ATTACHMENT E

THE PROPOSED DECISION
BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

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

JUSTIN Z. HENDEE,
Respondent,

and

CALIFORNIA STATE UNIVERSITY SAN BERNARDINO,
Respondent.

Case No. 2015-1226
OAH No. 2016080762

PROPOSED DECISION


Charles H. Glauberman, Senior Staff Attorney, represented complainant, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System, State of California (CalPERS).

Michael J. DeNiro, Attorney at Law, represented respondent, Justin Z. Hendee, who appeared telephonically.

Stacey Barnier, Human Resources Director, represented respondent, California State University, San Bernardino (CSUSB).

The record was held open for the parties to submit written closing arguments. Closing arguments were received from CALPERS and Mr. Hendee, and the matter was submitted for decision on September 1, 2017.
ISSUE

Is Mr. Hendee, who was granted an industrial disability retirement effective January 1, 2011, still permanently disabled or substantially incapacitated from performing the usual and customary duties of a police officer?

FACTUAL FINDINGS

Background

1. Mr. Hendee was employed by CSUSB as a police officer. By reason of his employment, Mr. Hendee was a state safety member of CalPERS.

2. On July 5, 2011, Mr. Hendee submitted an application for industrial disability retirement on the basis of an orthopedic (back, neck, and left shoulder) condition.

3. CalPERS approved the application and Mr. Hendee was retired for disability effective January 1, 2011.

4. On August 24, 2015, CalPERS had Mr. Hendee examined by an Independent Medical Examiner. On September 23, 2015, CalPERS notified Mr. Hendee that it conducted a reevaluation of his qualifications for industrial disability retirement (Mr. Hendee was under the minimum age for a voluntary service retirement). After reviewing medical reports, CalPERS determined that Mr. Hendee’s back, neck, and left shoulder were not disabling, and that he was no longer substantially incapacitated from the performance of his job duties as a police officer. CalPERS informed Mr. Hendee that he would be reinstated to his former position with CSUSB. Mr. Hendee appealed CalPERS’s determination.

5. On June 4, 2016, complainant signed the accusation in his official capacity. The accusation alleged that Mr. Hendee is no longer disabled or incapacitated from performance of his usual job duties as a CSUSB police officer.

Physical Requirements of a CSUSB Police Officer

6. The physical requirements for the position were described in a CalPERS Physical Requirements of Position/Occupational Title form which documented that Mr. Hendee, as a CSUSB police officer, was constantly (i.e., over six hours a day) required to grasp objects, repetitively use his hands, drive, and lift and carry objects weighing up to 25 pounds; that he was required to frequently (i.e., from three to six hours a day) sit, stand, run, twist at the neck, reach above and below the shoulder, work at heights, and be exposed to dust or fumes; and that he was occasionally (i.e., up to three hours a day) required to walk, crawl, kneel, climb, squat, bend at the neck, bend at the waist, twist his back, push, pull and grasp objects, use a keyboard and mouse, lift and carry objects weighing over 100 pounds,
operate foot controls or engage in repetitive foot movements; engage in fine manipulation of the hands, and walk on uneven ground.

Testimony and Report of Robert J. Kolesnik, M.D.

7. Robert J. Kolesnik, M.D., completed his residency in orthopedic surgery at the University of Southern California in 1984. After completing a fellowship in hand and microvascular surgery, Dr. Kolesnik was board certified in orthopedic surgery in 1985. He specializes in conditions of the hand and upper extremities but has been practicing general orthopedics for the past 30 years. He has multiple professional memberships relating to orthopedics and has made numerous professional presentations concerning orthopedics in academic settings. He is also published in a peer-reviewed journal. Based on his training and experience, Dr. Kolesnik was well qualified to render an expert opinion in this matter.

8. Dr. Kolesnik performed an independent medical examination of Mr. Hendee for CalPERS on August 24, 2015. Dr. Kolesnik’s evaluation of Mr. Hendee’s condition was based on a review of medical records, consideration of the occupation description, a physical exam, and an interview of Mr. Hendee. He prepared a report documenting his findings. He concluded that Mr. Hendee was fit to perform the usual and customary duties of a police officer without restrictions and was not substantially incapacitated from the performance of his usual and customary work duties.

9. Mr. Hendee was involved in a motor vehicle collision on July 10, 2010, while at work. Mr. Hendee, the driver, struck a tree after swerving to avoid hitting a pedestrian. He complained of pain in his neck, left shoulder, and lower back. Mr. Hendee underwent a number of medical examinations, including a qualified medical evaluation. On the date of Dr. Kolesnik’s evaluation, Mr. Hendee complained of occasional stiffness, tightness, and discomfort about the cervical spine; intermittent pain in his left shoulder that occurs with motion and lifting or cold weather; and constant throbbing pain in his lower back that increased with standing, walking, and sitting, with intermittent radiating pain into the buttocks and posterior thigh bilaterally. Dr. Kolesnik reviewed Mr. Hendee’s medical records, which contained results of diagnostic studies, and concluded there was no significant pathology.

10. Dr. Kolesnik performed a physical exam of Mr. Hendee. An examination of the cervical spine revealed no tenderness or muscle spasm, and Mr. Hendee had full range of motion without pain. An examination of Mr. Hendee’s shoulders was normal, but Mr. Hendee reported pain associated with the supraspinatus muscle, which is an indicator of rotator cuff tendinitis. Range of motion for the shoulders was normal and unassociated with pain. An examination of the lower spine was unremarkable, and Mr. Hendee had full range of motion without pain. Mr. Hendee reported minimal discomfort in the lumbar spine with all motions of both hips. Finally, Mr. Hendee’s arms, wrists, hands, and legs were all normal, without any evidence of atrophy.
11. Dr. Kolesnik diagnosed Mr. Hendee with chronic cervical strain with mild cervical arthritis; left shoulder sprain/strain with rotator cuff tendonitis and partial infraspinatus tear; history of ulnar neuropathy, which has resolved; and minimal degenerative disc disease at L5-S1.

12. Dr. Kolesnik reviewed the physical requirements and standards for a CSUSB police officer. In his 30 years of practice, he has also treated police officers. After reviewing Mr. Hendee’s history, symptomology, his medical records, and the job description, Dr. Kolesnik determined that Mr. Hendee could return to his occupation as a police officer.

13. Dr. Kolesnik reviewed the medical evaluation conducted by Aaron E. Mohr, D.C., Mr. Hendee’s chiropractor. The letter indicated that Mr. Hendee was in a motor vehicle collision on December 5, 2016, and Dr. Mohr evaluated him on December 9, 2016. Based on the additional diagnostic studies following this incident, Mr. Hendee’s shoulder and lumbar spine showed no significant pathology. Dr. Kolesnik also reviewed a report authored by Edwin Dunteman, M.D. Dr. Kolesnik said there was nothing in either report that caused him to change his opinion; however, he noted that his conclusion was only based on the diagnostic studies that were performed in February 2017 that were essentially normal, as Dr. Kolesnik had not conducted the physical exam. Dr. Kolesnik noted that although his evaluation occurred over two years ago, the MRIs performed in February 2017 revealed that the left shoulder was normal and there was no evidence of tendonitis. The MRI of the lumbar spine revealed no significant pathology. Although there was evidence of mild narrowing on the left where the nerve root comes out, there was no evidence of nerve root compression that would lead to significant pain. Based on these recent studies, Dr. Kolesnik continued to believe that Mr. Hendee could return to his usual duties as a campus police officer.

Mr. Hendee’s Testimony

14. Mr. Hendee, a probationary employee, worked at CSUSB in November 2009 until his injury in July 2010. He was released from his employment in December 2010. Prior to working at CSUSB, he was a police officer for California State University, Fullerton, for 10 years. Mr. Hendee testified that as a police officer with CSUSB, he had to wear duty gear that consisted of body armor, a gun belt, holster, firearm, two magazines, two handcuff cases with handcuffs, radio holder, radio with shoulder mic, expandable baton, Taser, and pepper spray. Mr. Hendee also carried a back-up pistol and was required to wear boots. He estimated that the duty gear weighed from 30 to 35 pounds. Mr. Hendee said he was also issued a ballistic helmet, assault rifle with three magazines, a gas mask, and riot baton. He said if he had to wear all his gear it would be approximately 65 to 70 pounds. Mr. Hendee also carried a duty bag that weighed approximately 20 to 25 pounds.

15. Mr. Hendee said while in duty gear, he frequently had to walk, get in and out of vehicles, stand and sit for long periods of time, and lift his gear bag. While in duty gear he occasionally had to run, climb fences, jump fences, engage in hand-to-hand combat with suspects, grapple with suspects, lift suspects from the ground, pursue suspects over rough
terrain, restrain mentally unstable people, and pull injured persons out of vehicles. He rarely had to kick in doors, climb through windows, swing heavy items, and don his ballistic helmet and assault rifle. Mr. Hendee explained that he had to put his hands on someone and perform some sort of compliance hold a little less than once a week. During his eight months on duty with CSUSB, Mr. Hendee said he had to grapple with suspects approximately three times, engaged in a foot chase six times, had to climb walls “all the time,” and never kicked in any doors.

Mr. Hendee moved to St. Louis in August 2011. For the past two months he has worked in asset protection. Prior to that he drafted emergency operation plans. Mr. Hendee said his latest motor vehicle accident in December 2016 occurred when he was rear-ended while waiting to exit the freeway. He said the airbag did not deploy and he did not file a police report.

Mr. Hendee was on probation with CSUSB when he was injured. He testified that CSUSB elected to release him.

Mr. Hendee believes that he would be a danger to the public, himself, and his colleagues if he were required to return as a police officer. He said he did not think he would be able to do certain things such as taking a combative suspect to the ground, engaging in a prolonged physical altercation, and getting in and out of a vehicle for 12 hours at a time. He said he still has trouble with his lower back and believes he has herniated discs. He said he has constant pain, including sciatic pain where his legs and feet feel numb. He also said he has problems with his left shoulder and thinks he has developed arthritis.

Testimony of Aaron E. Mohr, D.C.

16. Dr. Aaron Mohr is a chiropractor located in O’Fallon, Missouri, who evaluated and began treating Mr. Hendee beginning on December 9, 2016, after Mr. Hendee was involved in a motor vehicle collision several days earlier. Dr. Mohr testified telephonically and authored a report dated June 30, 2017. Since receiving his Doctorate of Chiropractic in 2006, Dr. Mohr has worked in private practice. Since 2013, he has been a chiropractor and owner of O’Fallon Pain Relief Associates. Dr. Mohr reviewed the job description of a CSUSB police officer. He has also treated a number of police officers for work-related injuries.

17. At the time of his initial evaluation, Mr. Hendee complained of pain in his neck, left shoulder, lower back, and tingling down the back of his legs. On December 9, 2016, Dr. Mohr conducted a physical examination of Mr. Hendee. Dr. Mohr testified that he has seen Mr. Hendee approximately 40 times since, the latest being the week prior to the hearing.

18. Dr. Mohr testified that Mr. Hendee, wearing 30 pounds of duty gear, was currently not able to walk, run, get in and out of a vehicle, stand for a long period of time, sit for a long period of time, climb fences or walls, engage in hand-to-hand combat, grapple
with suspects on the ground, lift suspects from the ground, lift a gear bag, pursue suspects over rough terrain, restrain suspects, pull injured persons out of vehicles or lift injured persons. Dr. Mohr stated that he based his opinion on the computerized strength test he administered and the amount of pain Mr. Hendee claimed to be in. Consequently, he concluded, Mr. Hendee "should not, and may not be able to" walk wearing 30 pounds of duty gear. However, he has never seen Mr. Hendee attempt to do so.

According to Dr. Mohr's report, Mr. Hendee underwent a 15-week rehabilitation program, which included chiropractic adjustments, physical therapy, and prescription medications.

**Testimony of Edwin Dunteman, M.D.**

19. Edwin Dunteman, M.D. received his medical degree from the University of Illinois, Chicago and he completed a residency at Barnes Hospital at Washington University. He completed a fellowship in pain management at Boston Children's and Women's Hospital. After his fellowship, he worked at Washington University School of Medicine as an assistant professor for two to three years. Since then, he worked in private practice as an orthopedic surgeon and pain management specialist. He has experience treating police officers involved in workers' compensation claims. Dr. Dunteman currently works part-time as an independent contractor for Pain Relief Associates. Based on his education and experience, Dr. Dunteman was well qualified to render an expert opinion in this matter.

20. Dr. Dunteman evaluated Mr. Hendee on January 23, 2017, and prescribed him pain medication to accompany his chiropractic and physical therapy. According to the report, there was gradual improvement in the shoulder and neck symptoms, but Mr. Hendee continued to have intermittent pain as well as low back pain, with symptoms radiating down the back of the legs. He continued to have back and neck pain that was similar to symptoms before his most recent collision. The report indicated a diagnosis of residual lower back pain with radiculopathy symptoms due to degenerative disc disease, as evidenced on the MRI. The report indicated that Mr. Hendee is not capable of returning to his police officer position due to chronic low back pain, radiculopathy, and secondary mobility restrictions arising from the degenerative spine disease. Finally, he noted, "A functional capacity evaluation would confirm our opinion, as well as more accurately quantify his degree of disability."

21. Dr. Dunteman testified that Mr. Hendee, wearing 30 pounds of duty gear, was currently not able to run, get in and out of a vehicle, stand for a long period of time, sit for a long period of time, climb walls, engage in hand-to-hand combat, grapple with suspects on the ground, lift suspects from the ground, lift a gear bag, pull injured persons out of vehicles, or lift injured persons. Dr. Dunteman testified that he is not familiar with CalPERS's standards for disability retirement, although he is familiar with the duties of police officers generally.

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1 Dr. Dunteman's curriculum vitae was not provided so the time periods were unclear.
LEGAL CONCLUSIONS

Purpose of the Retirement Law

1. The legislative purpose of public employee pension programs is well-established. They serve two objectives: To induce persons to enter and continue in public service, and to provide subsistence for disabled or retired employees and their dependents. Disability pension laws are intended to alleviate the harshness that would accompany the termination of an employee who has become medically unable to perform his duties. (Haywood v. American River Fire Protection Dist. (1998) 67 Cal.App.4th 1292, 1304.)

Burden and Standard of Proof

2. CalPERS had the burden of proving by a preponderance of the evidence that Mr. Hendee is no longer incapacitated from performing the duties of a CSUSB police officer. (Evid. Code, §§ 500, 115.)

Applicable Statutes

3. Government Code section 20026 defines the terms “disability” and “incapacity for performance of duty,” when used as a basis for retirement, to mean a “disability of permanent or extended and uncertain duration” that is based on “competent medical opinion.”

4. Government Code section 21151, subdivision (a), provides that a state safety or state peace officer who is “incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability . . . regardless of age or amount of service.”

5. Government Code section 21156 provides that if the evidence demonstrates that the member 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. The determination of incapacitation shall be based on competent medical opinion.

6. Government Code section 21192 provides:

The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. . .

. . . The examination shall be made by a physician or surgeon,
appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

7. Government Code section 21193 provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position. However, in that case, acceptance of any other position shall immediately terminate any right to reinstatement. A recipient who is found to continue to be incapacitated for duty in his or her former position and class, but not incapacitated for duty in another position for which he or she has applied for reinstatement and who accepts employment in the other position, shall upon subsequent discontinuance of incapacity for service in his or her former position or a position in the same class, as determined by the board under Section 21192, be reinstated at his or her option to that position.

8. Under Government Code section 21193, once CalPERS determines that a former state employee is not incapacitated for duty, the state agency has a mandatory duty to reinstate the employee. (Dept. of Justice v. Bd. of Administration (2015) (242 Cal.App.4th 133, 140.)

Evaluation

10. In resolving any conflict in the testimony of expert witnesses, the opinion of one expert should be weighed against that of another. Consideration should be given to the qualifications and believability of each witness, the reasons for each opinion, and the matter upon which it is based. (BAJI 2.41.) California courts have repeatedly underscored that an expert's opinion is only as good as the facts and reason upon which that opinion is based. (Kennemur v. State of California (1982) 133 Cal.App.3d 907, 924.) Dr. Kolesnik evaluated Mr. Hendee over two years ago and determined that there were no specific job duties Mr. Hendee could not perform and he was not incapacitated from the performance of his duties as a police officer. Since that time, Mr. Hendee was involved in another vehicle collision and sought treatment with Drs. Mohr and Dunteman. Dr. Dunteman reported that Mr. Hendee responded well to chiropractic and physical therapy such that the pain in the neck and shoulder had resolved, but continued to have residual low back pain with radiculopathy symptoms due to degenerative disc disease. Dr. Dunteman believed that the degenerative findings pre-existed his December 2016 motor vehicle collision. Dr. Dunteman opined that Mr. Hendee could not return to being a police officer because of his chronic low back pain, radiculopathy, and "secondary mobility restrictions" arising from the degenerative spine disease. He noted that performing certain job duties, such as getting in and out of a vehicle or restraining a suspect, may not be possible due to Mr. Hendee's status.

Dr. Mohr's testimony was essentially similar to Dr. Dunteman's. He noted that Mr. Hendee reported that the 2016 injuries were mostly resolved and he returned to his previous pain levels and limitation. Dr. Mohr believed that Mr. Hendee should avoid numerous activities associated with a police officer, which could worsen his pain level and exacerbate his conditions. It was not clear from Dr. Mohr's testimony whether Mr. Hendee should avoid these activities or could not perform them.

Mr. Hendee argued that Dr. Kolesnik's opinion should be discounted because he did not testify as to Mr. Hendee's ability to perform specific job functions required by a CSUSB police officer. However, Dr. Kolesnik is an experienced orthopedic surgeon who has treated police officers in the past and reviewed the physical duty requirements of a CSUSB police officer before making his determination that Mr. Hendee was not incapacitated. Thus, he did not need to testify about specific physical requirements for his testimony to be persuasive.
Mr. Hendee's testimony that he continues to have pain in his lower back was credible. However, Dr. Kolesnik's competent medical opinion was more persuasive as to the ultimate issue of whether Mr. Hendee is disabled or incapacitated from performing his usual and customary job duties. He noted Mr. Hendee has full range of motion and there was no atrophy or neurologic deficits. Dr. Kolesnik reviewed the most recent MRI results reported by Drs. Mohr and Dunteman in their reports and concluded that there was minimal pathology. Dr. Kolesnik did not change his opinion based on the reports of either doctor.

The gravamen of Drs. Mohr and Dunteman's opinions was that Mr. Hendee could not return to the position of a police officer was based on the fact that he continues to experience pain in his lower back and that performing certain job duties may exacerbate the condition. There were minimal objective findings to support the position that Mr. Hendee could not perform certain job functions, other than Mr. Hendee's subjective complaint of pain.

11. "Incapacitated" means the person must be substantially unable to perform his or her usual job duties. The board must consider the duties actually and usually performed by the applicant, and not simply examine a job description or a list of job demands prepared by an employer, to determine if the applicant is incapacitated for the performance of duty. (Hosford v. Bd. of Administration (1977) 77 Cal.App.3d 854, 860-861.) Disability is not an inability to perform fully every function of a given position. When a person can perform his or her usual and customary job duties, even though doing so may be difficult or painful, the employee is not substantially incapacitated and does not qualify for an industrial disability retirement. (Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 886-887.) Mere difficulty in performing certain tasks is also not enough to support a finding of disability. (Hosford, supra, 77 Cal.App.3d at p. 854.) Further, the claimed disability must be presently disabling; a disability that may be aggravated with time or that is speculative does not satisfy the requirements of the Government Code. (Id. at 863.)

12. Although Mr. Hendee might continue to experience back pain, Dr. Kolesnik's opinion that Mr. Hendee was no longer disabled was more persuasive than that of Drs. Mohr and Dunteman. A preponderance of evidence established that Mr. Hendee is no longer disabled or incapacitated from the performance of the usual and customary duties of a police officer.

13. Having found that Mr. Hendee is no longer entitled to remain on disability retirement, CSUSB contends that it cannot reinstate Mr. Hendee to his former position because it rejected Mr. Hendee from employment while he was still on probation. However, Government Code section 21193 requires that an employee found not to be incapacitated for duty must be reinstated without conditions. (Dept. of Justice, supra, at p. 624.) Whether Mr. Hendee was originally entitled to disability retirement due to a termination for cause is beyond the scope of the accusation and this hearing. Neither CalPERS nor CSUSB challenged Mr. Hendee's original application for disability retirement based on his release from employment while on probation. Because his disability retirement application was not contested, the issue of whether Mr. Hendee was released from employment for cause, because of a disabling medical condition, or to preempt an otherwise valid claim for
disability retirement, was never litigated. *(Smith v. City of Napa (2004) 120 Cal.App.4th 194, 205.)* Accordingly, CSUSB must reinstate Mr. Hendee to his former position without conditions.

ORDER

Respondent Justin Z. Hendee’s appeal is denied.

The determination by CalPERS that Mr. Hendee is not substantially incapacitated from the performance of his usual and customary duties of a police officer with CSUSB is affirmed.

Respondent CSUSB shall reinstate respondent to his former position immediately.

DATED: September 27, 2017

ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings