

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 the
Industrial Disability Retirement of:

MARK S. WHITNEY,

Applicant/Respondent,

and

DEPARTMENT OF STATE HOSPITALS -
PATTON,

Contracting Entity/Respondent.

Case No. 2015-0067

OAH No. 2015100947

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on November 29, 2016, in San Bernardino, California.

Preet Kaur, Senior Staff Attorney, represented Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS), State of California.

Mark Whitney, respondent, represented himself.

No appearance was made by or on behalf of respondent, Department of State Hospitals - Patton.

The matter was submitted on November 29, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 11/13/2016
Rachyl J. Kelly

ISSUE

Did competent medical evidence establish that Mr. Whitney was substantially disabled or incapacitated from performing the usual and customary duties of a psychiatric technician as a result of orthopedic conditions (neck, left shoulder, and lower back) when he filed his application for an industrial disability retirement on November 21, 2013?

FACTUAL FINDINGS

Jurisdictional Matters

1. Mr. Whitney was employed as a psychiatric technician with the Department of State Hospitals – Patton, for 15 years. By virtue of his employment, Mr. Whitney is a member of CalPERS subject to Government Code section 21151.

2. On November 21, 2013, Mr. Whitney signed and filed a Disability Retirement Election Application in order to receive a service retirement, retroactive to July 15, 2010, pending the outcome of a disability determination. Mr. Whitney wrote on his application that his industrial disability retirement should be granted, retroactive, to September 8, 2007, the last day he actually worked. Mr. Whitney claimed the right to a disability retirement on the basis of orthopedic conditions (neck, shoulder, and back). He cited 2001, 2003, and 2005 as the dates on which the disability occurred. Mr. Whitney claimed to be precluded from performing heavy work and that his doctor told him he could not return to work.

3. CalPERS obtained and reviewed medical records and reports related to Mr. Whitney's condition. CalPERS selected an independent medical examiner to perform a disability evaluation, who concluded that Mr. Whitney was not substantially incapacitated from the performance of his usual and customary job duties.

4. By letter dated September 15, 2014, CalPERS notified Mr. Whitney that his application for an industrial disability retirement was denied.

5. On October 10, 2014, Mr. Whitney appealed the denial of his application.

6. On April 20, 2016, Anthony Suine, Chief, CalPERS Benefits Services Division, signed the Statement of Issues in his official capacity denying Mr. Whitney's application for a disability retirement. This hearing ensued.

Duties of a Psychiatric Technician

7. Mr. Whitney's employer published a document listing the usual and customary job duties and essential functions required of a psychiatric technician. Pursuant to this document, psychiatric technicians must be able to work on a mental health team with doctors, psychologists, and therapists to treat institutionalized patients. They must provide

nursing care to patients who are “emotionally disturbed” and “developmentally disabled.” They “may” be called upon to restrain violent or physically combative patients. The document also indicates that “full body range of motion and physical strength may be required to subdue, restrain and lift [a] patient onto [a] gurney and/or restraint bed.”

The document also lists certain tasks that a psychiatric technician must be able to perform constantly (over 2/3 of the time), frequently (1/3 to 2/3 of the time), occasionally (0 to 1/3 of the time), seldom (intermittently), or never. The document then lists the following: Stoop/bed (occasionally); squatting (seldom); kneeling (seldom); crawling (seldom); twisting (occasional); reaching at or above shoulder height (seldom); climbing ladders (seldom); climbing stairs (occasional); and walking on uneven ground (occasional). They must be able to occasionally lift up to 25 pounds and occasionally or seldom lift between 26 and 50 pounds. They are only required to lift in excess of 165 pounds as needed, with the assistance of one to three other employees. They must also be able to push or pull doors that require 10 pounds or more of pulling pressure.

Mr. Whitney's Medical History

8. Mr. Whitney testified concerning his alleged condition. According to Mr. Whitney, he injured his neck and shoulder in 2001 while carrying a patient. In 2003, he aggravated the 2001 injury while carrying a patient. In 2005, he tore his shoulder. Mr. Whitney said he had surgery for his torn shoulder, and because it took so long to get his physical therapy approved, his shoulder became frozen. He said his doctors wanted to declare him permanent and stationary, but he wanted to continue to work. He was also in the national guard reserves, and wanted to continue working in that capacity.

9. Mr. Whitney said his last date of work was some time in 2007, and he hired a lawyer and has been fighting ever since that time. When asked why he feels he is substantially incapacitated, Mr. Whitney said because his “back hurts,” he has “sciatica,” “tingling in his two left fingers,” and his neck “cracks” sometimes. He said he has pain in his shoulder and sometimes it “pops.” Mr. Whitney feels his shoulder is unstable.

10. Mr. Whitney said the conditions at his former place of employment are “getting worse” because of “policy changes” and he does not feel he can perform his duties.

11. Mr. Whitney said that surgery could be performed to correct or help his condition, however, because he cannot get a guarantee from the state that it would pay for his post-operation care, he will not submit to the surgery. Mr. Whitney said he is disabled and if CalPERS does not qualify him as disabled he will go to another doctor who will render that conclusion.

12. Mr. Whitney provided voluminous medical records in support of his testimony, but did not call any expert medical witnesses to testify about the reports.

The Independent Medical Examination

13. Frederick Close, M.D., testified telephonically regarding the July 11, 2014, independent medical examination he performed on Mr. Whitney, as well as the report and supplemental report he completed memorializing his examination.

14. Dr. Close is a licensed physician in California, board-certified orthopedic surgeon, member of the American College of Surgeons, and a member of the American Academy of Orthopedic Surgeons. Dr. Close obtained his Bachelor of Science degree at Purdue University and his Doctor of Medicine at Indiana University. Dr. Close has been performing arthroscopic surgery since the 1970's. He has been a clinical professor at University of California, San Diego. He performed multiple internships, both in civilian hospitals and at various military facilities. Dr. Close is published in peer-reviewed journals and has given many presentations in the field of orthopedics. Dr. Close has been performing qualifying medical evaluations for workers' compensation cases for 30 years, and recently began acting as an independent medical examiner in CalPERS matters.

15. Based on his background, training, and experience, Dr. Close qualifies as an expert in the field of orthopedics.

16. Dr. Close interviewed Mr. Whitney to obtain information regarding Mr. Whitney's alleged condition. Mr. Whitney told Dr. Close about the three injuries he suffered prior to 2005. He also told Dr. Close that he had a "pulling sensation" on his left side, shoulder area, and upper spine. Mr. Whitney told Dr. Close he has pain that varies from a sharp to dull, and occurs at various times when he attempts to use or lift his left arm. Mr. Whitney also reported occasional tingling in his left arm and numbness.

17. Dr. Close reviewed 50 previous medical reports pertaining to the treatment and care of Mr. Whitney between 2005 and 2014.

18. Dr. Close performed a physical examination that included a general assessment of Mr. Whitney's appearance; range of motion – cervical spine; range of motion – shoulders; grip strength; and measurements of upper extremities. Palpation of the cervical spine revealed no specific areas of tenderness, no palpable spasm, no cervical compression, and an overall normal range of motion.

Regarding Mr. Whitney's left shoulder, Dr. Close noted some atrophy, but attributed the atrophy to underuse or disuse stemming from the 2005 shoulder injury and ensuing surgery. Dr. Close did note, however, that the 2005 injury resolved and Mr. Whitney returned to work. Dr. Close performed several medical tests designed to ascertain if there were any limitations on the range of motion in Mr. Whitney's shoulder. They were all negative. Dr. Close checked the joint where Mr. Whitney's clavicle attaches to the upper part of his shoulder blade and the joint was normal. He checked the bicep tendons and found them to be normal. He checked for torn ligaments surrounding the shoulder socket, which would cause the instability in the shoulder. He found no evidence of torn ligaments. All of

Mr. Whitney's upper extremity circumferential measurements were within one inch of each other, which indicates that there is no disuse. In sum, Dr. Close found no abnormalities in the shoulder and concluded that Mr. Whitney had good overall strength.

Dr. Close provided the following diagnoses: Cervical spondylosis, posterior labral tear of the left shoulder, possible mild glenohumeral instability, and mild arthritis of the left shoulder. Dr. Close explained that these diagnoses were based on the prior medical reports only, as his medical examination did not show these conditions.

Despite his exam findings, Dr. Close initially concluded Mr. Whitney was substantially incapacitated from performing the usual and customary duties of a psychiatric technician because "of the possible mild instability of the left shoulder" and the "risk of possible further injury" CalPERS sent Dr. Close a letter requesting clarification of his conclusion, noting that a person is only considered to be substantially disabled from performing the usual and customary duties of his or her position if the person was actually, and not prospectively, disabled. CalPERS also noted that prophylactic restrictions were not a basis for a disability retirement.

On July 29, 2014, Dr. Close revised his conclusion, indicating that Mr. Whitney was not substantially incapacitated from performing the usual and customary duties of a psychiatric technician. Dr. Close reviewed the job duties required of a psychiatric technician and testified that he saw "no specific limitations" that would preclude Mr. Whitney from performing his job duties.

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. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Applicable Statutes

2. Government Code section 20026 provides in 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.

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3. Government Code section 21150 provides:

A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076 or 21077.

4. Government Code section 21152, provides that application to the board for retirement of a member for disability may be made by the head of the office or department in which the member was last employed, the governing body of the contracting agency, or the member or someone acting on his or her behalf.

5. Government Code section 21153 provides:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.

6. Government Code section 21156, subdivision (a), provides in part:

(a)(1) If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service 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 . . .

(2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process. . . .

Appellate Authority

7. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual job duties. The board must consider the duties actually and usually performed by the applicant, and not simply examine a job description or a list of job demands prepared by an employer, to determine if the applicant is incapacitated for the performance of duty. (*Hosford v. Bd. of Administration* (1977) 77 Cal.App.3d 854, 860-861.) Disability is not an inability to perform fully every function of a given position. When

an applicant can perform his or her usual and customary job duties, even though doing so may be difficult or painful, the employee is not substantially incapacitated and does not qualify for an industrial disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887.) Mere difficulty in performing certain tasks is also not enough to support a finding of disability. (*Hosford, supra*, 77 Cal.App.3d at p. 854.) Further, the claimed disability must be presently disabling; a disability that may be aggravated with time or that is speculative does not satisfy the requirements of the Government Code. (*Id.* at 863.)

Evaluation

8. Cause does not exist to grant Mr. Whitney's application for a disability retirement. A preponderance of the competent medical evidence did not establish that he suffered from a physical or mental condition of a permanent or extended and uncertain duration that rendered him substantially incapacitated from performing the usual and customary duties of a psychiatric technician from the time he stopped work in 2007 to November 21, 2013, when he filed his application for an industrial disability retirement.

A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education sufficient to qualify him or her as an expert on the subject to which the testimony relates. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1318-1319.) An expert witness may give opinion testimony based on matters (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that are of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates. Uncontroverted expert opinion testimony, like any other testimony, may be rejected by the trier of fact, so long as the rejection is not arbitrary. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.)

Dr. Close qualifies as a competent medical expert. Mr. Whitney did not present any competent medical evidence to contradict Dr. Close's conclusion. Although Mr. Whitney submitted medical reports, those reports did not contain medical evaluations in light of the standard used by CalPERS to determine whether a person is substantially incapacitated. Most of the reports provided were also over a decade old and therefore did not speak to Mr. Whitney's alleged present inability to perform his job duties. They also constituted administrative hearsay and as such, cannot support a finding of fact as to any issue relevant to the determination of this matter.

Moreover, Dr. Close's independent medical examination did not uncover any substantially disabling condition. Mr. Whitney's statements to Dr. Close regarding his complaints consisted of complaints of pain, occasional tingling, and occasional numbness, none of which are disabling conditions. Certainly these sensations may make it more difficult to do his job based on the description of his job duties, however, mere difficulty in performing one's job, pain while performing one's job, or the fact that an injury may be aggravated are not bases to grant an application for a disability retirement.

Accordingly, based on the evidence presented and in consideration of applicable statutory and appellate law, Mr. Whitney's application for an industrial disability retirement is denied.

ORDER

The application for an industrial disability retirement filed by Mark S. Whitney with the California Public Employees' Retirement System is denied. Mr. Whitney is not now, and was not at the time he filed his application for an industrial disability retirement, substantially incapacitated from performing the usual and customary duties of a psychiatric technician.

DATED: December 12, 2016

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Kimberly Belvedere
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KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings