

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Reinstatement from
Industrial Disability Retirement of:

SCOTT M. COTTEEN,

Respondent,

and

DEPARTMENT OF CALIFORNIA
HIGHWAY PATROL,

Respondent.

Case No. 2013-0461

OAH No. 2016061049

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on November 28, 2016, in San Bernardino, California.

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

Scott M. Cotteen, respondent, represented himself.

No appearance was made by or on behalf of respondent, Department of California Highway Patrol (CHP).

The matter was submitted on November 28, 2016.

ISSUE

Is Mr. Cotteen, who was granted an industrial disability retirement on December 28, 2006, still permanently disabled or incapacitated from performing the usual and customary duties of a CHP sergeant?

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED 12-23-2016

Summer Daniels

SUMMARY

In 2006, Mr. Cotteen applied for an industrial disability retirement from his job as a CHP sergeant for injuries he sustained on the job. CalPERS approved his application for an industrial disability retirement. In 2012, Mr. Cotteen filed an application for reinstatement from industrial disability retirement. After undergoing an independent medical examination in December 2012, CalPERS approved his application. CHP informally appealed, and in March 2013, Mr. Cotteen sent CHP a letter withdrawing his request for reinstatement. There was no further action until January 2016, when CHP notified Mr. Cotteen that he was to report to the CHP academy. Mr. Cotteen did not report to the academy and was then service retired.

Although the medical evidence established Mr. Cotteen was not incapacitated in 2012, his condition has since worsened such that the independent medical evaluation no longer accurately reflects whether Mr. Cotteen is incapacitated. As such, CalPERS failed to establish that Mr. Cotteen should be reinstated as a CHP sergeant, he should continue to receive industrial disability retirement benefits.

FACTUAL FINDINGS

Background

1. Mr. Cotteen was employed by CHP as a sergeant. By reason of his employment, Mr. Cotteen was a state safety member of CalPERS.
2. On February 25, 2005, Mr. Cotteen submitted an application for industrial disability retirement on the basis of an orthopedic (left upper extremity) condition.
3. On December 28, 2006, CalPERS approved the application and Mr. Cotteen was retired for disability effective December, 28, 2006.
4. On April 2, 2012, Mr. Cotteen submitted an application to CalPERS for reinstatement from industrial disability retirement.
5. CalPERS reviewed Mr. Cotteen's medical records and independent medical evaluation. On January 24, 2013, CalPERS notified Mr. Cotteen and CHP that it approved his application for reinstatement from industrial disability retirement. The letter informed Mr. Cotteen that CalPERS could only reinstate an annuitant to active membership in the retirement system; it could not order his return to the job. Actual re-entry into employment needed to be arranged by CHP. Finally, the letter noted that CHP had the right to appeal the decision.
6. On February 6, 2013, CHP informally appealed CalPERS's decision reinstating Mr. Cotteen. According to CHP, on March 22, 2013, during the reinstatement

process, Mr. Cotteen advised CHP that he did not believe he was able to complete all required phases of the reinstatement process. On March 22, 2013, he submitted a letter to CHP withdrawing from the reinstatement process. By memorandum dated March 27, 2013, CHP notified CalPERS that CHP could not reinstate Mr. Cotteen to his former position and requested that he continue to receive industrial disability retirement benefits.

7. On January 4, 2016, CHP sent a letter to Mr. Cotteen stating he had been approved for reinstatement by CalPERS and he was to report to the CHP Academy on January 25, 2016, for Police Officers Standards and Training (POST) Peace Officer Requalification Training.

8. Respondent did not report to the CHP academy and was instead service retired. Respondent contended that he remained incapacitated and should continue to receive industrial disability retirement. CalPERS treated this as an appeal of its determination that Mr. Cotteen was no longer incapacitated.

9. On June 9, 2016, complainant signed the accusation in his official capacity. The sole issue on appeal is whether respondent is disabled or incapacitated from performance of his usual job duties.

Testimony of Dr. Joseph Matan

10. Joseph Matan, M.D., has been licensed to practice medicine in California since 1966. He was board certified in orthopedic surgery in 1971 and has worked in private practice ever since. Based on his training and experience, Dr. Matan was well qualified to render an expert opinion in this matter.

11. Dr. Matan performed an independent medical examination for CalPERS on December 17, 2012. He has not seen Mr. Cotteen since. Dr. Matan's evaluation of Mr. Cotteen's condition was based on a review of medical records, consideration of the occupation description, a physical exam, and an interview of Mr. Cotteen. He prepared a report documenting his findings. He concluded that Mr. Trejo was fit to perform the usual and customary duties of a CHP sergeant without restrictions and was not substantially incapacitated from the performance of his normal work duties.

HISTORY OF CONDITION

12. Mr. Cotteen was moving furniture at work when he developed a cervical disk herniation at C6-7 with left non-dominant pain and numbness. In relation to this injury, he was diagnosed with a five millimeter herniated disk at C6-C7 and minimal degenerative disk disease of the lumbar spine. On November 30, 2011, Mr. Cotteen was seen at the Haider Spine Center Medical Group. The report from Dennis Cramer, D.O., and Thomas Haider, M.D., stated that the radiating pain had improved such that Mr. Cotteen was no longer having symptoms. He was again seen at the Haider Clinic on January 25, 2012, to review the results of an MRI taken on January 4, 2012. The MRI showed a 2.2 millimeter broad-based

disk herniation at C6-C7. Dr. Matan testified that the herniation is very small and unlikely to be symptomatic. Mr. Cotteen's physicians determined he could return to work and perform the duties of a peace officer without increased risk of injury. Mr. Cotteen reported to Dr. Matan that his condition has gradually improved such that he was asymptomatic. He no longer had pain or numbness in his left arm. Mr. Cotteen reported that he went to the gym frequently and no longer had physical restrictions. At the time of his evaluation with Dr. Matan, Mr. Cotteen worked as an emergency room scribe, which required him to be on his feet and perform paperwork tasks.

13. Dr. Matan performed a physical exam that was completely normal. Dr. Matan reviewed the CHP physical requirements and job specifications. Based on his evaluation, Dr. Matan opined that Mr. Cotteen was not substantially incapacitated and was physically able to return to CHP.

14. On cross-examination, Dr. Matan was asked to review a progress report from the Haider Spine Clinic dated March 21, 2016.¹ In the report, Mr. Cotteen reported continued neck pain with paresthesia in both arms. Mr. Cotteen reported taking Tylenol daily for pain. After reviewing the report, Dr. Matan testified that it is probable that Mr. Cotteen's condition has changed since Dr. Matan conducted his evaluation in December 2012. Dr. Matan noted that the report indicated a recent MRI found disk desiccation at C6-C7, and moderate disk herniation at C5-C6. Additionally there was C6-C7 disk space collapse, which was not noted in the previous MRI. Dr. Matan noted that the latest MRI indicated Mr. Cotteen's condition was worse than what was seen in the November 2011 MRI. The report also indicated electrodiagnostic testing of the arms was consistent with moderate right C6 sensory radiculopathy. Dr. Matan explained that electrodiagnostic studies are objective measurements that confirm that a nerve is being irritated. As a result, Dr. Matan testified that "there is no question that everything is significantly worse" than when he evaluated Mr. Cotteen. As such, he would be "very hesitant" in now concluding that Mr. Cotteen could return to work.

Mr. Cotteen's Testimony

15. Mr. Cotteen is now 57 years old. After consulting with his physicians, he requested reinstatement in 2012. After CalPERS granted Mr. Cotteen's application for reinstatement, Mr. Cotteen had discussions with CHP about his returning to work. CHP required him to undergo a number of requirements prior to being reinstated. After learning this information, Mr. Cotteen determined that he was not physically able to meet those requirements. On March 22, 2013, he submitted a letter to CHP withdrawing his request for reinstatement. CHP noted this in its communication with CalPERS. Based on this communication, Mr. Cotteen believed that this was the end of the matter and he heard nothing more until January 2016, when he received a letter from CHP ordering him to report

¹ The report was received as administrative hearsay under Government Code section 11513, subdivision (d). The report can be used to supplement or explain other evidence, but is not sufficient in itself to support a factual finding.

to the Academy in three weeks.² At that time, Mr. Cotteen still had left arm numbness and pain associated with his injury. He said his condition had become progressively worse since 2012 when he requested to return to work. Mr. Cotteen did not report to the CHP academy and was service retired. He stopped receiving his industrial disability retirement in January 2016. He believes that CalPERS erred in not requiring a new independent medical evaluation based on his change in condition. His treating physicians believe that he is not capable of returning to work. Mr. Cotteen is now working as a licensed physician's assistant.

Evaluation of the Medical Evidence

16. Dr. Matan qualified as a medical expert. Although four years ago, Dr. Matan determined that Mr. Cotteen was no longer substantially incapacitated, Dr. Matan believed that Mr. Cotteen's condition has worsened, and he could no longer conclude that Mr. Cotteen could return to work. Although the report by the Haider Spine Clinic is hearsay, and can only supplement or explain other evidence, Dr. Matan's testimony indicated his belief that Mr. Cotteen's condition has worsened since the evaluation four years ago. As such, the 2012 independent medical evaluation is no longer a reliable determination of whether Mr. Cotteen is permanently disabled or incapacitated from performing the usual and customary duties of a CHP sergeant.

This case presents a unique issue because Mr. Cotteen felt he had recovered sufficiently to return to work and Dr. Matan, CalPERS's expert, agreed. However, CHP disagreed and informally appealed the decision. Soon thereafter, Mr. Cotteen requested to withdraw his request for reinstatement and CHP advised CalPERS it would not be reinstating Mr. Cotteen. There was apparently no further communication on the issue until January 2016, when CHP advised Mr. Cotteen he was to report to the CHP academy. In the two-and-a-half years that passed, Mr. Cotteen's claimed his condition worsened. At hearing, Dr. Matan revised his earlier opinion and testified that today, he would be hesitant to conclude that Mr. Cotteen was able to return as a CHP sergeant. As such CalPERS' was unable to meet its burden of establishing that Mr. Cotteen is no longer incapacitated.

LEGAL CONCLUSIONS

Purpose of the Retirement Law

1. The legislative purpose of public employee pension programs is well-established. They serve two objectives: To induce persons to enter and continue in public

² Mr. Cotteen believes that CHP took this action based on a December 2015 California Court of Appeal decision holding that when CalPERS makes a determination that an individual is no longer substantially disabled, the contracting agency has a mandatory duty to reinstate the individual and could not require preconditions for reinstatement. (*Dept. of Justice v. Bd. of Administration* (2015) 242 Cal.App.4th 133.)

service, and to provide subsistence for disabled or retired employees and their dependents. Disability pension laws are intended to alleviate the harshness that would accompany the termination of an employee who has become medically unable to perform his duties. (*Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, 1304.)

Burden and Standard of Proof

2. Evidence Code section 500 provides that, except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that the party is asserting.

3. Evidence Code section 115 defines "burden of proof" as a party's obligation "to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." Unless specified, the burden of proof requires proof by a preponderance of the evidence.

4. In this proceeding, CalPERS had the burden of proving by a preponderance of the evidence that circumstances have changed, that Mr. Cotteen is no longer substantially incapacitated from performing the duties of a CHP sergeant, that Mr. Cotteen is capable of returning to work, and that Mr. Cotteen should be reinstated to his former employment as a peace officer.

Applicable Statutes

5. Government Code section 20026 defines the terms "disability" and "incapacity for performance of duty," when used as a basis for retirement, to mean a "disability of permanent or extended and uncertain duration" that is based on "competent medical opinion."

6. Government Code section 21151, subdivision (a), provides that a state safety or state peace officer who is "incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability. . . regardless of age or amount of service."

7. Government Code section 21156 provides that if the evidence demonstrates that the member 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. The determination of incapacitation shall be based on competent medical opinion.

8. Government Code section 21192 provides:

The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made

of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. . . . The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

9. Government Code section 21193 provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position. However, in that case, acceptance of any other position shall immediately terminate any right to reinstatement. A recipient who is found to continue to be incapacitated for duty in his or her former position and class, but not incapacitated for duty in another position for which he or she has applied for reinstatement and who accepts employment in the other position, shall upon subsequent discontinuance of incapacity for service in his or her former position or a position in the same class, as determined by the board under Section 21192, be reinstated at his or her option to that position.

Appellate Authority

10. "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.)

11. Under Government Code section 21193, once CalPERS determines that a former state employee is not incapacitated for duty, the state agency has a mandatory duty to reinstate the employee. (*Dept. of Justice v. Bd. of Administration* (2015) (242 Cal.App.4th 133, 140.)

Evaluation

12. At the time Mr. Cotteen submitted his application for reinstatement and underwent an independent medical evaluation, he was not incapacitated from performing the duties of a CHP sergeant. CalPERS contends that the medical evaluation is sufficient evidence to conclude that Mr. Cotteen is not incapacitated, and he should be reinstated. However, four years have now passed since Dr. Matan conducted his medical evaluation. Although Mr. Cotteen was not incapacitated at the time of his medical evaluation, Dr. Matan *now* believes Mr. Cotteen's condition has since changed such that he would not necessarily reach the same conclusion. Government Code section 21192 states that "Upon the basis of the examination, the board or the governing body shall determine whether he or she *is still* incapacitated, physically or mentally, for duty . . ." (emphasis added.) The plain language of the statute requires the board to make its determination of incapacity based on the member's current condition, whether he is *still* incapacitated. Thus the decision whether to reinstate Mr. Cotteen must be based on his current condition, rather than the condition at the time of his application or medical evaluation four years ago. Considering Dr. Matan's testimony that Mr. Cotteen's condition has changed for the worse, it cannot be established that Mr. Cotteen is no longer incapacitated.


13. Because CalPERS failed to establish Mr. Cotteen is no longer incapacitated, his industrial disability retirement should be reinstated retroactive to the date it was terminated. In March 2013, Mr. Cotteen notified CHP he was withdrawing his request for reinstatement. In turn, CHP notified CalPERS it would not reinstate Mr. Cotteen. Mr. Cotteen received no communication from either agency until January 2016, when CHP notified him to report to duty. CalPERS permitted Mr. Cotteen to challenge the reinstatement through the administrative hearing process, and his industrial disability

benefits should not have been terminated until the board issued a final decision in accordance with Government Code section 21192.

ORDER

Respondent Scott Cotteen's appeal from CalPERS's determination that he is no longer eligible for industrial disability retirement is granted. Mr. Cotteen remains substantially incapacitated from performing the usual and customary duties of a CHP sergeant. He shall continue to receive industrial disability retirement retroactive to its termination, less credit for service retirement payments received.

DATED: December 19, 2016

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ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings