

ATTACHMENT E
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:

Case No. 2015-0107

ELIZABETH HOFFMAN,
Respondent,

OAH No. 2015071075

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
WASCO STATE PRISON,
Respondent.

PROPOSED DECISION

This matter was heard before Tiffany L. King, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on September 29, 2016, in Fresno, California.

John Shipley, Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Brett Sherman, Attorney at Law, Goyette & Associates, represented Elizabeth Hoffman (respondent), who was present at the hearing.

There was no appearance by or on behalf of the California Department of Corrections and Rehabilitation (CDCR), Wasco State Prison. At the hearing, CalPERS established that CDCR was properly served with the Statement of Issues and Notice of Continued Hearing. This matter therefore proceeded as a default against CDCR under Government Code section 11520.

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

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Nov. 2, 2016
Summer Doylett

ISSUE

On the basis of an internal condition, is respondent permanently disabled or substantially incapacitated from the performance of her usual and customary duties as an Electrician II for Wasco State Prison?

FACTUAL FINDINGS

1. Respondent was employed as an Electrician II by CDCR at Wasco State Prison. By virtue of her employment, she is a state safety member of CalPERS subject to Government Code section 21151. On July 22, 2013,¹ respondent signed and filed an application for service pending industrial disability retirement (Application). Respondent retired for service on February 17, 2013, and has been receiving her retirement allowance since that date.

2. In her Application, respondent described her disability as “internal organ disabilities, West Nile virus.” She asserted that, in 2007, she was bit by a mosquito while at work. She subsequently experienced “high blood pressure, thyroid problems, acid reflux, migraine headaches[s], dizziness ... [and] spine problems.” Respondent asserted that, as a result of her condition, she does not feel safe climbing ladders or operating heavy equipment.

3. CalPERS obtained medical records and reports including those prepared by Sean Leoni, M.D., Robert F. Meth, M.D., and Samuel B. Rush, M.D., who conducted an independent medical evaluation (IME) of respondent’s internal condition. After reviewing the reports, CalPERS determined respondent was not substantially incapacitated from the performance of her job duties as an Electrician II for CDCR.

4. On November 22, 2014, CalPERS notified respondent that her application for industrial disability retirement was denied and advised her of her appeal rights. Respondent filed an appeal and request for hearing by letter dated December 11, 2014.

5. On July 24, 2015, Anthony Suine, Chief, Benefit Services Division, CalPERS, made and thereafter filed the Statement of Issues in his official capacity. This hearing followed.

¹ The Statement of Issues alleges respondent signed her application “on or about January 16, 2013”; however, the application which was received into evidence indicates she signed it before a notary public on July 22, 2013.

Employment History and Duties of an Electrician II

6. Respondent is 57 years old. In 1988, she began her state employment with CDCR as an electrician at Solano State Prison. She transferred to Wasco State Prison in 1991, where she remained until her retirement in February 2013.

7. In approximately June 2007, respondent was working in the telephone switch room at Wasco State Prison. The switch room was located just outside the electrified fence and pedestrian tower, across from a ditch where water was known to accumulate and mosquitos were prevalent. Respondent felt a sudden burning sensation on the left side of her neck and shoulder. She did not feel any immediate flu symptoms; however, she began to feel ill a few weeks later. She also experienced constant, mild headaches which progressively worsened on a daily basis. She treated the headaches with over-the-counter aspirin. After four weeks, respondent was experiencing "excruciating" pain. She had dizziness, and had difficulty opening her eyes or standing.

8. From July 4, 2007 to October 14, 2007, respondent was off from work due to her symptoms. In August 2007, respondent was informed she had the West Nile virus. When she returned to work, respondent continued to experience dizziness, vomiting, and headaches. She was diagnosed with high blood pressure, hypertension, and gastroesophageal reflux disease (GERD). She frequently missed work due to her symptoms.

9. On January 20, 2011, the State Compensation Insurance Fund (SCIF) accepted respondent's workers' compensation claim. SCIF rated respondent as 81-percent permanently disabled. Respondent service retired in February 2013, at which time she felt unable to perform her job duties any longer.

10. As set forth in respondent's duty statement, her primary duties as an Electrician II included: (1) supervising and working with an inmate crew performing the installation and repair of electric lights, motors, heaters, generators, transformers, switchboards, and other electrical equipment; (2) troubleshooting electrical and emergency systems; (3) installing and maintaining electronic alarms, TVs, phones, and PA systems; and, (4) monitoring all aspects of an electric shop. Respondent also testified she regularly used tall ladders or a scissor lift to perform electrical work.

11. On November 16, 2012, respondent signed a "Physical Requirements of Position/Occupational Title" form (Physical Requirements form), which was submitted to CalPERS. According to the Physical Requirements form, an Electrician is expected to: (1) constantly (over six hours a day) walk; (2) frequently (three to six hours a day) stand, bend and twist at the waist, twist at the neck, reach above and below the shoulder, simple and power grasp, use hands repetitively, carry up to 50 pounds, walk on uneven ground, work at heights, and use special visual or auditory protective equipment; and, (3) occasionally (up to three hours a day) sit, crawl, kneel, climb, squat, push and pull, bend at the neck, engage in fine manipulation, use a keyboard and mouse, drive, work with heavy equipment, operate

foot controls or engage in repetitive movement, and be exposed to excessive noise, extreme temperature, humidity, wetness, dust, gas, fumes, or chemicals.

Independent Medical Evaluation by Samuel B. Rush, M.D.

12. On July 9, 2014, at CalPERS's request, Dr. Rush conducted an IME of respondent. Dr. Rush has been a licensed physician in California since 1969. He is Board-certified in Internal Medicine and a Fellow of the American Academy of Cardiology. Since 1974, Dr. Rush has operated a private practice in Fresno, California. Since 2011, Dr. Rush has performed approximately 50 IMEs for CalPERS. On July 9, 2014, Dr. Rush prepared a report concerning his IME of respondent. The IME report was received by CalPERS on July 21, 2014.

13. As part of the IME process, Dr. Rush reviewed respondent's duty statement, job description, physical requirements, and relevant medical records. He also interviewed and examined respondent. In his IME report, Dr. Rush concluded that respondent was not substantially incapacitated from the performance of her job. At hearing, Dr. Rush testified consistently with his IME report.

14. Respondent told Dr. Rush that she was bitten on the neck by a mosquito in 2007, after which she developed a severe headache and neck pain, as well as nausea, vomiting, and a generalized rash. These symptoms lasted approximately two months. Respondent was taken off work for three months, from July to October 2007. An evaluation showed positive antibodies for the West Nile virus. Respondent returned to work in October 2007. She developed GERD and high blood pressure. Respondent ultimately stopped working in February 2013, due to her inability to perform her duties as an Electrician II.

15. At hearing, Dr. Rush explained that the West Nile virus is a rare virus which originated in Africa and is transmitted by mosquitos. It first appeared in the United States in approximately 1999. Dr. Rush noted that most people who have the virus are unaware that they have it. Common symptoms include muscle pain, rash, and encephalitis. The West Nile virus can even be fatal in extremely rare cases. There is no known treatment for the virus. Diagnosis is very difficult and requires a careful history of the mosquito bite, the patient's symptoms, and antibody levels in the patient's blood. A spinal tap is typically taken to determine if the central nervous system was affected.

16. Respondent reported to Dr. Rush a history of chest pain, but that no heart disease was found. She has arthritis of the neck and has experienced neck stiffness for several years. She has occasional thoracic and low back pain. At the time of the IME, respondent was taking the following medications: Atenolol, 50 milligrams, twice daily for blood pressure; Synthroid, 75 milligrams for hypothyroidism; Zantac for GERD; and Norco for pain.

17. In his report, Dr. Rush noted respondent was cooperative and not in acute distress during the physical examination. She measured 61 inches and weighed 126 pounds. Her blood pressure was 132/86. She had 20/20 vision in both eyes without glasses. An examination of her ear, nose and throat was normal. Her neck was "somewhat tight in the paracervical muscles." However, there was no lymphadenopathy or palpable mass, and no jugular venous distention. An examination of respondent's chest and lungs showed her lungs were clear, she did not have shortness of breath, and her respiratory rate was not increased. A cardiovascular examination revealed respondent had a normal sinus rhythm and no murmurs, rubs, or gallops. Her abdomen was soft and without tenderness. Peripheral pulses were present and equal in her extremities bilaterally.

18. Dr. Rush's musculoskeletal exam of the cervical spine found that respondent had some forward flexion of the neck but good range of motion of the neck overall. Respondent had normal range of motion in her shoulders, elbows, forearms, wrists, hands, hips, knees and ankles. Dr. Rush further noted that respondent got on and off the examination table easily and walked normally. The neurological examination was normal. Regarding respondent's mental status, Dr. Rush noted that respondent did not appear depressed or anxious, she answered questions appropriately, and she had no localizing neurologic abnormalities.

