On July 30, 2015, CalPERS notified respondent that her application for industrial disability retirement was denied. Respondent was advised of her appeal rights. Respondent filed an appeal and request for hearing by letter dated August 26, 2015.

5. On March 21, 2016, Anthony Suine, in his official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, made and thereafter filed the Statement of Issues.

FACTUAL FINDINGS

Respondent's Employment History and Duties of a Correctional Officer

1. On December 7, 2007, respondent was hired to work as a CO for the Department. She worked at the Facility, a prison for women in Chowchilla, California. The Facility housed several hundred prisoners. Respondent worked at different areas of the Facility, including the area where prisoners were received and a unit that housed approximately 200 prisoners.

2. As set forth in the Essential Functions statement, a CO must be able to perform the following relevant functions:

- Must be able to perform the duties of all the various posts
- Must be able to work overtime. 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
- Must be able to wear personal protective equipment (stab proof vest), and clothing and breathing apparatus to prevent injuries and exposure to blood borne pathogens
- Walk occasionally to continuously
- Run occasionally, run in an all-out effort while responding to alarms or serious incidents, distances vary from a few yards 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/decent or climb a series or steep stairs, several tiers of stairs or ladders as well as climb onto bunks/beds while involved in cell searches, must be able to carry [unintelligible] while climbing stairs
- 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
- Continuously wear equipment belt weighing 15 pounds

3. On April 21, 2015, respondent signed a "Physical Requirements of Position/Occupational Title" form (Physical Requirements form). The Physical Requirements form was submitted to CalPERS. According to the Physical Requirements, when working as a CO, respondent: (1) constantly (over 6 hours) sat, stood, walked, walked on un-even ground, drove, was exposed to excessive noise, was exposed to extreme temperature, humidity and wetness, and operated foot controls or repetitive movement; (2) frequently (three to six hours a day) bent and twisted at her neck and waist, reached below the shoulders, pushed and pulled, engaged in fine manipulation, power and simple grasped, repetitively used her hands, lifted from 0 to 50 pounds and worked at heights; and (3) occasionally (up to three hours), ran, crawled, kneeled, climbed, squatted, reached above her shoulders, used a keyboard and mouse, lifted between 51 and over 100 pounds, worked with heavy equipment, was exposed to dust, gas, fumes or chemicals, used special visual or auditory protective equipment, or worked with bio-hazards.

History of Respondent's Condition and Work Restrictions

4. In 2011, respondent began to experience pain in her feet. Respondent was seen by Dr. Kroeker, a podiatric doctor. Dr. Kroeker took her off work for one week. She continued to have pain in both feet. At different times, Dr. Kroeker placed restrictions on the amount of standing and overtime respondent could work. Between 2011 and 2014, respondent was taken off work and returned to work four times. Kathy Noain, Return-to-Work Coordinator at the Facility, met with respondent numerous times to assist with respondent's return to work.

5. On or about August 11, 2015, Ms. Noain sent Dr. Kroeker a letter and form requesting him to review the essential functions of respondent's duties as a CO and to opine whether respondent was able to perform the essential functions. Ms. Noain also asked Dr. Kroeker to list any medical limitations that precluded respondent from performing her essential functions. At hearing, Ms. Noain testified that the purpose of the letter was to get more information from Dr. Kroeker about whether respondent had any work restrictions and if those restrictions could be accommodated.

Dr. Kroeker completed the form on August 18, 2015, and returned the form to Ms. Noain. Dr. Kroeker indicated on the form that after reviewing the essential job functions of a CO, respondent's limitation was an "8 hours shift only." Ms. Noain testified that the ability to perform overtime is mandatory for a CO. As a result of respondent's restriction from working more than eight hours per day, Ms. Noain determined that respondent could not perform the essential functions of her job as a CO and could not return to work at the Facility as a CO.

6. At hearing, respondent testified that she still experiences pain in her left foot when she gets up in the morning and steps out of bed. Respondent stretches her foot which helps with the pain. The longer she is on her feet throughout the day, the more pain she experiences. If she does not warm-up and stretch her foot, her Achilles tendon feels tight. For a period time after respondent left the Facility, she operated a daycare business out of her home. She watched two three-year old boys. Respondent testified that the daycare business allowed her to rest and stay off of her feet as needed.

Testimony of Roy Kroeker, D.P.M.

7. Dr. Kroeker is a licensed podiatrist. He has practiced podiatry for 46 years. Has operates a private practice and treats patients. Dr. Kroeker is also a Qualified Medical Examiner and Agreed Medical Evaluator for workers compensation matters. Dr. Kroeker has never testified in a CalPERS proceeding related to a claim for disability retirement. He is also not familiar with the standard CalPERS applies to determine if an applicant is substantially incapacitated from the performance of her usual and customary duties.

8. On June 3, 2011, Dr. Kroeker began treating respondent for her foot condition. Respondent initially reported to Dr. Kroeker that she began to experience pain in both of her

heels while she was at work. Dr. Kroeker diagnosed respondent with bi-lateral neuritis, which is nerve inflammation and plantar fasciitis, which relates to the ligament that runs from the heel to the ball of the foot. Plantar fasciitis is caused when the plantar fascia becomes strained and inflamed. Small fibers in the fascia can fray, causing pain in the heel and bottom of the foot. Between June 2011 and August 2015, respondent underwent various treatments to address the plantar fasciitis, including physical therapy, use of orthotic inserts, and injections in the plantar fascia and medial calcaneal nerve. The pain in respondent's right foot improved. The left foot pain did not improve. Dr. Kroeker opined that respondent's left foot neuritis and plantar fasciitis are permanent conditions.

9. Dr. Kroeker opined that respondent cannot perform her job as a CO because she cannot stand or walk for more than six hours. She also cannot repetitively climb. Dr. Kroeker opined that respondent's work restrictions are necessary because walking, standing, running and climbing would cause respondent pain in her left foot. He contended that the pain may prevent her from responding to a work-related situation, which might cause injury to herself or someone else.

Independent Medical Evaluation by Ekta Shah, D.P.M.

10. On June 19, 2015, at the request of CalPERS, Ekta Shah, D.P.M. conducted an IME of respondent and thereafter prepared a report. Dr. Shah also prepared supplemental reports dated July 20, 2015, and October 2, 2015. Dr. Shah obtained her Doctor of Podiatric Medicine in May 2003, from California College of Podiatric Medicine, and obtained her license to practice podiatric medicine. She is a board-certified podiatric physician and surgeon. Dr. Shah operates a private practice where she treats patients. Dr. Shah contracts with CalPERS to perform IMEs.

11. As part of the IME of respondent, Dr. Shah interviewed respondent, obtained a medical and work history, and conducted a physical examination. She also reviewed respondent's job description, the physical requirements of a CO and her medical records related to her foot condition, including records from Dr. Kroeker, Dr. Runge, D.O., Jaspal Sidhu, M.D., Francis Glaser, M.D. and Dr. Smith. In reviewing respondent's treatment records, Dr. Shah noted that an MRI study performed on respondent's left foot on October 2, 2013, indicated that her foot had mild inflammation.

RESPONDENT'S COMPLAINTS

12. Respondent informed Dr. Shah that on June 3, 2011, she was seen by Dr. Kroeker for bi-lateral foot pain. He "taped her foot, injected her heel and took her off work for a few days." Respondent reported that her right foot healed, but she still had pain in her left foot. She returned to work and the pain continued. Dr. Kroeker again took her off work. At some point in 2011, respondent began wearing custom orthotics which felt "okay." She was working double shifts at work three times per week. Her foot pain continued and Dr. Kroeker took her off work again for a period of time. She returned to work for

approximately two months in a light duty assignment. After the light duty assignment ended Dr. Kroeker took her off work again.

13. Respondent reported that in 2013 she attended physical therapy. Dr. Kroeker also administered a total of five injections in her left foot. Respondent stated that she was not offered surgery or other treatment options. Respondent stated that she experiences pain from the "bottom of the arch to the mid-heel and then to the back of the left foot."

14. Respondent stated that she was able to help get her children ready for school each day and drive them to school. Her pain level in the morning was typically "3" out of 10. She described the pain as "constant and dull until mid-day. If standing, after sitting, she experiences a sharp shooting pain at times." By the end of the day her pain is "8" out of 10, which she attributed to being on her feet from 3:00 p.m. until 6:00 p.m., "cooking and picking up her kids."

15. Respondent arrived at the IME wearing flip-flop sandals with memory foam. She informed Dr. Shah that she had to attend her daughter's dance recital. Respondent indicated that she typically wore tennis shoes with orthotic inserts which hold her feet in place and reduce her foot pain. Respondent did not bring the orthotic inserts to the IME. As a result, Dr. Shah was not able to determine whether the orthotic inserts fit properly.

PHYSICAL EXAMINATION

16. Dr. Shah conducted a physical examination of respondent's feet, which included vascular, neurological, and musculoskeletal examinations. Respondent's pulses were normal. Her neurological examination was also normal. Dr. Shah found no evidence of neuritis. Dr. Shah focused the musculoskeletal examination on respondent's left foot. Respondent had "5/5 muscle strength in all four quadrants" of her left foot. She had "pain with palpation of left central arch on plantar fascia." She also had "increased pain with palpation on left plantar medial heel."

17. Dr. Shah also observed respondent walk. She noted that initially respondent walked with a limp to avoid pressure on her left foot. With continued walking, her left foot gait became similar to her right foot.

DIAGNOSIS AND IMPRESSION

18. Based on Dr. Shah's evaluation of respondent, her impressions related to respondent's left foot condition were:

1. Chronic plantar fasciitis, left foot
2. Pain, left foot

19. In response to the question posed by CalPERS to Dr. Shah concerning whether there were specific job duties that respondent was unable to perform because of a physical or mental condition, Dr. Shah answered "No." Dr. Shah opined that respondent was able to "perform all duties at home, even with mild pain" and able to operate a daycare. Dr. Shah opined that respondent could also perform the job duties of a CO.

20. Dr. Shah further opined that respondent was not incapacitated from the performance of her usual duties as a CO. At hearing, Dr. Shah opined that there were no job duties respondent could not perform due to her left foot condition. Additionally, respondent is capable of working overtime. Dr. Shah explained that that respondent had pain in her left foot due to the plantar fasciitis, but not the type of pain that would prevent her from walking or standing. The type of pain that may prevent respondent from walking or standing would typically be associated with a tear or rupture of the plantar fascia. Dr. Shah found no evidence of a tear or rupture. Additionally, Dr. Shah opined that it is very rare for plantar fasciitis to be debilitating. The majority of cases of plantar fasciitis heal with appropriate conservative treatment.

21. Dr. Shah also opined that respondent's subjective complaints did not correlate with objective findings. Specifically, Dr. Shah stated that wearing flip flop sandals would be "very uncomfortable for someone with chronic plantar fasciitis" because the rear foot would not be supported. Also, Dr. Shah noted that when respondent walked, after a few steps her left-foot gait was the same as her right foot.

JULY 20, 2015 SUPPLEMENTAL REPORT

22. At the request of CalPERS, Dr. Shah issued a supplemental report dated July 20, 2015, which addressed the issue of whether respondent's left foot condition was work-related.

OCTOBER 2, 2015 SUPPLEMENTAL REPORT

23. Dr. Shah issued a supplemental report dated October 2, 2015, after she reviewed additional medical records from Dr. Runge and Dr. Kroecker. None of the information reviewed by Dr. Shah changed her opinions set forth in her June 19, 2015 and July 20, 2015 reports.

Discussion

24. When all the evidence is considered, Dr. Shah's opinion that respondent is not substantially incapacitated from the performance of her usual and customary duties as a CO for the Department, based upon her left foot condition, was persuasive. Dr. Shah based her opinion on her review of respondent's job description, the physical requirements of her job, review of her medical records and a physical examination. The physical examination she conducted revealed that respondent had plantar fasciitis and pain in her left foot. Dr. Shah persuasively testified that respondent may experience pain in her left foot when she engages

in certain activities, such as prolonged walking or standing, but the evidence established that she is capable of performing her duties as a CO, including walking, standing, running, climbing and overtime.

25. Dr. Kroeker's opinion that respondent cannot walk or stand for more than six hours, work overtime or perform the duties of a CO, is not supported by the evidence. First, Dr. Kroeker was not familiar with the CalPERS standard applied to determine if an applicant is substantially incapacitated from the performance of her usual and customary duties. Rather, his experience in rendering an expert opinion is limited to the workers compensation standards. As a result, he did not apply or consider whether respondent was substantially incapacitated from the performance of her usual and customary duties as a CO for the Department. Furthermore, the activity restrictions recommended by Dr. Kroeker are designed to limit or reduce the amount of pain she was having in her left foot. The restrictions were not based on an inability to perform the activities or any current disability.

26. Additionally, none of the medical records reviewed by Dr. Shah contradict Dr. Shah's opinion that respondent is not substantially incapacitated from the performance of her usual and customary duties as a CO. There is no indication in the records that any of the doctors determined that respondent was substantially incapacitated from the performance of her usual and customary duties as a CO for the Department, based on her left foot condition.

27. Respondent failed to present competent medical evidence to support her assertion that she is substantially incapacitated from the performance of her usual and customary duties as a CO based upon the legal criteria applicable in this matter. Consequently, respondent failed to establish that her industrial disability retirement application should be granted based upon her left foot condition.

LEGAL CONCLUSIONS

1. Respondent seeks disability retirement pursuant to Government Code section 21151, subdivision (a), which provides in pertinent part, that "[a]ny 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."

2. To qualify for disability retirement, respondent must prove that, at the time she applied, she was "incapacitated physically or mentally for the performance of his or her duties..." (Gov. Code, § 21156, subd. (a)(1).) As defined in 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.

3. 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.)

4. In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, the court explained that prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. The applicant in *Hosford* had suffered injuries to his left ankle and knee, and had strained his back. The court noted that the sergeant "could sit for long periods of time but it would 'probably bother his back;' that he could run but not very adequately and that he would probably limp if he had to run because he had a bad ankle; that he could apprehend persons escaping on foot over rough terrain or around and over obstacles but he would have difficulty and he might hurt his back; and that he could make physical effort from the sedentary state but he would have to limber up a bit." (*Id.* at p. 862.) Following *Mansperger*, the court in *Hosford* found that the sergeant:

is not disabled unless he is substantially unable to perform the usual duties of the job. The fact that sitting for long periods of time in a patrol car would "probably hurt his back," does not mean that in fact he cannot so sit; ...[¶] As for the more strenuous activities, [a doctor] testified that Hosford could run, and could apprehend a person escaping over rough terrain. Physical abilities differ, even for officers without previous injuries. The rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the function, renders [the doctor's conclusion that Hosford was not disabled] well within reason. (*Ibid.*)

In *Hosford*, the sergeant argued that his condition increased his chances for further injury. The court rejected this argument, explaining that "this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently existing." (*Hosford, supra*, 77 Cal.App.3d at p. 863.)

5. In *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff was not permanently incapacitated for the performance of his duties, finding, "A review of the physician's reports reflects that aside for a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the appellant's condition are dependent on his subjective symptoms." In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, the court found that discomfort, which may make it difficult for an employee to perform his duties, is not sufficient in itself to establish permanent incapacity. (See also, *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.)

6. The standards in CalPERS disability retirement cases are different from those in workers' compensation cases. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Kimbrough v. Police & Fire Retirement System* (1984) 161 Cal.App.3d 1143, 1152-1153; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132 [a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different].) Thus, any determination of disability that may have been made in respondent's workers' compensation case cannot be given any weight in this proceeding.

7. The burden of proof is on respondent to demonstrate that she is substantially incapacitated from the performance of her usual and customary duties such that she is permanently disabled. (*Harmon v. Board of Retirement of San Mateo County*, *supra*, 62 Cal. App. 3d 689; *Glover v. Board of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) To meet this burden, respondent must submit competent, objective medical evidence to establish that, at the time of her application she was permanently disabled or incapacitated from performing the usual duties of her position. (See *Harmon v. Board of Retirement*, *supra*, 62 Cal.App.3d at 697.)

8. When all the evidence in is considered in light of the courts' holdings in *Mansperger*, *Hosford*, *Harmon*, *Smith* and *Keck*, respondent did not establish that her industrial disability retirement application should be granted. Respondent failed to establish through competent, objective medical evidence that she was substantially incapacitated from the performance of her usual and customary duties of her job as a CO, based on her left foot condition. Consequently, her industrial disability retirement application must be denied.

ORDER

Respondent Jerri Clay's application for industrial disability retirement is DENIED.

DATED: September 16, 2016

DocuSigned by:
Marcie Larson
F72F4885838541C...

MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings