

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 the
Disability Retirement of:

SALMA O. JUAREZ,

Applicant/Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,

Contracting Entity/Respondent.

Case No. 2015-0311

OAH No. 2015050511

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on December 16, 2015, in San Bernardino, California.

Rory J. Coffey, Senior Staff Counsel, represented petitioner Diane Alsup, Interim Chief, Benefit Services Division, California Public Employees' Retirement System, State of California.

No appearance was made by respondent or anyone on behalf of respondent.

The matter was submitted on December 16, 2015.

DEFAULT

On proof of compliance with Government Code sections 11505 and 11509, this matter proceeded as a default pursuant to section 11520.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Jan 16 2016
K. Parley

ISSUE

Was respondent permanently disabled or incapacitated from performing the usual and customary duties of a Correctional Officer as a result of orthopaedic injuries at the time she filed her application for a disability retirement on May 27, 2014?

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent was employed as a Correctional Officer by the State of California Department of Corrections from 2009 to 2014.¹ By virtue of her employment, respondent is a member of CalPERS subject to Government Code section 21151.

2. Respondent was injured at work on April 29, 2012. On May 27, 2014, respondent, signed a Disability Retirement Election Application (application) and filed it with CalPERS. In the application, respondent claimed her right to receive a disability retirement was based on an orthopaedic injury, specifically, pain in her left chest wall and back.

3. CalPERS obtained and reviewed medical records and reports related to respondent's condition. CalPERS selected an independent physician to perform a disability evaluation of respondent. On December 16, 2014, James Fait, M.D., conducted an independent medical exam. After review of all relevant medical reports, including the independent medical examination completed by Dr. Fait, CalPERS determined that respondent was not permanently disabled or substantially incapacitated from performance of her usual job duties at the time she filed her application for a disability retirement.

4. By letter dated January 22, 2015, CalPERS notified respondent of its determination that she was not entitled to a disability retirement. On February 8, 2015, respondent appealed that determination.

5. On April 3, 2015, complainant signed the Statement of Issues in her official capacity. The Statement of Issues and other jurisdictional documents were served on respondent and the California Department of Corrections and Rehabilitation. This hearing ensued.

¹ Respondent left her position as a correctional officer on February 27, 2014, when she was determined to be permanent and stationary for purposes of receiving workers' compensation.

Duties of a Correctional Officer

6. The Department of Corrections' list of usual and customary job duties and essential functions of a correctional officer require that a correctional officer must: work in minimum and maximum security institutions; wear personal protective equipment such as stab proof vests and breathing apparatus; qualify with firearms; swing a baton with force; defend against inmates armed with weapons; subdue inmates and apply restraints; run occasionally and walk in an all-out effort when responding to alarms or serious incidents; crawl, crouch, stoop, and bend; search cells and other tightly enclosed spaces; stand continuously for long periods of time; lift and carry 20 to 50 pounds on a regular basis, perhaps up to 100 pounds on an occasional basis; reach overhead occasionally while performing cell or body searches; twist the body frequently and continuously while performing regular duties; and engage in frequent hand and wrist movement.

Respondent's Claimed Disability

7. On April 29, 2012, respondent was collecting and hanging up personal protective equipment received from other correctional officers on brackets mounted to a wall. Respondent lost her balance and grabbed one of the wall brackets but could not regain her balance and she fell to the ground. Respondent claimed on her disability application that she continued to experience "ongoing problems" such as "throbbing and pain" and "spasms" on the "left side of [her] back." Respondent claimed that she is limited to lifting no more than 25 pounds and unable to wear her protective vest. As a result, she claimed she could not perform the usual and customary duties of a correctional officer.

Dr. Fait's Independent Medical Evaluation

8. Dr. Fait testified at the hearing. Dr. Fait is a board certified orthopedic surgeon. He obtained his medical degree in 1996 from the University of California, Davis. Following medical school, he completed his internship in surgery and his residency in orthopaedic surgery. Dr. Fait also completed post-doctoral training in hip and knee reconstruction.

9. After completing his residency, Dr. Fait worked at Kaiser Permanente for approximately 11 years in the Department of Orthopaedic Surgery. When he left Kaiser, he worked in private practice for three years performing orthopaedic surgery. Dr. Fait specializes in disorders of the joints or bones, predominantly joints and/or bones located in the back, mid-back, neck and extremities. He completes both operative and non-operative assessments of patients suffering from conditions of the joints and bones, treats fractures, performs reconstructive surgery, and treats patients for degenerative conditions.

10. Dr. Fait has completed 20 to 24 independent medical evaluations for CalPERS. Approximately 70 percent of those evaluations have been on correctional officers claiming to have a disability.

11. Dr. Fait examined respondent on December 16, 2014. Prior to conducting the physical exam, Dr. Fait reviewed the essential functions of a correctional officer and respondent's prior medical records.² Dr. Fait conducted an interview of respondent in order to ascertain the mechanism of injury; respondent's history of injuries; why respondent applied for a disability retirement; what past treatments were rendered; and respondent's occupational, social and family history.

12. Respondent reported to Dr. Fait that she was experiencing "throbbing, pinching, aching, and burning pain in the back." Respondent told Dr. Fait that the pain was present "all the time," worsens with "activity," and radiates from her back to her left shoulder and to her left rib area when performing activities like twisting, running, lifting, lying on her left side, and when reaching overhead.

13. Respondent told Dr. Fait that after her injury, she was able to qualify in her defensive tactics and weapons training. Dr. Fait found this significant; in order to qualify in defensive tactics and weapons, a correctional officer who has been off of work due to an injury must undergo training refresher courses in baton techniques, handcuffing, physical restraint of inmates, and demonstrate the physical ability to perform his or her duties.

14. Dr. Fait also found it significant that respondent was currently employed as a substitute teacher in elementary school classes for the Chula Vista school district. Dr. Fait has examined elementary school teachers and is familiar with their usual and customary job duties. Dr. Fait explained that elementary school teachers are required to stand, sit, change direction, reach above and below shoulder level, rearrange chairs, lift 20 to 30 pounds, and engage in a fair amount of movement on a consistent basis in order to keep children attentive. While performing the duties of an elementary school teacher would not be as physically demanding as dragging an inmate out of a cell, it certainly required the same movements respondent was required to do as a correctional officer and use of the area where respondent claimed to have been injured.

15. During his physical examination, Dr. Fait took respondent's vital signs and circumferential measurements of her upper and lower extremities. He did not note anything unusual regarding the vital signs or measurements, except that she was a very small woman standing at 4 feet 11 inches, and very large for her stature, weighing approximately 170 pounds.

Dr. Fait measured respondent's grip strength using the Jamar Dynamometer. This test involved having respondent grip the measuring device with both hands in order to produce a reading in kilograms of pressure for each hand. While a person could easily manipulate the test, it did not appear to Dr. Fait that respondent adjusted her grip in order to magnify her claimed symptoms. Dr. Fait stated that there is normally a 15 percent difference in the grip strength between a person's strong and weak hand. Respondent is right-hand dominant. The

² Dr. Fait reviewed medical reports concerning respondent's injury completed by Donna Asimont, M.D., Barbara Scott, M.D., Glenna Tolbert, M.D., and Tyler Taylor, M.D.

results for respondent's left hand grip were notably lower than the 15 percent that would be expected from her right hand grip results. Dr. Fait therefore examined respondent for atrophy on her left side, which should have been present if respondent was using her left arm or hand less due to pain or an injury. The purpose of examining a patient for atrophy is to find an objective indicia of injury to substantiate the subjective complaints of the patient. Dr. Fait did not find any atrophy present.

Dr. Fait examined different areas of respondent's spine. He did not find any deformities, masses, or other abnormalities in respondent's cervical spine. Dr. Fait examined respondent's thoracic spine and the muscles that attach to the bones of the rib cage. Although he noted that respondent complained of mild left mid thoracic paraspinal tenderness, there was no evidence of deformities in the thoracic area. Respondent's lumbar spine revealed slight hyperlordotic posture in that there was an exaggerated lumbar curve, however, Dr. Fait did not find this unusual because hyperlordotic posture is typically found in large women. Dr. Fait noted that deformities, abnormal curvature, gaps that indicated spinal column instability, or limited range of motion should have been present during his spinal column examination given respondent's alleged level of pain. However, he did not find any objective physical evidence to support respondent's alleged injury.

Dr. Fait examined respondent's shoulders. He measured her forward flexion, abduction, internal and external rotation but did not observe any limitations on her range of motion. Dr. Fait also made the following observations: no step-off mass; no visible skin defects; no visual abnormalities; and no evidence of swelling or deformities. Dr. Fait found that there was tenderness by palpation to over the medial border of the left scapula and inferior to the left scapula along the chest wall.

16. Dr. Fait found no objective physical evidence to support respondent's alleged pain. He diagnosed her with left chest wall intercostal muscle strain of a chronic nature, attributable to respondent's reported injury at work in August 2012. Dr. Fait concluded that respondent's claimed pain did not render her substantially incapacitated and unable to perform the usual or customary duties of a correctional officer.

Evaluation of the Evidence

17. Respondent did not appear at the hearing. No competent medical evidence was submitted to support respondent's claim that she is substantially incapacitated from performance of her usual and customary job duties at the time she filed her application for a disability.

By contrast, Dr. Fait's expert testimony qualifies as a competent medical opinion. Dr. Fait is a trained orthopaedic surgeon with substantial experience in diagnosing and treating conditions like the one claimed by respondent on her disability application. Dr. Fait reviewed numerous medical records, scholarly studies, medical literature, and medical reports. He conducted a detailed interview of respondent and completed a comprehensive independent physical examination of her. Based on the medical evidence in the record, Dr. Fait

determined that there was no objective evidence to support respondent's subjective reports of pain to her left chest wall and back, and that respondent was not substantially incapacitated from performing the usual and usual and customary duties of a correctional officer.

A preponderance of the evidence did not establish respondent's right to receive a CalPERS disability retirement.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Applicable Statutes

2. Government Code section 20026 provides in part:

"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. Government Code section 21151, subdivision (a), provides in part:

Any 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.

4. Government Code section 21156, subdivision (a), provides in part:

(a)(1) If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability . . .

(2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion and shall not

use disability retirement as a substitute for the disciplinary process. . . .

Appellate Authority

5. “Incapacitated” means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his customary duties, even though doing so may be difficult or painful, the employee is not incapacitated and does not qualify for a disability retirement. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 886-887.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) Further, respondent must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Id.* at 863.)

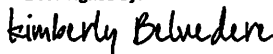
Cause Exists to Deny the Application

6. Cause does not exist to grant respondent’s application for a disability retirement. A preponderance of the evidence did not establish that respondent suffered from a physical or mental condition of a permanent or extended and uncertain duration that rendered her substantially incapacitated from performing the usual and customary duties of a correctional officer at the time she filed her application for a disability retirement.

ORDER

The application for a disability retirement filed by Salma O. Juarez with the California Public Employees’ Retirement System is denied.

DATED: December 30, 2015

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KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings