

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:

Case No. 2016-0274

MELVIN J. FERYANCE

OAH No. 2016061233

Respondent,

and

FOLSOM STATE PRISON, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Respondent.

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, State of California, Office of Administrative Hearings, on January 31, 2017, in Sacramento, California.

The California Public Employees' Retirement System (CalPERS) was represented by Terri Popkes, Senior Staff Attorney.

Respondent Melvin Feryance was present at the hearing and represented himself.

There was no appearance by or on behalf of the Folsom State Prison (Folsom), California Department of Corrections and Rehabilitation, (Department). The Department was duly served with Notices of Hearing. The matter proceeded as a default against the Department, pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on January 31, 2017.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 2/7 20 15

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ISSUE

The issue on appeal is whether on the basis of an orthopedic condition (right knee), respondent is permanently disabled or substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer (CO) for the Department?

PROCEDURAL FINDINGS

1. Respondent was employed by the Department as a CO from approximately January 1987 until December 31, 2015. On November 10, 2015, respondent signed and thereafter filed an application for industrial disability retirement (application) with CalPERS. By virtue of his employment respondent is a state safety member of CalPERS subject to Government Code section 21151. Respondent was 67 years old when he filed his application.

2. In filing the application, respondent claimed disability on the basis of a right knee injury. Respondent wrote that the condition occurred "while walking inside the prison near the east gate up a slight grade." Respondent further wrote that due to the injury he had "limited movement and pain in [his] right knee."

3. CalPERS obtained medical records and reports, including reports prepared by David Coward, M.D., Evelyn Fainsztein, M.D. and Harry Khasigian, M.D., who conducted an Independent Medical Evaluation (IME) of respondent concerning his orthopedic condition. After reviewing the reports, CalPERS determined that respondent was not substantially incapacitated from the performance of his job duties as a CO for the Department.

4. On January 15, 2016, CalPERS notified respondent that his application for industrial disability retirement was denied. Respondent was advised of his appeal rights. Respondent filed an appeal and request for hearing by letter dated February 2, 2016.

5. On April 26, 2016, Anthony Suine, in his official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, made and thereafter filed the Statement of Issues.

FACTUAL FINDINGS

Respondent's Employment History and Duties of a Correctional Officer

1. On January 11, 1987, respondent entered the Department's academy. Upon graduation he was assigned to work at California State Prison in Sacramento. In 1995, he transferred to Folsom where he worked until approximately May 1, 2015, when he injured his right knee. Respondent testified that on May 1, 2015, he walked up steep stairs near his

office. He felt a sharp pain in his right inner knee. He stopped for a moment and continued up the stairs. The pain subsided. He finished his work for the day. Respondent left the prison facility and walked up a hill to exit the last gate. His right knee "locked up." He could not walk but he kept trying to move his leg. His right knee eventually unlocked and with a "great amount of pain" he walked to his truck and returned home. Respondent testified that the Department would not allow him to return to work after May 1, 2015, due to the limitations caused by his knee. On October 7, 2015, he underwent arthroscopic surgery on his right knee. Respondent retired effective December 31, 2015.

2. As set forth in the Essential Functions statement, a CO must be able to perform the following relevant functions:

- Must be able to perform the duties of all the various posts
- Walk occasionally to continuously
- Run occasionally, run in an all-out effort while responding to alarms or serious incidents, distances vary from a few yards up to 400 yards, running may take place over varying surfaces including uneven grass, dirt areas, pavement, cement , etc., running can include stairs, or several flights of stairs maneuvering up or down
- Climb occasionally to frequently ascent/decent or climb a series or steep stairs, several tiers of stairs or ladders as well as climb onto bunks/beds while involved in cell searches, must be able to carry items while climbing stairs
- Crawl and crouch occasionally; crawl or crouch under an inmates bed or restroom facility while involved in cell searches; crouch while firing a weapon or while involved in property searches
- Stand occasionally to continuously, stand continuously depending on the assignment
- Sit occasionally to continuously, sit while performing record keeping or report writing activities, observing designated areas
- Stoop and bend occasionally to frequently; stoop and bend while inspecting cells, physically searching inmates from head to toe; and while performing janitorial work including mopping and cleaning
- Lift and carry continuously to frequently, lift and carry in the light: (20 pound maximum) to medium (50 pound maximum) range frequently throughout the workday and in the very heavy lifting rand (over 100 pounds)

occasionally; lift and carry an inmate and physically restrain the inmate including wrestling an inmate to the floor, drag/carry an inmate out of a cell; perform lifting/carrying activities while working in very cramped space

Independent Medical Evaluation by Harry Khasigian, M.D.

3. On December 16, 2015, at the request of CalPERS, Harry Khasigian, M.D. conducted an IME of respondent and thereafter prepared a report. Dr. Khasigian testified at hearing. Dr. Khasigian is a board-certified orthopedic surgeon. Dr. Khasigian obtained his medical degree from the University of Southern California in 1970. Dr. Khasigian has been licensed to practice medicine for 37 years. He operates a private practice where he treats patients with orthopedic conditions. Dr. Khasigian is a Qualified Medical Examiner and performs IMEs for CalPERS.

