

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:

TRAVIS A. BUSCH and

**SIERRA CONSERVATION CENTER, CALIFORNIA DEPARTMENT
OF CORRECTIONS AND REHABILITATION, Respondents.**

OAH No. 2019051033

CASE No. 2019-0108

PROPOSED DECISION

Heather M. Rowan, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on October 7, 2019, in Sacramento, California.

Helen Louie, Attorney, represented the California Public Employees' Retirement System (CalPERS).

Travis A. Busch (respondent) appeared and represented himself.

There was no appearance by or on behalf of Sierra Conservation Center, California Department of Corrections and Rehabilitation (Department). CalPERS

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
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established that it served the Department with a Notice of Hearing. Consequently, this matter proceeded as a default hearing against the Department pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted on October 7, 2019.

ISSUES

a. Whether, at the time respondent filed his application for disability retirement on the basis of a cardiovascular (hypertension, heart disease, and atrial fibrillation) condition, he was permanently disabled or substantially incapacitated from performing his usual and customary duties as a Correctional Sergeant for the Department?

b. If respondent is found to be permanently disabled or substantially incapacitated from the performance of duties, whether he made a mistake, which was the result of inadvertence, mistake, surprise, or excusable neglect correctable by Government Code section 20160, which would have entitled him to an effective retirement date retroactive to the last day for which salary was payable?

FACTUAL FINDINGS

Application Background

1. The Department employed respondent as a Correctional Sergeant. Respondent and CalPERS had the following contacts regarding respondent's Industrial Disability Retirement Application:

- On December 30, 2015, respondent met with a CalPERS Field Office Representative who provided him with disability retirement information and the documentation necessary for CalPERS to make a determination.
- On July 26, 2016, respondent again met with a CalPERS Field Office Representative for retirement counseling. The representative also reviewed respondent's disability retirement application.
- On December 15, 2016, respondent submitted his industrial disability retirement application, and a representative informed him that he needed to submit required documents within 21 days to avoid his application being cancelled.
- By letter dated December 23, 2016, CalPERS informed respondent that it had not received respondent's job description/duty statement, Physical Requirements of Position/Occupational Title form, Authorization to Disclose Protected Health Information form, and medical records. CalPERS requested that respondent submit these documents within 21 days, or his application would be cancelled.
- On January 10, 2017, CalPERS had not received the required forms, and informed respondent that his application would expire on January 23, 2017.
- On February 15, 2017, CalPERS informed respondent that his industrial disability application was cancelled due to missing documents. CalPERS informed respondent that he needed to reapply

for industrial disability retirement and submit all the required forms as soon as possible.

- On August 15, 2017, respondent re-submitted his application for industrial disability retirement to the CalPERS Regional Office in Fresno. A representative informed him that he would need to submit the required documents.
- By letter dated August 18, 2017, CalPERS again informed respondent that he needed to submit all required forms within 21 days, or his application would be cancelled.
- On September 15, 2017, CalPERS cancelled respondent's application for industrial disability retirement because it had not received the required documents.

2. On March 29, 2018, respondent dated and CalPERS received respondent's Disability Retirement Election Application (application) in which he claimed disability based on heart disease and stress. He submitted the required documentation with this application. By letter dated December 10, 2018, CalPERS denied respondent's application on the basis of his cardiovascular condition. CalPERS stated that the available medical evidence was insufficient "for us to make a determination on a psychological condition." Consequently, respondent's psychological condition was not considered in its evaluation. Respondent filed a timely appeal. This hearing followed.

Respondent's Application

3. In his application, respondent described his disabilities as: "hypertension, heart disease, stress, atrial fibrillation." He stated that his disability occurred on December 1, 2014, "while performing [his] duties as a correctional sergeant." Respondent noted that he "cannot focus, [he] cannot undergo any stress or [he gets] chest pains and heart palpitations." This limits his ability to do his job because he "must have routine - no stress schedule." Respondent added: "I have proudly served [the Department] for almost 21 years. I did not want to leave the Department early, but now my life and health depend on it."

Respondent requested a retirement effective date of "expiration of benefits," which means his retirement allowance would begin on his last day of pay, including any vacation or sick leave accrued. His last day of reported payroll at the time of his application was March 1, 2016.

4. In its December 10, 2018 denial letter, CalPERS stated that its review "included the reports prepared by Richard Levy, M.D., Diego Allende, M.D., Michael Krueger, D.O., and Thomas Leonard, M.D." Based on these reports, CalPERS determined respondent's cardiovascular (hypertension, heart disease, atrial fibrillation) condition was not disabling. Based on a lack of medical evidence, CalPERS did not consider respondent's psychiatric (stress) condition. Respondent is not precluded from re-applying for disability retirement on this basis.

The December 10, 2018 letter also denied respondent's request to have his disability retirement become effective earlier than the first day of the month in which CalPERS received his application. CalPERS informed respondent that he had 30 days to

file a written appeal from the denial. By letter dated January 7, 2019, respondent appealed CalPERS's findings.

Duties of a Correctional Sergeant

5. CalPERS submitted two documents that describe the duties of a Correctional Sergeant: a list of physical requirements of the position and an Essential Functions list. Generally, a Correctional Sergeant must be able to work in minimum and maximum security institutions, as well in male and female institutions, work various shifts, and function in non-institutional settings. On March 29, 2018, respondent signed a form entitled: "Physical Requirements of Position/Occupational Title." The pertinent physical tasks of a Correctional Sergeant are:

Occasionally (up to three hours): running, crawling, kneeling, climbing, squatting, bending the waist, reaching above and below shoulder, pushing and pulling, power grasping, lifting and carrying 51 to more than 100 pounds.

Frequently (three to six hours): power and simple grasping; lifting up to 26 pounds, walking on uneven ground.

Constantly (over six hours): sitting, standing, walking, bending or twisting at the neck or waist, lifting and carrying up to 25 pounds.

The Essential Functions of the position include:

Working overtime, up to 16 hours in addition to a regular eight-hour shift;

Wearing protective clothing, equipment, and breathing apparatus;

Range qualifying with a handgun, rifle, and shotgun;

Disarming, subduing, and applying restraints to an inmate;

Defending self against an inmate armed with a weapon;

Running occasionally with effort from a few yards up to 400 yards, including over uneven surfaces;

Quickly ascending or descending a series of stairs, several tiers of stairs or ladders, and carrying items while climbing stairs;

Bracing while restraining an inmate, during an altercation or while performing a body search.

Expert Opinion: Dr. Thomas E. Leonard

6. CalPERS retained Thomas E. Leonard, M.D., to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Leonard testified at hearing. He is board-certified in internal medicine by the American Board of Internal Medicine, with subspecialties in cardiology and pulmonary disease. He obtained his medical degree from New York Medical School in 1967. Dr. Leonard ran a cardiology and pulmonary disease private practice from 1973 until 1996. He was the Critical Care Director, Intensive Care and Coronary Care at Vallejo General Hospital from 1973 to 1983. He is a Qualified Medical Evaluator and also performs IMEs for CalPERS.

7. On November 19, 2018, at CalPERS's request, Dr. Leonard conducted an IME of respondent and issued a report. As part of respondent's IME, Dr. Leonard interviewed respondent, obtained a medical history, conducted a physical examination, and reviewed medical records related to respondent's heart condition. He also reviewed the job description and physical duties of a Correctional Sergeant. CalPERS provided Dr. Leonard with respondent's medical records, which he reviewed and summarized in his report.

8. Respondent informed Dr. Leonard that he was a 46-year-old Correctional Sergeant, and he had been with the Department for 20 years. Six to eight years prior to the IME, respondent began experiencing lightheaded episodes, often associated with a fast heart rate. He also noticed he was easily fatigued. He tried to address these symptoms by reducing stimulants such as caffeine and ensuring he got adequate sleep. The problems persisted, however, and on December 11, 2014, respondent was at a fire camp and developed heart palpitations. He was transferred to the nearest hospital emergency room, and paramedics administered nitroglycerin and aspirin, which seemed to relieve his symptoms. The paramedics reported that respondent experienced atrial fibrillation, a rapid, irregular heartbeat. James Sidney, D.O. was the emergency room doctor who performed several tests and took an x-ray of respondent's chest. By the time respondent was treated in the emergency room, his heart rate had returned to normal rhythm. Dr. Sidney's diagnoses were chest pain and anxiety.

9. In February 2015, respondent underwent an ablation procedure to prevent future occurrences of atrial fibrillation. Following the procedure, respondent continued to experience palpitations, dizziness, blurred vision, and occasional nausea. Respondent is hypertensive, but controls his blood pressure with medication.

10. Dr. Leonard's review of respondent's medical records revealed that respondent is a credible historian. His oral recounting of his medical history comports with the picture the medical records painted. Respondent had been administered several tests to determine whether he had heart disease. He performed well on the treadmill test that measured his heart during incrementally increased activity, his echocardiogram was normal, and his electrocardiogram showed he was no longer in atrial fibrillation. Testing in January 2016 and December 2017 showed respondent's heart was beating at a normal rhythm.

11. Dr. Leonard's physical examination of respondent was consistent with respondent's health records. Respondent's blood pressure was "borderline," his heart exam was "very normal" and consistent with the echocardiogram reports, and he was otherwise healthy.

12. Dr. Leonard's diagnoses were: "1) paroxysmal atrial fibrillation; 2) status post ablation therapy 2/27/15; 3) essential hypertension; 4) probable sleep apnea; and 5) probable severe anxiety disorder." He explained at hearing that he described respondent's sleep apnea as "probable" because respondent had not yet undergone a sleep study, but his primary care doctor recommended it. He described severe anxiety disorder as "probable" because mentions and diagnoses that respondent suffered from severe anxiety "permeated the medical records." Respondent's medical records also revealed that his primary care physician kept him off work for several months. The reasoning, however, was unclear, except that respondent was suffering from "stress issues related to his occupation."

13. Dr. Leonard conceded that anxiety and stress in the workplace can cause stress to the heart, but medical research shows that people habituate to chronic stress, and physical responses lessen. Acute stress can impact heart health in the moment of

stress, but it is not a sustained impact. Dr. Leonard does not doubt that respondent had an episode of atrial fibrillation. Respondent's medical history and Dr. Leonard's physical examination, however, did not reveal an on-going heart condition. Consequently, respondent is not substantially incapacitated from performing his regular duties based on a cardiologic issue.

Respondent's Evidence

14. Respondent is 47 years old. He began having heart trouble in 2014. He was diagnosed with atrial fibrillation and had an ablation in 2015. He believes the ablation failed because he continues to experience heart palpitations. Respondent has worked for the Department for 24 years. He has been a Correctional Officer and a Correctional Sergeant, and has accepted such assignments as hostage negotiator and SWAT team member. In April 2019, respondent attempted to return to work as a Correctional Sergeant because his family could not afford for him not to have an income. In June 2019, he voluntarily "demoted" to a Correctional Officer in an attempt to reduce his stress.

15. Respondent explained that Sierra Conservation is "one of the most active centers for [inmate] violence in the state." Currently, the Department is in the process of integrating the inmates at the highest risk of experiencing violence in the general population. This has caused even more riots than Sierra Conservation had been experiencing. When there is violence and other stressful situations, respondent's stress and anxiety increase, which makes his symptoms worse. He is consistently "held over" and works 12 to 16-hour shifts, which also causes stress. He is required to be able to wear a gas mask in riot situations, but when he puts it on, his "heart starts jumping," and he is forced to remove it. He believes that the current state of his health and the unpredictability of his symptoms create a danger to his, his coworkers', and inmates'

safety. If he has "an episode" during a shift, he cannot defend himself or others during a riot or other dangerous situation.

16. Respondent submitted a "Physician's Report on Disability" form that he had included with his application. His primary care doctor, Diego Allende, D.O., completed the form. Dr. Allende wrote, "I believe to subject [respondent] to the high stress environment of CDCR would be reckless and irresponsible at this time. Additionally, could prove fatal and/or hazardous to himself or his co-workers during an emergency operation." He opined that respondent was substantially incapacitated from performing his job duties, and he should completely avoid high-stress situations, such as riots. The ideal position for respondent would be a non-stress environment with normal hours and no inmate contact.

Disability Retirement Effective Date

17. Mari Cobbler is an Appeals Analyst for CalPERS. She reviews and processes disability retirement applications. She explained that if an application is filed within nine months of the last day on pay, the start-date for retirement allowance can reach back to the Expiration of Benefits. If the application was received more than nine months from the member's last day on pay, CalPERS must either determine whether there was a mistake that could be corrected under the Public Employee Retirement Law (PERL) or assign the first day of the month in which the application was filed as the date to begin paying the disability retirement allowance.

18. Respondent went to a CalPERS field office in Fresno on December 30, 2015 and July 26, 2016, to gather information regarding disability retirement and receive retirement counseling. He applied for disability retirement on December 15, 2016, but because he did not submit the required accompanying information, CalPERS

cancelled the application on February 15, 2017. He applied again on August 15, 2017, but did not submit the required documentation. CalPERS cancelled that application on September 15, 2017. On March 29, 2018, respondent submitted his application with the required documentation, and his application was deemed complete and accepted. Respondent requested that his retirement allowance begin on the "Expiration of Benefits." His last day on the Department's payroll at the time he submitted his application was March 1, 2016.

19. CalPERS cancelled respondent's first two applications because he did not submit a job description or Physical Requirements of Position form. CalPERS sent multiple letters to respondent requesting the information.

20. CalPERS cannot assign a date to begin a retirement allowance that is earlier than the member's last day on pay. Additionally, a member cannot concurrently receive salary and retirement allowance. Respondent is currently working for the Department as a Correctional Officer. While his former last paid date was March 1, 2016, since he started working in April 2019, that date no longer applies.

21. Respondent testified that his application was delayed for two reasons. The first is that the medical information he requested from his worker's compensation case was not submitted to CalPERS. He stated that he was forced to "sue worker's compensation" to get access to the records. The second was that CalPERS lost his application and supporting documents for four months. He also stated that he included the required documentation with his first application, and he expected that once he submitted it electronically, CalPERS should apply the documents to each subsequently filed application.

22. Respondent argued in the alternative that he should be paid from March 1, 2016, to April 2019, when he returned to work. He conceded that he cannot be paid both a salary and disability retirement at the same time. If CalPERS had not lost his application, he would not be in his current financial situation and would not have had to return to work. Thus, it is CalPERS that created the error and he should not be penalized.

Discussion

23. The burden was on respondent to offer sufficient competent medical evidence at hearing to support his disability retirement application. The evidence respondent submitted included his testimony and a statement from his primary care physician, Dr. Allende, on CalPERS's "Physician's Report on Disability" form. Dr. Allende is not a cardiologist. He opined that the stressful environment of a prison is a dangerous situation for respondent. Dr. Allende's primary findings appear to be that respondent suffers from stress and anxiety. Throughout his medical notes on respondent that recommended respondent not return to work, Dr. Allende did not specify a diagnosis. Respondent's evidence did not establish that at the time he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Correctional Sergeant based on his cardiovascular (hypertension, heart disease, and atrial fibrillation) condition.

24. Conversely, Dr. Leonard's testimony and his IME report's findings established respondent suffered an episode of atrial fibrillation, but there was no indication in the medical records or his physical examination of on-going heart disease. Dr. Leonard's opinion that respondent was not substantially incapacitated

from performing his usual job duties was persuasive. Consequently, his disability retirement application must be denied.¹

LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Correctional Sergeant, respondent is a state safety member of CalPERS subject to Government Code section 21151. Government Code section 21151, subdivision (a), provides the following with regard to a patrol member's eligibility for industrial disability retirement:

Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

2. To qualify for disability retirement, respondent had to prove that, at the time he applied for disability retirement, he was "incapacitated physically or mentally

¹ Because applicant did not establish that he is permanently disabled or incapacitated from performance of his duties as a Correctional Sergeant, there is no need to reach the issue of whether respondent's retirement allowance should be retroactive to March 1, 2016, as a result of inadvertence, mistake, surprise, or excusable neglect correctable by Government Code section 20160, which would entitle him to retroactively change his retirement date.

for the performance of [his] duties." (Gov. Code, § 21156.) 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, as determined by the board . . . on the basis of competent medical opinion.

3. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.)

4. When all the evidence in this matter is considered, respondent did not establish that his disability retirement application should be granted. He failed to submit sufficient evidence based upon competent medical opinion that, at the time he applied for disability retirement, he was permanently and substantially incapacitated from performing the usual duties of a Correctional Sergeant based on his cardiovascular (hypertension, heart disease, and atrial fibrillation) condition. As a result, his disability retirement application must be denied.

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ORDER

The application of respondent Travis A. Busch for disability retirement is
DENIED.

DATE: October 24, 2019

DocuSigned by:
Heather M. Rowan
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HEATHER M. ROWAN

Administrative Law Judge

Office of Administrative Hearings