

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:

EDDIE L. JOHNSON,

Respondent.

and

DEPARTMENT OF CORRECTIONS AND
REHABILITATION, PAROLE AND
COMMUNITY SERVICES DIVISION.

Respondent.

Case No. 2015-1224

OAH No. 2016050477

PROPOSED DECISION

This matter was heard before Heather M. Rowan, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on November 14, 2016, in Sacramento, California.

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

Eddie L. Johnson (respondent) represented himself.

There was no appearance by or on behalf of the Department of Corrections and Rehabilitation, Parole and Community Services Division (Department).

Evidence was received and the matter was submitted on November 14, 2016.

ISSUE

On the basis of a left wrist condition, is respondent substantially incapacitated from performing his usual and customary duties as a Parole Agent?

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED Dec. 15, 2016
Summer Daylett

FACTUAL FINDINGS

1. Respondent was employed as a Parole Agent by the Department. On December 31, 2014, CalPERS received respondent's Disability Retirement Election Application (application), seeking service retirement pending industrial disability retirement. Respondent retired for service effective March 1, 2015, and has been receiving his service retirement allowance from that date.

Respondent's Application

2. In his application, respondent described his disabilities as: "Repaired torn ligaments in my left wrist." He stated that his injuries occurred on February 11, 2014, "while placing [his] duty bag inside the trunk of [his] state vehicle, the hood of the trunk came down on [his] left hand, palm up, injuring [his] wrist." He described his limitations/preclusions as follows:

I am unable to type for extended periods of time without pain[.]
I am unable to subdue an attacker. I have pain in left wrist.

In his application, respondent stated that he was not currently working.

3. By letter dated August 19, 2015, CalPERS notified respondent that it had denied his application. In the letter, CalPERS stated that its "review included the reports prepared by Wesley Hashimoto, M.D., Ronald Whitmore, M.D., Sean B. Rocha, M.D., and Daniel M. D'Amico, M.D.," and that based on "the evidence in those reports, [CalPERS] finds that you are not substantially incapacitated from the performance of your job duties. . . ." The letter notified respondent that he had 30 days to file a written appeal from the denial.

4. By letter dated September 19, 2015,¹ respondent appealed from CalPERS' denial of his application.

Duties of a Parole Agent I

5. CalPERS submitted two documents that describe the duties of a Parole Agent I: a duty statement for Parole Agent I, Adult Parole and an Essential Functions list.

6. The duty statement sets forth that a Parole Agent I has "administrative responsibility for supervision of assigned parolees." The Parole Agent I provides written reports to the paroling authorities regarding violations of parole conditions, discharge review and other matters and maintains case records. Additionally, the Parole Agent I investigates alleged parole violations by obtaining police and other reports and interviewing parties involved; evaluates such information and recommends appropriate sanctions." The Parole

¹ CalPERS did not contest the timeliness of the request for appeal.

Agent I must also investigate proposed release and transfer plans and apprehend parolees who have violated the conditions of parole.

7. The Essential Functions list describes the physical and mental tasks required of a Parole Agent I as well as the administrative tasks. The pertinent administrative tasks involve writing reports and typing in databases. Among the physical tasks required are:

Conducting investigations that include search, surveillance, apprehending and arresting;

Disarming, subduing, and applying restraints;
Defending self or others;

Searching subjects for contraband, including homes and body searches;

Qualifying for range with departmentally approved weapons every quarter;

Using appropriate force when necessary;

Lifting and carrying in the light to medium range (0 to 50 pounds) frequently throughout the workday and in the very heavy range occasionally. This could include physically restraining or wrestling a person to the ground as well as partially lifting and dragging a person;

Pushing and pulling while opening and closing gates and doors throughout the workday or during an altercation or restraining a person;

Moving hands and wrists; grasping and squeezing with hands or wrists.²

Expert Opinion

8. CalPERS retained Daniel D'Amico, M.D. to conduct an Independent Medical Evaluation (IME) of respondent. Dr. D'Amico is board-certified as an orthopedic surgeon. Dr. D'Amico examined respondent on July 10, 2015, took respondent's medical history, reviewed respondent's medical records, and prepared an IME report.

² Respondent submitted a completed Physical Requirements of Position/Occupational Title, which was fairly consistent with the Essential Job Functions Analysis.

9. At the time of the IME, respondent was 50 years old. Respondent told Dr. D'Amico he injured his left hand and wrist on February 11, 2014, when his trunk lid hit his hand. After his injury, respondent was evaluated by a doctor and was not allowed to work at his regular duty. He was given restrictions and finally had surgery on his left wrist on October 14, 2014. He did not return to work after the injury.

10. Respondent is right-hand dominant. He complained of left wrist and hand pain as well as shoulder pain during Dr. D'Amico's exam. Respondent's shoulder was not claimed as a basis for his incapacity nor was it discussed at hearing, and is therefore not addressed herein.

11. Dr. D'Amico's examination was restricted to respondent's left wrist, hand, and upper extremity. Respondent was prescribed a wrist splint, which he frequently wears. After examining respondent and reviewing his medical records, Dr. D'Amico's impressions were that respondent has minor loss of extension and grip strength because of discomfort and that there was no objective basis for respondent's pain.

12. Dr. D'Amico opined that respondent was not substantially incapacitated for the performance of his duties as a Parole Agent I. Dr. D'Amico further opined that, because respondent is right-hand dominant, if respondent were to wear the left wrist brace, he "could probably" drive a vehicle, use a computer, and use a baton or restrain people. Dr. D'Amico stated that based on the physical findings pre- and post-surgery, "it is difficult to ascertain that [respondent] has an ongoing physical disability in his left wrist that would not allow him to perform the functions of a Parole Officer."

13. At the hearing, Dr. D'Amico described his examination of respondent. He measured pronation and extension of the wrist. Compared to respondent's right hand, there was minimal loss of motion in his left wrist. He found that respondent's left wrist motion was not restricted. When he tested respondent's grip strength, he noted it was weaker on the left side by about 35 to 40 percent. His forearm muscles showed no atrophy. Overall, Dr. D'Amico found the amount of pain of which respondent complained was out of proportion to the exam results. Additionally, he opined that "with appropriate treatment and physical therapy, [respondent] could do [the job], including computer work." Were respondent to wear the brace, he could restrain or arrest someone. Dr. D'Amico concluded, "[respondent] might not be pain-free, but he can function."

Respondent's Evidence

14. At the hearing, respondent testified about his work and injury history. Early in his career, he was in the Air Force and Air Force Reserves. Starting in 1996, respondent was a correctional officer at several state prisons for five years and taught at the correctional academy for correctional officer training. In 2001, he became a Parole Agent I. In this position, he supervised parolees, helping them reintegrate into society, took some into custody, visited their homes and family members, and completed reports.

15. Respondent explained that he started every day the same way: he lifted up the trunk of his car and put his duty bag in the trunk. On February 11, 2014, he opened his trunk to put his duty bag in, the trunk lid started to come down and he caught it with his left hand. He heard a “pop” in his arm. He continued to work that day. Two days later, he was treated by a doctor for an occupational injury.

16. Respondent did not call an expert witness to testify on his behalf, but he submitted an evaluation that was performed by Dr. Michael D. Ciepiela for his workers’ compensation case, which summarized his previous medical history, and which was admitted as administrative hearsay and has been considered to the extent permitted under Government Code section 11513, subdivision (d).³ The following medical information is based on Dr. Ciepiela’s summary.

17. On February 13, 2014, Dr. Wesley Kay Hashimoto ordered respondent to get x-rays on his left wrist, and the x-rays showed no break in the bone. He gave respondent a splint and prescribed physical therapy. Dr. Hashimoto recommended modified work duty and stated that respondent “should not subdue clients.” Respondent then saw Dr. Sean B. Rocha who suggested that respondent wear a cast. Respondent wore a cast for three weeks and then wore a splint for six weeks. He saw a physical therapist for four visits. Dr. Rocha recommended an injection, which respondent refused at first. Eventually, he said that “if it would get [him back to work],” he would try the injection. The pain continued, however.

18. In August of 2014, respondent continued to experience pain and Dr. Rocha recommended arthroscopic surgery. The surgery revealed a “left triangular fibrocartilage tear.” Respondent was given a “sugar tong splint,” and instructed to begin physical therapy. In February of 2015, respondent returned to Dr. Hashimoto for an occupational medicine follow-up appointment. Dr. Hashimoto noted that some pain and numbness persisted, prescribed more physical therapy, and placed respondent on modified duty until March 9, 2015. Respondent was instructed not to lift greater than two pounds, not to perform repetitive wrist motions or twisting of the left hand, and not to subdue clients.

19. On March 2, 2015, respondent returned to Dr. Hashimoto. He told Dr. Hashimoto that he tripped on some stairs on February 27, 2015, and landed on his left wrist with the wrist extended. He experienced a lot of pain and some swelling. By March 9, 2015, respondent’s pain was at a three of ten on the pain scale. On February 10, 2016, respondent saw Dr. Scott R. Lipson to consult regarding another hand surgery. Respondent continued to experience pain. On March 21, 2016, respondent underwent a second surgery on his wrist. Dr. Lipson described the surgery as “left wrist arthroscopy with TFCC debridement and open

³ Government Code section 11513, subdivision (d), in relevant part, provides:

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.

removal of a suture from the sixth wrist compartment.” In March and April of 2016, respondent reported to Dr. Lipson that he was experiencing less pain than before his surgery.

20. On October 4, 2016, respondent was evaluated by Dr. Ciepiela for purposes of his workers’ compensation claim. Dr. Ciepiela reviewed respondent’s medical history following the injury and evaluated his wrists. Dr. Ciepiela opined that inadequate post-operative physical therapy had caused greater loss of motion and grip strength. With physical therapy, which respondent had not done, Dr. Ciepiela implied that respondent’s motion and strength could be maximized.

21. Respondent testified that he continues to experience pain and takes ibuprofen to manage it. He stated that “physical therapy was improving the arm,” and that without physical therapy, he does not have strength. He cannot lift weights every day and cannot do push-ups. He cannot type for long periods and even driving causes him pain. Respondent stated that he cannot do the job he was previously able to do.

Discussion

22. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, at the time he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Parole Agent I. Dr. D’Amico’s opinion that respondent was not substantially incapacitated from performing his usual job duties was persuasive. The results of his physical examination and his review of respondent’s medical records supported his opinion.

23. 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 an expert witness to testify. There was no indication in the medical reports respondent offered at hearing that the doctors who authored those reports evaluated respondent according to the standards that apply to a CalPERS disability retirement proceeding. To the extent the doctors applied evaluation standards applicable in workers’ compensation cases, their opinions can be given little weight. The standards in CalPERS disability retirement cases are different 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 findings in Dr. Ciebiela’s report summarized above were insufficient to support that respondent is substantially and permanently incapacitated from performing the usual duties of a Parole Agent I.

24. In sum, because respondent failed to offer sufficient competent medical evidence at the hearing to establish that, at the time he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Parole Agent I, his disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Parole Agent I, respondent is a member of CalPERS, subject to Government Code section 21151, subdivision (a).⁴
2. To qualify for disability retirement, respondent had to prove that, at the time he applied, he was "incapacitated physically or mentally for the performance of [his] duties." (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 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. 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.)
4. When all the evidence in this matter is considered in light of the analyses in *Mansperger*, *Hosford*, *Smith* and *Keck*, respondent did not establish that his disability retirement application should be granted. He failed to submit sufficient evidence based upon competent medical opinion that, at the time he applied for disability retirement, he was permanently and substantially incapacitated from performing the usual duties of a Parole Agent I. Consequently, his disability retirement application must be denied.

⁴ 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 be retired for disability, pursuant to this chapter, regardless of age or amount of service.

ORDER

The application of respondent Eddie L. Johnson for disability retirement is DENIED.

DATED: December 13, 2016

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Heather M. Rowan
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HEATHER M. ROWAN
Administrative Law Judge
Office of Administrative Hearings