4. As part of the IME of respondent, Dr. Khasigian interviewed respondent, obtained a medical history, and conducted a physical examination. He reviewed respondent's job description and essential functions of a CO. Dr. Khasigian also reviewed respondent's medical records related to his orthopedic condition, an x-ray report from May 4, 2015, which showed mild degenerative changes without an acute fracture, an MRI report from May 26, 2015, which showed "advanced patellofemoral chondromalacia, medial meniscus tear," and an October 7, 2015 operative report that "involved a partial medial meniscectomy and a minor chondroplasty of the femoral condyles." Dr. Khasigian also reviewed photographs of the arthroscopic surgery performed on respondent by Dr. Coward.

RESPONDENT'S COMPLAINTS AND HISTORY OF INJURY

5. Respondent reported to Dr. Khasigian that he injured his right knee on May 1, 2015, while at work. He was walking up a hill and suddenly felt pain in his right knee. He did not trip, or twist his knee, nor did he have any trauma or injury associated with the onset of his symptoms. Respondent further reported that since he underwent arthroscopic surgery, he had continued pain under his knee cap. He felt pain when he squats, kneels or climbs. Respondent contended that he could not run or climb stairs. Respondent reported that he was able to perform activities such as carry grocery sacks, yard work, wash his car and vacuum. He felt better when sitting down and worse in the middle of the night or lying on his side.

PHYSICAL EXAMINATION

6. Dr. Khasigian conducted a physical examination of respondent, including his right knee, and a neurological examination. Respondent's neurological examination was normal. His lower extremity reflexes were equal and symmetrical. Dr. Khasigian observed respondent walk. Respondent's gait was normal, with no limping. On standing, respondent was only able to do a 30 degree squat.

7. Dr. Khasigian palpated respondent's right knee. There was no tenderness. Dr. Khasigian conducted the "Second Steinman's" and "McMurray's tests," which test the knee joint and meniscus. The tests were "minimally positive" with no significant finding. Respondent had a "trace of crepitus," which is grinding, with range of motion of the patella. The medial collateral, lateral collateral and posterior cruciate ligaments were stable. Dr. Khasigian opined that the most significant findings were that respondent's right knee was straight, he had full range of motion and no signs of arthritis. There was no swelling of the right knee, which means that there is no irritation. Respondent's right knee was "relatively normal."

8. Dr. Khasigian explained that respondent had a one-third of an inch in his right knee that was affected prior to undergoing arthroscopic surgery. The total knee area was approximately four to five inches. Dr. Khasigian opined that respondent had a mild chondral injury which was mild scuffing of the knee cartilage with a fray that was grade II, which means less than 50 percent in depth, and a torn meniscus. The arthroscopic surgery of the right knee involved a post partial medial meniscectomy, which involves removal of the torn portion of the meniscus and chondroplasty which entails shaving of the frayed cartilage.

9. Dr. Khasigian opined that respondent's right knee condition was not the result of a traumatic injury. He further opined that the chondral injury was likely due to routine wear and tear due to age. Dr. Khasigian also opined that "due to the absences of a traumatic lesion, it appears that the medial meniscus tear was chronic and likely preexisting." The arthroscopic surgery improved his knee condition by "shaving, removal of a torn meniscus, and by removal of loose bodies."

DIAGNOSIS AND IMPRESSION

10. Based on Dr. Khasigian's evaluation of respondent, his diagnosis related to respondent's orthopedic condition were:

1. Post partial medial meniscectomy
2. Chondroplasty, medial femoral condyle for grade II lesion of medial and lateral femoral condyles

11. In response to the question posed by CalPERS to Dr. Khasigian concerning whether there were specific job duties that respondent was unable to perform because of a physical or mental condition, Dr. Khasigian opined that respondent "may have difficulty walking constantly over 6 hours when it is up to 12 miles in a day." He further opined that respondent could perform walking on a frequent basis up to "3 to 6 hours per day and up to approximately 9 miles per day." Respondent "may have difficulty lifting 50 pounds frequently throughout the work day." Dr. Khasigian opined that respondent's inability to perform those physical conditions, "is because the mild amount of degenerative change in the femoral condyles so that extremes of activity would be difficult, although not impossible, for him to perform."

12. Dr. Khasigian further opined that respondent was not substantially incapacitated from the performance of his usual duties as a CO. Dr. Khasigian explained that the surgical findings “do not show deterioration of his joint that is substantial.” Dr. Khasigian opined that respondent was performing all of his job duties prior to the May 1, 2015 incident, when his knee condition was likely present. There was no incident that involved a “traumatic change in his knee.” Since surgery in October 2015, the “pathologic conditions are no longer present within his knee, he should be at improved state of health.” Dr. Khasigian found no evidence of “loss of motion, atrophy, or subsequent diagnostic signs of significant impairment.” As a result, respondent can perform the physical requirements of the CO position.

Respondent’s Evidence

13. Respondent testified that he is not able to perform the physical requirements of his job as a CO at Folsom. Respondent testified that Folsom is one of the oldest prisons in California. Folsom is built on three levels and the main housing unit is five stories tall. There are no elevators. On numerous occasions respondent had to run to various parts of Folsom and then climb five flights of stairs. He also often had to lift and carry inmates on stretchers through the narrow stairways of Folsom.

14. Three to four weeks prior to May 1, 2015, respondent’s knee began to “bother” him. He kept working and ignored the pain. Respondent contended that the physical demands and strain on his body from his physically demanding job caused his knee injury. After surgery in October 2015, he continued to have knee pain. He cannot walk long distances or climb stairs without severe pain. Respondent did not call any health care providers to testify, nor did he provide any documentation from medical providers concerning his orthopedic condition.

Discussion

15. When all the evidence is considered, Dr. Khasigian’s opinion that respondent is not substantially incapacitated from the performance of his usual and customary duties as a CO for the Department, based upon his orthopedic condition, was persuasive. Dr. Khasigian based his opinion on his review of respondent’s job description, the essential functions of the job, review of the medical records and a physical examination. Respondent underwent arthroscopic surgery consisting of shaving, removal of a torn meniscus, and removal of loose bodies. The physical examination Dr. Khasigian conducted revealed no evidence of “loss of motion, atrophy, or subsequent diagnostic signs of significant impairment.” Dr. Khasigian persuasively opined that respondent may experience pain with prolonged walking and frequent lifting in excess of 50 pounds, but the evidence established that he is capable of performing his duties as a CO.

16. Respondent failed to present competent medical evidence to support his assertion that he is substantially incapacitated from the performance of his usual and customary duties as a CO based upon the legal criteria applicable in this matter.

Consequently, respondent failed to establish that his industrial disability retirement application should be granted based upon his orthopedic condition.

LEGAL CONCLUSIONS

1. Respondent seeks disability retirement pursuant to Government Code section 21151, subdivision (a), which provides in pertinent part, that “[a]ny 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.”

2. To qualify for disability retirement, respondent must prove that, at the time he applied, he was “incapacitated physically or mentally for the performance of his or her duties...” (Gov. Code, § 21156, subd. (a)(1).) 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.)

4. In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, the court 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. The applicant in *Hosford* had suffered injuries to his left ankle and knee, and had strained his back. The court noted that the sergeant “could sit for long periods of time but it would ‘probably bother his back;’ that he could run but not very adequately and that he would probably limp if he had to run because he had a bad ankle; that he could apprehend persons escaping on foot over rough terrain or around and over obstacles but he would have difficulty and he might hurt his back; and that he could make physical effort from the sedentary state but he would have to limber up a bit.” (*Id.* at p. 862.) Following *Mansperger*, the court in *Hosford* found that the sergeant:

... is not disabled unless he is substantially unable to perform the usual duties of the job. The fact that sitting for long periods of time in a patrol car would “probably hurt his back,” does not mean that in fact he cannot so sit; ... [¶] As for the more strenuous activities, [a doctor] testified that Hosford could run, and could apprehend a person escaping over rough terrain.

Physical abilities differ, even for officers without previous injuries. The rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the function, renders [the doctor's conclusion that Hosford was not disabled] well within reason. (*Ibid.*)

In *Hosford*, the sergeant argued that his condition increased his chances for further injury. The court rejected this argument, explaining that “this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently existing.” (*Hosford, supra*, 77 Cal.App.3d at p. 863.)

5. In *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff was not permanently incapacitated for the performance of his duties, finding, “A review of the physician’s reports reflects that aside for a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the appellant’s condition are dependent on his subjective symptoms.” 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.)

6. The burden of proof is on respondent to demonstrate that he is substantially incapacitated from the performance of his usual and customary duties such that he is permanently disabled. (*Harmon v. Board of Retirement of San Mateo County, supra*, 62 Cal. App. 3d 689; *Glover v. Board of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) To meet this burden, respondent must submit competent, objective medical evidence to establish that, at the time of his application he was permanently disabled or incapacitated from performing the usual duties of his position as a CO for the Department. (See *Harmon v. Board of Retirement, supra*, 62 Cal.App.3d at 697.)

7. When all the evidence in is considered in light of the courts’ holdings in *Mansperger, Hosford, Harmon, Smith and Keck*, respondent did not establish that his industrial disability retirement application should be granted. Respondent failed to establish through competent, objective medical evidence that he was permanently disabled or substantially incapacitated from the performance of his usual and customary duties of his job as a CO, based on his orthopedic condition. Consequently, his industrial disability retirement application must be denied.

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ORDER

Respondent Melvin J. Feryance's application for industrial disability retirement is DENIED.

DATED: February 3, 2017

DocuSigned by:
Marcie Larson
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MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings