

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:

JAMES D. GREER,

Respondent,

and

PRESTON YOUTH CORRECTIONAL
FACILITY, CALIFORNIA DEPARTMENT
OF CORRECTIONS AND
REHABILITATION,

Respondent.

Case No. 2016-0239

OAH No. 2016031224

PROPOSED DECISION ON REMAND

This remanded matter was heard before Administrative Law Judge Joy Redmon, Office of Administrative Hearings (OAH), State of California, on January 24, 2017, in Sacramento, California.

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

Respondent James Greer was present at the hearing and represented himself.

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

This matter was heard on remand from the Board of Administration, California Public Employees' Retirement System. The matter originally proceeded to hearing on July 21, 2016. The administrative law judge issued his proposed decision on August 1, 2016.

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denying respondent's application for industrial disability retirement. On October 5, 2016, CalPERS' notified OAH that on September 21, 2016, its Board of Administration remanded the matter to OAH to take additional evidence on a limited issue. Specifically, "[t]he Board requested that the Administrative Law Judge receive and consider additional evidence regarding the psychological conditions and related limitations asserted by the member."¹ The other issues adjudicated in the original Proposed Decision are not addressed herein.

Evidence was received, the record was held open until February 14, 2017, for submission of the transcript from the original hearing held in this matter. The transcript was received and the matter was submitted for decision on February 14, 2017.

ISSUE

At the time respondent filed his application, was he permanently disabled or substantially incapacitated from performing his usual and customary duties as a Youth Correctional Counselor (YCC) for Preston based upon a psychological condition?

FACTUAL FINDINGS

1. On February 23, 2006, respondent filed an application for industrial disability retirement with CalPERS. By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151.

2. In his application, respondent described his specific disability as, "had heart attack @ work, Preston – (Preston-YCF, Ione, Calif.) on 01-16-04. After recoup., returned to work Feb. 04. Had 2 more related incidents @ work over next years." He listed his work limitations and preclusions due to injury or illness as, "precluded from heavy work, undue emotional stress, (AME) Malcolm M. McHenry M.D. FACC 11-30-05."

3. CalPERS obtained medical reports concerning respondent's orthopedic, cardiovascular, neurological, and psychological conditions. After reviewing respondent's medical records and reports, it concluded respondent was not permanently disabled or substantially incapacitated from performing his usual duties and a youth correctional counselor at the time he filed his application for industrial disability. CalPERS notified respondent by letter dated June 29, 2007, of its decision. Respondent appealed by letter dated August 1, 2007. The initial and current hearing on remand, were conducted pursuant to that request.²

¹ This request was consistent with the relevant excerpt of the Board meeting during which the decision to remand was made.

² Respondent questioned the nine-year delay from the time he appealed until the initial hearing was held in this matter. That was addressed on page five of the Proposed Decision issued August 1, 2016. It was not subject to the remand and is not addressed herein.

Respondent's Employment History and Duties as a Youth Correctional Counselor

4. Respondent worked for CDCR (and its predecessor) from 1970 until March 2006. He was approximately 52 years old at the time he retired in 2006.

5. On February 19, 2005, respondent signed an acknowledgement of his duty statement. According to the duty statement, respondent was responsible for:

- Maintaining custody of the wards;
- Maintaining supervision of the wards;
- Providing recreation for the wards;
- Maintaining accountability of the wards;
- Maintaining care of welfare of the wards;
- Providing counseling and casework services to the wards;
- Preparing for emergency work;
- Maintaining lodge and ward security;
- Attending training and staff meetings; and
- Additional duties as assigned.

Respondent testified that the job entailed being both a correctional counselor and peace officer in that he was, "... supposed to try to heal and also try to keep order and peace."

Independent Medical Evaluation, by Michael S. Barnett, M.D.

6. Michael Barnett, M.D., conducted an independent medical evaluation (IME) of respondent in December 2006, at the request of CalPERS. Dr. Barnett has been Board-certified in psychiatry and neurology since 1982. As part of the IME, Dr. Barnett reviewed respondent's medical records, reviewed the duty statement for a Youth Correctional Counselor, interviewed respondent, and conducted a mental status examination. Thereafter, Dr. Barnett prepared a written report and also testified at hearing.

7. Dr. Barnett acknowledged at hearing that he had no independent recollection of respondent. He testified that he was confident in his opinions based on his review of the written report he drafted in 2006. During the evaluation, Dr. Barnett took a detailed background and history of complaints from respondent related to his physical and psychological complaints. Respondent reported that he sustained a head injury in 1984 during an attempted escape. Respondent informed Dr. Barnett that he had to re-learn basic neurological functions and missed several years of work. In 2004, respondent suffered a heart attack and was off work for approximately one month before attempting to return. Ultimately, after a second episode of chest pain he stopped working in October 2005 and retired in 2006. At the time of the IME, respondent's chief psychological complaint was, "[s]ome emotional things, since my mother passed this summer."

8. Respondent reported to Dr. Barnett that following the heart attack he felt like "damaged goods." His major stressors at that time included a pending Workers' Compensation case and the stress of raising his two sons, one of whom had been diagnosed with autism, following a divorce from his wife. Dr. Barnett reported that despite these stressors, respondent, "... stated clearly though that he would be working if his heart was fine and he was allowed to." During the appointment, Dr. Barnett observed, "[t]here was no tearfulness, no current, past, or future suicidal ideation. He is not irritable or withdrawn. He is able to enjoy things. He does feel guilty. He denies psychotic or manic symptoms. He denies panic attacks."

9. Dr. Barnett reviewed medical records from respondent's treating physician, Richard J. Axelrod, M.D. Dr. Barnett noted that Dr. Axelrod authored a letter dated November 8, 2005, in which he stated that, "... Claimant should avoid extremes of undue emotional stress and is not to work overtime." Dr. Axelrod also indicated in June 2005 that he would start respondent on the antidepressant Lexapro.

DIAGNOSIS AND OPINION

10. Dr. Barnett determined that respondent's mood was intermittently depressed, but generally described him as, "bright, happy, talkative, alert, somewhat sad about his inability to work, the loss of his wife, and his physical problems." He diagnosed respondent using the Diagnostic and Statistical Manual IV, which was the manual applying the multiaxial or multi-dimensional approach used at the time. According to Dr. Barnett, respondent had an Axis I (clinical syndromes) diagnosis of adjustment disorder with depressed mood; under Axis III (physical conditions) respondent had a history of head trauma, elevated lipids, high blood pressure, coronary artery disease, and sleep apnea; under Axis IV (severity of psychological stressors) he suffered the loss of his wife, loss of his mother, physical injuries, and struggles with work; finally under Axis V (highest level of functioning) respondent had a Global Assessment of Functioning score of 65, which Dr. Barnett testified was "a good level of functioning."

11. In his IME and testimony at hearing, Dr. Barnett found that respondent had no significant psychiatric illness. He acknowledged respondent suffered from what he called situational depression brought on by the stress of his heart attack and losing his mother, coupled with raising his sons. Dr. Barnett explained that situational depression is different from clinical depression. Situational depression is a typical condition for many people with the stressors respondent had at the time. According to Dr. Barnett, situational depression passes and is not considered a permanent condition. Even with the diagnosis discussed above, Dr. Barnett concluded that respondent was not substantially incapacitated from performing his usual and customary duties as a Youth Correctional Counselor, due to a psychological condition.

Discussion

12. Respondent contends that Dr. Barnett's IME was incomplete because he did not fully consider Dr. Axelrod's restrictions and did not conduct psychological testing. He also asserts that the nature of the job as a Youth Correctional Counselor was so stressful in and of itself that he could not continue to work in that field. These arguments were unpersuasive. Dr. Barnett persuasively testified that he fully considered Dr. Axelrod's letters and notes. Dr. Barnett noted that Dr. Axelrod never concluded that respondent could not work due to a psychological condition. Any recommendations he made about reducing stress were more related to respondent's heart condition. Regarding psychological testing, Dr. Barnett testified that psychological testing would not be necessary or appropriate in determining respondent's ability to work. He persuasively testified that as a psychiatrist it was appropriate for him to rely on his interview, examination, records review, and his own expertise in reaching a conclusion. Regarding the inherent job stress, Dr. Barnett considered respondent's job duties and believed there was no psychological reason that respondent was not unable to perform those duties. Respondent submitted no competent medical evidence in support of his position or from any medical provider that expressed an opinion inconsistent with Dr. Barnett's.

13. When all the evidence is considered, Dr. Barnett's opinion that respondent is not permanently disabled or substantially incapacitated from performance of the duties of a Youth Correctional Counselor is persuasive. Respondent's physical examinations and the medical records reviewed by Dr. Barnett did not reveal any objective evidence that he had a psychological condition that prevented him from performing the usual and customary duties of a Youth Correctional Counselor at the time he filed his application for industrial disability retirement.

14. Respondent did not present competent medical evidence to support his disability retirement application as it relates to a psychological condition. In the absence of supporting medical evidence, respondent's application for disability retirement must be denied.

LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Youth Correctional Counselor for CDCR, he is a local miscellaneous member of CalPERS, subject to Government Code section 21151.³

³ 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 a 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. “Incapacity for the performance of duty” under Government Code section 21022 (now section 21151) “means the substantial inability of the applicant to perform his usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876.) Substantial inability to perform usual duties must be measured by considering applicant’s abilities. Discomfort, which makes it difficult to perform one’s duties, is insufficient to establish permanent incapacity from performance of one’s 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.) A condition or injury that may increase the likelihood of further injury, as well as a fear of future injury, do not establish a present “substantial inability” for the purpose of receiving disability retirement. (*Hosford v. Board of Administration of the Public Employees’ Retirement System* (1978) 77 Cal. App. 3d 854, 863-864.) As the court explained in *Hosford*, prophylactic restrictions 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.

4. An applicant for disability retirement must submit competent, objective medical evidence to establish that at the time of application, he was permanently disabled or incapacitated from performing the usual duties of his position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697.) In *Harmon*, the court found that a deputy sheriff was not permanently incapacitated from the performance of his duties, because “aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for [the sheriff’s] condition are dependent on his subjective symptoms.”

5. 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, supra*, 120 Cal.App.4th at 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.)

6. Respondent bears the burden of proving that he is permanently and substantially unable to perform his usual 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.) Although respondent asserted subjective complaints of a psychological condition due to emotional stress, he did not present competent, objective medical evidence to establish that he was permanently disabled or

incapacitated from performance of his duties as a Youth Correctional Counselor at the time he filed his disability retirement application. Therefore, based on the Factual Findings and Legal Conclusions, respondent is not entitled to retire for disability pursuant to Government Code section 21151.

ORDER

The application of JAMES GREER for industrial disability retirement based on a psychological condition is DENIED.

DATED: March 2, 2017

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Joy Redmon
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JOY REDMON
Administrative Law Judge
Office of Administrative Hearings