

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:

Michael J. Wurtz, Respondent

And

**California Correctional Institution, California Department of
Corrections and Rehabilitation, Respondent**

Case No. 2018-0756

OAH No. 2019010479

PROPOSED DECISION

James Michael Davis, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on July 10, 2019, in Glendale, CA.

Kevin Kreutz, Senior Attorney, represented complainant, the California Public Employees' Retirement System (CalPERS).

Michael J. Wurtz (respondent) appeared personally and represented himself.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED Aug. 28 2019


No one appeared for or on behalf of respondent California Correctional Institution; California Department of Corrections and Rehabilitation (CDCR), and a default was taken against this respondent pursuant to Government Code section 11520.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on July 10, 2019.

Upon the ALJ's subsequent review of the record, he determined that respondent's exhibit B, a February 10, 2018, Qualified Medical Evaluation of respondent, was incomplete. On August 6, 2019, the ALJ reopened the record to receive a complete exhibit B and to give complainant an opportunity to object to its admission. Complainant's timely objection was sustained and exhibit B was admitted as administrative hearsay. (See Gov. Code, § 11513, subd. (d).) The record was closed and the case was deemed submitted on August 13, 2019.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent CDCR employed respondent as a correctional officer. Respondent's employment qualifies him as a state safety member of CalPERS, subject to Government Code section 21151.
2. On November 27, 2017, respondent signed an application for industrial disability retirement. In filing the application, respondent claimed disability based upon an orthopedic (low back) condition.

3. On April 2, 2018, CalPERS denied respondent's request for industrial disability retirement.
4. Respondent timely appealed and this matter ensued.
5. Specifically, in January 2019, Anthony Suine, in his official capacity as Chief of CalPERS Benefit Services Division, signed the Statement of Issues in this matter, setting forth CalPERS' contention that respondent did not legally qualify for an industrial disability retirement. The matter was then set for an evidentiary hearing before the Office of Administrative Hearings, an independent adjudicative agency of the State of California, under Government Code section 11500 et seq. All jurisdictional requirements have been met.

Overview

6. Respondent is 52 years old. He was employed as a correctional officer at Kern Valley State Prison, until the summer of 2017. On June 30, 2017, while fulfilling duties as a transportation officer, he injured his back intervening in a fight between two prisoners making court appearances at the Kern County courthouse. Having not worked since, he has filed for an industrial disability retirement. Respondent contends that his back injury absolutely precludes him from working again and, accordingly, warrants an industrial disability retirement. He has worked for CDCR for the past 22 years. Complainant contends that the injury is not supported by objective medical evidence and therefore cannot support an industrial disability retirement. As discussed below, respondent failed to establish by medical evidence that he was substantially disabled at the time he filed his application and consequently, his appeal must be denied.

Respondent's Disability Retirement Application

7. On December 1, 2017, respondent submitted a Disability Retirement Election Application (application) to CalPERS. The application identified the application type as "Industrial Disability Retirement." In the application, respondent's disability was described as:

(Back) Multilevel degenerative changes of the lumbar spine canal stenosis and left foraminal narrowing at the L4/5 level and left foraminal narrowing at the L5/S1 level due to endplate osteophyte and facet changes[.] Additionally lumbar radiculopathy is noted[.]

8. The application identified the date respondent's disability occurred as June 30, 2017.

9. In response to the question asking how the disability occurred, the application stated:

On 06/30/17[.] while at the Kern County Courthouse with inmates from the California Correctional Institution (CCI)[.] an inmate from another institution[.] Kern County Valley State Prison (KVSP)[.] attacked an inmate under the custody of the Kern County Sheriff[.] As a result[.] a struggle ensued and in the course of the struggle I suffered injury to my back[.]

10. In response to the question asking what are the limitations/preclusions due to the injury or illness, the application stated: "No lifting over twenty five (25)

lbs[.], prolonged standing[.], sitting or walking[.], limited bending[.], stooping [*sic*][.], climbing or twisting and must be allowed to change positions as needed[.]”

11. In response to the question asking how respondent’s injury affected his ability to perform his job, the application stated: “Due to my physical condition and physicians [*sic*] restrictions[.], I am no longer able to perform the essential functions of my job[.]”

12. The application indicated that respondent was not working in any capacity. Respondent did not describe his job duties.

Job Duties of a Correctional Officer

13. But CDCR has memorialized the essential functions of a correctional officer. Relevant to respondent’s back injury, they include working at least 40 hours per week with the potential to have to defend one’s self or others from combative inmates, the potential to have to stand for protracted periods of time, and the ability to climb, lift and carry, stoop, crawl and crouch, and brace and twist the body, to name a few. (Ex. 10.)

14. Respondent’s employer submitted a CalPERS Physical Requirements of Position/Occupational Title form containing information regarding the physical requirements of the Correctional Officer position. (Ex. 11.)

The job requirements include sitting, standing, running, crawling, kneeling, climbing, squatting, bending and twisting from the waist and pushing and pulling from occasionally up to three hours.

Further job requirements include sitting, standing, walking, climbing and bending and twisting from the waist from occasionally up to three to six hours.

Further job requirements include sitting, standing, walking, bending the neck and waist, twisting the neck and waist, simple grasping, repetitive use of hands, and walking on uneven ground, driving, exposure to excessive noise, extreme temperature, humidity, wetness, dust, gas, fumes or chemicals; operation of foot controls or repetitive movement, and working with biohazards from occasionally to over six hours.

Other job requirements include sitting, standing, walking, bending the neck and waist, twisting the neck and waist, fine manipulation, power and simple grasping, and repetitive use of hands for over six hours.

Regarding lifting and carrying, the job requirements include over six hours of lifting or carrying up to 25 pounds, from three to six hours of lifting or carrying between 26 to 50 pounds, and occasionally to up to three hours of lifting or carrying between 51 to 100-plus pounds.

Respondent's Evidence

15. Respondent testified sincerely and convincingly regarding the dramatic impact the back injury had and continues to have on his life. The pain required him to retire for service on August 13, 2018, which was earlier than he planned. Since then, his lower back pain is unchanged. Indeed, he testified that he was in great pain at the hearing.

16A. Respondent submitted evidence from his primary treating physician Dr. Andrews-Steele and a Qualified Medical Evaluation (QME) performed by John Sedgh, M.D. (Exs. A & B.) Over complainant's objections, both exhibits were admitted as

administrative hearsay.¹ As discussed below, their admission as administrative hearsay affects their evidentiary weight and, correspondingly, the strength of respondent's appeal.

16B. Dr. Andrews-Steele's report (ex. A) reviews respondent's medical records and documents respondent's spine range of motion measurements made on the day of examination. Dr. Andrews-Steele's report concludes, using a Workers' Compensation analysis, that respondent was permanent and stationary and unable to return to his usual and customary employment without restrictions.

16C. Dr. Sedgh's report (ex. B) finds respondent permanent and stationary as of February 10, 2018 (the date of examination) and finds respondent has a permanent partial disability. The report makes no diagnosis of lumbar radiculopathy.

CalPERS' Expert

17. CalPERS called Dr. John D. Kaufman as its expert witness. Dr. Kaufman is board-certified in orthopedic surgery. He has been in private practice in Southern California for over 45 years, and treats patients in a wide scope of orthopedic surgery practice. He has worked for CalPERS for six to seven years and has participated in 40-50 hearings on CalPERS' behalf.

¹ "Administrative hearsay" may be used to supplement or explain other evidence but, is not alone sufficient to support a factual finding unless otherwise admissible over objection in a civil lawsuit. (Gov. Code, § 11513, subd. (e).)

18A. Dr. Kaufman examined respondent on March 11, 2018, and issued an Independent Medical Evaluation (IME) report. (Ex. 8.)

18B. In his IME report, Dr. Kaufman reviewed respondent's medical history, job duties, respondent's June 30, 2017 injury and subsequent treatment. Respondent stated the injury occurred when he intervened to break up an inmate-on-inmate fight at the Kern County courthouse. Respondent stated he jumped onto the inmate combatants and twisted and pulled them both to the ground at the same time. He then restrained the inmates and took control of the situation. He noted the onset of low back pain about 15 minutes later, pain which continued to increase. Respondent continued working his shift, notified his supervisor and reported to the prison's onsite nurse for an evaluation.

June 30, 2017 fell on a Friday and respondent's employer referred respondent to Kaiser on the Job on Sunday (July 2nd) but the facility was closed. He was treated by another Kaiser physician that day. The treatment included medication but he did not receive x-rays. On July 6, 2017, respondent was seen by Dr. Andrews-Steele at Kaiser On the Job. There, he was examined and taken off work. Respondent has not returned to work since.

Respondent has continued follow-up care with Dr. Andrews-Steele. The treatment includes medication and four to five sessions of massage therapy, which he reports has provided no benefit. Although recommended, respondent has declined to attend physical therapy.

On August 29, 2017, respondent underwent an MRI of the lumbar spine. The MRI revealed "[m]ild multilevel degenerative changes, minimal canal stenosis,

narrowing L4-5 and L5-S1 due to endplate osteophyte and facet changes; no protrusion or extrusion, no focal neural impingement.”

18C. Respondent’s present complaints at his IME involved “constant low back pain described as dull and sharp and varies with activity. [respondent] notes radiation of pain down both legs to the thighs. He reports numbness and tingling in both legs to the feet and toes. [Respondent] denies popping or locking of the low back. He reports stiffness and tightness in the low back and weakness of both legs. . . .Pain is increased with sitting, standing, bending, and twisting. . . . The examinee currently rates his low back pain as 5-9/10, on a pain scale of 1 to 10.” (Ex. 8, p. 1.)

During the IME, Dr. Kaufman subjected respondent to a series of tests to check for objective signs of injury. Dr. Kaufman noted a slight spasm in the lumbar paraspinous muscles, no atrophy in the lower extremities, a quarter-inch difference between the circumference of the right and left thighs, and good muscle strength in all muscles in both lower extremities. Dr. Kaufman noted that toe and heel standing was satisfactorily performed and that respondent exhibited normal range of motion in both hips. Dr. Kaufman further noted no sensory deficit in either lower extremity. Corroborating his examination findings, Dr. Kaufman stated: “[respondent] had no objective findings of any disability on any of his examinations from Dr. Andrews-Steele from July 25, 2017 through November 28, 2017. The only findings that Dr. [Andrews-Steele] reported were tenderness and decreased range of motion. These are purely subjective.” (Ex. 8, p. 7.)

19. Dr. Kaufman testified that respondent, to a reasonable degree of medical probability, had a lumbar strain that would have subsided by now. Dr. Kaufman disagreed with Dr. Andrews-Steele’s diagnosis of lumbar radiculopathy in that it was unsupported by objective evidence.

20A. At hearing Dr. Kaufman explained why he disagreed with Dr. Andrews-Steele's diagnosis of lumbar radiculopathy. Dr. Kaufman stated that radiculopathy is shown by the patient manifesting four objective indicators:

1. pattern-specific numbness in the lower back, e.g., in a toe as opposed to the whole foot;
2. a change in reflexes;
3. muscular atrophy; and
4. an MRI that shows evidence of a pinched nerve.

20B. Dr. Kaufman testified that although all four of these indicators are necessary for a lumbar radiculopathy diagnosis, respondent had no evidence of any single indicator, either in medical records following the injury or when respondent was evaluated during his IME. Dr. Kaufman was dubious of Dr. Andrews-Steele's change in diagnosis on November 27, 2017. On November 27, 2017, Dr. Andrews-Steele added lumbar radiculopathy, without any objective support for the diagnosis.

20C. Overall, the only abnormalities respondent showed at the IME were a decreased range of motion and a slight age-related muscle spasm, both of which Dr. Kaufman opined are consistent with a lumbar strain or sprain. And because a lumbar strain or sprain will resolve over a period of months, respondent does not have a substantial disability. Although not unsympathetic to respondent's pain, Dr. Kaufman noted that discomfort alone is not a substantial impairment.

21. On June 20, 2018, Dr. Kaufman prepared a supplemental report following the IME after receiving a March 27, 2018 permanent and stationary worker's compensation report from Dr. Andrews-Steele. (ex. A.) Dr. Kaufman's opinion did not

change following his review of these records, which included an MRI, because the MRI showed no evidence of a pinched nerve (one of the four lumbar radiculopathy factors detailed above). (Ex. 9.)

Discussion

22. Respondent failed to offer competent medical evidence to establish that, at the time he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a correctional officer. Instead, the medical evidence established that respondent received a lumbar strain or sprain following the June 30, 2017 inmate altercation.

23. Dr. Kaufman's opinion was thorough and evenhanded; he considered the entirety of respondent's medical records, despite the fact that the standards in disability retirement cases are different from those in workers' compensation. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Kimbrough v. Police & Fire Retirement System* (1984) 161 Cal.App.3d 1143, 1152-1153; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132 [a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different].)

24. In reaching his opinion that respondent was not substantially and permanently incapacitated from performing the usual duties of a correctional officer, Dr. Kaufman employed the standards applicable in these types of disability retirement proceedings. His opinion that respondent's subjective complaints of pain were not adequately supported by objective medical evidence was persuasive and consistent with the medical records offered at hearing. Dr. Kaufman was well-versed on the medical issues related to respondent's condition, ably supported his opinions with

objective findings and medical knowledge, and displayed no apparent bias in detailing his views.

25. The evidence failed to establish that at the time respondent applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a correctional officer: his disability retirement application must, therefore, be denied.

LEGAL CONCLUSIONS

1. At all times relevant, respondent was a state safety member of CalPERS, under Government Code section 21151.

2. Respondent is seeking an industrial disability retirement, which requires meeting the criteria set forth in Government Code section 20026. As defined in Government Code section 20026, "'disability' and 'incapacity for performance of duty' as a basis of retirement, mean disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of *competent medical opinion*." (Italics added.)

Applicable Burden/Standard of Proof

3. Respondent has the burden of proving he qualifies for industrial disability retirement, and he must do so by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5 ["As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of

persuasion by a preponderance of the evidence“].) This evidentiary standard requires respondent to produce evidence of such weight that, when balanced against evidence to the contrary, it is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567 As discussed below, respondent has not met his burden.

Evidentiary Weight of Respondent’s Evidence

4A. Respondent’s testimony effectively established the circumstances leading to his back injury and the subjective aspects of that injury. But this alone is an insufficient basis for an industrial disability retirement under Government Code section 20026.

4B. In a similar vein, respondent’s documentary evidence did not assist him in establishing, that he met the criteria for an industrial disability retirement. Specifically, respondent’s medical reports did not support a competent medical opinion that respondent is substantially and permanently incapacitated from performing the usual duties of a correctional officer for three reasons.

First, Dr. Andrews-Steele had no objective findings supporting her diagnosis of lumbar radiculopathy and Dr. Sedgh’s report had no diagnosis of lumbar radiculopathy. (Factual Findings 16C & 20B.) On those bases alone, the reports could not form the basis of a competent medical opinion. (See Factual Finding 20B.)

Second, because the Dr. Sedgh and Dr. Andrews-Steele’s reports applied evaluation standards applicable in workers’ compensation cases, their opinions can be given little weight in this proceeding. The standards in disability retirement cases are different from those in workers’ compensation. (See Factual Finding 23.)

Lastly, respondent's documentary evidence is administrative hearsay (see Factual Finding 16A.): None of the treating or evaluating health care professionals whose reports respondent relied upon testified at the hearing. Consequently, even assuming for argument's sake that these reports advanced respondent's case, they do not support or explain any other direct evidence received in the record, and thus, can be afforded little evidentiary weight.

Disposition

5. When all the evidence in this matter is considered, respondent did not establish that his disability retirement application should be granted. At hearing, CalPERS' medical evaluator, Dr. Kaufman, convincingly demonstrated that respondent suffers from age-related degeneration and a lumbar strain or sprain. Dr. Kaufman's testimony persuasively contradicted Dr. Andrews-Steele's diagnosis of lumbar radiculopathy. Respondent offered no objective evidence in rebuttal, either from his treating doctor or from a medical expert. Consequently, respondent did not meet his burden of proof and his disability retirement application must be denied. (Factual Findings 6-25, Legal Conclusions 1-4.)

ORDER

The application of respondent Michael J. Wurtz for industrial disability retirement is denied.

DATE: August 27, 2019

DocuSigned by:
James Michael Davis
JAMES MICHAEL DAVIS
Administrative Law Judge
Office of Administrative Hearings