

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:

ANTHONY LEE,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS & REHABILITATION -
CALIFORNIA CORRECTIONAL
INSTITUTION,

Respondents.

Case No. 2015-0985

OAH No. 2016060646

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on December 7, 2016, in Glendale, California.

Charles Glauberman, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS). Respondent Anthony Lee (respondent) appeared and represented himself. No appearances were made by or on behalf of respondent California Department of Corrections & Rehabilitation-California Correctional Institution.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on December 7, 2016.

FACTUAL FINDINGS

Parties and Jurisdiction

1. On March 29, 2016, Anthony Suine, Chief of the Benefits Services Division of CalPERS, filed the Statement of Issues while acting in his official capacity.

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2. At the time he filed his application for disability retirement, respondent was employed as a Stationary Engineer with California Department of Corrections & Rehabilitation-California Correctional Institution (Department of Corrections). By virtue of his employment, respondent is a "state safety member" of CalPERS.

3. On August 11, 2014, respondent signed, and subsequently filed, an application for industrial disability retirement (application), claiming disability on the basis of an orthopedic condition (right shoulder). In the application, respondent claimed that, on December 5, 2012, while "working on the roof of a walk in freezer, [he] had to carry multiple pieces of equipment up and down a ladder and suffered [an] injury to [his] right shoulder." (Ex. 3.) Respondent indicated in the application that his injury resulted in the following limitations/preclusions: "No heavy lifting, carrying, pushing, or pulling overhead lifting, or working, and prolonged or repetitive motion of the right shoulder." (Ex. 3.) Respondent noted that, due to his physical condition, he was "no longer able to perform the essential functions of [his] job." (Ex. 3.)

4. After a review of the medical reports submitted by respondent in support of his application, CalPERS determined that respondent was not substantially incapacitated for performance of his duties as a Stationary Engineer with the Department of Corrections at the time the application was filed.

5. In a letter dated June 15, 2015, CalPERS notified respondent of its determination that he was not substantially incapacitated for the performance of his duties as a Stationary Engineer and that his application was denied.

6. In a letter dated July 2, 2015, respondent timely appealed the denial and requested an administrative hearing.

7. The issue on appeal is whether, at the time of the application, on the basis of an orthopedic condition (right shoulder), respondent is permanently disabled or substantially incapacitated from the performance of his duties as a Stationary Engineer for the Department of Corrections.

Respondent's Job Duties

8. Respondent worked as a Stationary Engineer for the Department of Corrections from June 2000 to December 5, 2012, when he was placed on temporary disability.

9. According to a description issued by the Department of Corrections, a Stationary Engineer "performs a variety of skilled work in the operation, maintenance and repair of boiler, heating, air conditioning, ventilation, lighting, power, water treatment, and other mechanical systems normally found in a state hospital, institution, large office building or complex of buildings." (Ex. 9.) The description further indicated that the daily job duties of a Stationary Engineer include the following: standing and walking; lifting and carrying;

bending/ stooping and reaching in front of body; climbing and reaching overhead; pushing/pulling; among other physical activities. Standing and walking are frequent activities (one-third to two-thirds of a work day) which involve walks throughout the prison grounds back and forth to various work sites to repair equipment, and standing while making some repairs to the various types of equipment. Lifting and carrying are occasional to frequent activities (less than one third to two-thirds of a work day), which involve lifting and carrying a tool bag weighing approximately 20 pounds and carrying tools and materials to perform repair jobs. Bending/ stooping and reaching in front of body are frequent activities (one-third to two-thirds of a work day), which involve bending and reaching hands forward while inspecting and repairing equipment. Climbing and reaching overhead are occasional activities (one-third or less of a workday), which involve utilizing the ladder to access the roof and doing overhead work on the ladder. Pushing and pulling are occasional activities (one-third or less of a workday), which involve pushing and pulling against parts, tools, and equipment.

10. On August 18, 2014, respondent signed a "Physical Requirements Position/Occupational Title" form (Physical Requirements form) which was submitted to CalPERS. According to the Physical Requirements form, when working as a Stationary Engineer, respondent: (1) constantly (over 6 hours a day), lifted from zero to 10 pounds; (2) frequently (three to six hours a day), sat; stood; walked; reached below the shoulders; engaged in fine manipulation and simple grasping; repetitively used his hands; lifted between 11 to 25 pounds; walked on uneven ground; drove; was exposed to excessive noise; was exposed to extreme temperature, humidity, and wetness; was exposed to dust, gas, fumes, or chemicals; operated foot controls or repetitive movement; and used special visual or auditory protective equipment; and (3) occasionally (up to three hours a day), crawled; kneeled; climbed; squatted; bent and twisted at his neck and waist; reached above the shoulders; pushed and pulled; used a keyboard and mouse; lifted between 26 and 100 pounds; and worked at heights.

Injury and Treatment

11. On December 5, 2012, while respondent was climbing a ladder and carrying tools and a refrigerant compressor weighing approximately 50 pounds, he began to experience pain on his right shoulder. Respondent could not finish the job and had difficulty climbing down from the ladder. Respondent reported his injuries to his supervisor and went home. The next day, respondent received treatment at High Desert Medical Group where x-rays were taken and pain medication was prescribed.

12. Two weeks after the incident, respondent began chiropractic treatment with Rodrigo Sanchez, D.C.

13. A. On December 17, 2013, after almost a year of chiropractic treatment which did not help with the pain in his right shoulder, respondent sought treatment from Thuong Vo, M.D., a pain management doctor. Respondent complained of a constant pain which worsened with cold weather and movement. Respondent rated his pain as an average

of seven on a scale of 10. Dr. Vo recommended steroid injections in the right shoulder, daily stretching, and walking or other low impact exercises. Dr. Vo also prescribed a shoulder brace for respondent.

B. On January 8, 2014, Dr. Vo noted that respondent's right shoulder condition had not changed since the last visit and that respondent continued to experience pain in the region. Dr. Vo subsequently referred respondent to an orthopedic surgeon, Mark Ganjinpour, MD.

14. A. On January 29, 2014, Dr. Ganjinpour saw respondent and diagnosed him with frozen shoulder (right shoulder) with acromioclavicular joint degeneration, and continued pain and stiffness despite multiple rounds of physical therapy and two cortisone injections.

B. On February 25, 2014, Dr. Ganjinpour performed surgery on respondent's right shoulder. Dr. Ganjinpour's diagnosis of respondent's condition at the time of the surgery was right shoulder impingement syndrome, with a right shoulder bursal side rotator cuff tear measuring 10 percent of the bursal side of the rotator cuff and labral tearing. The operation performed was a right shoulder arthroscopy, extensive intra-articular shaving labral debridement, subacromial bursectomy, arthroscopic debridement of the rotator cuff, and Mumford procedure which is the excision of the distal end of the clavicle.

C. On March 7, 2014, one week post-operation, respondent reported severe pain and spasms. However, on March 17, 2014, two weeks post-operation, respondent reported to Dr. Ganjinpour that he was feeling better, with some soreness and decreased spasms. Dr. Ganjinpour recommended for respondent to start post-operation physical therapy and to work on home exercises to regain range of motion.

D. On July 21, 2014, after having completed 24 sessions of post-operation physical therapy, respondent reported to Dr. Ganjianpour that he was feeling better, although he experienced occasional pain, stiffness of the shoulder, and limited motion. Respondent continued to receive physical therapy sessions from Kinetix Advanced Physical Therapy and chiropractic sessions from Rodrigo Sanchez.

15. As set forth above in Factual Finding 3, on August 11, 2014, respondent signed, and subsequently filed, an application for industrial disability retirement (application), claiming disability on the basis of orthopedic condition (right shoulder).

Independent Medical Evaluation

16. On May 11, 2015, John D. Kaufman, M.D., conducted an Independent Medical Evaluation (IME) of respondent at the request of CalPERS. Dr. Kaufman is a board-certified orthopedic surgeon with over 40 years of experience in his field. He contracts with CalPERS to perform IMEs.

17. As a part of the IME of respondent, Dr. Kaufman interviewed respondent, obtained a medical and work history, and conducted a physical examination. He also reviewed respondent's job description, the physical requirements of a Stationary Engineer, and respondent's medical records relating to his right shoulder condition.

18. Dr. Kaufman noted that, at the time of the evaluation, respondent was a 50-year-old right-hand dominant male who was cooperative and friendly throughout the examination. When asked to provide his medical history, respondent complained of constant pain in his shoulders that occasionally radiated down the right arm. He stated that he also experienced occasional numbness around the upper part of his right arm. Respondent also asserted that he could not return to work because he could no longer lift or carry heavy tools or equipment.

19. A. On physical examination, Dr. Kaufman found that there were three well-healed arthroscopy portal incisions on respondent's right shoulder. Dr. Kaufman did not find any deformity or any swelling, although he found moderate to severe tenderness throughout respondent's entire right shoulder. Respondent had normal motion in the right elbow, wrist, hand, and fingers.

B. Dr. Kaufman obtained the following range of motion, in degrees, from respondent's right shoulder: flexion 80/180; abduction 90/180; internal rotation 70/90; external rotation 30/45; and extension 25/75. Dr. Kaufman measured respondent's arm and forearm circumference at maximum circumference and obtained the following results: right arm, 13.5 inches; left arm, 13 inches; right forearm, 11.5 inches; and left forearm, 11.5 inches. Dr. Kaufman also measured respondent's grip strength using the Jamar Dynamometer (Jamar grip strength test) and obtained the following readings in pounds: right 30, 45, 40; left 95, 110, 95.

C. At the administrative hearing, Dr. Kaufman noted that, on the Jamar grip strength test, respondent's right arm was significantly weaker than the left arm. However, Dr. Kaufman emphasized that while measurements of respondent's arm and forearm circumference are objective findings, measurements of respondent's range of motion and grip strength are subjective findings. Dr. Kaufman explained that tests for range of motion and grip strength are subjective because the patient can determine the outcome of these tests by putting forth as much or as little effort as he wishes.

20. A. Based on the patient history provided by respondent, the objective medical findings from the physical examination, and the review of prior medical records, Dr. Kaufman found that respondent has completely recovered from his shoulder injury and the subsequent operation. Dr. Kaufman concluded that respondent's complaints were exaggerated and that respondent is not substantially incapacitated for the performance of his duties as a Stationary Engineer.

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B. Specifically, Dr. Kaufman did not find any objective evidence of pathology during the physical exam. Of particular significance was the fact that respondent's right arm circumference was larger than his left arm. Dr. Kaufman opined that

[i]f respondent had a disability regarding his right upper extremity and right shoulder[,] he would have muscle atrophy and his right arm and forearm circumferences would be smaller than his left. The fact that his right arm is larger and his right forearm is equal to the left forearm indicates that he has been using his right upper extremity in a normal manner. (Ex. 7.)

C. In addition, Dr. Kaufman reviewed respondent's magnetic resonance imaging (MRI) report of March 15, 2013, and found that there was no indication of a serious injury. The MRI report indicated that respondent suffered mild rotator cuff tendinitis but no tears. Although the MRI report also showed that respondent had arthritis in the acromioclavicular joint, it was preexisting to respondent's shoulder injury.

D. With respect to Dr. Ganjinpour's diagnosis that respondent had bursal side rotator cuff and labral tearing, Dr. Kaufman opined that bursal side rotator cuff tears generally do not cause symptoms and that most labral tears in respondent's age group are age-related and asymptomatic.

E. At the administrative hearing, Dr. Kaufman testified consistently with the findings and conclusions of his report.

Respondent's Evidence

21. At the administrative hearing, respondent testified that he continues to experience pain in his right shoulder and that he "has not been the same person since the surgery." Respondent disagreed with Dr. Kaufman's opinion that he could return to work.

22. Respondent did not call any other witnesses to testify regarding his medical condition.

LEGAL CONCLUSIONS

1. Respondent has not established that he is entitled to retirement for disability, as set forth in Factual Findings 8 through 22, and Legal Conclusions 2 through 7.

2. In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof, including the both the initial burden of going forward and the burden of persuasion, by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, note 5.) In this case, therefore, respondent has the burden of establishing by a preponderance of the evidence that he is entitled to an industrial disability retirement. He has not met this burden.

3. Government Code section 21151 provides, in pertinent part:

(a) 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. . . .

4. Government Code section 20026, states, in pertinent 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.

5. “Incapacitated for the performance of duty,” means the “substantial inability of the applicant to perform his usual duties,” as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) Restrictions which are imposed only because of a risk of future injury are insufficient to support a finding of disability. (*Hosford, supra*, 77 Cal.App.3d at p. 862 –863.) The fact that a small percentage of duties could not be performed does not result in a substantial inability to perform. (*Ibid.*) The claimed disability may not be prospective and speculative and must be presently in existence. (*Ibid.*)

6. In *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, the Court of Appeal held that a deputy sheriff was not permanently incapacitated for the performance of his duties. The court stated, “A review of the physician’s reports reflects that aside from 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.” (*Id.* at p. 697). 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.)

7. In this case, although Dr. Vo and Dr. Ganjinpour treated respondent, there was no evidence of either physician having proffered an opinion about whether respondent was substantially incapacitated for the performance of his job duties. Dr. Kaufman was the only physician who rendered an opinion about respondent’s condition using the disability standards under the holdings of *Mansperger* and *Hosford*. Dr. Kaufman’s report and expert testimony established that respondent’s complaints were exaggerated and that respondent was not substantially incapacitated to perform his job duties. Dr. Kaufman’s opinion was reasonable, supported by the evidence, and unrefuted. Respondent did not present any evidence regarding whether the lack of atrophy in respondent’s right arm signified normal usage of the arm, whether the results from the range of motion or Jamar grip tests constituted

subjective findings, whether the MRI report of March 15, 2013 indicated any serious injury, and whether bursal side rotator cuff and labral tears are generally asymptomatic. In sum, respondent offered only subjective symptoms of on-going pain in his right shoulder without presenting any competent medical opinion of permanent incapacity. Thus, there is no reason to conclude that respondent's right shoulder problem would preclude him from performing his usual job duties with the Department of Corrections, even though his medical condition may cause him discomfort or difficulty in the performance of his job duties. Based on the record presented in this case, the totality of the evidence established that respondent is not incapacitated for the performance of his duties as a Stationary Engineer with the Department of Corrections based on an orthopedic condition (right shoulder).

ORDER

The appeal of respondent Anthony Lee, seeking retirement for disability as a state safety member of CalPERS, is denied.

DATED: December 27, 2016

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JI-LAN ZANG
Administrative Law Judge
Office of Administrative Hearings