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 the Industrial Disability Retirement of:

SHERRY DONNELL,
Respondent

and

PAROLE & COMMUNITY SERVICES DIVISION, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent.

Case No. 2017-1224
OAH No. 2018020376

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on July 31, 2018, in San Bernardino, California.

Austa Wakily, Senior Attorney, represented complainant, Anthony Suine, Chief, Benefit Services Division, California Public Employees’ Retirement System (CalPERS), State of California.

Sherry Donnell, respondent, represented herself.

No appearance was made on behalf of respondent Parole & Community Services Division, California Department of Corrections and Rehabilitation (CDCR).

The matter was submitted on July 31, 2018.
ISSUE

Is respondent, Sherry Donnell, permanently disabled or incapacitated from performing the usual and customary duties of a Parole Agent I with CDCR?

FACTUAL FINDINGS

General Background

1. Ms. Donnell worked as a parole agent for CDCR until her service retirement on March 18, 2017. By virtue of her employment, Ms. Donnell is a state safety member of CalPERS.

2. On January 25, 2017, Ms. Donnell filed a disability retirement election application, claiming orthopedic conditions (neck and back) as a basis for a disability retirement. In her application, Ms. Donnell claimed she was injured at work in two separate vehicle collisions, one of which occurred on June 3, 2014, and the other on September 29, 2014. In the application, Ms. Donnell claimed:

   neck and back pain with “prolonged driving, sitting, bending, twisting, muscle spasms, hot spot of pain in lower back almost daily controlled by therapy and pain medication. I do have difficulty back, trapezius pain, some shooting pain in cervical area periodically . . . .

3. CalPERS retained Alice Martinson, M.D., to conduct an independent medical examination (IME). Dr. Martinson conducted that examination on April 4, 2017, and prepared a report detailing her examination and conclusions. Dr. Martinson did not testify at the hearing. According to Dr. Martinson’s IME report, which included an extensive review of Ms. Donnell’s medical history and a comprehensive physical examination, Ms. Donnell’s examination was generally normal and there were no objective conditions to support the claims of pain. Dr. Martinson reviewed the essential functions of a parole agent and other documentation provided by CalPERS concerning that position. Dr. Martinson concluded Ms. Donnell was not substantially incapacitated from performing the usual and customary duties of a parole agent.¹


¹ Dr. Martinson’s report constitutes administrative hearsay under Government Code section 11513, subdivision (d); it can only be used to supplement or explain other direct evidence and may not be used to make a finding of fact.
Duties and Physical Requirements of a Parole Agent I

5. CalPERS submitted documents detailing the physical requirements and essential functions of a Parole Agent I.

A Parole Agent I must carry a caseload involving office and field work in the assessment, supervision, and guidance of adult parolees/releases.

The physical requirements show that a Parole Agent I must do the following tasks constantly (over 6 hours): sitting, standing, walking, bending (neck) twisting (neck and waist), fine manipulation, power grasping, simple grasping, repetitive use of hands, lifting and carrying 0 to 25 pounds, driving, and be exposed to extreme temperatures/humidity/wetness. All other physical requirements are performed either occasionally or frequently. A Parole Agent I is never required to work with heavy equipment.

The essential duties of a Parole Agent I include, among others, the ability to conduct investigations, surveillance, search and seizure of parolees, apprehend and arrest parolees, defend oneself or others, meet all the requirements of a peace officer pursuant to Penal Code section 832, crawl, crouch, walk continuously, run when emergencies occur, climb when necessary, stoop and bend, move head and neck continuously, move hands and wrists as well as grasp and squeeze, push, pull, reach overhead, climb ladders, carry up to 50 pounds, use force when necessary, brace occasionally, press occasionally, and complete administrative tasks.

Ms. Donnell’s Medical Records

6. Ms. Donnell submitted documents from medical examinations in connection with her workers’ compensation claim. The records show that, at various points between Ms. Donnell’s first vehicle collision and her service retirement, Ms. Donnell was treated for various conditions relating to her neck and back. She was placed on modified duty and full duty at different times during that period as well. The reports also show that at times, Ms. Donnell was given work restrictions with respect to lifting, bending, climbing, and twisting. The reports, however, contained no objective medical evidence of orthopedic conditions. Even if they did, however, the reports were made in connection with Ms. Donnell’s workers’ compensation claim which is a different standard than that used for a CalPERS disability retirement. Furthermore, as no medical doctor was called to testify, no competent medical evidence was presented to show that Ms. Donnell is substantially incapacitated from performing the usual and customary functions of a parole agent with CDCR.

Ms. Donnell’s Testimony

7. Ms. Donnell testified that she was in two separate vehicle collisions with a few months of each other in 2014 while at work. She said that they were bad, but she returned to work with no modifications because she wanted to continue working. Ms. Donnell said she
has nevertheless been in pain since the incidents, but is able to take pain medication when
needed to control the pain. She did not want to take prescription pain killers while on duty,
so sometimes she would take Motrin. Even though the pain medications helped, she would
still feel pain in her neck and back while performing her duties as a parole agent. At some
point, workers' compensation was not going to let her treat anymore so she decided to
service retire pending her application for an industrial disability retirement.

When Ms. Donnell underwent the IME, she did not feel Dr. Martinson conducted a
full and thorough examination; it took very little time.

Ms. Donnell said that her decision to retire was made, in part, because if she were to
become involved in an altercation during an arrest, she might not be able to defend herself
because of her pain.

LEGAL CONCLUSIONS

1. Absent a statutory presumption, an applicant for a disability retirement has the
burden of proving that he or she is entitled to it by a preponderance of the evidence. (Glover

Applicable Statutes

2. Government Code section 20026 provides in part:

“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. Government Code section 21151, subdivision (a), provides in part:

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.

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

(a)(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. . . .

Appellate Authority

5. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his customary duties, even though doing so may be difficult or painful, the employee is not incapacitated and does not qualify for a disability retirement. (Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 886-887.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (Hosford v. Bd. of Administration (1978) 77 Cal.App.3d 854.) Further, respondent must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (Id. at 863.)

Evaluation

6. Ms. Donnell was credible, honest, and sincere with respect her claims of pain in her neck and back following two major vehicle collisions in 2014. However, no medical doctor testified as to any objective conditions that would warrant a disability retirement. The reports submitted by Ms. Donnell constituted administrative hearsay, and could not be used to support a finding of fact. Further, the medical reports submitted by Ms. Donnell were in connection with a workers' compensation claim and did not show any evaluation of Ms. Donnell's condition in connection with the standard used by CalPERS or case law applicable to a CalPERS disability retirement. Finally, although the prophylactic restrictions placed on Ms. Donnell by the workers' compensation doctors would indeed preclude her from performing the duties of a parole agent, prophylactic restrictions, or any restriction placed on a person to prevent further injury, is not a basis for a disability retirement according to appellate law.

Accordingly, a preponderance of the competent medical evidence did not establish that Ms. Donnell is substantially incapacitated from performing the usual and customary duties of a parole agent with CDCR.

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2 The reports submitted by CalPERS were also administrative hearsay, however, the burden was not on CalPERS to establish that Ms. Donnell was not eligible for a disability retirement. In other words, CalPERS did not have the burden to produce competent medical evidence to support its denial. To the contrary, the burden was on Ms. Donnell to produce competent medical evidence that she qualified for a disability retirement.
ORDER

Respondent, Sherry C. Donnell's appeal is denied. The determination by CalPERS that respondent Sherry C. Donnell is not substantially incapacitated from the performance of her usual and customary duties of a Parole Agent I with the Parole & Community Services Division, California Department of Corrections and Rehabilitation, is affirmed.

DATED: August 9, 2018

KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings