

ATTACHMENT E

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 C. HAMPTON and CALIFORNIA CORRECTIONAL
CENTER, CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION, Respondents.**

Case No. 2019-0205

OAH No. 2019040785

PROPOSED DECISION

Marcie Larson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on January 27, 2020, in Sacramento, California.

Charles Glauberman, Senior Attorney, appeared on behalf of the California Public Employees' Retirement System (CalPERS).

There was no appearance by or on behalf of respondents Michael C. Hampton (respondent) or California Correctional Center, California Department of Corrections and Rehabilitation (Department). Respondent and the Department were duly served

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED February 18 2020

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with a Notice of Hearing. The matter proceeded as a default against respondent and the Department pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on January 27, 2020.

ISSUE

The issue on appeal is whether, on the basis of his cervical, hip, back, left calf, and leg pain (orthopedic conditions), respondent is substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer (CO) for the Department?

FACTUAL FINDINGS

Procedural History

1. Respondent was employed by the Department as a CO for approximately 30 years. On March 8, 2018, respondent signed and thereafter filed an application for industrial disability retirement (application) with CalPERS. By virtue of his employment respondent is a state safety member of CalPERS subject to Government Code section 21151. Respondent was 51 years old when he filed his application.

2. In filing the application, respondent claimed disability on the basis hip, left calf and "numerous job related issues." Respondent wrote that the conditions occurred when he fell at work. Respondent further wrote that due to the injury he had pain and "could no longer work as peace officer."

3. On or about November 8, 2018, respondent signed and thereafter filed an application for service retirement. Respondent retired for service effective February 5, 2017.

4. CalPERS obtained medical records and reports, including reports prepared by Wesley Hashimito, M.D., William Brose, M.D. Seyed Tahael, M.D., Roger J. Raimundo, M.D. and Charles F. Xeller, M.D., who conducted an Independent Medical Evaluation (IME) of respondent concerning his orthopedic conditions. After reviewing the reports, CalPERS determined that respondent was not substantially incapacitated from the performance of his job duties as a CO for the Department.

5. On December 19, 2018, CalPERS notified respondent that his application for industrial disability retirement was denied. Respondent was advised of his appeal rights. He filed an appeal and request for hearing by letter dated January 10, 2019.

6. On or about April 18, 2019, Anthony Suine, Chief, Benefit Services Division, Board of Administration, CalPERS, signed and thereafter filed the Statement of Issues. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Respondent's Duties as a Correctional Officer

7. Respondent worked as a CO at the Department's Fire Camp. As set forth in the Essential Functions statement, a CO in respondent's position was required to supervise and oversee inmates. Respondent was required, in part, to prevent inmate escapes and injuries, work overtime, wear protective clothing, utilize a baton, and defend himself and staff if necessary.

8. On March 8, 2018, a Return-to-Work Coordinator for the Department, signed a "Physical Requirements of Position/Occupational Title" form (Physical Requirements form). The Physical Requirements form was submitted to CalPERS. According to the Physical Requirements form, when working as a CO, respondent: (1) constantly (over 6 hours) sat, stood, walked, bent his neck, twisted his neck and waist, engaged in fine manipulation, power and simple grasped, repetitively used his hands, carried up to 25 pounds, drove, and was exposed to extreme temperature, humidity, and wetness; (2) frequently (three to six hours a day) climbed, bent at the waist, reached below the shoulders, pushed and pulled, used a keyboard and mouse, lifted from 25 to 50 pounds, was exposed to excessive noise, was exposed to dust, gas, fumes, or chemicals, and worked at heights; (3) occasionally (up to three hours), ran, crawled, kneeled, squatted, reached above his shoulders, lifted between 51 and over 100 pounds, operated foot controls or repetitive movement, used special visual or auditory protective equipment and worked with biohazards; and (4) never worked with heavy equipment.

Independent Medical Evaluation by Charles F. Xeller, M.D.

9. On November 12, 2018, at CalPERS's request, Charles F. Xeller, M.D., conducted an IME of respondent. Dr. Xeller prepared an initial report and a supplemental report. He testified at the hearing. Dr. Xeller is a board-certified orthopedic surgeon and holds subspecialties in hand and spine surgery. In 1979, he obtained his medical degree from the State University of New York (SUNY) at DownState Medical School in New York. Between 1980 and 1984, he completed an orthopedic residency at SUNY Stony Brook, New York. Dr. Xeller currently treats orthopedic patients but no longer performs surgery. He also serves as the Medical Director for a Veterans organization and performs medical evaluations.

10. As part of the IME, Dr. Xeller interviewed respondent, obtained a medical history, and conducted a physical examination. He also reviewed the Physical Requirements form and essential functions for respondent's position. Dr. Xeller reviewed respondent's medical records related to his orthopedic conditions.

RESPONDENT'S COMPLAINTS

11. Dr. Xeller obtained a history of respondent's employment, orthopedic conditions, treatment, and complaints. Respondent explained he worked for the Department and was in charge of Camp Fire, maintaining trails, and fighting fires in Suisun City. He worked at Camp Fire for 20 years and had been in the "Correctional System for 30 years." Respondent retired in February 2017 and had not worked in any capacity since that time. Respondent's orthopedic complaints included calf and neck pain. Respondent reported that his calf pain was his "number one problem."

PHYSICAL EXAMINATION AND REVIEW OF MEDICAL RECORDS

12. Dr. Xeller completed a physical examination of respondent. Dr. Xeller examined respondent's upper and lower extremities. He observed that respondent's calves were not swollen and measured 25 centimeters bilaterally. His thighs measured 40 centimeters bilaterally. Respondent was able to "toe and heel raise." His gait was normal. He had full range of motion in both knees, ankles, and feet. His reflexes were normal and there was no evidence of radiculopathy.

13. Respondent's range of motion in his neck was reduced by 25 percent and he had pain with side-to-side bending at 25 degrees. Dr. Xeller noted that X-Rays taken of respondent's cervical spine demonstrated "cervical facet arthropathy and multilevel degenerative disk disease," which Dr. Xeller described as arthritis. Dr. Xeller

further explained that respondent's neck pain "waxes and wanes," which means his pain increases and decreases depending on the day.

14. Dr. Xeller reviewed respondent's medical records between 2015 and 2018, related to his orthopedic conditions. Dr. Xeller summarized the records in his report. The records included a report dated April 18, 2017, from William Brose, M.D., a Qualified Medical Evaluator (QME), noted that respondent was injured at work on July 15, 2012, when he missed a step at work and fell on his left leg causing pain. He was diagnosed with "left gastrocnemius strain." Respondent received physical therapy. He did not have surgery. Dr. Brose noted that he could not find any specific disabling conditions.

On February 13, 2018, respondent had an MRI of his cervical spine that revealed "multilevel degenerative disk disease and facet arthropathy." Respondent's medical records demonstrated he complained of neck, left arm pain, and numbness and tingling down his left hand and fingers. Physical therapy and home exercises were recommended.

DIAGNOSIS AND OPINIONS

15. Dr. Xeller's diagnosis of respondent's orthopedic conditions included neck and calf pain. He explained that respondent had "myriad complaints," including neck pain with some restricted motion and calf pain. Dr. Xeller opined that he could not find "any specific parts that would cause him any sustained disability." He further opined that respondent's "neck arthropathy, low back chronic strain and a left calf injury" are not "disabling conditions."

16. Dr. Xeller opined that respondent is not substantially incapacitated from the performance of his duties as a CO for the Department. He also opined that

respondent can perform all the duties of a CO as set forth in the essential functions and Physical Requirements forms.

SUPPLEMENTAL REPORT

17. On July 12, 2019, Dr. Xeller issued a Supplemental Report after CalPERS provided him additional medical records to review from 2019, including an MRI taken of respondent's cervical spine on June 3, 2019. Dr. Xeller noted that the MRI identified multilevel degenerative changes, which was consistent with a previous MRI. Dr. Xeller explained that the additional records did not change his opinion that respondent is not substantially incapacitated from the performance of his duties as a CO for the Department.

Discussion

18. When all the evidence is considered, Dr. Xeller's opinion that respondent is not substantially incapacitated from the performance of his usual and customary duties as a CO, based upon his orthopedic conditions, was persuasive. Dr. Xeller based his opinion on his review of respondent's essential functions, the Physical Requirements form, medical records and a physical examination. The evidence established respondent has complaints of calf pain and arthritis in his cervical spine. Neither conditions preclude respondent from performing the duties of a CO for the Department.

19. Respondent failed to appear at hearing and did not present competent medical evidence to demonstrate that at the time he submitted his application, he was permanently disabled or substantially incapacitated from the performance of his usual duties as a CO for the Department based upon the legal criteria applicable in this

matter. Consequently, respondent failed to establish that his industrial disability retirement application should be granted based upon his orthopedic conditions.

LEGAL CONCLUSIONS

1. Respondent seeks disability retirement pursuant to Government Code section 21151, subdivision (a), which provides in pertinent part, that “[a]ny 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.”

2. To qualify for disability retirement, respondent must prove that, at the time he applied, he was “incapacitated physically or mentally for the performance of his or her duties....” (Gov. Code, § 21156, subd. (a)(1).) Government Code section 20026 defines “disability” and “incapacity for performance of duty,” as follows:

“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.

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." (See also *In re Theresa V. Hasan*, (2000) CalPERS Precedential Bd. Dec. No. 00-01.)

4. In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, the court explained that prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. The applicant in *Hosford* had suffered injuries to his left ankle and knee, and had strained his back. The court noted that the sergeant "could sit for long periods of time but it would 'probably bother his back;' that he could run but not very adequately and that he would probably limp if he had to run because he had a bad ankle; that he could apprehend persons escaping on foot over rough terrain or around and over obstacles but he would have difficulty and he might hurt his back; and that he could make physical effort from the sedentary state but he would have to limber up a bit." (*Id.* at p. 862.) Following *Mansperger*, the court in *Hosford* found that the sergeant:

... is not disabled unless he is substantially unable to perform the usual duties of the job. The fact that sitting for long periods of time in a patrol car would "probably hurt his back," does not mean that in fact he cannot so sit; ...[¶] As for the more strenuous activities, [a doctor] testified that Hosford could run, and could apprehend a person escaping over rough terrain. Physical abilities differ, even for officers without previous injuries. The rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the function, renders [the doctor's

conclusion that Hosford was not disabled] well within reason. (*Ibid.*)

In *Hosford*, the sergeant argued that his condition increased his chances for further injury. The court rejected this argument, explaining that "this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently existing." (*Hosford, supra*, 77 Cal.App.3d at p. 863.)

5. In *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff was not permanently incapacitated for the performance of his duties, finding, "A review of the physician's reports reflects that aside for a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the appellant's condition are dependent on his subjective symptoms." In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, the court found that discomfort, which may make it difficult for an employee to perform his duties, is not sufficient in itself to establish permanent incapacity. (See also, *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.)

6. The burden of proof is on respondent to demonstrate that he is substantially incapacitated from the performance of his usual and customary duties such that he is permanently disabled. (*Harmon v. Board of Retirement of San Mateo County, supra*, 62 Cal. App. 3d 689; *Glover v. Board of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) To meet this burden, respondent must submit competent, objective medical evidence to establish that, at the time of his application he was permanently disabled or incapacitated from performing the usual duties of his position as a CO for the Department. (See *Harmon v. Board of Retirement, supra*, 62 Cal.App.3d at 697.)

7. When all the evidence is considered respondent did not present competent, objective medical evidence to establish that he was substantially incapacitated from performance of his usual duties as a CO at the time he filed his industrial disability retirement application. Therefore, based on the Factual Findings and Legal Conclusions, respondent is not entitled to retire for industrial disability pursuant to Government Code section 21151, subdivision (a).

ORDER

Respondent Michael C. Hampton's application for industrial disability retirement is DENIED.

DATE: February 19, 2020

DocuSigned by:
Marcie Larson
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MARCIE LARSON

Administrative Law Judge

Office of Administrative Hearings