

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:

ARTURO TREJO,

Respondent,

and

CALIFORNIA STATE PRISON -
CENTINELA, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Respondent.

Case No. 2014-1262

OAH No. 2015090850

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 20, 2016, in San Diego, California.

Rory J. Coffey, Senior Staff Attorney, represented petitioner, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System, State of California (CalPERS).

Andrew D. Smith, Attorney at Law, represented respondent, Arturo Trejo.

No appearance was made by or on behalf of respondent, California State Prison - Centinela, California Department of Corrections and Rehabilitation (department).

The matter was submitted on September 20, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Oct. 19 2016

C. Bodily

SUMMARY

In 2010, Mr. Trejo applied for an industrial disability retirement from his job as a correctional officer due to low back injuries he sustained on the job. CalPERS approved the application for an industrial disability retirement due to his orthopedic condition and placed Mr. Trejo on the industrial disability retirement roll effective September 8, 2010.

In 2014, CalPERS re-evaluated Mr. Trejo's eligibility for industrial disability retirement based on an examination conducted by an orthopedic surgeon. CalPERS determined that Mr. Trejo was no longer disabled or incapacitated from the performance of his duties as a correctional officer and reinstated him to employment. Mr. Trejo appealed from that determination. The hearing in this matter followed.

A preponderance of the competent medical evidence failed to show a change in Mr. Trejo's physical disability from 2010 to the present. Mr. Trejo remains eligible to receive a CalPERS industrial disability retirement. He should not be reinstated to employment as a correctional officer.

ISSUE

Is Mr. Trejo, who was granted a disability retirement on November 30, 2010, still permanently disabled or incapacitated from performing the usual and customary duties of a correctional officer?

FACTUAL FINDINGS

Background

1. Mr. Trejo was employed as a correctional officer at Centinela State Prison. By reason of his employment, Mr. Trejo was a state safety member of CalPERS.
2. On August 30, 2010, Mr. Trejo submitted an application for disability retirement on the basis of an orthopedic (low back) condition.
3. Soheil Aval, M.D., a board certified orthopedic surgeon, prepared a report on Mr. Trejo's disability. Dr. Aval diagnosed Mr. Trejo with lumbar spine sprain/strain; degenerative disc disease; a 5 mm disc bulge at L4-L5; and a 2 mm disc bulge with annular tear at L5-S1.
4. On November 30, 2010,¹ CalPERS approved the application and Mr. Trejo was retired for disability effective September 8, 2010.

¹ The Accusation incorrectly alleged that CalPERS approved the disability application in 2014.

5. Provisions of the Government Code authorize CalPERS to re-evaluate members who are under the minimum age for voluntary retirement to determine if they remain eligible for a disability retirement. If CalPERS determines that the member is no longer incapacitated or permanently disabled, it may cancel the disability retirement allowance and seek to have the member reinstated.

6. On September 26, 2014, CalPERS notified Mr. Trejo that after reviewing his records, it had determined that he was no longer substantially incapacitated from performing the usual and customary duties of a correctional officer. By letter dated October 14, 2014, Mr. Trejo timely appealed that determination; this hearing ensued.

Duties of a Correctional Officer

7. The department's list of a correctional officer's "essential functions" require that a correctional officer must: work in minimum and maximum security institutions; wear personal protective equipment such as stab proof vests and breathing apparatus; qualify with firearms; swing a baton with force; defend against inmates armed with weapons; subdue inmates and apply restraints; run occasionally and run in an all-out effort when responding to alarms or serious incidents up to 400 yards over varying surfaces including stairs; climb occasionally to frequently series of steps/stairs as well as ladders; crawl, crouch, stoop, and bend; search cells and other tightly enclosed spaces; stand continuously for long periods of time; lift and carry 20 to 50 pounds on a regular basis, perhaps up to 100 pounds on an occasional basis; reach overhead occasionally while performing cell or body searches; twist the body frequently and continuously while performing regular duties; and engage in frequent hand and wrist movement.

Independent Medical Evaluation by Dr. Patrick O'Meara

8. CalPERS requested Patrick M. O'Meara, M.D., to perform an independent medical evaluation. Dr. O'Meara has been licensed to practice medicine in California since 1990. He was board certified in orthopedic surgery in 1992. Since then, he has worked in private practice. Approximately 95 percent of his practice consists of patient care, the other 5 percent is medical-legal evaluations. Approximately 20 percent of his practice is devoted to problems with the spine. Dr. O'Meara does not perform spine surgery and has no spine fellowships or specializations. Although Dr. O'Meara testified at hearing, he did not recall examining Mr. Trejo and had no independent recollection of his findings in this matter other than what was contained in the reports that were received as evidence.

9. Dr. O'Meara reviewed Mr. Trejo's medical records, conducted a physical exam, and reviewed Mr. Trejo's x-rays. On June 23, 2014, he prepared a report documenting his findings. He concluded that Mr. Trejo was fit to perform his usual and customary work without restrictions and was not substantially incapacitated from the performance of his normal work duties. However, Dr. O'Meara requested that Mr. Trejo undergo a follow-up MRI of his lumbosacral spine.

10. On September 2, 2014, Dr. O'Meara prepared a supplemental report, which contained an addendum to his previous report. Dr. O'Meara noted that Mr. Trejo underwent an MRI on August 22, 2014, that was interpreted by Dr. Gregory Nicpon. Dr. Nicpon read the MRI as essentially consistent with the patient's age and body habitus. Mr. Trejo had no herniated disk and only mild degenerative changes. Dr. O'Meara opined that the MRI supported his conclusion that Mr. Trejo was not substantially incapacitated.

MEDICAL RECORD REVIEW

11. Dr. O'Meara reviewed and summarized the "Centinela State Prison Duty Statement" in his report. However, this duty statement provided a general description of job duties of a correctional officer at Centinela State Prison, and was different than the department's "Essential Functions" of a correctional officer, which provided a more detailed list of physical tasks expected of a correctional officer. Thus, the duty statement did not reflect the types and duration of tasks a correctional officer is required to perform. Dr. O'Meara testified he did not recall if he reviewed the "Essential Functions" sheet, other than to say if it was in the packet of documents CalPERS sent him, then he reviewed it. That "packet" was not presented at hearing and the "Essential Functions" sheet was not referenced in Dr. O'Meara's reports. However, Dr. O'Meara said he has treated correctional officers in the past and has an understanding of their typical duties.

Dr. O'Meara noted that Mr. Trejo was seen by Dr. Lokesh Tantuwaya on June 6, 2008, complaining of a back injury incurred after Mr. Trejo was moving boxes. An MRI performed on May 1, 2008, revealed disk desiccation at L4-L5 and L5-S1. Dr. Tantuwaya noted a right paracentral disc extrusion at L4-L5 that caused compression of the right L5 nerve root.

On September 12, 2009, Dr. Brian Ahangar performed nerve conduction studies and found no electrodiagnostic evidence of peripheral polyneuropathy or plexopathy of the lower extremities.

On March 25, 2010, Dr. Blake Thompson prepared secondary treating physician's physical medicine evaluation and diagnosed Mr. Trejo with disc herniation at L4-L5 and L5-S1 with right radiculopathy.²

On August 19, 2010, Dr. Jerome Hall prepared a primary treating physician's permanent and stationary report stating that Mr. Trejo had a disability precluding heavy work with a 13 percent whole person impairment.

² Radiculopathy is the impingement or compression of a nerve root causing pain, numbness, or weakness in the part of the body supplied with nerves from the root.

On December 2, 2010, Dr. Soheil Aval performed an Agreed Medical Evaluation. Dr. Aval diagnosed Mr. Trejo with lumbar spine sprain/strain with degenerative disc disease, a 5 mm disc bulge at L4-L5, and right L5 lumbar radiculopathy.

PHYSICAL EXAMINATION

12. Dr. O'Meara examined Mr. Trejo in 2014.³ Dr. O'Meara testified about his usual and customary procedure for conducting CalPERS's evaluations. He said he does not review a patient's medical records prior to the exam. Instead, he has a patient complete paperwork that Dr. O'Meara reviews with the patient in person. At the time of the exam, Mr. Trejo complained of pain in his neck and back, pins and needles and aching pain throughout his buttocks, and pain in his lateral hips. He described his pain as moderate to severe, with 70 percent of the pain in the back, 20 percent in the right leg, and 10 percent in the left leg. Mr. Trejo reported weakness in his legs, which limits how far he can walk. He stated that activities such as standing, sitting, driving, bending, lifting, and rising from a chair worsen his discomfort. Mr. Trejo reported taking naproxen, orphenadrine, and omeprazole.⁴

13. Dr. O'Meara performed a physical examination of Mr. Trejo's lower back. He found a normal exam and believed Mr. Trejo's condition was permanent stationary, he was fit to perform work without restrictions, and he was not substantially incapacitated. However, he believed a follow-up MRI would be helpful. After reviewing the report of that MRI on August 22, 2014, Dr. O'Meara confirmed that the MRI supported his conclusion that Mr. Trejo was not substantially incapacitated. Dr. O'Meara did not review the MRI films, just the report of those films prepared by the reviewing radiologist.

14. Dr. O'Meara testified that he did not review the reports and findings of Mr. Trejo's treating physician, Vrijesh Tantuwaya, M.D.

Mr. Trejo's Testimony

15. Mr. Trejo is 41 years old. He began working at Centinela State Prison as a correctional officer in 2007. He worked in various positions and testified that he enjoyed his job. In March 2008 he injured his back while moving boxes at work. He reported the injury and received medical treatment. He received workers' compensation benefits and a lifetime medical award. His physician, Dr. Hall, recommended disability retirement. Competent medical opinions determined that Mr. Trejo was unable to carry out his job duties, which resulted in his receiving a disability retirement in 2010.

16. Mr. Trejo described his duties as a correctional officer. He said he was required to wear a stab vest and duty belt, which added an additional 20 to 30 pounds of

³ The date of examination was not contained in Dr. O'Meara's report.

⁴ Naproxen is a non-steroidal anti-inflammatory drug, orphenadrine is a muscle relaxant, and omeprazole reduces the production of stomach acid.

weight. He had to climb stairs to reach the top of housing units and the guard tower; run in order to respond to alarms; carry items such as food carts and trays; perform cell extractions; climb a ladder to perform searches of top bunks; bend, kneel, and crouch to conduct searches; drive a vehicle for an entire shift, and subdue inmates. His description of his duties was consistent with the department's listing of essential duties and functions.

17. Mr. Trejo testified that he constantly has lower back pain, which he rated a 7 out of 10. He has pain, cramping, and tingling in his right thigh down to his foot. He said this pain is constant and he rated it 8 out of 10. He has less pain and discomfort in his left leg, which he rated 5 out of 10. He takes naproxen and orphenadrine, as well as a medication for stomach pain, caused by the naproxen. He said the medication provides temporary relief for a few hours.

Mr. Trejo testified that he cannot stand for a significant period of time. He is unable to walk extended distances. He has not attempted to run since his injury. He said he does not have the strength in his back and legs to lift heavy objects. He said operating a gas pedal for an extended period of time is very difficult and painful.

18. Mr. Trejo testified that his examination with Dr. O'Meara was limited. He said Dr. O'Meara's exam lasted approximately five minutes. He said Dr. O'Meara performed two tests on his legs. Dr. O'Meara did not ask him questions about his job or discuss with him how the injury occurred, his current complaints, or medication he was taking. He said Dr. O'Meara did not ask him to walk, bend, stoop, attempt to run, or lift objects.

Testimony of Dr. Vrijesh S. Tantuwaya

19. Mr. Trejo began treating with neurological surgeon Vrijesh S. Tantuwaya, M.D., approximately one-and-a-half to two years ago. Dr. Tantuwaya has been licensed to practice medicine in California since 2002. He is a board certified neurological surgeon and independent medical examiner. Following his residency in neurosurgery he completed a spine fellowship. He is a California qualified medical examiner and an expert reviewer for the Medical Board of California.

20. Dr. Tantuwaya testified in this proceeding. In addition to performing a full physical examination, Dr. Tantuwaya reviewed Mr. Trejo's August 2014 MRI. He found multilevel disc desiccations, bulging, and loss of height. Dr. Tantuwaya also reviewed the July 2010 MRI, where he observed disc protrusion, which abutted and impinged the traversing L5 root.

21. Dr. Tantuwaya believed that Mr. Trejo had objective signs of a right L5 radiculopathy and components of an S1 radiculopathy. This was consistent with the 2010 MRI, which demonstrated a right L4-L5 disc herniation with compression of the traversing right L5 root. Dr. Tantuwaya believed that Mr. Trejo only received conservative management despite a lack of improvement and opined that Mr. Trejo would have been an

appropriate candidate for surgical intervention, which would have likely prevented the long-term pain Mr. Trejo now experiences. Dr. Tantuwaya believed that the duration of the compression of the nerve likely caused permanent deficits of his L5 root.

22. Dr. Tantuwaya noted that Mr. Trejo has had gastrointestinal symptoms from his non-steroidal anti-inflammatory. He started Mr. Trejo on Tylenol with codeine and recommended physical therapy.

23. Dr. Tantuwaya disagreed with Dr. O'Meara's conclusion that Mr. Trejo was not substantially incapacitated from performing the duties of a correctional officer. Dr. Tantuwaya believed there were clear and legitimate reasons for Mr. Trejo to be suffering from chronic back pain based on his history and injury. Significantly, Dr. Tantuwaya believed there was system concordance with Mr. Trejo's descriptions of pain and weakness. That is, there was objective evidence validating Mr. Trejo's complaint of pain. His pain descriptions fit the anatomical pattern of L5-S1 radiculopathy.

24. Dr. Tantuwaya reviewed the essential job duties and functions of a correctional officer. He opined that Mr. Trejo would be incapable of prolonged standing, walking, and sitting. Mr. Trejo's ability to bear weight, twist, and bend have been severely compromised, and he would be unable to effectively and safely restrain an inmate. Mr. Trejo's limitations would prevent him from running for sustained periods of time, climbing multiple flights of stairs, and driving for extended periods of time. Considering all of these factors, Dr. Tantuwaya believed Mr. Trejo remains substantially incapacitated from the customary duties of a correctional officer. Dr. Tantuwaya testified that he is familiar with the CalPERS standard for substantial disability and recognizes that it is higher than other standards for disability.

25. Dr. Tantuwaya was an extremely knowledgeable, credible, and persuasive witness. Dr. Tantuwaya did not overstate Mr. Trejo's condition, he has discussed conservative medical treatment with Mr. Trejo, and he convincingly explained why Mr. Trejo continues to be permanently incapacitated and disabled from performing his job duties as a correctional officer. As Mr. Trejo's treating physician, he had the opportunity to meet with, observe, and physically examine Mr. Trejo on several occasions.

Evaluation of the Medical Evidence

26. Dr. O'Meara and Dr. Tantuwaya qualified as medical experts. In resolving the conflict in their testimony, the expert's opinions, and the reasons for them, were weighed against the other expert's opinions and reasons to the contrary. In resolving the conflict, it is found that Dr. Tantuwaya had more professional contact with Mr. Trejo than Dr. O'Meara, and he was in a far better position to assess what Mr. Trejo could and could not do. Additionally, unlike Dr. O'Meara, Dr. Tantuwaya is a neurological surgeon specializing in the spine. Dr. O'Meara had not reviewed any of Mr. Trejo's medical history prior to his examination. Although Mr. Trejo reported to Dr. O'Meara that he was experiencing chronic pain in his back and legs, and had difficulty performing essential tasks of a correctional

officer such as walking, standing, running, crouching, bending, and lifting, Dr. O'Meara seemed to base his finding on a fairly limited physical examination and belief that Mr. Trejo was never substantially disabled in the first place. Finally, it was not clear if Dr. O'Meara specifically reviewed the essential functions of a correctional officer in reaching his conclusion.

27. A preponderance of the credible medical opinion and other evidence established that Mr. Trejo currently suffers from a low back disability that precludes him from performing the usual and customary duties of a correctional officer. Those duties have not changed since CalPERS approved Mr. Trejo's industrial disability retirement. As a result of his low back condition, Mr. Trejo is precluded from many of the essential functions, such as standing and sitting for long periods of time; running; bending, crouching and stooping; climbing flights of stairs; continuously using a gas pedal; and perhaps most importantly, being able to safely defend himself and his coworkers from an inmate attack. Mr. Trejo remains permanently disabled and incapacitated from performing the usual and customary duties of a correctional officer.

LEGAL CONCLUSIONS

Purpose of the Retirement Law

1. The legislative purpose of public employee pension programs is well-established. They serve two objectives: to induce persons to enter and continue in public service, and to provide subsistence for disabled or retired employees and their dependents. Disability pension laws are intended to alleviate the harshness that would accompany the termination of an employee who has become medically unable to perform his duties. (*Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, 1304.)

Burden and Standard of Proof

2. Evidence Code section 500 provides that, except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that the party is asserting.

3. Evidence Code section 115 defines "burden of proof" as a party's obligation "to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." Unless specified, the burden of proof requires proof by a preponderance of the evidence.

4. In this proceeding, CalPERS had the burden of proving by a preponderance of the evidence that circumstances had changed, that Mr. Trejo was no longer substantially incapacitated from performing the duties of a correctional officer, that Mr. Trejo was capable of returning to work, and that Mr. Trejo should be reinstated to his former employment as a correctional officer.

Applicable Statutes

5. Government Code section 20026 defines the terms “disability” and “incapacity for performance of duty,” when used as a basis for retirement, to mean a “disability of permanent or extended and uncertain duration” that is based on “competent medical opinion.”

6. Government Code section 21151, subdivision (a), provides that a state safety or state peace officer who is “incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability. . . regardless of age or amount of service.”

7. Government Code section 21156 provides that if the evidence demonstrates that the member 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. The determination of incapacitation shall be based on competent medical opinion.

8. Government Code section 21192 provides that recipients of a disability retirement allowance under the minimum age for voluntary retirement for service may be required to undergo a medical examination. Based on the results of that examination, CalPERS shall determine whether or not the member is still incapacitated from performing his or her job duties.

9. Government Code section 21193 provides that if the member is determined to no longer be eligible for a disability retirement, it shall be canceled and the member shall be reinstated.

Eligibility for a Disability Retirement

10. “Incapacitated for the performance of duty” means the substantial inability of the applicant to perform his or her usual duties. An employee who is incapacitated only to a limited extent is not entitled to disability retirement. (*Mansperger v. Public Employees’ Retirement System* (1979) 6 Cal.App.3d 873, 875-877.) 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.)

Conclusion


11. A preponderance of the competent medical opinion and other reliable evidence established that Mr. Trejo remains substantially incapacitated from performing the usual and customary duties required of a correctional officer. He is incapable of returning to work as a correctional officer as a result of his inability to perform many of the essential functions, such as standing and sitting for long periods of time; running; bending, crouching and stooping. He is not sufficiently fit to be reinstated to his former employment as a

correctional officer because he cannot meet the demands of the position and because reinstatement would result in his being ineffective and a danger to himself and others. His industrial disability allowance should not be cancelled.

ORDER

Arturo Trejo's appeal from CalPERS's determination that he is no longer eligible for a disability retirement is granted. Arturo Trejo remains substantially incapacitated from performing the usual and customary duties of a correctional officer and shall remain on disability retirement.

DATED: October 18, 2016

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ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings