

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:

JOSE L. RIVERA, Respondent

and

**CALIFORNIA INSTITUTION FOR WOMEN, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent**

Case No. 2019-0271

OAH No. 2019050148

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on September 11, 2019, in San Bernardino, California.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED October 1 2019

LEA

John L. Shipley, Senior Staff Attorney, represented petitioner Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

There were no appearances by or on behalf of respondent Jose L. Rivera or respondent California Institution for Women, California Department of Corrections and Rehabilitation. Based on proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default against both respondents pursuant to Government Code section 11520.

The matter was submitted on September 11, 2019.

ISSUE

Was Mr. Rivera permanently disabled or incapacitated from performing his usual and customary duties as a Correctional Officer for California Institution for Women, California Department of Corrections and Rehabilitation due to his orthopedic (back) condition when he filed his application for disability retirement?

SUMMARY OF DECISION

Mr. Rivera had the burden to prove that he was permanently disabled or incapacitated from performing his usual and customary job duties due to his orthopedic (back) condition. Mr. Rivera did not appear so there was no competent medical evidence introduced that supported his claim that he was permanently disabled or incapacitated from performing the regular and customary duties of a

Correctional Officer due to his condition. Mr. Rivera's claim for disability retirement is denied.

FACTUAL FINDINGS

Jurisdictional Matters

1. Mr. Rivera was employed by California Institution for Women, California Department of Corrections and Rehabilitation as a Correctional Officer. By virtue of his employment, Mr. Rivera was a state safety member of CalPERS subject to Government Code section 21151.

2. On August 24, 2018, Mr. Rivera filed a Disability Retirement Election Application with CalPERS. In the "Application Type" section he checked the box marked "Service Pending Industrial Disability Retirement." Mr. Rivera identified his disability as "lower back" which occurred on February 27, 2017, when he was assaulted by an inmate. The limitations/preclusions due to his injury/illness were "cannot lift anything more that [*sic*] 10 lbs cant [*sic*] sit more than 15 minutes." He was not then working and he identified his treating physician.

3. CalPERS obtained medical records and documents related to Mr. Rivera's conditions and selected James Fait, M.D., a board certified orthopedic surgeon, to perform a disability evaluation. Dr. Fait provided CalPERS with two reports containing his findings and conclusions. After reviewing all of those documents, CalPERS determined that when Mr. Rivera filed his application for disability retirement, he was not permanently disabled or incapacitated from performing the usual and customary duties of a Correctional Officer.

4. On November 26, 2018, CalPERS notified Mr. Rivera that his application for disability retirement was denied. CalPERS advised him of his right to appeal.

5. On December 11, 2018, Mr. Rivera sent a letter to CalPERS appealing its decision. His letter also set forth various physical limitations he claimed he had.

6. On May 3, 2019, petitioner filed the statement of issues in his official capacity. The statement of issues and other jurisdictional documents were served on respondents and this hearing ensued.

Job Description Documents

7. The Physical Requirements of Position/Occupational Title of a Correctional Officer completed by Mr. Rivera and his employer outlined the physical requirements including the activities and frequency of those activities for that position. The Essential Functions outlined the essential functions and examples of work required of the position.

Dr. Fait relied upon these documents when formulating his opinions.

Dr. Fait's IME, Reports, and Testimony

8. CalPERS retained Dr. Fait to perform an Independent Medical Examination (IME). Dr. Fait obtained his Doctor of Medicine Degree from University of California, Davis. His curriculum vitae stated that he did an internship in surgery and a residency in orthopedic surgery at University of California, Davis. He did a fellowship in lower extremity reconstruction at Scripps Clinic and Scripps Green Hospital, Division of Orthopedic Surgery. Dr. Fait is board certified in orthopedic surgery. He has a private practice in orthopedic surgery.

9. On September 20, 2018, Dr. Fait performed the IME and authored a report. Dr. Fait obtained Mr. Rivera's current complaints and history of injury. Mr. Rivera was injured when an inmate, wearing waist and leg chain restraints, was able to free herself from her handcuffs, swing the chain with the handcuffs, and strike Mr. Rivera in the head and shoulders, pushing him into a metal pipe fence. Mr. Rivera struck his back on the fence and his head on the ground, losing consciousness, and requiring assistance from fellow officers. Dr. Fait took a work history and obtained a job description from Mr. Rivera who last worked the day of the inmate assault. Mr. Rivera's job duties included managing and supervising inmates, doing pat-downs, searching cells, and maintaining a safe work environment. Mr. Rivera's work was "heavy," he was required to lift or push objects weighing 100 to 300 pounds and climb stairs. Dr. Fait inquired about Mr. Rivera's previous injuries which included four prior inmate assaults. Dr. Fait also reviewed records which he summarized in his report.

Dr. Fait performed a physical examination, noting that Mr. Rivera "put forth only fair effort" and was demonstrating behaviors that were consistent with "symptom magnification." Mr. Rivera's pain complaints were "inconsistent" with the physical findings on examination and were "in a non-dermatomal distribution." Mr. Rivera's weakness claims were also not consistent with a right L5 radiculopathy that one of Mr. Rivera's treating physicians diagnosed. Dr. Fait diagnosed lumbar spine degenerative disc disease, status post epidural injections, and a reported history of major depressive disorder and PTSD. Dr. Fait opined that it was "difficult to assess" Mr. Rivera's complaints given his "lack of full effort put forth."

Dr. Fait answered the three CalPERS questions, finding that Mr. Rivera was not presently substantially incapacitated for the performance of his duties, there were no

job duties Mr. Rivera could not perform, and Mr. Rivera did not put forth his best effort at the IME.¹

10. On October 30, 2018, Dr. Fait authored a Supplemental Report after reviewing additional medical records provided. These additional records did not change his opinions.

11. Dr. Fait testified about his findings, IME and records review. His testimony was consistent with his IME report. He believed Mr. Rivera's slow and guarded movements at the IME were "much greater" than his medical records documented, possibly making the findings at the IME "skewed." Dr. Fait did not believe Mr. Rivera was putting forth "a full effort." Dr. Fait did not think Mr. Rivera was substantially incapacitated from performing his job duties.

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¹ As is discussed in the Legal Conclusions portion of this decision, substantial incapacity to perform usual and customary duties must be based on competent medical opinion. Even though CalPERS's letter to Dr. Fait asked him to make a determination based on his "objective findings," the applicable statutory and case law do *not* state that the competent medical opinion must be based solely on "objective" findings.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*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 evidence. The *quantity* of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation]." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

Purpose of CalPERS's Laws

3. The court in *Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, examined the purpose of CalPERS's legislation, noting it serves two objectives: inducing persons to enter and continue in public service, and providing subsistence for disabled or retired employees and their dependents. A disability pension is intended to alleviate the harshness that would accompany termination of an employee who became medically unable to perform his or her duties. Generally, CalPERS's legislation is to be construed liberally in favor of the employee to achieve these objectives. Moreover, eligibility for retirement benefits does not turn upon whether the employer

dismissed the employee for disability or whether the employee voluntarily ceased work because of disability. (*Id.* at p. 459.)

Applicable Code Sections

4. Government Code section 20021 defines "Board" as "the Board of Administration of the Public Employees' Retirement System" (CalPERS).

5. Government Code section 20026 provides:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, 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.

6. Government Code section 21151, subdivision (a), provides that a state safety member who is "incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability . . ."

7. Government Code section 21152 sets forth who may make the disability retirement application.

8. Government Code section 21154 states:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent

on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

9. Government Code section 21156 states:

(a)(1) If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, 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, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.

(2) In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

(b)(1) The governing body of a contracting agency upon receipt of the request of the board pursuant to Section 21154 shall certify to the board its determination under this section that the member is or is not incapacitated.

(2) The local safety member may appeal the determination of the governing body. Appeal hearings shall be conducted by an administrative law judge of the Office of Administrative Hearings pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of this title.

Incapacitated from Performance of Duty

10. Unlike the right to a widow's or widower's pension that accrues upon the employee spouse's death, the right to a disability retirement does not automatically

arise upon the happening of an injury. Rather, the injury must result in the employee being so physically or mentally disabled as to render retirement from active service necessary. The illness or injury is not the controlling factor, but, rather, the resulting inability to perform the work. The employer's duty to find the disability does not attach nor is the right to a disability finding created until that further point of time is reached. The disability finding cannot be made without a determination of the results of the injury, the condition of the employee, and the necessity for the retirement. (*Tyra v. Board of Police and Fire Pension Commissioners of City of Long Beach* (1948) 32 Cal.2d 666, 671, citations omitted.)

11. "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 or her customary duties, even though doing so may be difficult or painful, the public employee is not "incapacitated" and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876-877²; *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1057.)

In *Mansperger, supra*, there was no dispute that Mansperger, who was a fish and game warden, had suffered an injury that caused him to be unable to engage in heavy lifting. The sole issue in dispute was whether his physical limitations amounted to "incapacity for the performance of duty." (*Mansperger, supra*, 6 Cal.App.3rd at p. 876.) After concluding that "incapacity for the performance of duty" meant the

² The *Mansperger* decision analyzed the language then contained in Government Code section 21022, the substance of which is now contained in Government Code section 20026 (although there have since been some amendments to section 20026).

substantial inability to perform an applicant's usual duties, the appellate court assessed the facts in that case as follows (*Id.* at pp. 876-877):

While it is clear that petitioner's disability incapacitated him from lifting or carrying heavy objects, evidence shows that the petitioner could substantially carry out the normal duties of a fish and game warden. The necessity that a fish and game warden carry off a heavy object alone is a remote occurrence. Also, although the need for physical arrests do occur in petitioner's job, they are not a common occurrence for a fish and game warden. A fish and game warden generally supervises the hunting and fishing of ordinary citizens. Petitioner testified that, since his accident, he was able to perform all his required duties except lifting a deer or lifting a lobster trap out of kelp.

12. A similar result was reached in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854. In that case, a California Highway Patrol (CHP) officer applied for industrial disability retirement, claiming he feared his back injuries placed in him danger of further injury if he was required to overpower someone resisting arrest. CalPERS's determination that he was not substantially incapacitated from performing the usual duties of his job was upheld on appeal. The appellate court determined that the fact that an injury increases an individual's chances of further injury does little more than demonstrate that the injury is prospective, hence, speculative, and presently not in existence. (*Id.* at p. 862-863.) Accordingly, fear of further injury or fear of aggravation of an existing injury is insufficient to support a finding of disability. (*Ibid.*)

13. In *Thelander v. City of El Monte* (1983) 147 Cal.App.3d 736, a probationary police officer was found eligible for industrial disability retirement because she was unable to complete Police Officer Standard Training, which was one of the requirements of the job, and which would have trained her on "the countless duties which a field officer might be required to perform at any given moment. . . ." (*Id.* at pp. 742-743.) The appellate court noted, "If every officer must be capable of and prepared for the worst every day, then that is the 'usual' duty of the job." (*Id.* at p. 742.)

14. The *Mansperger* and *Hosford* decisions were more recently considered in *Beckley v. Board of Administration of California Public Employees' Retirement System* (2013) 222 Cal.App.4th 691. In that case, the appellate court affirmed the trial court's judgment that found Beckley eligible for disability retirement due to his orthopedic condition (carpal tunnel syndrome and low back injury) because he was incapacitated from performing critical duties required of a CHP officer. Beckley had served as a CHP officer and had been reassigned to a Public Affairs Officer (PAO) position before he applied for retirement disability. The PAO position was not considered a limited duty position. As a PAO, he was not assigned a beat to patrol, but he drove a patrol car, was expected to engage in law enforcement activities, and had done so on occasion. Beckley's doctor took him off work because he was unable to perform "the 14 critical activities, required by CHP," because he was "unable to safely extract a 200-pound victim from a vehicle and lift, carry, and drag the victim 50 feet; physically subdue and handcuff a combative subject; change a flat tire; drive for extended periods of time; and run up and down stairs." (*Id.* at p. 694.)

Competent Medical Opinion

15. CalPERS makes its determination whether a member is disabled for retirement purposes based upon "competent medical opinion." That determination is based on the evidence offered to substantiate the member's disability. (*Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 461, distinguished on other grounds.)

Evaluation

16. In order to qualify for a disability retirement, Mr. Rivera must demonstrate, based on competent medical opinion, that he was permanently disabled or incapacitated from performing the regular and customary duties of a Correctional Officer when he filed his application. Mr. Rivera did not appear at this hearing. No evidence that Mr. Rivera was unable to complete Police Officer Standard Training was offered. No competent medical opinions to support Mr. Rivera's claim or refute Dr. Fait's opinions were offered. As such, Mr. Rivera failed to meet his burden of proof and his application must be denied. Petitioner's determination that Mr. Rivera was not permanently disabled or incapacitated from performance of his duties is affirmed.

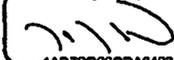
Cause Exists to Deny the Application

17. Cause exists to deny Mr. Rivera's application for disability retirement. Mr. Rivera failed to prove by a preponderance of the evidence that his disability was of a permanent or extended duration that incapacitated him from performing his duties as a Correctional Officer as a result of his orthopedic (back) condition when he filed his application for disability retirement with CalPERS.

ORDER

The application for disability retirement filed by Jose L. Rivera with the California Public Employees' Retirement System is denied. CalPERS's denial of Mr. Rivera's application is affirmed.

DATE: September 30, 2019

DocuSigned by:

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MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings