

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:

Case No. 2014-1284

DAWN WISE,

OAH No. 2015060846

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
CALIFORNIA CORRECTIONAL CENTER,

Respondent.

PROPOSED DECISION

This matter was heard before Tiffany L. King, Administrative Law Judge, Office of Administrative Hearings, State of California, on March 17, 2016, in Sacramento, California.

John Shipley, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Dawn Wise (respondent) was present and represented herself.

There was no appearance by or on behalf of California Department of Corrections and Rehabilitation (CDCR).

Evidence was received, the hearing concluded, and the record was held open until April 1, 2016, to allow respondent to review her Official Personnel File maintained by CDCR and to offer into evidence any relevant documents therefrom concerning CDCR's request that respondent file an application for retirement. On March 24, 2016, respondent's email was received in which she asserted she made the request and no such documents exist. No response was received from CalPERS. No additional records were received from respondent. The March 24, 2016 email was marked as Exhibit E. The record was closed, and the matter was submitted for decision on April 1, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

May 6, 2016
Ruthie Schach

ISSUE

On the basis of an orthopedic (low back) condition, is respondent permanently disabled or substantially incapacitated from performing her usual and customary duties as a Correctional Officer (CO) for CDCR?

FACTUAL FINDINGS

1. Respondent was employed by CDCR as a Correctional Officer at California Correctional Center. By virtue of her employment, she is a state safety member of CalPERS subject to Government Code section 21151.¹

2. On March 3, 2014, respondent filed with CalPERS an application for industrial disability retirement on the basis of an orthopedic (back) condition, claiming chronic pain in her lower back. Respondent asserted she can no longer perform typical job duties, such as running in response to an alarm, walking the prison yard for eight hours, carrying food trays up and down the stairs, or protecting herself from attack.

3. Respondent retired for service effective February 1, 2014, and has been receiving her retirement allowance from that date.

4. CalPERS retained Robert Henrichsen, M.D., to conduct an independent medical examination (IME) of respondent's asserted orthopedic condition in her lower back. Dr. Henrichsen examined respondent and prepared an IME report. CalPERS reviewed the IME report and determined that respondent was not permanently and substantially incapacitated from performing her usual and customary duties as a Correctional Officer.

5. On August 26, 2014, CalPERS notified respondent of its determination and advised her of her appeal rights. On September 25, 2014, respondent filed an appeal and request for hearing. On June 19, 2015, CalPERS filed the Statement of Issues in its official capacity.

6. This matter was called for hearing as specified in the Notice of Hearing. No one appeared on behalf of respondent CDCR, and an evidentiary hearing was conducted as a default proceeding pursuant to Government Code section 11520 as to that party only.

Duties and Physical Requirements of a Correctional Officer

¹ Government Code section 21151, subdivision (a), states: "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."

7. The essential functions of a Correctional Officer with CDCR relevant to this matter include the following: perform the duties of all the various posts; work overtime up to 16 hours; wear personal protective equipment (stab proof vests) and equipment belt weighing 15 pounds; walk occasionally to continuously; run occasionally to respond to alarms or serious incidents; climb, crawl, and crouch occasionally; stand and sit occasionally to continuously; stoop and bend occasionally to frequently; lift and carry up to 20 pounds continuously to frequently; lift and carry up to 50 pounds frequently; lift and carry over 100 pounds occasionally when moving or restraining an inmate; push and pull occasionally to frequently; and, reach overhead occasionally to continuously.

On-the-Job Injury

8. On February 18, 2013, respondent was on the upper floor of the housing unit releasing inmates for breakfast when she heard an alarm over the institutional radio signaling a fight in another housing unit across the yard. Respondent yelled for the inmates to get down on the floor. She then ran down the stairs and across the yard to the alarm incident. By the time respondent arrived to the area of the fight, pepper spray already had been dispersed. Respondent ingested the pepper spray, causing her to sneeze and cough a couple of times. Immediately, respondent felt a sharp pain in her lower spine, as if there were a "jammed rod in my spine." At the time, respondent believed she had pulled a back muscle and that she could "walk it off." Respondent stayed at the scene until the investigations unit arrived and assumed control.

9. Respondent returned to her assigned housing unit and continued rotating inmates to and from the chow hall. Her back continued to ache but she believed she could work through the pain. Following the morning meal, respondent informed her sergeant that she had injured her back during the fight incident. The sergeant gave her worker's compensation forms to complete. While respondent was completing the forms in the unit office, a second alarm sounded in the upper floor of the neighboring housing unit. Respondent was unable to run in response to the alarm, and instead walked behind the other responding officers. However, when they arrived, respondent was in too much pain to climb the stairs to the second floor where the incident was taking place.

10. Respondent returned to her unit office and completed the workers' compensation forms. She continued to work, but walked with a noticeable limp. Later, she experienced a back spasm causing her "horrible pain." Unable to finish her shift, respondent left and went to the emergency room. There, respondent was evaluated and prescribed Celebrex and Percocet. She was discharged and advised to follow up with her primary physician.

11. Respondent has not returned to work since February 18, 2013. After CDCR received the report from the qualified medical examiner, discussed *infra*, opining respondent had attained "maximal medical improvement," it informed respondent she could not return to

work and must file for service retirement pending disability retirement. As noted above, she service retired effective February 1, 2014.

Medical Evidence

12. Respondent's treating physicians did not testify at hearing, though she introduced some of their medical records. The summary of her treatment herein is derived from those medical records, the medical reports of other medical evaluators, and respondent's testimony.

13. Respondent was evaluated by her primary physician, Hal L. Meadows, M.D. on February 21, 2013. Dr. Meadows diagnosed respondent with lumbar strain, ordered x-rays, and directed her off from work. The x-rays revealed "only minimal degenerative changes ... in the lower thoracic and upper lumbosacral spine." Respondent continued to experience back pain. Dr. Meadows ordered an MRI which demonstrated degenerative disc at L1-L3, mild posterior broad-based disc bulging, and mild spinal canal stenosis. Dr. Meadows referred respondent to Joseph Walker, M.D., a neurosurgeon.

14. Dr. Walker evaluated respondent on April 29, 2013, and diagnosed respondent as follows: "Low back pain with no radiculopathy and large facet joints at the L4-L5 level, particularly on the right side." Dr. Walker ordered x-rays and prescribed physical therapy. He continued to treat respondent over the next two months. In June 2013, Dr. Walker made the following diagnosis: "low back pain with no radiculopathy and large facet joints, which are arthritic at the L4-5 level, particularly on the right." He recommended facet joint injections and the following work restrictions: no heavy lifting; no bending at the waist; and, no walking with heavy equipment on her duty belt.

15. In July 2013, respondent received medial branch block injections which failed to relieve her pain. In October 2013, she received sacroiliac and joint injections on the right and left side, which were also unsuccessful. An epidural was recommended, but was not approved by her insurance.

16. On December 10, 2013, respondent was evaluated by Wayne E. Anderson, M.D., a qualified medical evaluator (QME), in connection with respondent's workers' compensation claim. Dr. Anderson reviewed respondent's work history and medical records. He then performed a neurological examination. During the exam, Dr. Anderson observed there was no pain behavior. Respondent's vital signs were stable and there was no acute distress. A straight leg test was negative for neurological radicular symptoms, but respondent had pain at 90 degrees at her left hip. She also had right low back pain and palpatory tenderness in her middle and lower back. Dr. Anderson concluded the MRI demonstrated "no findings significantly different from those that might be expected as normal for age." Dr. Anderson noted, "[t]he claimant is very clear that she continues to experience pain, despite the absence of abnormalities on testing that would help explain why she is experiencing so much pain." He then suggested respondent may be experiencing chronic lumbar strain pain. He recommended prophylactic restrictions concerning twisting at

the waist, bending at the back, and climbing. Finally, Dr. Anderson opined that respondent had reached maximal medical improvement for her lower back injury and rated her five percent whole person impairment with respect to her lumbar spine.

17. On January 21, 2014, Dr. Meadows completed a physician's report on disability in which he diagnosed respondent with low back pain lumbosacral disc degeneration and meniscus tear of the left knee following a previous surgery.² Dr. Meadows concluded respondent is substantially incapacitated due to her inability to run to alarms, restrain inmates, or to stand or sit for prolonged periods of time.

IME by Robert Henrichsen, M.D.

18. Dr. Henrichsen is a board-certified orthopedic surgeon. On July 15, 2014, Dr. Henrichsen physically examined respondent, reviewed her history, medical records and job duties, and issued an IME report. At the time, respondent was 51 years old. Respondent told Dr. Henrichsen that she was responding to an alarm when she ingested pepper spray, causing her to cough. The coughing produced the onset of low back pain which prevented her from finishing her shift. Respondent's present complaint was low back pain on a daily basis, in particular on the right side. She asserted lesser pain while in a sitting or supine position, and increased pain while standing. Respondent related she can walk one half to one mile before experiencing a spasm in her low back and some aching in her legs. She can drive for 60 to 90 minutes before the pain becomes too significant. Common household chores, such as mopping, vacuuming, making beds or cooking, cause her pain to increase.

19. Dr. Henrichsen physically examined respondent. He observed she had normal strength when standing on her heels and toes, had normal hip function, and was able to squat within 95 percent of the normal range. There was no evidence of femoral nerve impairment. Her lumbar spine range of motion was normal and she had good bending capacity forward and backward. Respondent had more flexibility on her left side than right when bending laterally.

20. Dr. Henrichsen also performed a supine examination, observing respondent had some hip pain with left hip flexion of 90 degrees, and "lower back and upper rump pain with abduction of 60 degrees on each side (the right and left)." She also had low back pain when she pushed with her hips in extension, but no pain when pulling. There was no evident radicular syndrome, no ligament instability or effusion, and no atrophy.

21. After examining respondent and reviewing her medical records and job duties, Dr. Henrichsen diagnosed respondent as follows:

- History of lumbar sprain
- Degenerative disc disease and degenerative arthritis of the lumbar spine

² Dr. Meadow's physician's report was not offered into the record. However, it is summarized in the medical records review portion of Dr. Henrichsen's IME report.

- Suspect left hip arthritis

He further concluded that respondent's "symptoms of pain and the self-imposed limitations are much greater than can be explained medically from the overall examination."

22. In his IME report, Dr. Henrichsen opined that respondent is not substantially incapacitated for the performance of her duties as a Correctional Officer noting that, "her degenerative disease in her low back and possible left hip arthritis does [*sic*] not arise to the level of substantial incapacity." He also opined that there are no specific occupational duties which respondent cannot accomplish.

23. Dr. Henrichsen testified at hearing in a manner consistent with his written report.

Discussion

24. Respondent sought disability retirement on the basis of her lower back condition. No competent medical evidence was presented that respondent was substantially incapacitated for the performance of her usual duties as a Correctional Officer. That is not to say she does not suffer from back pain or that such pain may make it more difficult for her to perform her job duties. But discomfort alone, even if it makes performance of one's duties more difficult, is insufficient to establish a substantial incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; citing, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Similarly, prophylactic restrictions imposed to prevent the risk of future injury or harm are insufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

25. Respondent had the burden to present competent medical evidence to establish that she is permanently and substantially incapacitated for the performance of her usual job duties. When all the evidence is considered, respondent failed to meet her burden. Therefore, her disability retirement application must be denied.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Respondent has the burden of proving she is eligible for disability retirement benefits by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) To be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

Applicable Statutes

2. Government Code section 20026 provides, in pertinent part:

“Disability” and “incapacity for performance of duty” as the 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: “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. An application for disability retirement of a member may be made by the member’s employer, the governing body of the contracting agency with whom a member is employed, or the member himself. (Gov. Code, § 21152, subds. (a), (c), and (d).)
5. An application for disability retirement must be made while a member is still in state service or within four months after the discontinuance of his state service. Upon receiving the application, the board must order a medical evaluation of the member to determine if he is incapacitated for the performance of duty. (Gov. Code, § 21154.)
6. Government Code section 21156, subdivision (a), provides, in pertinent part:
 - (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.
7. The courts have interpreted the phrase “incapacitated for the performance of duty” to mean “the substantial inability of the applicant to perform [her] usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.) Discomfort, which may make it difficult to perform one’s duties, is insufficient to establish permanent incapacity for the performance of her position. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at p. 207; citing, *Hosford v. Board of Administration, supra*, 77 Cal.App.3d at p. 862.) Furthermore, an increased risk of further injury is insufficient to constitute a

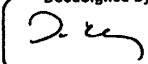
present disability, and prophylactic restrictions on work duties cannot form the basis of a disability determined. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d at p. 863.)

8. As set forth in Findings 24 and 25, respondent failed to meet her burden of establishing, based upon competent medical opinion, that she is substantially incapacitated for the performance of her usual duties as a Correctional Officer due to an orthopedic condition. Therefore, her industrial disability retirement application must be denied.³

ORDER

The application of Dawn Wise for industrial disability retirement is DENIED.

DATED: May 4, 2016

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Tiffany L. King
Administrative Law Judge
Office of Administrative Hearings

³ The issue of whether respondent is substantially incapacitated for the performance of her usual job duties as a result of a disability is the sole issue for determination on appeal. If she is found to be substantially incapacitated, the issue of causation shall be determined as provided in Government Code section 21166, which states:

If a member is entitled to a different disability retirement allowance according to whether the disability is industrial or nonindustrial and the member claims that the disability as found by the board ... is industrial and the claim is disputed by the board ... the Workers' Compensation Appeals Board, using the same procedure as in workers' compensation hearings, shall determine whether the disability is industrial.

The jurisdiction of the Workers' Compensation Appeals Board shall be limited solely to the issue of industrial causation, and this section shall not be construed to authorize the Workers' Compensation Appeals Board to award costs against this system pursuant to Section 4600, 5811, or any other provision of the Labor Code.