

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:

BROOKE R. MOORE,

Respondent,

and

SALINAS VALLEY STATE PRISON,
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,

Respondent.

Case No. 2016-0390

OAH No. 2016070578

PROPOSED DECISION

This matter was heard before Heather M. Rowan, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on January 23, 2017, in Sacramento, California.

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

Brooke Moore (respondent) represented herself.

There was no appearance by or on behalf of the Salinas Valley State Prison, California Department of Corrections and Rehabilitation (Department). CalPERS established that it duly served the Department with a Notice of Hearing. Consequently, this matter proceeded as a default hearing against the Department pursuant to Government Code section 11520, subdivision (a).

Evidence was received and the matter was submitted on January 23, 2017.

ISSUE

On the basis of an orthopedic (left ankle) condition, is respondent substantially incapacitated from performing her usual and customary duties as a Correctional Officer?

FACTUAL FINDINGS

1. Respondent was employed as a Correctional Officer by the Department. On May 7, 2015, CalPERS received respondent's Disability Retirement Election Application (application). On March 4, 2016, respondent's application was denied. Respondent filed a timely appeal.

Respondent's Application

2. In her application, respondent described her disability as: "left ankle injury." She stated that her injury occurred on May 2, 2011, while "responding to an alarm at work." Respondent was running across the yard at the prison, her foot fell through a depressed area in the dirt, and she twisted her left ankle. She described her injury's effect on her ability to do her job as follows: "I am unable to perform my job at all."

In her application, respondent stated that she was not currently working.

3. By letter dated March 4, 2016, CalPERS notified respondent that it had denied her application. In the letter, CalPERS stated that its "review included the reports prepared by James Ushiba, M.D., Kalle Varav, M.D., Paul F. Clayman, M.D., Anuradha Reddy, M.D., and Daniel D'Amico, M.D.," and that based on "the evidence in those reports, [CalPERS] find[s] that you are not substantially incapacitated from the performance of your job duties as a Correctional Officer" The letter notified respondent that she had 30 days to file a written appeal from the denial.

4. By letter dated March 15, 2016, respondent appealed from CalPERS' denial of her application.

Duties of a Correctional Officer

5. CalPERS submitted two documents that describe the duties of a Correctional Officer: a list of physical requirements of a Correctional Officer and an Essential Functions list. Based on these documents, the pertinent physical tasks required of a Correctional Officer are:

Must range-qualify with departmentally approved weapons;

Must be able to swing a baton with force to strike an inmate.

Disarm, subdue, and apply restraints to an inmate;
Defend self against an inmate armed with a weapon;

Walk occasionally to continuously;

Run occasionally; run in an all-out effort while responding to alarms or serious incidents, distances ranging from a few yards to up to 400 yards and may take place on varying, uneven surfaces; may include stairs;

Climb occasionally to frequently, ascent/descent or climb a series of steps/stairs or ladders, as well as climb onto bunks/beds; must be able to carry items while climbing stairs;

Lifting and carrying in the light to medium range (20 to 50 pounds) frequently throughout the workday and in the very heavy range (100 pounds or more) occasionally. This could include physically restraining or wrestling an inmate to the ground as well as partially lifting and dragging an inmate; and

Pushing and pulling occasionally to frequently, which could include restraining an inmate.

Expert Opinion

6. CalPERS retained Daniel D'Amico, M.D. to conduct an Independent Medical Evaluation (IME) of respondent. Dr. D'Amico is a board-certified orthopedic surgeon. Dr. D'Amico examined respondent on December 9, 2015, took respondent's medical history, reviewed respondent's medical records, and prepared an IME report.

7. Respondent explained to Dr. D'Amico that she injured her left ankle on May 2, 2011, when she responded to an alarm on the prison yard while on duty as a Correctional Officer. After her injury, respondent was evaluated by a doctor and was treated conservatively with pain medication and physical therapy. In February of 2012, respondent had "lateral capsulotomy" surgery on her ankle and was diagnosed with a grade three sprain. She did not return to work after the date of injury.

8. Respondent's pain continued, and worsened, following surgery. She began wearing a boot, but continued experiencing pain. From Dr. D'Amico's review of respondent's medical history, he opined that the surgery worsened respondent's condition. Dr. D'Amico reported that respondent felt the ankle was unstable as well as stiff. In his opinion, this is not possible. He testified that it is "incompatible to have lateral instability and stiffness." He later said that it is possible, but the way that she described her pain and instability did not make sense to him. Additionally, the surgeon who performed respondent's ankle surgery was not clear on the connection between the actual pain respondent

experienced from the injury and what the surgery would do to correct that pain. The surgery did not correct respondent's pain, and possibly made it worse. Without seeing the ligament in an MRI, however, Dr. D'Amico could not say for certain whether it had healed. Based on his examination of respondent, he did not find a high degree of instability.

9. In Dr. D'Amico's IME report, he noted that respondent could wear a boot on her left foot and perform her job duties. She would also need to limit her activities. Over time, she would need to recondition herself so that she would be fully rehabilitated to perform as a Correctional Officer.

10. During the course of her treatment, respondent was referred to mental health doctors to treat her anxiety, depression, and mood symptoms. Dr. D'Amico reviewed respondent's psychiatrist's report, in which the psychiatrist opined that respondent's psychiatric condition and pain were interrelated. Dr. D'Amico agreed. He testified that respondent was disabled, "from a psychiatric point of view." Additionally, a psychiatric condition such as depression or anxiety can cause a person to experience increased pain. In his initial IME report, Dr. D'Amico found that respondent was substantially incapacitated from performing the usual duties of a correctional officer on the basis of her psychological conditions. CalPERS requested that he reissue his report and limit his findings to his expertise as a board-certified orthopedic surgeon. In response to CalPERS's request, Dr. D'Amico issued a revised report dated January 27, 2016, in which he opined that respondent was not substantially incapacitated on the basis of an orthopedic ankle injury. He deleted from his report all conclusions based upon her psychiatric condition.

Respondent's Evidence

11. At the hearing, respondent testified about her work and injury history. She was a Correctional Officer with the Department for four or five years. On May 2, 2011, she responded to an alarm at work, ran across a dirt yard, and her foot fell into a hole. She twisted her ankle and fell. She has not returned to work. She testified that the Department requires Correctional Officers to wear a specific uniform and she is not able to wear a "walking boot" at work. Additionally, a Correctional Officer may not use prescribed pain medication while on duty.

12. Respondent agreed with the duties of a Correctional Officer as described above. Salinas Valley State Prison is a "Level 4" prison, which is a prison that has the highest level of security. Respondent described the prison as being busy with daily incidents to which the officers must respond. Depending on the incident, officers must run at full speed, climb stairs, take down inmates, or protect themselves against inmates.

13. Respondent described the medical treatment she received since her work injury. She has seen four or five doctors. She has been told that her pain is in her head. The surgery performed on her ankle made the pain worse. When she saw doctors to try to address the cause of her pain, she was accused of being "drug seeking" and prescribed pain medication rather than receiving treatment. The increasing instability in her ankle has caused

her to experience post-traumatic stress symptoms that make her scared to run or walk down stairs. She now has depression and anxiety and takes medication for both. She cannot get through a normal day without taking prescribed narcotic pain medication. She has attempted to run, but experiences so much pain that she must stop and then is barely able to walk.

Discussion

14. The burden was on respondent to offer sufficient competent medical evidence at hearing to support her disability retirement application. She did not call an expert witness to testify or present medical evidence. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a Correctional Officer based on her left ankle injury. Dr. D'Amico's report and testimony stated that respondent was not substantially incapacitated from performing her usual job duties. There was no competent medical evidence to counter that opinion.

15. In sum, because respondent failed to offer sufficient competent medical evidence at the hearing to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a Correctional Officer, her disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Correctional Officer, respondent is a member of CalPERS, subject to Government Code section 21151, subdivision (a).¹

2. To qualify for disability retirement, respondent had to prove that, at the time she applied for disability retirement, she was "incapacitated physically or mentally for the performance of [her] duties." (Gov. Code, § 21156.) 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.

¹ Government Code section 21151, in relevant part, provides:

(a) Any 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.

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. When all the evidence in this matter is considered, respondent did not establish that her disability retirement application should be granted. She failed to submit sufficient evidence based upon competent medical opinion that, at the time she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual duties of a Correctional Officer on the basis of her orthopedic (left ankle) condition. Consequently, her disability retirement application must be denied.

ORDER

The application of respondent Brooke R. Martin for disability retirement is DENIED.

DATED: February 14, 2017

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Heather M. Rowan

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HEATHER M. ROWAN
Administrative Law Judge
Office of Administrative Hearings