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 A. JENKINS

Respondent.

and

DIVISION OF ADULT PAROL OPERATIONS, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION

Respondent.

PROPOSED DECISION

Nana Chin, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on September 13, 2017, in Los Angeles, California.

Charles H. Glauberman, Senior Staff Attorney, represented the California Public Employees’ Retirement System (CalPERS).

Respondent James A. Jenkins (Respondent Jenkins) was present and represented himself. No appearance was made on behalf of Respondent Division of Adult Parole Operations, California Department of Corrections and Rehabilitation (Respondent Department of Corrections).

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on September 13, 2017.
FINDINGS OF FACT

Parties and Jurisdiction

1. Between August 19, 1996 and December 9, 2015, Respondent James Jenkins was employed with Respondent Department of Corrections, as a Parole Agent I (parole agent). By virtue of his employment, Respondent Jenkins is a state safety member of CalPERS.

2. On December 2, 2015, Respondent Jenkins signed an application for service pending industrial disability retirement (application) on the basis of “toxic exposure-mold, chronic sinusitis.” (Exhibit 3.)

3. CalPERS obtained or received medical reports concerning Respondent Jenkins’s otolaryngological condition from medical professionals. After review of the reports, CalPERS determined that Respondent Jenkins was not permanently disabled or incapacitated from performance of his duties as a parole agent at the time the application for industrial disability retirement was filed.

4. By letter dated September 9, 2016, Respondent Jenkins and Respondent Department of Corrections were notified of CalPERS’s determination and were advised of their appeal rights.

5. By letter dated October 7, 2016, Respondent Jenkins filed a timely appeal and requested an administrative hearing.

6. On March 2, 2017, Anthony Suine, in his official capacity as Benefit Division Chief, Board of Administration, CalPERS, executed a Statement of Issues against Respondent Jenkins and Respondent Department of Corrections.

7. The issue on appeal is limited to whether Respondent Jenkins is permanently disabled or substantially incapacitated from performance of his usual and customary duties as a parole agent for Respondent Department of Corrections based on an otolaryngological condition.

Employment History and Otolaryngological (Sinusitis) Claim

8. While employed as a parole agent for Respondent Department of Corrections, Respondent Jenkins supervised individuals released from prison. Respondent Jenkins estimated that half of his time was spent in the field and the other half was spent in the office. As a parole agent, Respondent Jenkins was required to perform a wide range of physically demanding essential functions including: carrying and occasionally drawing a weapon; conducting searches and seizures; exerting appropriate physical force to subdue, restrain, and arrest parolees; and engaging in self-defense and defense of others.
9. Sometime in 2006, Respondent Jenkins began noticing high levels of what he characterized as “black mold” in the office where he worked. In 2010 or 2011, Respondent Jenkins developed symptoms of a cold which never went away. These symptoms included nasal congestion, generalized weakness and fatigue, postnasal drainage and a headache which he had for five to six months. Respondent Jenkins constantly cleared his throat and experienced ear pressure and coughing. During this time, Respondent Jenkins also developed a rash on his hand which he believes was a result of his exposure to mold.

10. The building where Respondent Jenkins worked was closed on two occasions to eradicate mold from various areas in the building. The building was eventually closed for renovation for a period of approximately two to three months. Despite being away from the office during the renovation, Respondent Jenkins’s symptoms did not improve. Respondent Jenkins continued to experience coughing, mucus collection in his throat, voice change, nasal congestion and ear pressure.

11. After the renovation, Respondent Jenkins returned to the office, and his physical symptoms continued. In October 2013, Respondent Jenkins learned that one of his office partners had been diagnosed with an ailment that he was told was a complication of black mold exposure.

12. In September 2014, Respondent Jenkins filed a worker's compensation claim based on his above-noted symptoms. Dr. Majcher was Respondent Jenkins’s primary treating physician in connection with the worker’s compensation claim. Respondent Jenkins met with Dr. Majcher, but Dr. Majcher did not provide him with treatment.

13. The building at which Respondent Jenkins worked was eventually closed, and he was moved to another building. Respondent continued to have the same nasal and throat symptomatology, and his physical condition did not improve. Respondent Jenkins eventually discontinued his employment in December 2015.

Medical History

14. On March 27, 2015, Eli E. Hendel, M.D. conducted a pulmonary medical evaluation of Respondent Jenkins as Agreed Medical Evaluator (AME) in relation to Respondent Jenkins’s worker’s compensation claim. Dr. Hendel determined that Respondent Jenkins did not have hyper-reactive airway disease or any airway disease involving his lungs. Dr. Hendel also determined that Respondent Jenkins had an upper airway disease involving the nasal mucosa and sinuses. Dr. Hendel further determined that “[t]here is a reasonable medical probability that [Respondent Jenkins’s] exposure to indoor molds were aggravating factors on his chronic sinusitis that is responsible for his symptoms.” (Exhibit A.)

15. Since discontinuing his employment, Respondent Jenkins has continued to have residual symptoms. Respondent Jenkins sought treatment at Kaiser Permanente in Moreno Valley and Riverside on three occasions. On one of those occasions, Respondent Jenkins reported having congestion and coughing up yellow mucous.
16. At the present time, Respondent Jenkins’s nasal breathing has improved with the continued use of nasal spray. However, he continues to have nasopharyngeal drainage and a cough. Respondent Jenkins’s primary concern, however, is his constant fatigue, which he believes prevents him from performing his duties as a parole agent.

Evaluations Conducted at CalPERS’ Request

17a. At the request of CalPERS, Konstantin Salkinder, M.D, who is certified with the American Board of Otolaryngology-Head and Neck Surgery, examined Respondent Jenkins on March 24, 2016. Dr. Salkinder issued a report of his findings, and he testified credibly as to the contents of his report. Dr. Salkinder obtained pertinent medical history, performed a physical examination and reviewed medical reports, a list of essential functions for a Parole Agent I and the duty statement. Dr. Salkinder found that Respondent Jenkins’s main problem was fatigue and not the symptomology from his sinuses. Dr. Salkinder noted that fatigue issues should be addressed by an internal medicine physician. Dr. Salkinder did not find Respondent Jenkins to be substantially incapacitated from the performance of his usual duties.

17b. Subsequent to the evaluation, Dr. Salkinder was provided with Respondent Jenkins’s 2016 records from Kaiser Permanente. Dr. Salkinder determined that there was nothing in the additional medical records which would cause him to change his opinion with respect to Respondent Jenkins’s sinus condition.

18. CalPERS did not refer Respondent Jenkins to any additional medical examiners.

Findings Regarding Respondent Jenkins’s Disability

19. Respondent Jenkins did not present competent medical evidence to establish that, by reason of an otolaryngological condition, he is substantially incapacitated from the performance of his usual duties as a parole agent employed by Respondent Department of Corrections.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for an industrial disability retirement has the burden of establishing eligibility by a preponderance of the evidence. (Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1332.)

2. "Preponderance of the evidence means evidence that has more convincing force than that opposed to it." [Citations.] . . . The sole focus of the legal definition of "preponderance" in the phrase "preponderance of the evidence" is on the quality of the

Applicable Law

3. The Public Employees' Retirement Law is set forth in Government Code section 20000 et seq. The general purpose of the public retirement system is "to prevent hardship to state employees who because of age or disability are replaced by more capable employees. The pension system serves as an inducement to enter and continue in state service [citation], and the provisions for disability retirement are also designed to prevent the hardship which might result when an employee who, for reasons of survival, is forced to attempt performance of his duties when physically unable to do so." (Quintana v. Board of Administration (1976) 54 Cal.App.3d 1018, 1021.)

4. Government Code section 21151, subdivision (a), provides, "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."

5. Government Code section 20026 defines "disability" and "incapacity for performance of duty" as follows:

"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, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

Evaluation

6. "Incapacitated for the performance of duty" means "the substantial inability of the applicant to perform his usual duties," as opposed to mere discomfort or disability. (Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 877.) Substantial inability to perform one's usual duties must be measured by considering the applicant's present abilities; disability cannot be prospective or speculative. (Hosford v. Board of Administration of the Public Employees' Retirement System (1978) 77 Cal.App.3d 854, 863.)

7. In this case, Respondent Jenkins claims to suffer from sinusitis and other symptoms which he attributes to his exposure to toxic mold. However, Respondent Jenkins failed to present competent medical evidence to establish that his condition rendered him incapacitated from performing the usual duties of a parole agent.
ORDER

1. The decision of the CalPERS is affirmed.

2. The application for industrial disability retirement of James A. Jenkins is denied.

DATED: October 13, 2017

[Signature]

Nan Soh
Administrative Law Judge
Office of Administrative Hearings