

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:

RICHARD T. AYALA,

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
VALLEY STATE PRISON,

Respondent.

Case No. 2015-0380

OAH No. 2016061035

PROPOSED DECISION

This matter was heard before Administrative Law Judge (ALJ) Ed Washington, Office of Administrative Hearings (OAH), State of California, in Sacramento, California, on October 24, 2016, and November 29, 2016.

Senior Staff Attorney Cynthia A. Rodriguez represented the California Public Employees' Retirement System (CalPERS).

Richard T. Ayala (respondent) represented himself.

CalPERS properly served California Department of Corrections and Rehabilitation, Pleasant Valley State Prison (CDCR) with the Statement of Issues and Notice of Hearing. CDCR made no appearance. This matter proceeded as a default against CDCR pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on November 29, 2016.

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ISSUE

Was respondent permanently disabled and substantially incapacitated from performing his usual and customary duties as a Correctional Officer for CDCR based on an orthopedic (left shoulder and left wrist) condition when he applied for service pending industrial disability retirement?

FACTUAL FINDINGS

1. Respondent was born in 1955. He worked as a Correctional Officer for CDCR. On June 20, 2014, respondent signed a Disability Retirement Election Application (application), seeking service retirement pending industrial disability retirement, and subsequently filed the application with CalPERS. Respondent retired for service effective September 1, 2014, and has been receiving his service retirement allowance from that date.

Respondent's Application

2. In his application, respondent described his disability as "(Left shoulder) Torn rotator cuff. (Left wrist) No formal diagnoses to date, however, I have been advised that I have possible nerve damage." He stated that his disability occurred on November 20, 2013, as follows:

While escorting an inmate out of his assigned housing in restraints he dropped to the ground abruptly and wrapped his legs around mine which caused me to fall to the ground with him and suffer my injuries. Additionally, when the inmate was falling I tried to hold him up which very likely added to my injury.

3. Respondent described his limitations/preclusions due to his condition as, "No use of left arm, heavy lifting, pushing or pulling and carrying." He stated that, "Due to my physical condition and physicians restrictions I am no longer able to perform the essential functions of my job." He provided the following other information:

To date I have not had surgery for my injuries, however, there is a possibility it will be necessary in the future. At this point, I continue to experience constant pain throbbing which radiates from my left shoulder down through my left hand, limited range of motion, loss of strength and a diminished grip strength. It should also be noted that due to overcompensation, I now have pain in my right shoulder, arm, and hand, as well as I now experience cervical pain.

4. On January 14, 2015, CalPERS notified respondent that his application had been denied. Respondent timely appealed from the denial.

Duties of Correctional Officer

5. CalPERS submitted two exhibits that describe the duties of a Correctional Officer: (1) a CDCR Division of Adult Institutions, Correctional Officer, Essential Functions; and (2) a completed CalPERS Physical Requirements of Position/Occupational Title form for the Correctional Officer position at Valley State Prison.

6. The essential functions of a Correctional Officer relevant to this matter include the following: (1) range qualifying with departmentally approved weapons and firing weapon in combat/emergency situations; (2) swinging a baton with force; (3) disarming, subduing and applying restraints to an inmate; (4) defending against an inmate armed with a weapon; (5) climbing occasionally to frequently, ascending/descending or climbing a series of steps/stairs, several tiers of stairs or ladders, and climbing onto bunks/beds while involved in cell searches and carrying items while climbing stairs; (6) crawling and crouching occasionally and crouching while firing a weapon or while involved in property searches; (7) lifting and carrying 20 to 50 pounds continuously to frequently and over 100 pounds occasionally, including lifting, carrying, dragging, and physically restraining an inmate; (8) pushing and pulling while opening and closing locked gates and cell doors throughout the workday or during an altercation with or restraint of an inmate; (9) reaching occasionally to continuously overhead while performing cell or body searches; and (10) frequent to continuous hand and wrist movement for grasping and squeezing.

7. As set forth in the Physical Requirements of Position/Occupational Title submitted with respondent's application, a Correctional Officer must occasionally (up to three hours a day) to constantly (more than six hours a day), sit, stand, run, walk, squat, bend at the waist, reach above shoulder, push and pull, and lift and carry up to 50 pounds. They must constantly to frequently (from three to six hours a day) bend at the neck, twist, power grasp, simple grasp, and use hands repetitively, and frequently to occasionally climb, use a keyboard and mouse, and lift and carry between 51 and 75 pounds. A Correctional Officer must also occasionally crawl, kneel, and lift and carry between 76 pounds to over 100 pounds, frequently reach below shoulder and constantly engage in fine manipulation.

Respondent's Medical Records

8. Respondent did not call a medical expert to testify on his behalf. Instead, he submitted medical reports from his workers' compensation case, which were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).¹

¹ Government Code section 11513, subdivision (d), in relevant part, provides:

9. Cyril W. Rebel, M.D. On June 27, 2014, Dr. Rebel completed and signed a CalPERS Physician's Report on Disability, which CalPERS received on September 29, 2014. The report reflects that Dr. Rebel examined respondent on June 25, 2014, regarding "left arm, wrist and shoulder pain" due to an injury respondent sustained while escorting an uncooperative inmate at work. Dr. Rebel diagnosed respondent with "left shoulder strain," based on respondent's "limited range of motion ... tenderness on palpation ... and small labral tear tendonosis."

10. In his report, Dr. Rebel opined that respondent was substantially incapacitated from performing his usual job duties, because he could not engage in "climbing, crawling, reaching, pushing, pulling, power grasping, fine manipulation, simple grasping, repetitive hand use, and lifting or carrying [more than] 51 pounds."

11. Jeffrey M. Lundeen, M.D. Dr. Lundeen is a Diplomate, American Board of Orthopaedic Surgery. He performed an Agreed Medical Re-Evaluation (AME) on respondent on September 6, 2016, as part of respondent's workers' compensation action. Dr. Lundeen interviewed respondent, reviewed his medical records, performed a physical examination, and issued a report dated September 6, 2016. After evaluating respondent, Dr. Lundeen diagnosed him as follows:

1. Left shoulder impingement syndrome with acromioclavicular joint arthrosis and labral tear. Status post arthroscopic subacromial decompression and distal clavicle resection with debridement labral tear.
2. Left elbow lateral epicondylitis and triceps tendinitis with resolution of the medial epicondylitis.
3. Left elbow cubital tunnel syndrome. Status post previous left elbow ulnar nerve transposition.
4. Left wrist tendonitis.
5. Remote history of a volar wrist ganglion cyst. Status post previous ganglion cyst excision on three occasions.

12. Dr. Lundeen's report indicates that respondent's future medical treatment should include "the judicious use of nonsteroidal anti-inflammatory medications or Tylenol," and periodic use of opioid narcotics, subacromial steroid injections, and physical therapy,

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

should symptoms exacerbate. He added that if respondent's shoulder fails to respond to non-surgical management, future medical care should allow for re-evaluation by a board-certified orthopaedic surgeon and allow for additional surgery. It was also Dr. Lundeen's opinion that respondent was not capable of performing all of the customary duties of his job, and, therefore, was medically eligible to be a Qualified Injured Worker. He indicated that respondent should avoid heavy lifting with the left arm, heavy pushing and pulling activities with the left arm, repetitive work at or above shoulder level with the left arm and repetitive forceful gripping, grasping, and torqueing activities with the left hand.

13. Additional Workers' Compensation Claim Documents. Respondent submitted a list from State Compensation Insurance Fund (SCIF) reflecting each of the medical providers he saw regarding his workers' compensation claim. Respondent also submitted two letters from SCIF reflecting that he received a disability benefits award and deemed eligible to receive a supplemental job displacement voucher.

Respondent's Testimony

14. At the hearing, respondent read the meaning of "disability" and "incapacity for the performance of duty," as described in Government Code section 20026, into the record and testified that he believes his condition is consistent with that description. He testified to the substance of several documents he submitted to support his claimed incapacity. Those documents included the CalPERS Physician's Report on Disability, signed by Cyril W. Rebel, M.D., the AME performed by Dr. Lundeen, and the correspondence from SCIF, discussed above.

15. He testified that he could not perform his usual job duties due to pain in his left shoulder and left wrist that resulted from his escorting an unruly inmate while working. He asserted that the diagnoses and opinions in the reports of Drs. Rebel and Lundeen support his claimed incapacity inasmuch as Dr. Rebel opined that he was substantially incapacitated from performing his job due to his inability to perform several job functions, and because Dr. Lundeen opined that he was not capable of performing all of the customary duties of his job.

Expert Opinion

16. CalPERS retained Daniel D'Amico, M.D., to conduct an Independent Medical Evaluation (IME) of respondent. Dr. D'Amico is a board-certified orthopedic surgeon whose practice encompasses all levels of trauma surgery, total joint surgery, total joint revisions surgery, acetabular fractures and pelvic fractures. He has worked as both an Agreed Medical Examiner and Qualified Medical Examiner on several occasions and has evaluated work-related injuries since 1966.

17. Dr. D'Amico evaluated respondent on December 8, 2014, reviewed his medical records, and wrote an 11-page report. During the evaluation, respondent reported pain in the left shoulder, left arm, left wrist, and left hand. Respondent described pain in the left deltoid area and diffuse pain to the left axilla and the back of the upper arm near the

triceps area and near the elbow. He reported a cramping pain in his left hand, a throbbing pain in his left shoulder, and discomfort in the back of his neck when he moves his head about vigorously.

18. After conducting the physical examination and reviewing respondent's medical records, Dr. D'Amico reached the following diagnostic impressions:

1. Sprain/strain left shoulder resolved.
2. Old ganglion left wrist, status surgery times three, resolved.
3. Ulnar nerve neuritis cubital area status post-surgery, resolved.
4. Mild tendonitis, tendinopathy, rotator cuff left shoulder, essentially asymptomatic or nondisabling.
5. Mild acromioclavicular joint arthritis left shoulder, nondisabling.

19. In his report, Dr. D'Amico found that although Dr. Rebel concluded that respondent had a rotator cuff tear, his review of the MRI showed no tear of the rotator cuff. Instead, it showed "mild attritional changes which are normal for [respondent's] age." Dr. D'Amico also found that the degenerative changes to respondent's acromioclavicular joint, as reflected in the MRI, were also normal for respondent's age. He found no evidence of cervical disease, radiculitis, radiculopathy, or rotator cuff tear. It was Dr. D'Amico's opinion, based on his examination and review of respondent's medical records, that there was "nothing neurologically or orthopedically that could justify [respondent] being disabled because of his very diffuse shoulder and arm pain." He identified no objective findings that would "make [respondent] disabled from performing or using his left shoulder and arm in any appropriate fashion," and determined that respondent was not substantially incapacitated for the performance of his job duties.

20. At hearing, Dr. D'Amico reiterated the opinions specified in his IME report. He stated that respondent essentially complained of diffused pain in multiple areas of his left shoulder, arm, and wrist that did not correlate to his objective findings. Dr. D'Amico testified that he does not believe any of the records from respondent's workers' compensation case support that he is substantially incapacitated based on the standard used for CalPERS disability cases and added that, although respondent's AME recommended that he avoid performing several job functions, "avoidance is not inability." He stated that respondent is not substantially incapacitated from performing his usual job duties because his evaluation revealed only "minimal objective findings that would not disable [respondent] to the point of being unable to perform his job."

Discussion

21. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, when he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Correctional Officer for CDCR. Dr. D'Amico's opinion that respondent was not substantially incapacitated from performing his usual job duties was persuasive. His IME report was detailed and thorough, and his testimony at hearing was clear and comprehensive. The results of his physical examination and his review of respondent's medical records supported his opinion.

22. The burden was on respondent to offer sufficient competent medical evidence at hearing to support his disability retirement application. He failed to do so. He did not call a medical expert to testify at hearing. There was no indication in respondent's medical reports that the doctors evaluated respondent according to the standards applicable to a CalPERS disability retirement proceeding. To the extent the doctors who authored those reports applied evaluation standards applicable in workers' compensation cases, their opinions can be given little weight. The standards in CalPERS disability retirement cases differ from those in workers' compensation. (*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].) The objective findings in the reports of Drs. Rebel and Lundeen, summarized above, were insufficient to support that respondent is substantially and permanently incapacitated from performing the usual duties of a Correctional Officer.

23. Because respondent failed to offer sufficient competent medical evidence at hearing to establish that, when he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Correctional Officer for CDCR, his disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Correctional Officer for CDCR, respondent is a state safety member of CalPERS subject to Government Code section 21151.²

² Government Code section 21151, in relevant part, provides:

(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

2. To qualify for disability retirement, respondent had to prove that, when he applied, he was “incapacitated physically or mentally for the performance of [his] duties in the state service.” (Gov. Code, § 21156.) 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.

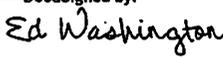
3. In *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term “incapacity for performance of duty” as used in Government Code section 20026 (formerly section 21022) to mean “the *substantial* inability of the applicant to perform his usual duties.” (Italics in original.) The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, 863, explained that prophylactic restrictions 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.

4. When all the evidence is considered in light of the courts’ holdings in *Mansperger* and *Hosford*, respondent did not establish that his disability retirement application should be granted. He failed to submit sufficient evidence based upon competent medical opinion that, when he applied for disability retirement, he was permanently and substantially incapacitated from performing the usual duties of a Correctional Officer for CDCR. Consequently, his disability retirement application must be denied.

ORDER

The application of respondent Richard T. Ayala for disability retirement is DENIED.

DATED: December 29, 2016

DocuSigned by:

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ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings

be retired for disability, pursuant to this chapter, regardless of age or amount of service.