

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:

MELISSA CENTENO,

Respondent,

and

OAKLAND UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. 2014-1175

OAH No. 2015031069

PROPOSED DECISION

This matter was heard before Tiffany L. King, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 2, 2016, in Sacramento, California.

Rory J. Coffey, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Richard Elder, Attorney at Law, represented Melissa Centeno (respondent), who was also present.

There was no appearance by or on behalf of Oakland Unified School District (District).

Evidence was received, the record was closed, and the matter was submitted for decision on May 2, 2016.

ISSUE

On the basis of an orthopedic (back) condition, is respondent permanently disabled or substantially incapacitated from performing her usual and customary duties as a Police Sergeant?

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED June 3, 2016

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FACTUAL FINDINGS

1. Respondent is 42 years old. She was first hired by the District as a Police Officer in 2000. In 2002, she left the District and accepted a police officer position in Norfolk, Virginia. In 2009, respondent returned to the District as a Police Officer. She promoted to Police Sergeant in the spring of 2010. Her last physical day worked on the job was in the spring of 2012.

Respondent's Disability Retirement Application

2. On December 16, 2013, respondent submitted an application for industrial disability retirement on the basis of an orthopedic (back) condition. CalPERS received the application on December 20, 2013. In her application, respondent described her specific disability as, "multilevel lumbar spondylosis, left sided lumbar non-verifiable radicular pain, and chronic pain syndrome." She further asserted her conditions arose from an on-duty vehicular accident in which she was struck on the driver's side of her patrol car by another vehicle.

3. Respondent described her limitations/preclusions as follows: "Minimal range of motion, lifting [more than] 20 pounds, prolonged walking, standing and sitting over 30 [minutes]." She also contended her injuries affected her ability to perform her job as follows: "sitting/driving in patrol vehicle; unable to handle physical confrontations; unable to jump, climb or run without limitations or discomfort and pain, duty belt; prolonged sit/stand."

4. CalPERS obtained medical reports concerning respondent's back condition from competent medical professionals. After reviewing these reports, CalPERS determined respondent was not permanently disabled or substantially incapacitated from the performance of her duties as a Police Sergeant at the time she applied for industrial disability retirement.

5. By letter, dated August 15, 2014, CalPERS notified respondent of CalPERS' determination, the denial of her retirement application, and her appeal rights. On September 10, 2014, through her attorney, respondent filed an appeal and requested a hearing. CalPERS accepted the appeal as timely. This appeal is limited to the issue of whether respondent is permanently disabled or substantially incapacitated from the performance of her duties as a Police Sergeant on the basis of an orthopedic (back) condition. If such disability is found to exist, any dispute as to whether the disability is industrial or non-industrial is to be resolved pursuant to Government Code section 21166.

Duties of Police Officer

6. The police department for the District has jurisdiction over 100 schools (elementary, junior high, and high school) as well as administrative buildings.

7. As set forth in respondent's position description, her duties included: patrolling the District's owned and controlled property; performing law enforcement and crime prevention functions; responding to crime in-progress calls from the police radio regarding the District's property, personnel and students; and performing other related work as required.

8. The relevant essential functions for a Police Officer/Police Sergeant include patrolling District property and facilities, responding to crime in-progress calls from dispatch and other emergency calls within the District's jurisdiction, and assisting other law enforcement agencies. Peace officers must also have the ability to use firearms, operate police vehicles, manage emergency and life threatening situations, and maintain physical conditioning appropriate to perform their assigned duties.

9. The relevant physical requirements for the Police Sergeant position include the following: occasional running, crawling, kneeling, climbing, squatting, reaching above and below shoulder, lifting/carrying 26 pounds or more, and working with heavy equipment; frequent sitting, pushing and pulling, power grasping, and lifting/carrying up to 25 pounds; and, constant standing, walking, bending and twisting at the waist and neck, repetitive use of hands, simple grasping, use of computer, walking on uneven ground, and driving.¹

10. In addition, as a peace officer, respondent was required to wear a duty belt at all times. Respondent's duty belt carried the following: two magazines with 17 rounds of ammunition each; baton holder; radio with microphone; flashlight; two handcuff cases; expandable baton; oleoresin capicum (OC) spray; handcuff key; and, Glock 22 in a leather holster. A fully loaded belt measured two and one-half to three inches wide and weighed approximately 20 pounds.

11. The District's police department has jurisdiction for more than 100 schools (elementary through high school, charter, and adult education) as well as administrative buildings within the District. In 2011-2012, the department employed twelve sworn personnel. Typically, six officers, two sergeants, and a watch commander were assigned to the field. At least one sergeant and the chief of police were assigned to the administrative building. At all relevant times, respondent was assigned to the field as a roaming patrol sergeant in an assigned vehicle.

History of Respondent's Injury and Treatment

12. On November 2, 2011, respondent was driving her patrol car through a controlled intersection when another vehicle ran a red light and struck the driver's side of her vehicle. The driver's side door pinned respondent's knee between the door and the seat,

¹ The CalPERS form, Physical Requirements of Position/Occupational Title, which respondent completed, defines "occasional" as up to three hours, "frequent" as three to six hours, and "constant" as more than six hours.

trapping her in the vehicle for approximately 45 minutes. Ultimately, the fire department used the "jaws of life" to extricate respondent from the vehicle.

13. An ambulance transferred respondent to the hospital where she received a knee immobilizer, crutches, and medications. She had a mild concussion. X-rays of her left knee and lower left leg were negative. Approximately 24 hours after the accident, respondent experienced "mild back pain which escalated into back spasms."

14. In the following weeks, respondent continued to experience left knee pain. She also felt increased low back pain when wearing her duty belt or sitting for a long period of time. Respondent was prescribed medications and physical therapy.

15. Respondent returned to full duty at work for two days. Thereafter, she went off work after experiencing increasing and excessive back pain from sitting in a patrol vehicle with her duty belt. Respondent returned to work on modified duty in the summer of 2012 to assist with the department's PAL summer camp for kids. This was a temporary, light duty assignment. Respondent worked on and off at the program for two weeks, however her back pain persisted. Her last physical day of work for the District was July 11, 2012.

16. On July 19, 2012, respondent began treatment with Pacito Yabes, M.D., a pain management specialist. Dr. Yabes continued to treat respondent for 18 months, seeing her approximately once a month. His treatment is summarized in the "Medical Evidence" section below.

Medical Evidence

17. Respondent called Dr. Yabes, as her expert witness. She also introduced medical records from Steven Feinberg, M.D., which were admitted as administrative hearsay pursuant to Government Code section 11513. CalPERS called Joseph B. Serra, M.D., as its expert witness.

18. Pacito Yabes, M.D. Dr. Yabes is board-certified in physical medicine and rehabilitation and is a diplomate of the American Board of Pain Medicine. He has specialized in chronic pain management since 2003 and is the Medical Director and owner of Pain Rehabilitation Institute, LLC, in Roseville. Since 2012, he has also served as the Associate Medical Director for the Sutter Rehabilitation Institute at the Sutter Roseville Medical Center. From 2005 to 2014, Dr. Yabes was the Co-Medical Director and Medical Director for Summit Pain Management Institute, Inc., in Auburn. He saw respondent at least 15 times from July 2012 to March 2014.

19. During respondent's initial visit on July 19, 2012, she told Dr. Yabes that she had difficulty standing, walking and sitting for prolonged periods of time. She had "on and off, sharp, stabbing pain that radiates to her left lower extremity." Dr. Yabes examined respondent and observed that she ambulated slowly, had a slow gait, and had difficulty

getting on and off the exam table. She also had marked tenderness on palpitation to her lumbar paraspinals and left buttock. Dr. Yabes noted the following impression: (1) chronic low back pain facet arthropathy at L4-5 and L5-S1, with lumbar degenerative disc disease; (2) neuropathic pain, left lower extremity; and, (3) chronic pain syndrome. He requested a nerve conduction study and prescribed respondent Vicodin.

20. On August 17, 2012, respondent had a follow up visit with Dr. Yabes. He discontinued Vicodin and prescribed Norco. He also requested authorization for facet blocks.

21. From September 2012 through January 2013, respondent saw Dr. Yabes monthly for pain management and to refill her Norco prescription. In February 2013, he requested authorization for a radio frequency ablation, which the insurance company denied. Dr. Yabes opined that respondent was "temporarily totally disabled until May 30, 2013."

22. Dr. Yabes continued to see respondent approximately once a month and extended the length of her temporary total disability status. In August 2013, Dr. Yabes observed that respondent continued to ambulate slowly and have difficulty getting up from the seated position to standing. Though respondent complained of persistent low back pain, she asserted that with pain medication she was able to function at home. She could walk or stand for 30 minutes, and sit for 30 to 60 minutes. Dr. Yabes opined that respondent was "temporarily totally disabled until November 1, 2013." Respondent was also approved to participate in the Functional Restoration Program (FRP) to help her return to gainful employment.

23. Dr. Yabes last examined respondent in March 2014, after the settlement of respondent's workers' compensation case. On December 5, 2014, Dr. Yabes completed a Physician's Report on Disability and submitted it to CalPERS in support of respondent's disability retirement application. In his report, Dr. Yabes diagnosed respondent with chronic intractable low back pain and degenerative disc disease. He noted she had difficulty lifting, bending, stooping, or lifting in excess of 10 pounds. Dr. Yabes further opined that respondent was permanently and substantially incapacitated from the performance of her usual duties as a Police Sergeant, noting she was unable to sit or stand for prolonged periods of time and could not wear a duty belt or other protective equipment.

24. Steven Feinberg, M.D. On June 6, 2013, respondent was evaluated by Steven Feinberg, M.D., an agreed medical evaluator (AME), in connection with respondent's workers' compensation claim. Dr. Feinberg reviewed respondent's work history and medical records. He then performed a physical examination whereat he noted the following:

- There is no lower body muscular atrophy
- She is extremely self-limiting with lumbar motion to between 25 and 50% of expected motion with discomfort
- There is diffuse lumbar area palpatory discomfort

- Lower body strength was normal. She was able to walk on her heels and toes and do a partial squat. EHL strength was normal
- Sensation was intact in the lower body
- Straight leg raising was negative
- Gait was slow, but normal
- Reflexes were +2 at the knees and ankles and the plantar responses were flexor

25. Dr. Feinberg had the following impression: (1) multilevel lumbar spondylosis; (2) left-sided lumbar non-verifiable radicular pain; (3) psychiatric comorbidity; and (4) chronic pain syndrome. He opined that respondent was permanent and stationary, she could not return to her full and unrestricted work duties, and she is limited to light to medium-level work.

26. Joseph B. Serra, M.D. Dr. Serra is a board-certified orthopedic surgeon retained by CalPERS to perform an independent medical evaluation (IME) of respondent's condition. On April 28, 2014, he physically examined respondent, reviewed her history, medical records and job duties, and issued an IME report. At the time, respondent was 40 years old. In his IME report, Dr. Serra noted that respondent subjectively complained of constant aching in her lower back, which increased to "a sharp, stabbing pain when moving quickly." She had intermittent discomfort in her lower back at night, though this had improved. Occasionally, respondent experienced muscle spasms in her lower back. Respondent reported her symptoms worsened while lying down, lifting, sitting, bending, standing, walking, and crouching. However, respondent asserted she had "gotten better."

27. Upon physical examination, Dr. Serra found the following:

Examination of her back reveals her to stand erect with no evidence of list. There is no evidence of pelvic tilt, scoliosis, or muscle spasm. There is tenderness to palpation over the paravertebral musculature in the lumbar area extending from L5 to S1. There is no tenderness to palpitation over the sacroiliac joints. The sciatic notches are negative.

Neurologic examination of the lower extremities reveals motor and sensory function to be intact. Patellar and Achilles reflexes are 2+ bilaterally ... Straight leg raise in the sitting posture is negative to 90 degrees bilaterally. Straight leg raise when supine causes some discomfort in the lower back at approximately 80 degrees bilaterally. Squatting is carried out well ... Heal and toe standing are carried out well.

Circumferential measurements of the lower extremities in centimeters listing right/left are as follows: Thigh 52/52.5, calf

40/39.5. Leg lengths measuring from anterior superior iliac spine to the tip of the medial malleolus are 84 cm bilaterally.

28. Dr. Serra had the following impression of respondent: (1) mild degenerative disc disease, lumbar spine; (2) low back pain, exact etiology undetermined; and (3) functional overlay. He further opined that respondent had exaggerated her complaints insofar as "her subjective complaints far outweigh the objective findings."

29. Dr. Serra opined that, at the time of the IME, respondent could not lift 100 pounds as her job occasionally required. He also noted she may have difficulty wearing a duty belt depending on its weight. Dr. Serra further opined that respondent was substantially incapacitated from the performance of her duties beginning July 12, 2012. However, he noted that said disability was temporary with "an expected duration of less than [six] months."

Discussion

30. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a Police Sergeant. Throughout his treatment of respondent, Dr. Yabes opined that her disability was temporary and that she was responding well to the FRP in order to return to gainful employment. At her IME, respondent also reported to Dr. Serra that her condition was improving, which is consistent with Dr. Serra's finding of temporary disability. Dr. Yabes did not opine that respondent was substantially and permanently disabled until his December 2014 report submitted to CalPERS in support of respondent's disability retirement application. However, he had not examined respondent since March 2014 at which time he opined respondent was improving.

31. Dr. Feinberg's AME report, which was admitted as administrative hearsay, likewise did not support that respondent is substantially and permanently incapacitated from performing the usual duties of a Police Sergeant. Dr. Feinberg evaluated respondent utilizing standards applicable in workers' compensation cases, and therefore, his opinion can be given little weight in this proceeding. The standards in disability retirement cases are different from those in workers' compensation. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Kimbrough v. Police & Fire Retirement System* (1984) 161 Cal.App.3d 1143, 1152-1153; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132 [a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different].)

32. In contrast, Dr. Serra, in reaching his opinion that respondent was not substantially and permanently incapacitated from performing the usual duties of a Police Sergeant, applied the standards applicable in these types of disability retirement proceedings. His opinion that respondent's subjective complaints of pain were not adequately supported

by objective medical evidence was persuasive and consistent with the medical records offered at hearing.

33. In sum, when all the evidence is considered, respondent failed to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a Police Sergeant. Consequently, her disability retirement application must be denied.

LEGAL CONCLUSIONS

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.)

2. By virtue of her employment, respondent is a state safety member of CalPERS, pursuant to Government Code section 21151.²

3. To qualify for disability retirement, respondent had to prove that, at the time she applied, she was "incapacitated physically or mentally for the performance of [her] 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 ... on the basis of competent medical opinion.

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.)

² 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."

6. 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* (2004) 120 Cal.App.4th 194, 207; citing, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 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 determination. (*Hosford v. Board of Administration*, *supra*, 77 Cal.App.3d at p. 863.)

7. The employee in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations and apprehend violators, issuing warnings and serving citations, and serving warrants and making arrests. He suffered an injury to his right arm while arresting a suspect. He could shoot a gun, drive a car, swim, row a boat (with some difficulty), pick up a bucket of clams, pilot a boat, and apprehend a prisoner (with some difficulty). He could not lift heavy weights or carry a prisoner away. The court noted that “although the need for physical arrests do occur in petitioner’s job, they are not a common occurrence for a fish and game warden.” (*Mansperger*, *supra*, 6 Cal.App.3d at p. 877.) Similarly, the need for him to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding that the game warden was not incapacitated for the performance of his duties, the *Mansperger* court noted that the activities he was unable to perform were not common occurrences and that he could otherwise “substantially carry out the normal duties of a fish and game warden.” (*Id.* at p. 876.)

8. The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, reached a similar conclusion with respect to a state traffic sergeant employed by the CHP. The applicant in *Hosford* had suffered injuries to his left ankle and knee, and had strained his back. The court noted that the sergeant “could sit for long periods of time but it would ‘probably bother his back;’ that he could run but not very adequately and that he would probably limp if he had to run because he had a bad ankle; that he could apprehend persons escaping on foot over rough terrain or around and over obstacles but he would have difficulty and he might hurt his back; and that he could make physical effort from the sedentary state but he would have to limber up a bit.” (*Id.* at p. 862.) Following *Mansperger*, the court in *Hosford* found that the sergeant:

is not disabled unless he is substantially unable to perform the usual duties of the job. The fact that sitting for long periods of time in a patrol car would “probably hurt his back,” does not mean that in fact he cannot so sit; ...[¶] As for the more strenuous activities, [a doctor] testified that Hosford could run, and could apprehend a person escaping over rough terrain. Physical abilities differ, even for officers without previous injuries. The rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the

function, renders [the doctor's conclusion that Hosford was not disabled] well within reason. (*Ibid.*)

9. In *Hosford*, the sergeant argued that his condition increased his chances for further injury. The court rejected this argument, explaining that "this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently existing." (*Hosford, supra*, 77 Cal.App.3d at p. 863.) As the court explained, prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (*Ibid.*)

10. The court's reasoning in *Mansperger* and *Hosford* has been repeatedly followed by CalPERS. (See, *In re Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes*, (1999) CalPERS Prec. Dec. No. 99-03; *In the Matter of the Application for Disability Retirement of Theresa V. Hasan*, (2000) CalPERS Prec. Dec. No. 00-01; *In the Matter of the Application for Disability Retirement of Ruth A. Keck*, (2000) CalPERS Dec. No. 00-05.)


11. Finally, in *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff was not permanently incapacitated for the performance of his duties, finding, "A review of the physician's reports reflects that aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the appellant's condition are dependent on his subjective symptoms."

12. When all the evidence in this matter is considered, respondent did not establish that her disability retirement application should be granted. There was insufficient evidence based upon competent medical opinion that she is permanently and substantially incapacitated from performing the usual duties of a Police Sergeant. Consequently, her disability retirement application must be denied.

ORDER

The application of Melissa Centeno for industrial disability retirement is DENIED.

DATED: June 1, 2016

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TIFFANY L. KING
Administrative Law Judge
Office of Administrative Hearings