

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:

LA'TISHA C. WALKER-RICE,

Respondent,

and

CORRECTIONAL TRAINING FACILITY,
CALIFORNIA DEPARTMENT OF
CORRECTIONS,

Respondent.

Case No. 2016-0122

OAH No. 2016050554

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on October 25, 2016.

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

La'Tisha C. Walker-Rice, respondent, represented herself.

There was no appearance by Correctional Training Facility, California Department of Corrections. Upon proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default against the department pursuant to Government Code section 11520.

On October 25, 2016, the matter was submitted.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED Nov. 17, 2016

Shimmer D. Anglett

ISSUE

Was Ms. Walker-Rice permanently disabled or incapacitated from performing the regular and customary duties of a correctional officer with the department due to her orthopedic condition? Although Ms. Walker-Rice submitted evidence at the hearing that she is undergoing treatment for a psychological condition, that claim was not at issue in this hearing. The denial of consideration of that issue is without prejudice to Ms. Walker-Rice properly asserting that claim in the future.

SUMMARY OF DECISION

Ms. Walker-Rice had the burden to prove that she was permanently disabled or incapacitated from performing her regular and customary job duties due to her orthopedic conditions. The evidence did not support her claim that she was permanently disabled or incapacitated from performing the regular and customary duties of a correctional officer due to those conditions. Ms. Walker-Rice's claim for disability retirement is denied without prejudice to her filing a disability application for psychological injuries.

FACTUAL FINDINGS

Preliminary Matters

1. Ms. Walker-Rice was employed by the department as a correctional officer. By virtue of her employment, Ms. Walker-Rice was a state safety member of CalPERS subject to Government Code section 21151.
2. On March 6, 2015, Ms. Walker-Rice filed a Disability Retirement Election Application with CalPERS. She was not working when she filed her application. Ms. Walker-Rice claimed the right to receive a disability retirement because she injured "her back and both wrists" when she slipped and fell on food an inmate had thrown on the floor. Ms. Walker-Rice identified Ronald Fujimoto, D.O., as her treating physician.
3. CalPERS obtained medical records and reports related to Ms. Walker-Rice's orthopedic conditions and selected Robert J. Kolesnik, M.D., a board certified orthopedic surgeon to perform a disability evaluation. Dr. Kolesnik provided CalPERS with narrative reports of his findings and conclusions. After reviewing all of those documents, CalPERS determined that when Ms. Walker-Rice filed her application for a disability retirement, she was not permanently disabled or incapacitated from performing the usual and customary duties of a correctional officer.
4. On July 24, 2015, CalPERS notified Ms. Walker-Rice that her application for disability retirement was denied. CalPERS advised her of her right to appeal.

5. On August 23, 2015, Ms. Walker-Rice timely filed her appeal.

6. On April 19, 2016, petitioner filed the statement of issues in his official capacity. The statement of issues and other jurisdictional documents were served on all respondents. Ms. Walker-Rice requested a hearing. The department did not respond to the statement of issues or appear in this matter and the matter proceeded against it as a default.

Job Description Documents

7. The Essential Functions of a correctional officer and the Physical Requirements of that position outlined the tasks and physical requirements of that position. Dr. Kolesnik relied upon those records in formulating his opinions.

CalPERS's Medical Evaluation Conducted by Dr. Kolesnik and His Supplemental Report

8. CalPERS obtained Ms. Walker-Rice's medical records and sent those to Dr. Kolesnik to review. Dr. Kolesnik authored a report on June 16, 2015, discussing the orthopedic disability evaluation he performed for CalPERS. In his report, Dr. Kolesnik noted that he took a history of the injury, an employment history, an occupational history and performed a physical examination. Dr. Kolesnik reviewed numerous medical records CalPERS provided and summarized his findings in his report.

During his examination of her wrists, Dr. Kolesnik noted that the alignment of both wrists was normal, with an angular rotary deformity. There was minimal tenderness to palpation over the dorsal radial aspect of the right wrist. There was no tenderness about the left wrist. The soft tissues were intact, without fluctuance or induration. There was mild pain about the dorsal radial aspect of the right wrist with resisted dorsiflexion and palmar flexion of the wrist, both in neutral as well as in radial and ulnar deviation. Ms. Walker-Rice experienced no pain with resisted dorsiflexion and palmar flexion of the left wrist, either in neutral or in radial or ulnar deviation. She had full range of motion of her fingers and hands.

During the lumbar spine examination, Dr. Kolesnik found mild tenderness in the midline at the thoracolumbar junction, and no tenderness in the remaining portion of the lumbar spine or at the lumbosacral junction. There was no paraspinal tenderness or muscle spasm and no tenderness elicited with deep palpation of either sciatic notch. During active range of motion of the lumbar spine Ms. Walker-Rice grimaced and complained of pain with all motions. There was decreased range of motion during lumbar spine and lower extremity examinations.

Dr. Kolesnik's assessment was bilateral wrist sprains-resolved and lumbosacral strain with mild facet arthritis. He opined that there were no specific job duties that Ms. Walker-Rice was unable to perform and that she was not substantially incapacitated for performance of her duties. He noted that, although Ms. Walker-Rice cooperated with the exam, there was

some exaggeration of her complaints. Dr. Kolesnik attributed her complaints to her fall at work.

9. On July 8, 2015, and October 6, 2015, Dr. Kolesnik authored supplemental reports because he was provided with additional medical records to review. Those reviews did not alter his opinions contained in his June 16, 2015, report.

Dr. Kolesnik's Testimony

10. Dr. Kolesnik obtained his medical degree in 1979 from the University of Southern California. He did his internship and residency in orthopedic surgery at Los Angeles County/University of Southern California Medical Center. He did a fellowship in hand and microvascular surgery at the University of Colorado Health Science Center. He is board-certified in orthopedic surgery. He is currently on staff at three Southern California hospitals. He has a private practice and has been performing CalPERS's disability evaluations for approximately one year.

Dr. Kolesnik testified consistent with his report, opining that Ms. Walker-Rice did not qualify for an industrial disability. He testified that the MRI findings as documented in the medical records were not abnormal, showed mild degeneration but showed no evidence of nerve compression. He explained that the findings on the MRI were minimal and nothing that would cause the pain of which Ms. Walker-Rice complains.

Dr. Kolesnik also reviewed the records Ms. Walker-Rice produced at the hearing. He testified that he was not qualified to comment on the psychological records, but his review of the medical records did not change his opinions. Moreover, he questioned the veracity of the records because the injuries and limitations described in them were greater than he observed and documented during his evaluation. He testified that the increased limitations in Ms. Walker-Rice's condition "made no medical sense."

Based upon his review of all the records, and his examination, Dr. Kolesnik testified that Ms. Walker-Rice was not substantially incapacitated from performing her usual job duties.

Records Ms. Walker-Rice Produced At Hearing¹

11. A September 9, 2016, qualified medical evaluation report written by John Greene, M.D., outlined Ms. Walker-Rice's psychiatric injuries caused by her injury at work. While the report determined that Ms. Walker Rice suffered from major depressive disorder, generalized anxiety and pain disorder, the report was insufficient to support the issue

¹ A protective order was issued sealing claimant's psychiatric reports and records, Exhibits 14 and 15. Those records may be reviewed by Ms. Walker-Rice, CalPERS, their agents and representatives, as well as reviewing physicians retained by the parties, but may not be produced to the public absent a court order.

presented at this hearing: Whether she had an orthopedic condition that prevented her from performing her job duties. This report, alone, absent any supporting testimony, did not constitute competent medical evidence and was insufficient to support a claim. If Ms. Walker-Rice intends to file a disability retirement claim alleging psychiatric injury, she needs to file that claim with CalPERS and be evaluated under the CalPERS disability standards.

12. A May 4, 2016, agreed medical examination performed by Jonathan Ng, M.D., identified psychoemotional stress, sleep disturbance and sexual a disturbance caused by Ms. Walker-Rice's work injury. As Dr. Ng did not perform a CalPERS disability evaluation, his report did not constitute competent medical evidence and addressed issues beyond the scope of Ms. Walker-Rice's orthopedic disability retirement claim.

13. 2016 Progress notes from Kaiser, including reports from an April 2016 MRI documented Ms. Walker-Rice's complaints and assessments made, but did not constitute competent medical evidence sufficient to refute Dr. Kolesnik's opinions.

14. A May 12, 2016, functional capacity evaluation was performed that indicated the essential functions and physical requirements of correctional officers was reviewed and considered. The test was performed as part of Ms. Walker-Rice's workers' compensation case. The report concluded that Ms. Walker-Rice was able to return to work full time at a "sedentary physical demand capacity." There is no indication in the report that the CalPERS disability retirement standards were used making this report non-persuasive.

15. Ms. Walker-Rice introduced emails and correspondence demonstrating her many attempts to seek employment.

16. A November 3, 2015, follow-up medical evaluation performed by chiropractor Stephen Whitelaw as part of the workers' compensation case outlined Ms. Walker-Rice's temporary work disability and work restrictions. There is no indication in the report that the CalPERS disability retirement standards were used making this report non-persuasive.

17. December 18, 2014, March 27, 2015, June 19, 2015, September 11, 2015, and October 7, 2016, reports from Ronald Fujimoto, D.O., as part of Ms. Walker-Rice's workers' compensation case, noted the physical and psychological injuries caused by her injury at work and her physical limitations. There is no indication in the reports that the CalPERS disability retirement standards were used making these reports non-persuasive.

Ms. Walker-Rice's Testimony

18. Ms. Walker-Rice presented as a very credible, (but?) ??? emotional witness. It is clear that the loss of her employment is greatly upsetting to her and has devastated her life. She described how it ended her marriage, has resulted in her relocating to Southern California away from her husband and child, and she detailed the wrist pain, back pain, and

psychological injuries she suffered because of her injury at work. She described her love of her job and her desire to be gainfully employed again.

Although Ms. Walker-Rice's testimony regarding her physical limitations was sincere, she failed to introduce competent medical evidence to support her orthopedic claim. She explained that she was "more focused" on her back injury than her wrist injury when she saw Dr. Kolesnik, but now her wrists are her primary concern. She claimed her condition is worsening over time. Nevertheless, her testimony and the records she submitted at hearing were insufficient to refute the competent medical opinions expressed by Dr. Kolesnik.

While she may well have a valid psychological disability retirement claim, that issue was not before the administrative law judge at this hearing and cannot be considered. Ms. Walker-Rice may submit a disability retirement application alleging psychological injury if she wishes to pursue that claim so CalPERS can properly evaluate it.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Applicable Statutes

2. Government Code section 20026 defines "disability" and "incapacity for performance of duty," for purposes of a retirement, to mean "disability of permanent or extended and uncertain duration" based on "competent medical opinion."

3. Government Code section 21150, subdivision (a), provides that a member who is "incapacitated for the performance of a duty" shall receive a disability retirement.

4. Government Code section 21156 provides that if the medical evaluation or other evidence demonstrates that an eligible member is incapacitated physically or mentally, then CalPERS shall immediately retire the member for disability. The determination of incapacitation shall be based on competent medical opinion.

Appellate Authority

5. "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 public employee is not "incapacitated" and does not qualify for a disability retirement. (*Mansperger v. Public*

Employees' Retirement System (1970) 6 Cal.App.3d 873; *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1057.)

6. Although the Public Employees' Retirement Law and the workers' compensation law are aimed at the same general goals with regard to the welfare of employees and their dependents, they represent distinct legislative schemes. Courts may not assume that the provisions of one apply to the other absent a clear indication from the Legislature. (*Pearl v. W.C.A.B.* (2001) 26 Cal.4th 189, 197.)

7. Receipt of any type of disability in a related workers' compensation proceeding does not establish qualification for a disability retirement. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) Nor does the issuance of prophylactic work restrictions or a reasonable fear of injury justify granting an industrial disability retirement. (*Hosford, supra.*) Workers' compensation appeal board determinations do not apply to industrial disability retirement proceedings. (*English v. Board of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal. App. 3d 839, 844-845; *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

Precedential Decisions

8. CalPERS filed a request that Official Notice be taken of three precedential decisions. Government Code section 11425.60 authorizes agencies to designate decisions as precedential that contain "a significant legal or policy determination of general application that is likely to recur." Precedential decisions may be expressly relied upon by the administrative law judge and the agency. Official Notice was taken of *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (OAH No. L-1990 906-0537), *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Theresa V. Hasan* (OAH No. N-1990 910-0099), and *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Ruth A. Keck* (OAH No. L-1990 9120097).

In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes involved an injured CHP officer whose employer-retained physician determined he could not return to work but the CalPERS-retained physician determined that he could. The decision stands for the proposition that the opinions of the CalPERS-retained physician, who offered competent medical evidence and who applied the CalPERS industrial disability criteria, were the correct opinions.

In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Theresa V. Hasan involved an injured parole agent and stands for the proposition that prophylactic limitations are insufficient to support a finding of disability and competent medical evidence must be offered to establish that claim.

In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Ruth A. Keck involved an injured school district clerk typist and stands for the proposition that the difficulty performing a task is insufficient, competent medical evidence is required to establish disability and an employer cannot terminate a CalPERS member for medical reasons after CalPERS has denied a disability retirement.

Evaluation

9. In order to qualify for a disability retirement, Ms. Walker-Rice must demonstrate that she was permanently disabled or incapacitated from performing the regular and customary duties of a correctional officer when she filed her application. Any award Ms. Walker-Rice may have received in her worker's compensation case does not establish eligibility for a CalPERS disability retirement. The evidence demonstrated that Ms. Walker-Rice has orthopedic diagnoses, has received treatment for those conditions, and is currently undergoing treatment, but her conditions did not establish that she was permanently disabled or incapacitated from performing her regular and customary job duties. While she claimed her orthopedic condition was deteriorating, she did not introduce competent medical opinions to support her claim. As such, her application must be denied.

Moreover, Ms. Walker-Rice's psychiatric conditions cannot be considered in this case because her application for disability retirement did not seek retirement for those injuries, CalPERS has never evaluated her for those contentions, and no competent medical evidence using the CalPERS disability standards about them was put forth. This finding is made without prejudice to Ms. Walker-Rice filing a claim for industrial disability due to her alleged psychological condition and having that claim evaluated by CalPERS.

Cause Exists to Deny the Application

10. Cause exists to deny Ms. Walker-Rice's application for a disability retirement. A preponderance of the evidence did not establish that Ms. Walker-Rice was permanently disabled and incapacitated from performing the regular and customary duties of a correctional officer as a result of her orthopedic condition when she filed her application for a disability retirement with CalPERS.

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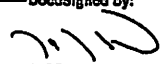
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ORDER

The application for a disability retirement filed by La'Tisha Walker-Rice with the California Public Employees Retirement System on March 6, 2015, is denied. CalPERS's denial of Ms. Walker-Rice's application is affirmed.

DATED: November 15, 2016

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MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings