

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 Disability Retirement of:

HAROLD S. JENNINGS, Respondent;

and

**CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS,
Respondent.**

Case No. 2019-0725

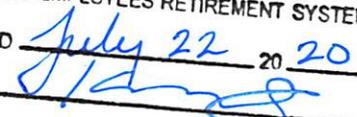
OAH No. 2019120039

PROPOSED DECISION

Administrative Law Judge Barbara O'Hearn, State of California, Office of Administrative Hearings, heard this matter by video conference and telephone on July 1, 2020.

California Public Employees' Retirement System Attorney Helen L. Louie represented the California Public Employees' Retirement System.

Attorney Andy Katz represented respondent Harold S. Jennings, who was present for the hearing.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED July 22 20 20


No appearance was made by or on behalf of respondent California Department of Consumer Affairs.

The matter was submitted for decision on July 1, 2020.

FACTUAL FINDINGS

1. The California Public Employees' Retirement System (CalPERS) filed a statement of issues by Keith Riddle, Chief, Disability and Survivor Benefits Division, acting in his official capacity. The statement of issues seeks to deny the application of respondent Harold S. Jennings (respondent) for disability benefits based on a determination that he was not substantially incapacitated from the performance of his job duties at the time of filing his application for disability retirement.

2. Respondent was employed as a Program Representative I with the Bureau of Automotive Repair (BAR), California Department of Consumer Affairs. By virtue of his employment, respondent is a state safety member of CalPERS. Respondent worked for 15 years and has service credit to qualify for retirement.

3. Respondent submitted a disability retirement election application on March 8, 2019, with a retirement date of April 1, 2019. In his application, he reports his disability as "severe back issues from scoliosis" developed in childhood which worsened over the past couple of years, impacting his right knee.

4. In his retirement application, respondent describes his limitations as difficulty standing, bending over, and getting in and out of seated positions. He adds that at times, sitting for a long period of time makes it worse.

5. Respondent's written job duty statement for BAR describes respondent's general duties, under the general supervision of a Program Representative III, as enforcing the laws and regulations governing auto repair and smog check, and independently investigating consumer complaints. Respondent's job duties comprise 65 percent in investigations.

6. Within that duty is communicating with consumers and repair facilities and developing statements and affidavits for legal actions (20 percent), and gathering and assembling evidence for legal actions (20 percent). Other duties within investigations comprise examining vehicles and related records to verify information on suspected violators and violations of law, and documenting violations in investigative reports (15 percent), preparing detailed investigative reports and making recommendations to management for disciplinary actions (five percent), and conducting covert surveillance operations to verify licensee compliance with auto repair and smog check laws (five percent).

7. Respondent's other job duties comprise 15 percent in field inspections, and 15 percent in public and private contact. An additional duty of five percent pertains to providing expert testimony.

8. Respondent acknowledged the written physical requirements of his job on March 5, 2019. Over six hours a day of his job is repetitive use of hands. Other requirements include three to six hours of sitting, while using keyboard and mouse, and while driving. Requirements up to three hours include standing, walking (including on uneven ground), kneeling, squatting, bending, twisting, reaching below the shoulder, lifting or carrying up to 50 pounds, and exposure to excessive noise, and to dust, gas, fumes or chemicals.

9. At the request of CalPERS, respondent was evaluated by Howard Sturtz, M.D., a board certified orthopedic surgeon. Dr. Sturtz had not previously performed evaluations involving scoliosis for CalPERS. He has performed about thirty evaluations for back conditions.

10. Dr. Sturtz performed an independent medical examination of respondent on May 16, 2019. He spent one hour performing the examination and taking respondent's history, and one hour reviewing respondent's medical records. In his report and his testimony at this hearing, Dr. Sturtz summarizes the medical records of respondent's treating physician, noted below and submitted at the hearing by respondent.

11. An x-ray report by Michael Park, M.D., dated February 16, 2015, notes respondent's history of low back pain. On March 7, 2015, Dr. Park notes respondent's history of scoliosis and low grade pain that respondent has learned to live with for many years.

12. On May 20, 2016, Dr. Park notes respondent's complaint of pain in the right lumbar region, radiating down the right buttock area, which is worse in the morning. Dr. Park recommends an MRI. The report of the MRI study dated May 27, 2016, notes a marked scoliosis concave with three millimeters of anterior listhesis at L4-5, and annular bulges at L1-2, L3-4, L4-5, and L5-S1.

13. On May 31, 2016, Dr. Park's report states that respondent continues to describe significant pain in his right side. Dr. Park scheduled him for an epidural injection to the right L4-5. It was performed on June 3, 2016. On June 27, 2016, Dr. Park reports that respondent's back and leg pain decreased by about fifty percent. Dr. Park recommends a second epidural injection, which was performed on July 8, 2016.

14. On October 4, 2016, Dr. Park reports that respondent's pain decreased after the second injection, and his pain was not as frequent and intense. Dr. Park notes that respondent was motivated to exercise, so will see a physical therapist to learn a home program.

15. On September 28, 2018, Dr. Park reports that respondent's pain has returned the last two months. Respondent requested another injection which was performed on December 17, 2018.

16. On January 23, 2019, Dr. Park states on a CalPERS physician's report that respondent is currently substantially incapacitated from the performance of his usual job duties. Specifically, respondent will be unable to examine vehicles, bend, kneel, squat, stand or sit for long periods of time, and maneuver around, underneath and over obstacles during investigations, because respondent's "condition will only worsen."

17. Respondent reflected on the progression of his condition and did not want to be in pain when performing job activities, especially sitting for long periods and bending over. He worked and performed his usual duties through March 31, 2019. He decided to retire effective April 1, 2019, because he believed he would be disabled from his regular duties, so it was not worth putting himself through more pain before he retired.

18. Respondent testified that when he was working, he felt better after weekends when he did not have to perform the physical aspects of his job. By mid-day Wednesday or Thursday, he felt pain in his lower back, and sometimes in his right leg. He was able to work because he did not stand for three hours a day. He took breaks

when he had to drive long distances, but most of his work driving was not more than 20 minutes. He continued working until his retirement without any sick time off work.

19. From his independent examination and evaluation of respondent on May 16, 2019, confirmed by his testimony, Dr. Sturtz opined that respondent did not have an orthopedic impairment from the underlying scoliosis that arises to the level of substantial incapacity to perform his usual job duties. Based on the lack of objective physical findings that would result in disability to cause respondent to be substantially incapacitated, Dr. Sturtz concludes that even though respondent has scoliosis, respondent is not substantially incapacitated. Dr. Sturtz notes that respondent worked through the years without any time loss due to his back problem.

20. Respondent contends that since Dr. Sturtz had not previously evaluated an applicant with scoliosis, his evaluation and testimony should be given little weight. Respondent contends that the medical records of his treating physician, Dr. Park, who did not testify under oath, should be given greater weight in determining whether respondent's condition caused substantial incapacity from the performance of his usual job duties at the time respondent filed his application for disability retirement.

LEGAL CONCLUSIONS

1. Under Government Code section 21150, a member who is credited with five years of state service may retire for a state industrial disability. By virtue of his employment described in Finding 2, respondent is a state safety member of CalPERS.

2. As described in Finding 3, respondent applied for disability retirement authorized by Government Code section 21152, subdivision (d). A member may retire for disability if he becomes "incapacitated for the performance of duty." (*Id.*, § 21151.)

3. The burden of proving an incapacitating condition is on the applicant for a disability retirement, and the standard of proof is a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

4. Government Code section 21154 authorizes CalPERS to 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. Under Government Code section 20026, "incapacitated for the performance of duty" is defined as "disability of permanent or extended and uncertain duration . . . on the basis of competent medical opinion."

5. By reason of Findings 9 and 10, CalPERS provided competent medical opinion, including testimony under oath by Dr. Sturtz. By reason of Finding 19, respondent does not have an incapacity to perform his work activities when he examined and evaluated him on May 16, 2019.

6. Contrary to the contentions described in Finding 20, the opinion of Dr. Sturtz is credible, reliable, and persuasive as a competent medical opinion required by Government Code section 21154. To form his opinion, Dr. Sturtz also reviewed the medical records of respondent's treating physician.

7. Respondent presented no competent direct medical evidence to contradict the opinion of Dr. Sturtz. The testimony under oath of Dr. Sturtz, subject to cross-examination, is given greater weight in this case than the medical records of Dr. Park and of Dr. Park's written statement on January 23, 2019, that respondent was substantially incapacitated from the performance of his usual job duties, when respondent was still performing his usual duties.

8. By reason of Finding 16, respondent will be unable to perform his usual work duties at some point after filing his application for disability. However, respondent has not met his burden of proof to show that he is substantially incapacitated for the usual duties of his investigator position as of the time of filing his application for disability retirement.

ORDER

The application of Harold S. Jennings for a disability retirement effective April 1, 2019, is denied.

DATE: July 22, 2020

DocuSigned by:
Barbara O'Hearn
39259713F13548B...

BARBARA O'HEARN
Administrative Law Judge
Office of Administrative Hearing