19. Dr. Rush reviewed respondent's relevant medical records and summarized them in his IME report. He noted that in a June 2011 Agreed Medical Examination (AME) report, Robert Meth, M.D. found that respondent had a history of the West Nile virus with headaches secondary to this history, hypertension and GERD which was secondary to her use of aspirin to treat her headaches. In an April 2012 Qualified Medical Examination (QME) report, Sean Leoni, M.D., also noted that respondent had GERD, hypertension, a history of the West Nile virus, and headaches secondary to the West Nile virus. In his July 1, 2013 Physician's Report on Disability, Dr. Leoni determined that respondent had severe headaches and fatigue, hypertension and a serology blood test for the West Nile virus. Dr. Leoni further opined that respondent was "permanently disabled."

20. In his IME report, Dr. Rush proffered the following diagnostic impressions:

- (1) History of West Nile virus in 2007. She did not have spinal tap done. There is no documentation of meningitis or encephalitis. There are no serial antibody levels taken to show a rising level of acute infection. The positive serology could be remote exposure or remote mild infection. Nevertheless, she recovered from possible West Nile virus and when someone recovers from this there is usually no sequela according to Harrison's Internal Medicine Textbook, 18th Edition.
- (2) Degenerative joint disease suspected of cervical spine with some paracervical muscle tightness but no limitation.

- (3) Gastroesophageal reflux disease with hiatus hernia causing chest pain.
- (4) Hypertension with good control with current medication and no evidence of end organ damage.
- (5) Smoker with no definite evidence of end organ damage. The lungs are clear and she is not short of breath at rest.

21. Dr. Rush summarized his findings as follows:

In summary, the claimant may or may not have had West Nile virus in 2007. Most of the doctors did think that she did have it. If she did, it apparently has resolved and she should be fully recovered by now. A spinal tap was not done to document meningitis or encephalitis.

She had no orthopedic limitations on objective range of motion measurements. The neurological examination was basically normal. She does not appear depressed today. She seems to be doing well with all of her diagnoses and conditions with no functional limitations noted.

22. In response to specific questions posited by CalPERS regarding respondent's condition, Dr. Rush opined that respondent was able to perform her job duties without limitation and was not substantially incapacitated for such performance. He believed that respondent was cooperative during the examination and had put forth her best effort with no exaggeration of complaints to any degree. He noted that while respondent may have contracted the West Nile virus from a mosquito bite while at work in 2007, her condition had likely resolved since then.

Other Medical Evidence

23. Respondent did not call any medical experts to testify at hearing. She introduced a single AME report, dated January 4, 2011, prepared by Dr. Meth in connection with her workers' compensation case. This report was admitted as administrative hearsay and was considered to the extent permitted under Government Code section 11513, subdivision (d).

24. In his AME report, Dr. Meth gave the following diagnostic impressions: (1) history of the West Nile virus; (2) headaches secondary to the West Nile virus; (3) GERD; and (4) hypertension. Dr. Meth further proffered that respondent's headaches "appear to be related" to her West Nile virus infection, that it was "medically probable" respondent developed elevated blood pressure due to the headaches from the West Nile virus, and that it was "medically probable" respondent's heartburn was caused by her use of aspirin to relieve her headaches from the West Nile virus. Dr. Meth further stated that respondent had reached "maximal medical improvement" as of the date of the AME. In his report, Dr. Meth did not

include any opinion regarding respondent's substantial incapacity from the performance of her job duties as an Electrician II.

Discussion

25. Respondent sought disability retirement on the basis of her alleged internal condition. No competent medical evidence was presented at the hearing to establish that respondent was substantially incapacitated to perform the usual duties of an Electrician II due to her medical condition. That is not to say respondent does not suffer from pain or ailments which may make it more difficult for her to perform her job duties. But discomfort alone, even if it makes performance of one's duties more difficult, is insufficient to establish a substantial incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; citing, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Similarly, an increased risk of further injury is insufficient to demonstrate a present disability. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.) Rather, the IME report and testimony of Dr. Rush were persuasive that respondent was not substantially incapacitated.

26. Respondent's workers' compensation claim and the AME and QME reports prepared in relation to her workers' compensation case have no bearing on the issue of her eligibility for disability retirement because the focus of the issues and the parties are different. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132.) Thus, Dr. Leoni's finding that respondent is permanently disabled or Dr. Meth's opinion that she has reached maximal medical improvement are irrelevant to the determination of whether respondent is substantially incapacitated from the performance of her duties as an Electrician II.

27. Respondent was required to produce a competent medical opinion to establish her substantial incapacity. (Gov. Code, § 21156, subd. (a)(2).) She introduced no expert medical testimony at hearing, and no medical reports, records, or opinions to demonstrate she is substantially incapacitated for the performance of her job duties. Respondent's lay testimony concerning her disability was insufficient to establish her substantial incapacity. (*Peter Kiewitt Sons v. Industrial Accident Commission* (1965) 234 Cal.App.2d 831, 838 ["Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a commission finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence"].)

28. When all the evidence is considered, respondent failed to meet her burden. Therefore, her industrial disability retirement application must be denied.

LEGAL CONCLUSIONS

1. Respondent has the burden of proving she qualifies for disability retirement, and she must do so by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) Evidence that is deemed to preponderate

must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) To be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.

2. Government Code section 21151, subdivision (a), provides that any state safety member incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability, regardless of age or amount of service. The application for disability retirement may be made by the member's employer or the member herself. (Gov. Code, § 21152, subs. (a), (c).)

3. An application for disability retirement must be made while a member is still in state service or within four months after the discontinuance of his state service. Upon receiving the application, the board must order a medical evaluation of the member to determine if he is incapacitated for the performance of duty. (Gov. Code, § 21154.)

4. Government Code section 21158 provides:

Upon the receipt by the board of an application for disability retirement with respect to a state peace officer/firefighter member, state patrol member, or a state safety member, the board shall inform both the employer and the member of all information required for the board to make its determination. ***The board shall make its determination within three months of the receipt by the board of all information required to make a determination for disability retirement on an application submitted by a state peace officer/firefighter member, state patrol member, or a state safety member for disability retirement pursuant to this article. (Emphasis added).***

5. CalPERS received Dr. Rush's IME report on July 21, 2014. On November 22, 2014, CalPERS issued a letter to respondent notifying her that her industrial disability retirement application was denied. At hearing, respondent argued that because CalPERS did not notify her of its determination within three months of receiving Dr. Rush's IME report, the denial was untimely and her industrial disability retirement application must be approved.² This argument is rejected. Respondent offered no legal authority that approval of her disability retirement application is the appropriate remedy for a delayed determination by CalPERS. Further, the delay in CalPERS's determination by one month was not significant and there was no evidence that respondent was prejudiced by it

² In its closing, CalPERS asserted the delay was due to respondent's late filing of her disability retirement application and CalPERS determination whether to accept the late application. However, there was no testimony or other evidence offered on the untimeliness of respondent's application, nor on CalPERS's determination to accept the late application. Therefore, the ALJ is precluded from considering these facts which were offered for the first time during closing arguments.

6. 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.

7. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term “incapacity for performance of duty” to mean “the *substantial* inability of the applicant to perform his usual duties.” (Italics in original.) Discomfort alone, even if it makes performance of one’s duties more difficult, is insufficient to establish a substantial incapacity. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, 853.) Subjective complaints alone, without competent medical evidence to substantiate the complaints, are insufficient to support a finding of permanent and substantial incapacity. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697.)

8. Several CalPERS precedential decisions have applied and adopted the reasoning in *Mansperger*, *Hosford* and *Harmon*, which requires the presentation of competent medical evidence to support a finding that a respondent is disabled or substantially incapacitated from the performance of her usual duties. (See, *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (Precedential Decision 99-03); *In the Matter of the Application for Disability Retirement of Theresa V. Hasan* (Precedential Decision 00-01); *In the Matter of the Application for Disability Retirement of Ruth Keck* (Precedential Decision 00-05).) Findings issued for the purposes of worker’s compensation are not evidence that respondent’s injuries are substantially incapacitating for the purposes of disability retirement. (*Smith v. City of Napa*, (2004) 120 Cal.App.4th 194, 207; *English v. Board of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal.App.3d 839, 844; *Bianchi v. City of San Diego*, (1989) 214 Cal.App.3d 563.)

9. When all the evidence in this matter is considered, respondent did not establish by competent medical evidence that she is permanently and substantially incapacitated from the performance of the usual duties of her job as an Electrician II, based on her internal conditions. Consequently, her industrial disability retirement application must be denied.

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ORDER

The application of Elizabeth Hoffman for industrial disability retirement is DENIED.

DATED: October 28, 2016

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TIFFANY L. KING
Administrative Law Judge
Office of Administrative Hearings