

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Involuntary Reinstatement
from Industrial Disability Retirement of:

Case No. 2015-0745

GUSTAVO L. MIRANDA,

OAH No. 2015100686

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
CALIFORNIA STATE PRISON,
CORCORAN,

Respondent.

PROPOSED DECISION

This matter was heard before Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 12, 2016, in Fresno, California.

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

Gustavo L. Miranda (respondent) represented himself.

There was no appearance by or on behalf of the California Department of Corrections and Rehabilitation, California State Prison, Corcoran (CDCR). Proper service of the Accusation and Notice of Hearing was made. The matter proceeded as a default against respondent CDCR, pursuant to Government Code section 11520.

Evidence was received, the record was closed, and the matter was submitted for decision on April 12, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 11 May 20 16

[Handwritten signature]

ISSUES

The issue for Board determination is:

Did CalPERS establish that respondent is no longer substantially incapacitated from performing the usual duties of a Correctional Officer and should therefore be reinstated from industrial disability retirement?

FACTUAL FINDINGS

1. Respondent was born in 1982. He was employed by CDCR as a Correctional Officer. On or about March 1, 2013, respondent applied for industrial disability retirement. Respondent's application was granted, and he disability retired effective October 16, 2013, on the basis of an orthopedic (back) condition.

Duties of a Correctional Officer

2. As set forth in a Correctional Officer Essential Functions (Essential Functions) document, Correctional Officers must "be able to work in both minimum and maximum security institutions as well as male and female institutions." They must be able "to perform the duties of all the various posts." Correctional Officers must work overtime, wear personal protective equipment, range qualify with departmentally approved weapons, swing a baton with force to strike an inmate, disarm, subdue and apply restraints to an inmate, defend themselves from an inmate armed with a weapon, inspect inmates for contraband, conduct body searches, read, write and count.

3. The Essential Functions also require Correctional Officers to be able to: (a) walk occasionally to continuously; (b) run occasionally in an all-out effort while responding to alarms or serious incidents; (c) climb occasionally to frequently, ascending/descending stairs, climbing onto bunk beds during cell searches; (d) crawl and crouch occasionally under an inmate's bed during cell searches; (e) stand occasionally to continuously; (f) sit occasionally to continuously while performing record-keeping or report-writing activities; (g) lift and carry continuously to frequently in the light (20 pound maximum) to medium (50 pound maximum) range throughout the work day and in the very heavy lifting range (100 pounds) occasionally; (h) continuously wear equipment belt weighing 15 pounds; (i) push and pull occasionally to frequently while opening and closing locked gates, and (j) reach occasionally to continuously while performing cell or body searches.

Respondent's March 2013 Industrial Disability Retirement Application

4. Respondent submitted an industrial disability retirement application dated March 1, 2013. In his application, respondent described his disabilities and their causes as follows:

(Left knee left hip and lower back) To date I have not been given a concise diagnoses however have been recently referred for an MRI on my back to determine by condition At this point I experience left knee left hip and lower back pain which limits my ability to walk sit or stand for prolonged periods I also cant run bend or squat without pain

(Grammar and punctuation errors in original.)

Respondent described how his disabilities occurred as:

While carrying food trays upstairs I lost my footing and fell forward [,] then slid down the staircase which resulted in my injury[.]

He described his limitations and preclusions as:

No prolonged walking or standing and no jumping or running[.]

In response to the question asking how his injury or illness affected his ability to perform his job, he stated:

Due to my physical condition and doctors [sic] restrictions [,] I am no longer able to perform the essential functions of my job[.]

October 1, 2013 Independent Medical Evaluation (IME) by Alice Martinson, M.D.

5. After receiving respondent's industrial disability retirement application, CalPERS sent respondent for an IME to Alice Martinson, M.D., a board-certified orthopedic surgeon. On October 1, 2013, Dr. Martinson physically examined respondent, reviewed his history, medical records and job duties, and issued an IME report. At the time, respondent was 31 years old. Respondent told Dr. Martinson that on August 20, 2011, he was carrying chow trays up a flight of stairs when he slipped and fell back down the stairs. Because his arms were full, he was unable to catch himself. Respondent injured his left knee, left hip and lower back. During Dr. Martinson's examination, respondent complained of persistent pain that ran from his lower back down to his left knee. He would frequently experience numbness and tingling that involved his entire left leg as far as his toes. This usually happened after respondent had been sitting for more than 45 minutes to an hour. He had been evaluated by a spine specialist, who did not recommend surgery. Respondent further stated that he was unable to run, and that squatting and bending were possible, but quite painful. His back disturbed his sleep when he turned over. Respondent's medications at the time were Ibuprofen, Vicodin, and a new medication (Effexor), which respondent found to be helpful for his leg pain.

6. Dr. Martinson reviewed the January 17, 2012 MRI of respondent's left knee, finding that it was "normal in all respects." An MRI of respondent's left hip was performed on April 5, 2012, and was also "normal in all respects." The MRI of respondent's lumbar spine performed on April 18, 2013, showed "transitional anatomy at the lumbosacral junction with loss of disc hydration at L3-4 and L4-5. There is a large annular bulge at the latter level which narrows the spinal canal and both neural foramina."

7. After examining respondent and reviewing his medical records, job duties and a sub rosa video surveillance recording, Dr. Martinson diagnosed respondent as follows:

Lumbar disc disease with probable left L5 nerve root irritation.

8. Dr. Martinson opined that respondent was substantially incapacitated from the performance of his usual duties based upon respondent's inability to perform "the constant walking, frequent reaching, occasional bending, twisting of the trunk, and occasional lifting or carrying objects weighing up to 100 pounds or more." Dr. Martinson identified the date of respondent's incapacity as August 20, 2011, the date of his original work injury. Dr. Martinson opined further that respondent's incapacity was "hopefully temporary since he is still under active treatment and his workers' compensation claim remains open." Dr. Martinson further noted, "At this point, I would hope that his incapacity would be temporary for only about one to two years."

CalPERS' Approval of Respondent's Disability Retirement Application

9. On November 12, 2013, CalPERS sent a letter to respondent approving his application for industrial disability retirement "based upon [his] orthopedic (back) condition."

March 10, 2015 IME by Ghol B. Ha'Eri, M.D.

10. In 2015, CalPERS sent respondent to Ghol B. Ha'Eri, M.D., for another IME. Dr. Ha'Eri is a board-certified orthopedic surgeon. On March 10, 2015, he physically examined respondent, reviewed his history, medical records and job duties, and issued an IME report. Respondent told Dr. Ha'Eri that on August 20, 2011, while at work, he was carrying food trays up the stairs when he lost his footing and fell forward, hitting his left hip and knee on the steps, and then slipped downward on his stomach. Following this accident, respondent experienced pain in his left hip, left knee and lower back.

11. Dr. Ha'Eri summarized respondent's medical history in his IME report. Respondent was seen by David Lenn, M.D. on August 23, 2011, and had x-rays taken of his knee and hip. He was placed on modified duty and referred for physical therapy. An MRI study of the lumbar spine, left hip and left knee was obtained. Respondent was then seen by Marshall Lewis, M.D., for an orthopedic consultation. He was advised to continue with his care at Dr. Lenn's office. Respondent underwent an electrodiagnostic study of his lower extremities by Calvin Voong, M.D. on June 20, 2012.

12. Respondent had another orthopedic consultation with Conner Telles, M.D. on January 2, 2013, when x-rays were taken of his left knee, left hip and lumbar spine. They were unremarkable. Dr. Telles opined that respondent had a "left paracentral disc protrusion at L5S1," and recommended that respondent see pain management specialist Gopi Kasturi, M.D. Dr. Kasturi administered epidural steroid injections of the lumbar spine on three occasions. Respondent was then seen by Dr. Martinson for the IME on October 1, 2013, and orthopedic surgeon William Previte, D.O., who was respondent's Agreed Medical Examiner for respondent's workers' compensation claim. Respondent had a flare-up of his lower back pain on November 15, 2013, and went to the emergency room and Kaweah Delta Hospital in Visalia.

13. At the time of Dr. Ha'Eri's IME, respondent remained under Dr. Lenn's care, and was last examined by Dr. Lenn on January 10, 2015, when he gave respondent a refill for Vicodin. At the IME, respondent complained of lower back pain with a tingling sensation and numbness in his left lower extremity, left hip pain, and left knee pain. Respondent was not working at the time of the IME.

14. Dr. Ha'Eri performed a physical examination of respondent. He observed respondent's station and gait, noting that respondent had a normal posture and walked independently with no limp. Dr. Ha'Eri's lumbar spine examination showed normal lordosis. Palpation revealed lumbosacral tenderness. There was no paravertebral muscle spasm. Dr. Ha'Eri observed that respondent was not wearing a lumbar brace. Dr. Ha'Eri examined respondent's range of motion in flexion, extension, lateral bending, and lateral rotation. He did not note any concerns with respondent's range of motion. Dr. Ha'Eri also performed a clinical neurological examination, finding that respondent's lower extremities were grossly intact, and no sensory deficits could be demonstrated. Respondent's "motor power was 5/5," and his "deep tendon reflexes were bilaterally present and normoactive."

15. Dr. Ha'Eri noted that on April 18, 2013, an MRI of respondent's lumbar spine was requested by Dr. Tenn, and reported by radiologist Tom Leskovar, M.D., who found disc degeneration with mild bulges at L3-L4 and L4-L5 levels.

16. After examining respondent and reviewing his medical records and job duties, Dr. Ha'Eri diagnosed respondent as follows:

Lumbar strain superimposed on pre-existing mild lumbar degenerative disc disease.

17. Dr. Ha'Eri opined that respondent was not substantially incapacitated from the performance of his duties as a Correctional Officer. Dr. Ha'Eri found that:

There are no specific job duties that I feel this member is unable to perform because of the physical condition of his lower back.

Dr. Ha'Eri further found that:

[Respondent's] subjective complaint of lower back pain could not be substantiated by the unremarkable MRI and electrodiagnostic studies previously performed.

18. At hearing, Dr. Ha'Eri testified that respondent's injury occurred in 2011, and the MRI of respondent's back was taken in 2013, two years later. Dr. Ha'Eri noted that respondent's fall was a "very trivial" injury, and that respondent "shopped around and found another orthopedic surgeon to justify his herniated disc and steroidal injections, which are very expensive." Respondent's x-rays and electromagnetic studies were normal, and Dr. Ha'Eri found "no justification for the injections," which are risky and can cause complications. Dr. Ha'Eri asserted that the steroidal injections were "certainly not administered for medical reasons." He further stated that usually the injections are done in intervals. The doctor takes into consideration the financial aspect of administering further injections after the first injection, and must see how the patient responds. Dr. Ha'Eri did not understand why a second or third injection was administered in respondent's case. The mechanism of respondent's injury, and his medical history, did not justify steroidal injection treatments. Dr. Ha'Eri has evaluated many correctional officers, and is "very familiar" with their duties. He found that respondent's complaints were not substantiated by the objective normal findings.

Respondent's Testimony

19. Respondent did not retain an expert witness to testify on his behalf. Instead, he relied on the medical records to establish that he continued to be substantially incapacitated from his usual and customary duties as a Correctional Officer. Respondent asserted that Dr. Ha'Eri was late for the IME, and that he did not perform an examination of respondent.

Discussion

20. When all the evidence is considered regarding respondent's back condition, the opinion of Dr. Ha'Eri that respondent was not substantially incapacitated from performing the usual duties of a Correctional Officer was persuasive. As Dr. Ha'Eri explained, respondent's pain complaints were not supported by any objective findings. His determination that respondent was not substantially incapacitated from performing the usual duties of a Correctional Officer were supported by his physical examination of respondent.

21. Respondent's assertion that Dr. Ha'Eri was late for the IME was irrelevant, and his assertion that Dr. Ha'Eri did not perform an examination, was unsupported by the evidence. Respondent did not provide expert testimony regarding his continued substantial incapacity. He did not provide any competent medical evidence to support his subjective reports of back pain. In the absence of sufficient competent medical findings to support

respondent's pain complaints, it cannot be found that respondent is substantially incapacitated from performing the usual duties of a Correctional Officer.

22. Because respondent is already receiving industrial disability retirement, the burden was on CalPERS to establish that respondent is no longer substantially and permanently disabled from performing the usual duties of a Correctional Officer. CalPERS presented sufficient competent medical evidence to meet its burden of proof. Consequently, its request that respondent be reinstated from industrial disability retirement should be granted.

LEGAL CONCLUSIONS

1. In accordance with Government Code section 21192, CalPERS re-evaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

The board ... may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination ... The examination shall be made by a physician or surgeon, appointed by the board... Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency ... where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

2. Government Code section 21193 governs the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty and, in relevant part, provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

3. Government Code section 20026 defines “disability” and “incapacity for performance of duty,” and, in relevant part, provides:

“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.

4. 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.) In *Hosford v. Board of Administration of the Public Employees’ Retirement System* (1978) 77 Cal.App.3d 854, 862 the court held that a disability or incapacity must currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient.

5. To involuntarily reinstate respondent from industrial disability retirement, CalPERS had to establish that respondent is no longer substantially incapacitated from performing the usual duties of a Correctional Officer. As set forth in Findings 20 to 22, CalPERS offered sufficient competent medical evidence at the hearing to meet its burden of proof. Consequently, CalPERS’ request that respondent be involuntarily reinstated from disability retirement should be granted.

ORDER

The request of California Public Employees’ Retirement System to involuntarily reinstate respondent Gustavo L. Miranda from industrial disability retirement is GRANTED.

DATED: May 9, 2016

DocuSigned by:
Danette C. Brown
ACEA0DD79CC44EF

DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings