

ATTACHMENT E
THE PROPOSED DECISION

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

In the Matter of the Application for Disability
Retirement of:

JOHNNY E. PALMER,

Respondent,

and

ELK GROVE UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. 2017-0239

OAH No. 2017050246

PROPOSED DECISION

Administrative Law Judge Joy Redmon, Office of Administrative Hearings, State of California, heard this matter on October 24, 2017, in Sacramento, California.

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

Respondent Johnny E. Palmer represented himself.

No one appeared on Elk Grove Unified School District's behalf and this matter proceeded as a default proceeding pursuant to Government Code section 11520 against the school district.

Evidence was received and the matter closed. It was submitted for decision on October 24, 2017

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED 11/9 20 17

D. G. Wooten

ISSUE

At the time respondent filed his application, was he permanently and substantially incapacitated from performing his usual duties as a Lead Custodian II based on the orthopedic condition of right carpal tunnel syndrome?

FACTUAL FINDINGS

1. On April 5, 2016, respondent filed for service pending disability retirement. He retired from service effective April 13, 2016, and has received his retirement allowance since that time.

2. In his application, respondent described his specific disability as, "carpoltunnels [sic] right hand." He specified his disability occurred on February 21, 2015, and occurred by, "job duties." He identified his limitations or work preclusions based on his injury as, "less than 50% of job duties," with no further specification. Regarding how his injury affected his ability to perform his job, respondent wrote, "lost my job."

3. CalPERS obtained medical reports concerning respondent's orthopedic condition. After reviewing respondent's medical records and reports, it concluded respondent was not permanently and substantially incapacitated from performing his usual duties as a Lead Custodian II. CalPERS notified respondent by letter dated August 11, 2016, of its decision. Respondent timely appealed the determination and the hearing in this matter was conducted pursuant to that request.

Respondent's Employment History and Duties as a Lead Custodian II

4. Respondent worked for the school district beginning in 1998 as a yard duty. He moved to operations in 2000, first as a substitute then as a permanent custodian. He was promoted to Lead Custodian in approximately 2002, and was promoted to Lead Custodian II approximately 10 years later. He remained in that capacity until he retired in 2016. Respondent is currently 52 years old.

5. According to the duty statement, as a Lead Custodian II, respondent was responsible for:

- Performing responsible custodial activities including maintaining buildings, office space, and adjacent grounds areas in a clean, orderly and secure condition;
- Training and providing work direction and guidance to assigned custodial staff, including assigning and inspecting their work and assuring guideline and schedule compliance, and providing input for performance evaluations;

- Conferring with site administrator and supervisor regarding care, cleaning, and facility maintenance; adjusting work schedules to fit site and district staff needs; and drive vehicles to various sites to respond to emergency calls and to pick up and deliver equipment and supplies;
- Requisition custodial supplies, maintain proper inventory levels, and issue supplies and equipment to staff;
- Assure facility security during assigned hours including locking gates, doors, and windows; monitoring facilities for vandalism, safety, and fire hazards, and report such to appropriate personnel; escort students as needed, raise and lower flags, respond to emergency calls after hours as assigned;
- Clean classrooms, offices, cafeterias, and other facilities including sweeping, scrubbing and mopping floors, vacuuming rugs, shampooing and spot cleaning carpets, and stripping, waxing, and refinishing floors;
- Dust and polish furniture, light fixtures and woodwork, clean chalkboards, trays and erasers, empty and clean waste receptacles and pencil sharpeners, and clean and adjust blinds or shades;
- Clean, scrub, and disinfect restrooms, wash windows, walls, polish metal work, clean sinks, mirrors and other bathroom fixtures, restock paper and soap supplies, and clean drinking fountains;
- Pick up paper, trash, and debris around school grounds and buildings, sweep and clean walkways and entrances, water lawns and shrubs;
- Move and arrange furniture and equipment, set up facilities for special events and meetings;
- Make minor repairs such as replacing lightbulbs and lighting tubes, unplugging toilets and sinks, changing fuses, performing minor touch-up painting, identify and report maintenance problems;
- Operate and maintain equipment including floor stripper, buffer, vacuum cleaner, small power and hand tools, replace belts and bags, operate a computer and a two-way radio;
- Participate in thorough school or district facility cleaning and restoration;
- Inspect fire extinguishers;

- Attend custodial staff meetings;
- Perform related duties.

Independent Medical Evaluation (IME)

6. CalPERS sent respondent to Harry A. Khasigian, M.D., for an independent medical evaluation (IME). Dr. Khasigian is certified by the American Board of Orthopedic Surgery and has practiced orthopedic surgery for nearly 40 years. Dr. Khasigian testified at the hearing in this matter. He performed an IME of respondent and prepared a report. He reviewed respondent's prior medical records and his Duty Statement. On June 22, 2016, he met with respondent, obtained his history, and performed a physical examination. Thereafter, he authored an IME report dated June 22, 2016. He also authored a supplemental IME report dated November 18, 2016, after receiving additional medical records. CalPERS asked for clarification regarding a reference to respondent's left wrist contained in his report and Dr. Khasigian issued his final IME report on January 6, 2017. Dr. Khasigian testified consistently with his reports.

7. Dr. Khasigian reviewed respondent's medical records. He noted that respondent underwent right carpal tunnel release in July 2015 following nerve conduction studies. Respondent's primary complaint to Dr. Khasigian was chronic pain and swelling subsequent to his right carpal tunnel release. Respondent reported that he could not lift more than 35 pounds and has difficulty grabbing things, such as a ladder. Respondent informed Dr. Khasigian that he could not hold or grasp instruments or tools. He reported numbness at the incision site. Respondent experienced stiffness in the three median fingers, and stiffness when flexing his hand. He told Dr. Khasigian that his index and long fingers get numb occasionally and that sometimes he wakes during the night with right arm pain. He also reported pain when grasping items.

8. Dr. Khasigian testified respondent's physical examination was essentially normal. Regarding his right wrist, respondent did not evince surgical complication, wrist abnormality, or advanced median nerve dysfunction. He had full range of motion of his fingers. He had no atrophy of his hand. His motor function was normal. Dr. Khasigian noted that respondent reported numbness, but the reports were not supported by objective findings. Dr. Khasigian found respondent to be cooperative, but concluded he exaggerated his complaints. Specifically, respondent shook his hand and complained after each hand compression, which Dr. Khasigian testified was not medically reasonable. Additionally, he noted a "complete absence of secondary changes and abnormalities of the median nerve." He testified this is non-indicative of a permanent abnormality. Respondent's complaints regarding numbness involved the radial nerve and not the median nerve, which is the nerve involved in carpal tunnel syndrome.

9. Dr. Khasigian opined that respondent did not have any specific job duties that he was unable to perform based on his orthopedic condition, specifically carpal tunnel.

syndrome. Dr. Khasigian further concluded that respondent was not substantially incapacitated from performing his usual job duties as a Lead Custodian II.

Respondent's Evidence

10. Respondent testified that he enjoys his job and wants to continue working. He first experienced pain in 2014 and went to the doctor after experiencing symptoms for six months to a year. He was diagnosed with acute carpal tunnel syndrome in the right wrist and was scheduled for surgery a few weeks later. He underwent extensive rehabilitation following surgery and eventually returned to work.

11. Respondent returned to work following rehabilitation in approximately November 2015. Respondent felt like his, "hand would not work right." He recalls lifting a cafeteria table and being nervous that his wrist would "give out" and he would drop the table. Respondent called his supervisor, Manual Azevedo, who sent him home from work. He attempted to return but remained concerned about injuring himself or someone else if his wrist gave out. According to respondent, his treating physician concluded in December 2015, his condition was "permanent and stationary." Respondent's treating medical records were not offered into evidence.

12. Respondent testified that because his treating physician concluded he was permanent and stationary, he completed his application for disability retirement. After receiving Dr. Khasigian's IME report, respondent went back to the school district seeking he be reinstated. Respondent testified that the school district denied his request. According to respondent, he is in a "catch 22" situation because his treating physician says he's disabled and the IME doctor says he is not and should return to work.

13. Respondent testified that he can perform all of his job functions. He believes that he can only do certain activities, specifically heavy lifting or repetitive movements, for approximately four hours per day rather than an eight-hour shift. He explained that he never knows when his "body will give out." Respondent testified that the two fingers next to his thumb feel numb, cold, and stiff.

14. Respondent's former supervisor, Manual Azevedo testified on respondent's behalf. He is the school district's Director of Maintenance and Operations.¹ Mr. Azevedo has known respondent for approximately 15 years. He recalls respondent calling him after returning from surgery and not being physically able to continue working. Mr. Azevedo would take him back as an employee if it was cleared through "risk management." Mr. Azevedo considers respondent a "good guy, a hard worker, and a good employee."

Discussion

¹ Mr. Azevedo appeared solely on respondent's behalf and not as a representative of the school district.

15. Dr. Khasigian persuasively testified that he fully considered respondent's medical records, including those from respondent's treating physician. Dr. Khasigian's IME was comprehensive and his opinions well-reasoned and supported by his examination of respondent. Respondent submitted no competent medical evidence in support of his position or from any medical provider that expressed an opinion inconsistent with Dr. Khasigian's.

16. When all the evidence is considered, Dr. Khasigian's IME reports and testimony were persuasive evidence that respondent's orthopedic condition (right carpal tunnel syndrome) did not render him permanently and substantially incapacitated from performing his job duties as a Lead Custodian II at the time he submitted his disability application. Accordingly, respondent's application for disability retirement must be denied.

LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Lead Custodian II for Elk Grove Unified School District, he is a local miscellaneous member of CalPERS, subject to Government Code section 21150.²

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,

² Government Code section 21150, provides:

(a) A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076 , 21076.5, or 21077.

(b) A member subject to Section 21076 , 21076.5, or 21077 who becomes incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with 10 years of state service, regardless of age, except that a member may retire for disability if he or she had five years of state service prior to January 1, 1985.

(c) For purposes of this section, "state service" includes service to the state for which the member, pursuant to Section 20281.5 , did not receive credit.

“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 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*, *supra* 77 Cal.App.3d at pp. 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 his 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 performing 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. Respondent bears the burden of proving, based on competent medical opinion, 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.) Respondent did not present competent, objective medical evidence to establish that he was permanently and substantially incapacitated from performing his duties as a Lead Custodian II at the time he filed his disability retirement application. The fact that he attempted to have his employment reinstated and was denied is outside the scope of this hearing. Therefore, based on the Factual Findings and Legal Conclusions, respondent is not entitled to retire for disability pursuant to Government Code section 21150.

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ORDER

The application of JOHNNY E. PALMER for disability retirement based on an orthopedic condition of right carpal tunnel syndrome is DENIED.

DATED: November 6, 2017

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Joy Redmon
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JOY REDMON
Administrative Law Judge
Office of Administrative Hearings