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:

ROBERT J. MURPHY,

Respondent,

and

CALIFORNIA HIGHWAY PATROL,

Respondent.

Case No. 2017-1152
OAH No. 2018010495

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on June 14, 2018, in San Bernardino, California.

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

Robert J. Murphy, respondent, represented himself.

Jodi Cleesattle, Staff Attorney, represented respondent, California Highway Patrol (CHP).

The matter was submitted on June 14, 2018.

ISSUE

Is Mr. Murphy substantially incapacitated from performing the usual and customary duties of a CHP Officer due to internal (gastroesophageal reflux disease, ulcerative colitis) and cardiologic conditions?
FACTUAL FINDINGS

General Background

1. Mr. Murphy is a sworn peace officer with the California Highway Patrol. By virtue of such employment, Mr. Murphy is a state safety member of CalPERS.

2. On November 22, 2016, CHP filed an application for disability retirement on Mr. Murphy's behalf, alleging a disability based on internal (gastroesophageal reflux disease, ulcerative colitis) and cardiologic conditions.

3. Mr. Murphy filed an application for disability retirement on January 26, 2017, alleging a disability based on circulatory/heart impairment, arrhythmia, and digestive impairment conditions.

4. CalPERS retained Robert Weber, M.D., to conduct an independent medical examination. Dr. Weber conducted that examination on September 7, 2017, and prepared a report as well as a supplemental report detailing his examination and conclusions. Dr. Weber concluded Mr. Murphy was not substantially incapacitated from performing the usual and customary duties of a CHP Officer.

5. On October 25, 2017, CalPERS denied Mr. Murphy's disability retirement application, based on a comprehensive review of respondent's medical record, and Dr. Weber's reports.

6. On November 20, 2017, CHP appealed the denial of Mr. Murphy's disability retirement application. CHP wrote:

   Although CalPERS provided the [CHP] with a copy of the denial of disability retirement based on the conclusion that Mr. Murphy's condition was not disabling, nothing in the denial nor any documents that PERS may have provide to [CHP] supports such a conclusion. CalPERS has failed to provide any supportive or confirming confirmation. As a result, [CHP] is unaware of any facts or information that support the decision for denial of retirement. The absence of such information renders the determination legally deficient. . . .

Duties and Physical Requirements of a CHP Officer

7. CalPERS submitted documents detailing the physical requirements and essential functions of a CHP Officer. According to the document entitled, "Physical Requirements of Position/Occupational Title," which was filled out by a lieutenant for the CHP who did not testify, a CHP Officer must be able to perform the following tasks occasionally, up to 3 hours per day: standing, running, walking, crawling, kneeling,
climbing, squatting, bending in all directions, reaching above and below the shoulder, pushing and pulling, fine manipulation, keyboard use, mouse use, lifting and carrying anywhere from 1 to 100+ pounds, and working with heavy equipment. A CHP Officer must be able to perform the following tasks frequently, from three to six hours: sitting, bending at the neck, and twisting at the neck. A CHP Officer must be able to perform the following tasks constantly, in excess of 6 hours: exposure to excessive noise, exposure to extreme temperatures, and exposure to dust/gas/chemicals.

The CHP 225 (CHP Officer 14 Critical Physical Activities), also details the frequency and duration of 14 critical activities a CHP Officer must be able to perform. Those activities include lifting/carrying, pushing and pulling, sitting, standing, squatting/bending/kneeling, walking, running, climbing, jumping, utilizing manual dexterity, driving, visual acuity, color vision, and hearing. The frequency and duration are similar to what was reflected for each activity in the document entitled, “Physical Requirements of Position/Occupational Title.”

CalPERS also submitted a copy of the State Personnel Board’s official job description of a CHP Officer (dated 7/27/2011). That document generally describes the duties of a CHP Officer as follows:

Under direction of a superior in the Department of California Highway Patrol to (1) Patrol state highways enforcing laws relating to the operation of motor vehicles or (2) provide law enforcement services to state employees officials and the public and provide for the safekeeping of state property or (3) provide for the protection of the Governor other constitutional officers and members of the Legislature or (4) perform special staff assignments and to do other related work.

Typical tasks performed by a CHP Officer are including, but not limited to: patrolling the highways in an automobile or on a motorcycle using defensive driving tactics; working a fixed post duty; interpreting and applying state law; removing obstacles from the roadway; making arrests and controlling combative suspects; issuing citations; conducting field sobriety tests; monitoring department radio frequencies; investigating traffic accidents; lifting or carrying accident victims or prisoners in varying terrain; testifying in court; operating departmental equipment; administering medical attention; protecting state officials; and performing full sworn law enforcement duties in a marked patrol vehicle.

Medical History

8. CHP submitted numerous medical reports and employer’s reports regarding occupational illness or injury (CHP121). Mr. Murphy testified that the first time he experienced a “heart” issue was in September 2006. A report submitted by CHP showed Mr. Murphy experienced chest pains while on duty on September 11, 2006. He was airlifted to Loma Linda University Medical Center, where he received treatment. The CHP 121 showed that, upon examination, Mr. Murphy’s heart was normal. However, doctors did find
esophageal ulcers and Duodenitis. Prior incidents of “similar episodes” were noted on January 9, 2006, and October 17, 2005, but the report indicated Mr. Murphy had been under extreme personal stress due to personal issues unrelated to work, and in both those instances, a heart condition was not found.

9. No reports were submitted for anything between 2006 and 2013. Another CHP 121 showed that on December 26, 2013, Mr. Murphy was on patrol and experienced “chest pains and fatigue.” Mr. Murphy drove himself to the hospital. Again, the report noted that Mr. Murphy was “dealing with several stress-related personal issues” and that a heart condition was expected but never confirmed.

10. On March 6, 2014, CHP removed Mr. Murphy from duty and stripped him of peace officer powers. Their basis for doing so was explained in a memorandum to Mr. Murphy as follows:

You were diagnosed with stress and anxiety by your treating physician on February 14, 2014, and placed off-duty until February 17, 2014. On February 18, 2014, your treating physical placed you on limited duty as a result of your condition. On March 3, 2014, you provided a CHP 443, Limited Duty Assignment-Physicians Report, indicating the injury/illness is work related. California Highway Patrol policy outlined in HPM 10.7, Injury and Illness Case Management, Chapter 8, states injuries/illnesses of this diagnosis require this action.

No medical doctors testified regarding this diagnosis, or whether the stress and anxiety triggered any cardiac conditions.

11. A CHP 443 (Limited Duty Assignment) dated March 10, 2014, show Mr. Murphy was placed off duty until June 30, 2014, and would be required to provide multiple medical test results to CHP in order to return to duty.

12. A CHP 443 dated April 1, 2014, showed Mr. Murphy was placed back on duty with prophylactic restrictions as follows: avoid excessive stress, no prolonged walking or standing, no prolonged or repetitive kneeling, walking, standing, or climbing ladders.

13. A CHP 443 dated April 21, 2014, showed Mr. Murphy was again placed off duty and would not be permitted to return to work until he provided evidence of being seen by a therapist because he “appeared emotionally unstable presently.”

14. A CHP 443 dated April 23, 2014, showed Mr. Murphy was allowed to return to work to the previous “light duties” described.
15. A report from Stanley J. Majcher, M.D., dated April 11, 2014, showed Mr. Murphy denied any congenital heart disease or heart problems. The report documented the on-duty chest pain incidents previously described, and noted that the following tests — none of which showed heart problems — had been performed: a stress test, a 48 hour Holter monitor, an angiogram, chest cat scan, lead toxicity tests, seizure disorder evaluation, and other medical tests. Dr. Majcher conducted several tests and did not diagnose a heart condition, but noted gastroesophageal reflux disease by history.

16. A CHP 443 showed Mr. Murphy was returned to full duty, without restriction, on May 19, 2014.

17. Multiple medical reports drafted by Dr. Majcher, dated between 2014 and 2017, were submitted. In one report, dated July 3, 2016, Dr. Majcher wrote: “the applicant’s condition is attributable to stress associated with his non-personal responsibilities” and that Mr. Murphy had “cardiac arrhythmia” as well as GERD (gastroesophageal reflux disease). An October 6, 2016, report showed Dr. Majcher diagnosed Mr. Murphy with GERD, cardiac arrhythmia, sleep disorder, and ulcerative colitis. However, Dr. Majcher’s reports do not state how he arrived at those conclusions, do not explain what tests he performed and how each test helps him reach a diagnosis, and were performed in connection with a workers’ compensation case, not a disability retirement case. None of the reports state that, based on the diagnoses or tests, Mr. Murphy would be unable to perform the usual and customary duties of a CHP officer utilizing the CalPERS standard. Moreover, Dr. Majcher did not testify, so his reports are hearsay. As such, they do not constitute competent medical evidence and cannot be used to make a finding of fact. (Gov. Code, § 11513, subd. (d).)

18. CHP submitted an e-mail from Sergeant Matthew McElvey, dated July 25, 2015. It states:

I finally spoke with Murphy . . . after several failed attempts to find out what’s going on with his health and on/off or light duty status. He stated he has been in a haze and sleeping for the past four days due to his pain meds. He is feeling better, but is unhappy about being placed on light duty. He will contact his doctor and try to be either put off or released to full duty. We agreed that light duty is not the best option for him due to the pain meds and commuting from the RP. I told him that spending all day every day at the bunker on light duty is not an option. Although, I did grant him one admin day . . . to spend at the bunker completing ALL his outstanding paperwork. He is to contact Sergeant Medina on Monday the 27th for further instruction regarding on/off/sick or light duty status. He also stated his QME was on the 17th with “unfavorable results” with more follow-up to come. Doctors are stating he is not healing and may get “retired” soon. He faxed his doctor’s orders which I placed on Sergeant Medina’s desk.
Dr. Weber's Independent Medical Examination

19. Dr. Weber graduated medical school in 1974 and completed residencies in internal medicine and cardiology. He was in private practice in internal medicine for several years and since 1982, has been in private practice in the field of cardiology. He is a fellow with the American College of Cardiology, is certified by the American Board of Internal Medicine, and is a qualified medical examiner for workers' compensation cases. Dr. Weber is familiar with the standard used by CalPERS to determine whether someone is substantially incapacitated from performing his or her usual and customary duties for purposes of a disability retirement. Dr. Weber is an expert in the fields of internal medicine and cardiology.

Dr. Weber testified at the hearing regarding the independent medical evaluation he conducted on Mr. Murphy on September 7, 2017. The following is a summary of Dr. Weber's testimony and reports.

Dr. Weber conducted an interview of Mr. Murphy and noted the following: Mr. Murphy has been a CHP officer for 15 years, currently on temporary total disability since December 2016. In 2010, he had been experiencing sudden palpitations occurring at rest. He had an extensive cardiology investigation, which did not yield any findings. He now experiences these palpitations up to one time per day, usually in the evenings, and they last anywhere from 15 minutes to two hours. He was given propranolol, which was changed to labetalol, which caused lethargy. He experiences chest pain at least once per day, described as sharp and on the left. He takes medication to sleep and is a smoker. He has gastrointestinal discomfort and takes medication for it.

Dr. Weber conducted a comprehensive medical examination, which included the head, ears, eyes, nose, and throat. It also included the neck, chest, lungs, heart, abdomen, and extremities. Dr. Weber also reviewed countless medical reports, which were detailed in his report. Dr. Weber explained that, although Mr. Murphy may have GERD, that affliction is quite common and does not incapacitate anyone. Mr. Murphy's echocardiogram from 2014 was normal. In fact, all reports related to Mr. Murphy's heart were normal. The only deviation from "perfectly normal" that Dr. Weber saw in all the reports reviewed was, on one occasion, Mr. Murphy had some "benign isolated abnormal heartbeats" called atrial contractions. Dr. Weber explained that the prior reports also showed Mr. Murphy drinks quite a bit of coffee – which can cause premature atrial contractions as well as GERD.

Dr. Weber did not find anything remarkable in his examination. Mr. Murphy's heart was normal. His blood pressure was normal. His respirations were normal. His height and weight were normal. His oxygen saturation and cardiac examination were normal. When examining Mr. Murphy's chest, he pressed certain areas and noted Mr. Murphy said there was slightly tender; however, from a cardiologic standpoint this is not significant. It is actually a "pertinent negative" for cardiac problems.
On the record review, he noted a 2011 diagnosis of mitral valve prolapse. He noted that people were overdiagnosed with that condition for many years, to the point of the criteria being reassessed some time ago. True mitral valve prolapse has been associated in some people with chest pain and palpitations, but it is not the kind of chest pain that someone has from coronary artery disease. Nonetheless, even assuming the diagnosis was correct, it would not change his ultimate conclusion.

When asked on cross-examination why he did not perform a new echocardiogram, Dr. Weber said he did not do so because the examination was completely normal and did not warrant that kind of test. When pressed about whether past blood pressures show hypertension, Dr. Weber said he did not agree with any diagnosis of hypertension because a diagnosis like that is usually made over time, after multiple high blood pressure readings, because people are often nervous and have high blood pressures in the doctor’s office. Dr. Weber’s examination did not indicate hypertension.

Dr. Weber diagnosed Mr. Murphy as follows: history of palpitations, likely related to anxiety; history of documented premature atrial contractions; normal coronary arteries; chest wall tenderness; history of GERD, controlled on medication; sleep disturbance, obstructive sleep apnea ruled out by normal sleep study.

Dr. Weber reviewed the CalPERS document entitled, Medical Qualifications for Disability Retirement, as well documents that showed the job descriptions of a CHP Officer and corresponding physical requirements. Based on his examination, Dr. Weber concluded that there were “no specific job duties” Mr. Murphy was unable to perform.

On October 10, 2017, Dr. Weber was asked to review additional records, mainly, an Internal Medicine Panel Qualified medical Re-Evaluation completed by Dr. Majcher on August 11, 2017, wherein Dr. Majcher made several cardiac-related findings (i.e. hypertensive cardiovascular disease, calcification of the aortic and mitral valves by echocardiogram, cardiac arrhythmia, premature atrial contraction, history of premature ventricular contractions, GERD, and irritable bowel syndrome). Dr. Weber said that as a board-certified practicing cardiologist, who interprets echocardiograms daily, “it is my interpretation of this citing of these valve abnormalities that it is an age-related finding, very common, and should not be considered pathologic.” He went on to say that Mr. Murphy had absolutely no symptoms or findings related to any of the “echocardiographically determined cardiac findings.” Dr. Weber re-reviewed an echocardiogram dated May 26, 2011, which showed normal ventricular wall thickness. It showed mild mitral valve prolapse, which, if true, was not a significant finding. He also noted a normal aortic valve. Dr. Weber did not change his conclusion that Mr. Murphy was not substantially incapacitated from performing the usual and customary duties of a CHP officer.

Testimony of Sergeant Matthew McElvey

20. Sergeant McElvey has been a CHP Sergeant for 16 years. He has worked with Mr. Murphy – most recently in December 2017. He was Mr. Murphy’s supervisor during the
time Mr. Murphy was on light duty. Sergeant McElvey observed health problems while Mr. Murphy was working. Sergeant McElvey described the "health issues" as "locking up" while Mr. Murphy was working. Mr. Murphy would freeze for a few seconds and stare into space. He said he would snap his finger and Mr. Murphy would snap out of it. Sergeant McElvey said sometimes Mr. Murphy would experience hand tremors as well. Sergeant McElvey said this occurred two or three times. It concerns him because freezing up could be an officer safety or public safety issue. His opinion is that if Mr. Murphy "goes into one of these episodes" on duty, "it is not going to turn out well."

Mr. Murphy's Testimony

21. Mr. Murphy's testimony is summarized as follows: he has been a CHP officer for 16 years and is currently assigned to the residence post out of the Barstow area office. On December 1, 2016, he was on "4800.5 time" due to a hand injury he received on duty. He returned to limited duty on November 29, 2017, and has been on limited duty since that time.

Mr. Murphy was in the military for a number of years prior to joining CHP, and was always very fit. In 2010, he had a "sudden onset of all this stuff." He said he would be speaking with his family and the next thing he knew he would be on the ground. He has had all types of tests over the years, and a heart valve issue was mentioned by Dr. Majcher. The GERD issues sometimes cause him to "shake" but it is very sporadic. Nothing seems to bring on or exacerbate any condition, and the incidents have usually happened in the evening at the end of his shift after he has gone home. He has only had two on duty incidents that required him to seek medical treatment (2006 and 2010). He has filed workers’ compensation claims in connection with "esophageal spasms" and ulcers.

Mr. Murphy said he does not want his career to "end the way it's looking" but he also does not want to "have a medical issue on the side of the road while performing [his] duties." Mr. Murphy said he loves his job and loves working for the public.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In its appeal letter, CHP said that CalPERS did not provide enough information to support its denial of Mr. Murphy’s disability retirement application, rendering the denial legally insufficient. The burden, however, is not on CalPERS to show a basis for its denial. 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 v. Bd. of Retirement (1989) 214 Cal.App.3d 1327, 1332.) Thus, the burden is on Mr. Murphy to provide a preponderance of competent medical evidence that he is substantially incapacitated from performing the usual and customary duties of a CHP officer.
**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 p. 863.)
Evaluation

6. Dr. Weber conducted a comprehensive examination of Mr. Murphy, and reviewed his medical history, which included reports of two echocardiograms, and reviewed the CalPERS standard for disability retirement and job/physical requirements of a CHP Officer. Dr. Weber has extensive experience in cardiology and internal medicine, and after conducting his examination, determined that Mr. Murphy's examination was normal and Mr. Murphy was not substantially incapacitated from performing the usual and customary duties of a CHP officer. The medical records provided support Dr. Weber's conclusions that – even if Mr. Murphy has a cardiac condition or GERD, he is not substantially incapacitated from performing the usual and customary duties of a CHP officer. Although one of Dr. Machjer's reports and a 2011 echocardiogram report suggest that Mr. Murphy may have a mitral valve condition, Dr. Weber does not necessarily agree with that diagnosis, and even if the condition existed, it would not change Dr. Weber's conclusion regarding the lack of substantial incapacitation. Finally, no competent medical evidence was provided to contradict Dr. Weber's conclusion.

Accordingly, a preponderance of the competent medical evidence did not establish that Mr. Murphy is substantially incapacitated from performing the usual and customary duties of a CHP officer based on internal (gastroesophageal reflux disease, ulcerative colitis) and cardiologic conditions.

ORDER

The determination by CalPERS that respondent Robert J. Murphy is not substantially incapacitated from the performance of his usual and customary duties of a CHP officer, is affirmed.

DATED: July 10, 2018