

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

In the Matter of the Statement of Issues against:

DESIREE L. MEUX, Respondent,

and

**CALIFORNIA CORRECTIONAL INSTITUTION, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,**

Respondent.

Agency Case No. 2019-0638

OAH No. 2019100733

PROPOSED DECISION

Administrative Law Judge (ALJ) Chantal M. Sampogna, Office of Administrative Hearings, State of California, heard this matter on March 9, 2020, in Los Angeles, California.

Charles Glauberman, Senior Attorney, represented California Public Employees' Retirement System (complainant or CalPERS).

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED 4/3 2020

SMS

No appearance was made on or behalf of Desiree L. Meux (respondent Meux) or California Correctional Institution, California Department of Corrections and Rehabilitation (respondent CDCR), (collectively, respondents).

The hearing as to respondents proceeded as a default pursuant to Government Code section 11520.

Testimony and documentary evidence was received. The record was closed and the matter was submitted for decision on March 9, 2020.

ISSUE

Whether at the time of the application, on the basis of an orthopedic (lower back and lumbar) condition, respondent Meux was substantially incapacitated from the performance of her usual and customary duties as a Correctional Sergeant for respondent CDCR.

SUMMARY

Respondent Meux, a Correctional Sergeant (CS) with respondent CDCR, applied for Industrial Disability Retirement based on an orthopedic (lower back and lumbar) disability. Complainant conducted an investigation of respondent Meux's disability, which included surveillance of respondent Meux and an Independent Medical Examination conducted by Juan Antonio Realyvasquez, M.D. Based on this information, complainant determined respondent Meux was not substantially incapacitated from performance of her usual and customary duties as a CS at the time of her application, and denied respondent Meux's application. Respondents did not appear at hearing

and did not present evidence. Respondent Meux failed to establish by a preponderance of the evidence she was substantially incapacitated at the time of her application. Complainant's determination is affirmed.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent Meux, a CS with respondent CDCR, submitted her application for Industrial Disability Retirement on August 30, 2018, based on an orthopedic (lower back and lumbar) disability. By virtue of her employment, respondent Meux is a state safety member of CalPERS.

2. On April 22, 2019, complainant denied respondent Meux's application. On May 22, 2019, respondent Meux submitted a timely appeal of complainant's decision.

3. On October 7, 2019, Keith Riddle, Chief of the Disability and Survivor Benefits Division, signed the Statement of Issues solely in his official capacity.

Respondent Meux's Job Duties and Essential Functions

4. Respondent Meux completed the *Physical Requirements of Position/Occupational Title* form included in the application and reported to complainant the job duties she performs frequently (three to six hours per shift), constantly (over six hours per shift), and duties she performs up to eight hours per shift. As a CS, respondent Meux frequently sits, bends her neck, twists her neck and waist, lifts or carries zero to 25 pounds, is exposed to dust, gas, fumes, or chemicals, uses special visual or auditory protective equipment, and works with bio-hazards;

respondent Meux constantly performs repetitive hand use, and is exposed to extreme temperature, humidity, and wetness; respondent Meux drives for up to eight hours per shift. Respondent Meux and a CDCR representative signed the form.

5. A. In a document titled *Department of Corrections and Rehabilitation Division of Adult Institutions Correctional Sergeant Essential Functions*, respondent CDCR defines a CS as an employee who supervises the work of correctional officers in the safe custody, discipline and welfare of inmates, performs other related work, and who must be able to work in conditions that require all of the listed essential functions. (Ex. 10.)

B. The essential functions of a CS which could be impacted by an orthopedic (lower back and lumbar) disability include the following: running between three to 400 yards, possibly on uneven pavement, when responding to alarms or serious incidents; occasionally climbing or ascending and descending stairs or ladders, at times while carrying items; occasionally crawling and crouching, while searching under bunk beds or firing a weapon; occasionally sitting, stooping, and bending; occasionally to continuously walking to patrol grounds; continuously to frequently lifting and carrying between 20 to 50 pounds throughout the workday and over 100 pounds occasionally; continuously wearing an equipment belt weighing 15 pounds; occasionally to frequently pushing, pulling, and reaching while performing body searches, opening gates, or handling an altercation; frequently to continuously moving head and neck in all directions throughout the workday while observing and surveilling inmates; occasionally bracing while restraining an inmate; and frequently to continuously twisting her body in all directions while performing regular duties.

Respondent Meux's Injury

6. On December 14, 2012, respondent Meux fell off of a company chair and hit the floor causing injury to her back, neck, shoulders, and both upper extremities. In her August 2018 application, respondent Meux reported her disability to be "lower back lumbar" (Ex. 3), and reported that due to her disability she cannot lift 10 pounds, bend, ascend or descend stairs, squat, twist, or wear a utility belt.

Respondent Meux's Independent Medical Examination

7. At complainant's request, on March 14, 2019, Independent Medical Examiner Juan Realyvasquez, M.D., conducted an Independent Medical Evaluation (IME) of respondent Meux. Dr. Realyvasquez established himself as an expert in orthopedic care and surgery, and he testified at hearing about his IME report and findings.

8. Dr. Realyvasquez spent one hour reviewing respondent Meux's medical records and one hour performing the examination and taking respondent Meux's history. At the time of evaluation, respondent Meux was 38 years old. Respondent Meux reported she continues to have constant pain in her lumbar spine, which radiates down both lower extremities to just below her knees and calves. Respondent Meux reported it is difficult for her to bend, reach, crouch, stoop, and to get out of a chair.

9. A. Dr. Realyvasquez reviewed respondent Meux's recorded medical history, spanning from November 2013 until May 2018. The medical assessments differed as to whether respondent Meux's injury had healed to the point where she was permanent and stationary, as Alan Sanders, M.D., concluded on July 28, 2017, or whether respondent Meux continued to be physically limited by her injury. Dr.

Sander's July 2017 findings were consistent with prior medical evaluations conducted by Dr. Sanders and Bruce E. Fishman, M.D., between 2014 and 2016: these assessments found that at the beginning of this time frame, respondent Meux's injuries had improved except for her lower back, with continued pain when bending, twisting, and turning, and that by 2016, respondent Meux was doing well without any requirements for any therapy care or treatments.

B. Gil Tepper, M.D., made a 2017 diagnosis of, and issued a 2018 modified work status for, respondent Meux which were inconsistent with the findings made by Drs. Sanders and Fishman. On April 14, 2017, Dr. Tepper performed an MRI on respondent Meux and on August 16, 2017, Dr. Tepper diagnosed respondent Meux with a two millimeter herniated disc at L5-S1 with bilateral radiculopathy. In May 2018, Dr. Tepper issued a modified work status for respondent Meux, which limited respondent Meux to lifting up to 10 pounds, and directed respondent Meux to avoid climbing ladders, forceful pulling or pushing more than two pounds, and prolonged standing, walking, bending, stooping, climbing, kneeling, squatting, or crawling. In addition, On November 28, 2018, Domenick J. Sisto, M.D., conducted an orthopedic evaluation of respondent Meux and concluded she had a chronic spine problem.

C. Dr. Realyvasquez resolved the inconsistent medical information by reviewing the MRI and found that contrary to Dr. Tepper's findings, respondent Meux's MRI results were normal, demonstrating one or two millimeter disc bulges without spinal stenosis and minimal foraminal obstruction, and not demonstrating a herniated disc. Further, based on his evaluation of respondent Meux, Dr. Realyvasquez found that she had no back spasm and her limitation of motion was mild, which he deemed to be voluntarily restricted by respondent Meux during his evaluation. Dr.

Realyvasquez determined these findings dispel Dr. Sisto's conclusion that respondent Meux has a chronic spine problem.

10. As part of his evaluation, Dr. Realyvasquez also reviewed video clips obtained during Board Investigator Natasha Cook's investigation. These video clips were videotaped either directly by Board Investigators during surveillance between December 19, 2018, through January 27, 2019, or were videos published to respondent Meux's FaceBook account between March 2017 and February 2019, and downloaded by Investigator Cook. Ms. Cook testified at hearing and, based on her review of respondent Meux's California Driver's License and social media posts, confirmed respondent Meux was the individual appearing on the videos contained in Exhibit 12. Ms. Cook documented her investigation and findings in her February 6, 2019, Report of Investigation.

11. As was found by Dr. Realyvasquez and Investigator Cook, and by the ALJ on her own viewing, the videotapes depicted respondent Meux doing the following: respondent Meux consistently exited her home and entered, drove, and exited her vehicle; on multiple occasions, and while wearing high heeled shoes, respondent Meux led a congregation in worship at her church, for periods of time greater than 20 minutes, by quickly and energetically dancing, jumping, and marching her legs, while bending forward and backward at her waist and twisting her waist in full range of motion, and moving her upper extremities in full range over her head. The videotapes also depicted respondent Meux pumping her own gas, bending at the waist to her foot to remove toilet paper from her shoe, and bending at the waist to pick up and move a door stop. At all times depicted, respondent moved freely and easefully, without demonstrating any pain or movement restriction.

12. When he reviewed all of the information available to him, Dr.

Realyvasquez found additional significant contradictions between respondent Meux's medical history and his physical examination as follows: 1) respondent Meux's physical examination demonstrated impingement syndrome on the right arm, but in the videos reviewed respondent Meux did not demonstrate any limitation of abduction; Dr. Realyvasquez concluded respondent Meux had no impairment of use of both shoulders; and 2) though respondent Meux has scoliosis, the x-rays of her lumbar spine showed mild if any degeneration; Dr. Realyvasquez concluded respondent Meux was not experiencing pain due to her scoliosis because scoliosis does not cause pain unless there is significant degeneration.

13. Dr. Realyvasquez diagnosed respondent Meux with mild right shoulder impingement, right thoracic and left lumbar scoliosis, and chronic lumbar pain. Dr. Realyvasquez concluded respondent Meux does not have an actual or present orthopedic (lower back and lumbar) impairment that rises to the level of substantial incapacity to perform her usual job duties.

LEGAL CONCLUSIONS

Authority; Burden and Standard of Proof

1. The Board of Administration of the Public Employees' Retirement System (Board) manages and controls the California Employees' Retirement System. (Gov. Code, §§20120, 220090.)¹
2. Applications for industrial disability retirement are subject to the Public Employees' Retirement Law. (Gov. Code, § 20000 et seq.)
3. Any patrol, state safety, state industrial, state peace officer or 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. (§ 21151, subd. (a).)
4. Application to the Board for retirement of a member for disability may be made by the head of the office or department in which the member is or was last employed, if the member is a state member other than a university member, or the member or any person in his or her behalf. (§ 21152, subds. (a), (d).)
5. When reviewing the denial of an application for benefits, the burden of proof is on the applicant. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits); *Greatorex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57

¹ All statutory references are to the Government Code unless otherwise designated.

(retirement benefits.) Respondent Meux had the burden to prove she is entitled to industrial disability retirement.

Evaluation of Disability and Incapacitation for the Performance of Duty

6. On receipt of an application for disability retirement of a member, the Board must 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. (§ 21154.)

7. If the member's medical examination and other available information show to the satisfaction of the Board based on competent medical opinion, that the member is incapacitated physically or mentally for the performance of her duties and is eligible to retire for disability, the Board must immediately retire her for disability. (§ 21156, subd. (a).)

8. "Disability" and "incapacity for performance of duty" as a basis for retirement mean disability of permanent or extended and uncertain duration, as determined by the Board, on the basis of competent medical opinion. (§ 20026.)

9. "Incapacitated for the performance of duty" is the substantial inability of the applicant to perform her usual duties, as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) An employee who can carry out most of his or her duties is not 'incapacitated for the performance of duty' within the meaning of the statute. (*Mansperger v. Public Employees' Retirement System, supra*, 6 Cal.App.3d at p. 877.)

10. Where complainant introduces competent medical evidence that respondent is not substantially incapacitated, respondent must, to meet the burden of proof on the appeal for industrial disability retirement, present competent medical evidence which establishes respondent was substantially incapacitated from the performance of the usual and customary duties at the time of the application. (*The Matter of the Application for Disability Retirement of Ruth A. Keck, Respondent, and LA Co. Schools* (2000), CalPERS Precedent Decision 00-05).

11. In this matter, complainant presented the only competent medical evidence, comprised of Dr. Realyvasquez's IME report and testimony, which was based on his review of his physical evaluation of respondent Meux and his review of her medical history and Investigator Cook's report and time relevant videos. This evidence established that at the time of application, respondent Meux was able to freely, quickly, and energetically, twist and bend at her waist, stoop, sit, reach, jump, kick, and walk, and had full range of motion in her upper extremities, head, and neck.

12. Complainant's competent medical evidence establish that at the time of application, based on an orthopedic (lower back and lumbar) condition, respondent Meux was not substantially incapacitated from the performance of her usual and customary duties as a CS for respondent CDCR. (Factual Findings 4-13.) Respondent Meux failed to establish her disability or incapacity to perform her usual duties as a CS as is required by section 20026.

ORDER

1. Complainant's denial of respondent Desiree L. Meux's application for industrial disability retirement is affirmed.

DATE: April 3, 2020

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Chantal M. Sampogna
CHANTAL M. SAMPOGNA
APR 03 2020 10:57 AM
Administrative Law Judge
Office of Administrative Hearings