

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:

BEN ISLA,

Respondent,

and

CALIFORNIA STATE PRISON,
CORCORAN, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Respondent.

Case No. 2016-0131

OAH No. 2016041011

PROPOSED DECISION

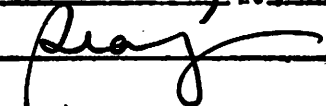
Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on February 27, 2017, in Sacramento, California

Cynthia R. Rodriguez, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Ben Isla represented himself.

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

Evidence was received, the record was closed, and the matter was submitted for decision on February 27, 2017.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED March 15, 2017


SUMMARY

The sole issue on appeal is whether Mr. Isla was permanently and substantially incapacitated for the performance of his usual job duties as a Correctional Officer for CDCR due to an orthopedic (right foot) condition at the time he applied for industrial disability retirement. Mr. Isla did not produce persuasive medical evidence establishing he was substantially incapacitated at that or any other time. Therefore, his application for industrial disability retirement should be denied.

FACTUAL FINDINGS

Procedural Background

1. On May 8, 2015, Mr. Isla signed, and CalPERS received, a Disability Retirement Election Application for Industrial Disability Retirement. He identified his specific disability on the application as a right foot injury that caused ligament and tendon damage. He suffered his injury on November 9, 2014, when responding to an alarm at work. He identified his treating physicians as Antonio Durazo, M.D., and Moshe Sinaie, D.P.M.

2. CalPERS notified Mr. Isla by correspondence dated December 15, 2015, that his application was being denied based on staff's review of medical reports prepared by Drs. Durazo, Sinaie, and Ghol Ha'Eri. Mr. Isla timely appealed CalPERS's denial, and Anthony Suine, Chief of CalPERS's Benefit Services Division, signed the Statement of Issues on April 7, 2016, solely in his official capacity.

Employment History

3. Mr. Isla began working as a Correctional Officer for the California Department of Corrections and Rehabilitation, Salinas Valley State Prison, in July 2002. Two years later, he transferred to the California Substance Abuse Treatment Facility and State Prison at Corcoran. He was still employed by CDCR on the date of hearing, but his last day of actual work was August 25, 2015, and he has not been on payroll since March 3, 2016. He is a state safety member of CalPERS by virtue of his employment as a Correctional Officer with CDCR.

History of Injury

4. Mr. Isla was working at CDCR on November 9, 2014, when he ran to an alarm in one of the housing units. After helping quell the disturbance, he returned to his post and felt a lot of pain in his right foot and ankle. He sat down, took his boot off, and stretched his foot, but eventually returned to his duties despite the pain. He later obtained ibuprofen from the medical office, but did not report his injury to anyone or receive any other medical treatment.

5. Mr. Isla estimated he first sought medical treatment for this injury from his primary care physician approximately one week after the incident. He did not seek treatment again until January 5, 2015, when he visited Dr. Durazo through the workers' compensation system. Dr. Durazo prescribed ibuprofen and meloxicam (both nonsteroidal anti-inflammatory drugs), referred Mr. Isla to a podiatrist, and excused him from work.

6. Mr. Isla first treated with Dr. Sinaie, a podiatrist, on February 9, 2015. Dr. Sinaie ordered a MRI of the right ankle and foot, the results of which showed a "complete tear and retraction of the proximal medial plantar cord." He prescribed a CAM Walker¹ to immobilize the right ankle and a pair of crutches for non-weight bearing ambulation, and released Mr. Isla to return to modified work with restrictions of limited standing, sitting, bending, and use of hands. Mr. Isla was released back to Dr. Durazo's care for follow-up.

7. Dr. Durazo continued to monitor Mr. Isla's progress while using the CAM Walker, and eventually released him to full duty without restrictions on August 18, 2015. Mr. Isla worked without restrictions for about one week before feeling significant pain in his right foot and ankle on August 25, 2015. He sought treatment from Dr. Durazo, and was excused from work. As of the date of hearing, Mr. Isla has not returned to work due to the restrictions imposed by Dr. Durazo.

Physical Requirements of a Correctional Officer

8. The Physical Requirements of Position/Occupational Title for a Correctional Officer employed by CDCR, signed by Mr. Isla and CDCR's return to work coordinator, identifies the following relevant physical activities as being performed for the following durations during any given work shift:²

Constantly: Sitting, standing, and walking.

Frequently: Climbing and walking on uneven ground.

Occasionally: Running.

Medical Evidence

CalPERS's evidence

9. At CalPERS's request, Ghol B. Ha'Eri, M.D., a board-certified orthopedic surgeon, performed an independent medical examination (IME) of Mr. Isla on November 10,

¹ A CAM Walker is an adjustable orthopedic apparatus that looks like a boot. The only such trademarked device is made by Alimed Inc., and is called a CAM Walker.

² "Constantly" is more than six hours, "frequently" is three to six hours, and "occasionally" is up to three hours.

2015. He prepared a report documenting his IME, and that report was admitted into evidence. He also testified at hearing.

10. Mr. Isla told Dr. Ha'Eri during the IME he was diagnosed with plantar fasciitis of the right foot in 2013. He received cortisone injections in his heel, was prescribed orthotics to wear inside his shoes, and was referred to physical therapy. He also disclosed a second episode of flare-up of right foot pain in March 2014. At the IME, Mr. Isla complained of pain in the heel of his right foot after standing or walking for prolonged periods of time.

11. While walking to the examination room, Dr. Ha'Eri observed Mr. Isla walked independently with a normal gait. He wore regular shoes with orthotics inside. He has flat feet.

12. Mr. Isla had a normal orthopedic physical examination. While he complained of pain under the right heel upon palpation, there was no swelling or discoloration. The range of motion in his right ankle and foot upon dorsiflexion, plantar flexion, eversion, and inversion was within normal limits. Neurological examination of the right foot showed no sensory or motor deficits. The circumferential measurements of his thighs and calves were equal, bilaterally.

13. Dr. Ha'Eri opined there are no duties of Mr. Isla's position as a Correctional Officer that he is physically incapable of performing due to the physical condition of his right foot. Therefore, he concluded Mr. Isla was not substantially incapacitated for the performance of the usual duties of a Correctional Officer at the time he applied for industrial disability retirement.

14. Dr. Ha'Eri testified at hearing in a manner consistent with his IME report. Additionally, he described the circumferential measurements of Mr. Isla's thighs and calves as objective evidence he was using both legs normally. Dr. Ha'Eri explained that a patient who has pain or suffers a neurological deficit in one of his legs will favor using the other leg, thereby causing the muscles in the injured leg to atrophy. Since both of Mr. Isla's thighs and calves were equal in size, he had no muscle atrophy in either leg, and was using both legs normally.

15. Dr. Ha'Eri further explained Mr. Isla has a long history of plantar fasciitis in his right foot, with November 9, 2014, being the third incident of flare-up. He opined Mr. Isla's plantar fasciitis does not render him substantially incapacitated because he has been able to perform his usual duties, with occasional accommodations when he experiences a flare-up of pain.

Mr. Isla's evidence

16. Mr. Isla did not call any medical experts to testify at hearing. However, he introduced copies of Dr. Durazo's August 1, 2016 Primary Treating Physician's Permanent

and Stationary Report and Physician's Return-to-Work & Voucher Report. Dr. Durazo opined in the former report that Mr. Isla is physically capable of standing and/or walking for less than two hours during an eight-hour day and sitting for less than eight hours during an eight-hour day. He also opined Mr. Isla is capable of "occasionally" climbing, but did not define occasionally. He opined in the latter report that Mr. Isla is physically capable of working, provided he is not required to stand, walk, or climb for more than two hours.

Discussion

17. Mr. Isla had the burden of producing sufficient competent medical evidence to establish he was substantially incapacitated for the performance of his usual duties as a Correctional Officer with CDCR at the time he applied for industrial disability retirement. When all the evidence is considered, he did not meet his burden. He called no medical expert witnesses at hearing, and his medical evidence consisted only of two reports prepared by his primary treating physician in his workers' compensation matter. Dr. Durazo did not opine in either report that Mr. Isla is substantially incapacitated, but instead explained he is physically capable of working with certain restrictions. Besides, Dr. Durazo's opinions are entitled to little weight because the standards in CalPERS's disability retirement cases are different from those in workers' compensation matters. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Kimbrough v. Police & Fire Retirement System* (1984) 161 Cal.App.3d 1143, 1152-1153; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132.)

On the other hand, Dr. Ha'Eri's opinion that Mr. Isla is not substantially incapacitated due to an orthopedic (right foot) condition was persuasive. His IME report was detailed and thorough, and the opinions expressed therein were supported by his physical examination of Mr. Isla. His hearing testimony was comprehensive, and he persuasively explained why Mr. Isla's history of plantar fasciitis in the right foot does not render him substantially incapacitated.

Summary

18. Mr. Isla did not produce sufficient persuasive medical evidence to establish he was substantially incapacitated for the performance of his usual duties as a Correctional Officer with CDCR due to an orthopedic (right foot) condition when he applied for industrial disability retirement. Therefore, his Disability Retirement Election Application for Industrial Disability Retirement should be denied.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Mr. Isla has the burden of proving he qualifies for industrial disability retirement, and he must do so by a preponderance of the evidence. (*McCoy v. Board of*

Retirement (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5 [“As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence”].) Evidence that is deemed to preponderate must amount to “substantial evidence.” (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And 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.)

Applicable Statutes

2. Government Code section 21151, subdivision (a), provides the following with regard to a safety member’s eligibility for industrial disability retirement:

Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

3. Government Code section 20026 provides, in pertinent part:

“Disability” and “incapacity for performance of duty” as the basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

4. Government Code section 21156, subdivision (a), provides, in pertinent part:

(1) If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability

(2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

5. 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.) It is not necessary that the person be able to perform any and all duties since public policy supports employment and utilization of the disabled. (*Schrier v. San Mateo County*

Employees' Retirement Association (1983) 142 Cal.App.3d 957, 961.) Instead, the frequency with which the duties he cannot perform are usually performed as well as the general composition of duties he can perform must be considered. (*Mansperger v. Public Employees' Retirement System, supra*, 6 Cal.App.3d at pp. 876-877 [while applicant was unable to lift or carry heavy objects due to his disability, "the necessity that a fish and game warden carry a heavy object alone is a remote occurrence"].)

6. Discomfort, which may make it difficult for one to perform his duties, is insufficient to establish permanent incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207 [mere discomfort which makes it difficult to perform one's job does not constitute a permanent incapacity]; citing, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability retirement. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

Conclusion

7. Mr. Isla did not produce sufficient persuasive medical evidence to establish he was substantially incapacitated for the performance of his usual duties as a Correctional Officer with CDCR due to an orthopedic (right foot) condition when he applied for industrial disability retirement. Therefore, his Disability Retirement Election Application for Industrial Disability Retirement should be denied.

ORDER

Respondent Ben Isla's Disability Retirement Election Application for Industrial Disability Retirement dated May 8, 2015, is DENIED.

DATED: March 14, 2017

DocuSigned by:
Coren D. Wong
F42876F5E758451...

COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings