

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:

DANIEL V. SALINAS,

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
CALIFORNIA STATE PRISON, NORTH
KERN.

Respondent.

Case No. 2014-0968

OAH No. 2015020144

PROPOSED DECISION

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge,
Office of Administrative Hearings, State of California, on September 15, 2015, in Fresno,
California.

Elizabeth Yelland, Senior Staff Counsel, represented the California Public
Employees' Retirement System (CalPERS).

Respondent Daniel Salinas was present throughout the hearing and represented
himself.¹

Evidence was received, the record was closed, and the matter submitted for decision
on September 15, 2015.

¹ There was no appearance by or on behalf of the California Department of
Corrections and Rehabilitation.

ISSUE

The following issue is before the Board of Administration for determination:

Based upon respondent's orthopedic (neck) condition, is respondent permanently disabled or substantially incapacitated from performing the usual duties of a Correctional Officer?

FACTUAL FINDINGS

Respondent's Disability Retirement Application

1. CalPERS received respondent's Disability Retirement Election Application on December 19, 2013. In his application, respondent described his disability as follows:

(Neck) Multi level stenosis of the cervical region with radiculitis. Severe right neural foraminal narrowing at the C3/4 and C4/5 levels and moderate left neural foraminal narrowing at the C5/6 level. Furthermore surgery was indicated to fuse the C3 through C6 vertebrae.

2. Respondent stated in his application that his injury occurred on August 23, 2010, as follows:

While dispensing medication to inmates in their cells with medical staff at North Kern State Prison (NKSP) I was assaulted by an inmate. In the course of the assault the inmate grabbed me by the throat and a struggle ensued and we fell to the ground. When I fell to the ground I struck my head on a concrete surface. As a result I suffered my neck injury.

3. Respondent provided additional information, as follows:

Surgery has been recommended on my neck however I have decided not to have surgery at this point. I came to this decision because I was advised success was not certain. At this point I experience constant pain in the cervical region with radiating pain down both my upper extremities & limited range of motion.

4. Respondent described his limitations/preclusions as: "no lifting pushing or pulling over ten (10) lbs. and no inmate contact." Respondent stated that the injury has affected his ability to perform his job in that he is "no longer able to perform the essential functions of [his] job."

Duties of a Correctional Officer

5. On June 28, 2013, respondent signed a document titled Physical Requirements of Position/Occupational Title, which described the physical requirements of the job as including over six hours per day of running, bending neck, twisting neck, carrying 26-50 pounds; and occasionally up to three hours per day of carrying more than 100 pounds.

A separate document titled Correctional Officer Essential Functions includes requirements that the officer must be able to "swing baton with force to strike inmate; disarm, subdue and apply restraints to an inmate; defend self against an inmate armed with a weapon; and head and neck movement frequently to continuously throughout the day."

Respondent's Evidence

6. Respondent testified that he has a neck injury and that it causes him pain throughout the day. He would like to be able to go to work, but he knows that he would not be able to make it through the day because of the pain.

7. Respondent did not call any physician or other clinician to testify. Respondent did, however, present a Qualified Medical Evaluation (QME) report dated November 5, 2012, written by John M. Larsen, M.D., an orthopedic surgeon. Dr. Larsen's report was received in evidence as administrative hearsay, and as such may be considered to the extent that it supplements or explains other evidence.² Dr. Larsen's report corroborates respondent's assertion that he suffered a neck injury.

CalPERS's Expert

8. CalPERS retained Ghol B. Ha'Eri, M.D., an orthopedic surgeon, to conduct an Independent Medical Examination (IME). Dr. Ha'Eri conducted an IME of respondent on April 22, 2014, and issued an IME report on that date. Dr. Ha'Eri testified that his conclusions in the April 22, 2014 report were mistakenly based on the standard used by a Qualified Medical Examiner in workers' compensation matters. Dr. Ha'Eri issued a supplemental report on May 27, 2014, and in that report stated his conclusions based on the correct standard applicable when conducting an IME pursuant to an application for industrial disability retirement.

9. Dr. Ha'Eri took respondent's history, conducted a physical examination, and reviewed respondent's medical records and diagnostic studies. In his April 22, 2014 IME report, Dr. Ha'Eri correctly stated his diagnosis as follows:

1. Concussion resolved
2. Cervical strain resolved

² Government Code section 11513, subdivision (d).

3. Aggravation of preexisting multilevel cervical degenerative disc disease/spondylosis/stenosis with the worst level being C5-C6 associated with moderate degree of left foraminal narrowing (per MRI study)

10. Dr. Ha'Eri reviewed the physical requirements and essential functions of a Correctional Officer. He concluded in his May 27, 2014 report and in his testimony at hearing that there are no specific job duties that respondent is unable to perform, and that respondent is not presently substantially incapacitated from performing the duties of a Correctional Officer.

Discussion

11. Respondent testified that he continues to experience pain. However, he did not offer any medical opinion that he is substantially incapacitated from performing the usual duties of a Correctional Officer. Expert opinion is necessary to clarify whether respondent's condition renders him substantially disabled. In the absence of such expert opinion, respondent failed to establish that he qualifies for disability retirement. Consequently, respondent's disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By reason of his employment, respondent is a member of CalPERS and eligible to apply for disability retirement under Government Code section 21150.³
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 duties in the state service." (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, 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 Government Code section 21150, subdivision (a), provides:

A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076 or 21077.

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.) An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of the application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697 [finding that a deputy sheriff was not permanently incapacitated from the performance of his duties, because "aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the [sheriff's] condition are dependent on his subjective symptoms."].)

4. *Mansperger*, and *Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date he applied for disability retirement, he was substantially unable to perform the usual duties of a Correctional Officer due to his orthopedic injury (neck). Respondent did not present sufficient evidence to meet this burden.

5. In sum, respondent failed to show that, when he applied for disability retirement, he was permanently and substantially incapacitated from performing the usual duties of a Correctional Officer due to an orthopedic injury (neck). His application for disability retirement must, therefore, be denied.

ORDER

The application of respondent Daniel V. Salinas for disability retirement is denied.

DATED: October 8, 2015



TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings