

ATTACHMENT E
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

Case No. 2015-0523

DAWN M. BROOKS,

OAH No. 2016050864

Respondent,

and

CALIFORNIA CORRECTIONAL
INSTITUTION, CALIFORNIA
DEPARTMENT OF CORRECTIONS &
REHABILITATION,

Respondent.

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on October 25, 2016, in Fresno, California.

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

Respondent Dawn M. Brooks represented herself.

No one appeared for or on behalf of respondent California Correctional Institution, California Department of Corrections & Rehabilitation (CCI/CDCR), its default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to that respondent only.

Evidence was received, and the record was left open to allow CalPERS to provide a copy of the signed Domestic Return Receipt for CCI/CDCR, an Amended Proof of Service, and a copy of the legal authority relied upon by its attorney at hearing, and to allow respondent to respond to the additional documentation. The signed Domestic Return Receipt and Amended Proof of Service are added to the jurisdictional documents previously marked as Exhibit 1 and admitted for jurisdictional purposes, and the legal authority is marked as

Exhibit 15. Ms. Brooks's response agreeing that the signed Domestic Return Receipt and Amended Proof of Service may be admitted for jurisdictional purposes but arguing that the legal authority is not applicable in this matter is marked as Exhibit F. The record was closed, and the matter was submitted for decision on November 7, 2016.

SUMMARY

Ms. Brooks's Industrial Disability Retirement Application was approved on the basis of an orthopedic (right wrist) condition, and she has been receiving industrial disability retirement benefits since April 17, 2003. The persuasive medical evidence, however, established that she is no longer substantially incapacitated for the performance of her usual duties as a Correctional Officer with CCI/CDCR. Therefore, CalPERS's decision to reinstate Ms. Brooks to her former position should be affirmed, and her appeal from that decision should be denied.

FACTUAL FINDINGS

Procedural History

1. Anthony Suine, Chief of CalPERS's Benefit Services Division, signed the Statement of Issues on March 28, 2016, solely in his official capacity. The sole issue raised by the Statement of Issues is whether Ms. Brooks continues to be substantially incapacitated for the performance of her usual job duties as a Correctional Officer with CCI/CDCR.

Prior Employment and Injury

2. Ms. Brooks was employed by CCI/CDCR as a Correctional Officer at all times relevant. She is a state safety member of CalPERS by virtue of her employment. She will not reach the minimum age for voluntary service retirement for state safety members until February 2017.

3. Ms. Brooks was in the process of removing an inmate's handcuffs through the food port of his cell on November 15, 2001, when the inmate grabbed her right hand and she quickly pulled away, hitting the top of her hand and wrist on the food port. The top of her hand and wrist immediately began to swell, and were painful. She reported her injury to her supervisor, and was sent to Bakersfield Occupational Medical Group for medical treatment. She filed a claim for workers' compensation benefits.

4. Ms. Brooks received conservative medical treatment through the workers' compensation system, with John Larsen, M.D., a physician board-certified in physical medicine and rehabilitation, serving as her most recent primary treating physician. X-rays and MRIs of her right arm and wrist were negative for fracture, dislocation, or other significant pathology.

5. At hearing, Ms. Brooks estimated she last treated with Dr. Larsen around the time she began receiving her industrial disability retirement benefits, and explained she thought she could no longer receive treatment since she had retired for disability. Since then, she has attempted to receive medical treatment for pain in her right hand and wrist through her primary care physician at Kaiser Permanente, but has repeatedly been denied treatment on the grounds that her injury is work-related.

Essential Duties of a Correctional Officer

6. Essential duties of Ms. Brooks's former position as a Correctional Officer that are relevant here include the ability to perform power grasping, simple grasping, and repetitive use of her hands for more than six hours during an eight-hour shift. Additionally, she had to be capable of lifting or carrying objects weighing greater than 50 pounds for up to three hours during an eight-hour shift.

Application for Disability Retirement

7. On November 20, 2002, Ms. Brooks signed an Industrial Disability Retirement Application. She alleged she was disabled due to an injury she sustained to her right hand and right wrist on November 15, 2001, when she was assaulted by an inmate at work. She claimed her disability prevented her from having any contact with inmates, and from performing any heavy lifting with her right arm. Finally, she claimed that work restrictions imposed due to her disability prevented her from being able to perform her duties as a Correctional Officer.

8. CalPERS referred Ms. Brooks to Mark Nystrom, M.D., a board-certified orthopedic surgeon, for an independent medical examination. Dr. Nystrom concluded, based upon his examination of Ms. Brooks, that she was substantially incapacitated for the performance of her usual job duties as a Correctional Officer with CCI/CDCR due to "right wrist pain and grip weakness." Specifically, he concluded the injury she suffered on November 15, 2001, prevented her from being able to subdue an inmate or drag another person "due to her documented grip loss." He also concluded she was incapable of lifting objects weighing greater than 50 pounds.

9. On May 30, 2003, CalPERS sent Ms. Brooks correspondence informing her that her Industrial Disability Retirement Application was approved on the basis of her orthopedic (right wrist) condition. The effective date of her industrial disability retirement was made retroactive to April 17, 2003.

Subsequent Employment

10. Ms. Brooks has been steadily employed since 2004. She initially started working part-time as the food service manager for Mercy Hospital, but eventually switched to working full-time. After four years, she left Mercy Hospital and went to work for IFCO Pallet Company as its assistant manager. She worked as a project manager for a demolition

company from 2010 to 2014. Ms. Brooks has been the operations manager for Tyac Tires since April 2014. All of her jobs since she began receiving industrial disability benefits have been administrative in nature, and none were labor-intensive.

Reevaluation of Ms. Brooks's Substantial Incapacity

11. Ms. Brooks was 36 years old when CalPERS approved her Industrial Disability Retirement Application, which is younger than the minimum age for voluntary service retirement for state safety members of CalPERS. Therefore, CalPERS sent her correspondence towards the end of 2011 advising that her "file is currently under review" to determine whether she continued to be substantially incapacitated for the performance of her usual job duties as a Correctional Officer.

12. Ms. Brooks was sent to Mohinder Nijjar, M.D., a board-certified orthopedic surgeon, for an independent medical examination. After examining Ms. Brooks on December 13, 2011, Dr. Nijjar concluded she remained substantially incapacitated due to an orthopedic (right wrist) condition.¹ On March 23, 2012, CalPERS sent Ms. Brooks correspondence advising that her "industrial disability allowance will be continued."

13. On September 3, 2014, CalPERS sent Ms. Brooks correspondence informing her once again that her "file is currently under review" to determine whether she continues to be substantially incapacitated for the performance of her usual job duties as a Correctional Officer." She was subsequently sent for an independent medical examination by G.B. Ha'eri, M.D., a board-certified orthopedic surgeon. After examining Ms. Brooks, Dr. Ha'eri concluded she is no longer substantially incapacitated due to an orthopedic (right wrist) condition.

14. On January 27, 2015, CalPERS sent Ms. Brooks correspondence advising her she would be reinstated to her former position as a Correctional Officer with CDI/CDCR. The correspondence also advised Ms. Brooks of her appeal rights. She appealed CalPERS's decision.

Medical Evidence

CalPER's evidence

15. Dr. Ha'eri performed his independent medical examination of Ms. Brooks on December 16, 2014. He prepared a written report summarizing his examination, which was admitted into evidence. He also testified at hearing.

16. At the time of the examination, Ms. Brooks complained of residual right wrist pain and right hand grip weakness. Physical examination revealed a reduced range of motion of the right wrist upon dorsiflexion (bending the wrist back) and palmar flexion (bending the

¹ Dr. Nijjar did not testify at hearing, and his written report was not produced.

wrist down). Range of motion was normal upon radial deviation (bending the wrist inward) and ulnar deviation (bending the wrist outward). Tinel's sign and Phelan's test were each negative for carpal tunnel, and Finkelstein's test was negative for tendinitis.

17. The circumferential measurements of Ms. Brooks's upper extremities were equal, bilaterally, except her left forearm was slightly bigger than her right. Dr. Ha'eri explained at hearing that when one suffers an injury to one of her extremities, she tends to favor the other extremity which causes the muscles in the injured extremity to atrophy due to lack of use. The fact that Ms. Brooks's right arm was substantially the same size as her left was compelling evidence of a lack of atrophy of the muscles in the former, and, therefore, the absence of any significant injury to that arm.

18. Lastly, Ms. Brooks's grip strength when using the jamar dynamometer measured 40, 35, and 35 pounds in the right hand, and 65, 60, and 65 pounds in the left. Dr. Ha'eri explained he would generally expect Ms. Brooks's grip strength in her right hand to be stronger than that in her left since she is right-hand dominant. The fact that testing of Ms. Brooks's grip strength showed otherwise, however, was insignificant without objective findings of weakness in the right hand, because the jamar dynamometer is a subjective test. There were no objective findings of weakness in the right hand.

19. Dr. Ha'eri concluded Ms. Brooks is not substantially incapacitated for the performance of her usual job duties as a Correctional Officer due to an orthopedic (right wrist) condition. He explained she suffered a contusion (a bruise) to the back of her right hand and wrist after the inmate grabbed her hand through the food port and she pulled away on November 15, 2001. He opined that such type of injury generally resolves itself within a couple of months.

20. Dr. Ha'eri criticized Dr. Nijjar's prior diagnosis of right carpal tunnel syndrome, explaining he found no objective evidence to support that diagnosis. Furthermore, he explained such diagnosis would be inconsistent with the mechanics of how Ms. Brooks's November 15, 2001 injury occurred because she explained she hit the top of her right hand and wrist on the food port, but carpal tunnel syndrome affects the opposite side of the wrist.

Ms. Brooks's evidence

21. Ms. Brooks did not call any medical experts to testify at hearing. However, she introduced correspondence dated April 4, 2003, signed by Dr. Larsen. He opined, "The patient is substantially incapacitated from her normal and customary duties as I have stated. This disability began November 15, 2001." She also introduced Dr. Nystrom's independent medical examination report, which CalPERS relied on when it initially approved her Industrial Disability Retirement Application. As previously discussed, he opined she was physically unable to subdue an inmate or drag another person "due to her documented grip loss."

22. Ms. Brooks also introduced a functional capacity evaluation performed by Thomas Traut, M. Ed., RKT. Mr. Traut has a Master's Degree in Exercise Science and Kinesiotherapy. He is the president and owner of Functional Ergonomics, Inc., a company that performs comprehensive ergonomic evaluations designed to match employers' specific job tasks to ensure workers are physically able to perform their essential functions. Functional Ergonomics, Inc., also provides ergonomic consulting and educational programs with the goal of helping to minimize job-related injuries.

23. Mr. Traut's report states:

A Functional Capacity Evaluation was performed on Brooks to determine the following:

- Ability to safely perform the physical demands required of the essential functions of the Correctional Officer at The [sic] State of California Department of Corrections and Rehabilitation. Ms. Brooks has been medically retired from this position since 2003 secondary to a work [sic] related right wrist injury.
- Current maximal safe functional work abilities.
- Current limitations that would prevent a safe return to work.
- Consistency of results and reliability of effort.
- Current maximal physical demand level that can be safely perform.

Discussion

24. Dr. Ha'eri's opinion that Ms. Brooks is no longer substantially incapacitated for the performance of her usual job duties as a Correctional Officer due to an orthopedic (right wrist) condition is more persuasive than Ms. Brooks's evidence to the contrary. Dr. Ha'eri is a board-certified orthopedic surgeon who performed an independent medical examination of Mr. Brooks on December 16, 2014. His written report of his examination was introduced at hearing, and he testified consistently with that report. He also explained the significance of his physical findings. His explanations were uncontroverted and persuasive.

25. Ms. Brooks, on the other hand, relied on a 13-year-old letter from her former primary treating physician, with whom she has not treated since the time the letter was written. Additionally, Dr. Nystrom's independent medical examination was based on his April 7, 2003 examination of Ms. Brooks. Additionally, he wrote in his report, "my examination revealed strong subjective and minimal objective findings.

26. Finally, Ms. Brooks relied on the opinion of one with no medical training or experience. Furthermore, Mr. Traut's evaluation was performed to determine the job

functions Ms. Brooks could “safely perform,” which is not the standard for determining eligibility for industrial disability retirement as explained below.

Summary

27. The persuasive medical evidence established that Ms. Brooks is no longer substantially incapacitated for the performance of her usual job duties as a Correctional Officer with CDI/CDCR due to an orthopedic (right wrist) condition. Therefore, she should be reinstated to her former position.

LEGAL CONCLUSIONS

Applicable Law

1. Once Ms. Brooks retired for industrial disability, the Board of Administration had authority to require her to undergo medical evaluation at any time prior to her reaching the minimum age for voluntary retirement for service. (Gov. Code, § 21192.) “If the determination pursuant to Section 21192 is that [she] is not so incapacitated for duty in the position held when retired for disability ... and ... her employer offers to reinstate her, ... her disability retirement allowance shall be canceled immediately” (Gov. Code, § 21193.) The minimum age for voluntary retirement for service applicable to Ms. Brooks is 50. (Gov. Code, § 21060, subd. (a).) She will not reach that age until February 2017.

2. The analysis of whether a recipient of an industrial disability retirement is “still incapacitated” for the performance of her usual job duties under Government Code section 21192 “is limited to determining whether the conditions for which disability retirement was granted continue to exist.” (*California Department of Justice v. Board of Administration of California Public Employees’ Retirement System* (2015) 242 Cal.App.4th 133, 141 [the analysis of “still incapacitated” is limited to consideration of the disability for which disability retirement was originally granted, and any substantial incapacity due to a different disability is irrelevant].) And the outcome of that analysis must be based on competent medical evidence. (Gov. Code, § 21192.)

3. The courts have interpreted the phrase “incapacitated for the performance of duty” to mean “the substantial inability of the applicant to perform his usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.) And disability pension law is not concerned with whether the member is capable of performing her job duties without significant pain despite her disability, because discomfort, which may make it difficult to perform one’s duties, is insufficient to establish permanent incapacity for the performance of her position. (*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.) Nor is an increased risk of further injury sufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability determined. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

Conclusion

4. The persuasive medical evidence established that Ms. Brooks is no longer substantially incapacitated for the performance of her usual job duties as a Correctional Officer with CDI/CDCR due to an orthopedic (right wrist) condition. Therefore, she should be reinstated to her former position.

ORDER

Respondent Dawn M. Brooks's appeal from CalPERS's determination that she is no longer substantially incapacitated for the performance of her usual job duties as a Correctional Officer with respondent California Correctional Institution, California Department of Corrections & Rehabilitation, due to an orthopedic (right wrist) condition is DENIED.

DATED: November 9, 2016

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Coren D. Wong

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COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings