

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

JAMES D. GREER,

Respondent,

and

PRESTON YOUTH CORRECTIONAL
FACILITY, CALIFORNIA DEPARTMENT
OF CORRECTIONS AND
REHABILITATION,

Respondent.

Case No. 2016-0239

OAH No. 2016031224

PROPOSED DECISION

Administrative Law Judge Gene K. Cheever, Office of Administrative Hearings, State of California, heard this matter on July 21, 2016, in Sacramento, California.

Terri Popkes, Senior Staff Attorney, represented The California Public Employees' Retirement System (CalPERS).

James D. Greer (respondent) appeared and represented himself.

There was no appearance on behalf of respondent Preston Youth Correctional Facility (Correctional Facility), California Department of Corrections and Rehabilitation.

Evidence was received, the record was closed, and the matter was submitted for decision on July 21, 2016.

ISSUE

At the time of filing his application, was respondent permanently disabled or substantially incapacitated from the performance of his usual and customary duties as a

Youth Correctional Counselor (YCC) for the Correctional Facility on the basis of orthopedic (knees, right ankle, right elbow, right hand and wrist, back, minor fractures of fingers), cardiovascular (heart), neurological (head injury), and psychological (work stress and depression) conditions?

FACTUAL FINDINGS

1. Prior to March 7, 2006, respondent was employed as a YCC for the Correctional Facility. By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151.¹ On February 23, 2006, at the age of 51, respondent filed an application for service-pending industrial disability retirement with CalPERS. He described his specific disability as, "had heart attack @ work, Preston – YCF, Ione, Calif. on 01-16-04. After recoup., returned to work Feb. 04. Had 2 more related incidents @ work over next years." Respondent retired from service effective March 7, 2006. He described his "limitations/preclusions" due to his injuries as, "precluded from heavy work; undue emotional stress." In response to the question of how his injuries have affected his ability to perform his job, he replied, "safety officer would not allow return to work."

2. CalPERS obtained medical reports from competent medical professionals concerning respondent's orthopedic, cardiovascular, neurological, and psychological conditions. After reviewing the reports, CalPERS determined that respondent was not permanently disabled or substantially incapacitated from performance of his duties as a YCC at the time he filed his application for industrial disability retirement. CalPERS' determination was based upon its review of medical records pertaining to respondent's conditions, including reports prepared by Raye Bellinger, M.D., Steven McIntire, M.D., Ph.D., and Joseph McCoy, M.D.

3. By letter dated June 29, 2007, CalPERS notified respondent of its determination and advised him of his appeal rights. By letter dated August 1, 2007, respondent filed an appeal and requested a hearing.

Duties of a Youth Correctional Counselor

4. As set forth in the Correctional Facility's December 2004 Duty Statement for a YCC (Duty Statement), respondent's job responsibilities included maintaining custody of wards, supervising wards under his custody, providing recreation for wards, maintaining accountability of wards, maintaining the care and welfare of wards, providing counseling and casework services to wards, emergency work, maintaining the security of the lodge and

¹ 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."

wards assigned to the lodge, and attending training and staff meetings. Respondent signed the Duty Statement on February 19, 2005.

Physician Testimony - CalPERS

JOSEPH W. MCCOY, M.D.

5. Dr. McCoy is an orthopedic surgeon. He is certified by the American Board of Orthopaedic Surgery and has practiced orthopedic surgery for approximately 30 years. Dr. McCoy testified at hearing. He performed an independent medical evaluation (IME) of respondent and prepared a report. He reviewed respondent's prior medical records and his Duty Statement. On February 12, 2007, he met with respondent, obtained his history, and performed a physical examination.

6. Respondent described sustaining numerous injuries to various bones over the years, sustaining a closed head injury in 1984, and sustaining a heart attack in January 2004, after which he underwent a cardiac stent placement. He described diffuse aches and pains as well as being on a regular exercise regimen of walking and strength training with a Bowflex.

7. On physical examination, respondent measured 5 feet, 10 inches tall and weighed 285 pounds. His cervical spine demonstrated normal range of movement, his upper extremities demonstrated excellent range of movement, and his grip strength was well preserved. His lumbar spine demonstrated normal curvature. He demonstrated no detectable neurologic deficits in his upper or lower extremities. His knees demonstrated some hypermobility of the bilateral patellofemoral joints and some mild patellofemoral crepitation bilaterally. His knees's range of motion was normal, but his right knee had a slight effusion.

8. Dr. McCoy opined that respondent did not have any specific job duties that he was unable to perform based on his orthopedic conditions alone, although he may experience some general discomfort with performing some of his job duties. Dr. McCoy concluded that respondent was not substantially incapacitated from the performance of his usual job duties as a YCC for the Correctional Facility.

RAYE L. BELLINGER, M.D.

9. Dr. Bellinger is a cardiologist. He is board certified in internal medicine, cardiovascular disease, and nuclear cardiology, and has practiced cardiovascular medicine for approximately 30 years. Dr. Bellinger testified at hearing. He performed an IME of respondent and prepared a report. He was provided with and reviewed respondent's prior medical records and his Duty Statement. On December 15, 2006, he met with respondent, obtained his history, and performed a physical examination.

10. Respondent described his present complaints as fatigue, due to being out of shape, shortness of breath, which limits his ability to perform heavy exercise, and minimal chest discomfort. He described his shortness of breath and chest discomfort began on

January 16, 2004, after which he was seen at a hospital. His early evaluations for the chest discomfort were not remarkable, with normal creatine phosphokinase (CPK), creatine kinase MB isoenzymes, troponins, and electrocardiogram. Because of a concern for unstable angina, he underwent a cardiac catheterization on January 17, 2004, by Richard Axelrod, M.D. Dr. Axelrod documented insignificant coronary artery disease of the left anterior descending coronary artery and circumflex artery, and a high grade, 95 percent stenosis of the mid-right coronary artery. Respondent underwent a successful coronary stenting. In June 2005, Dr. Axelrod performed a second cardiac catheterization and documented a patent right coronary stent. Dr. Axelrod returned respondent to regular full-time duty effective July 4, 2005, without restrictions other than not performing overtime work. Dr. Axelrod subsequently released respondent to return to full-time work without any restrictions effective November 22, 2005.

11. Dr. Bellinger performed a physical examination of respondent. Respondent weighed 292 pounds and was not in distress at the time of the exam. Respondent demonstrated no abnormalities.

12. Dr. Bellinger opined that from a cardiovascular perspective, respondent did not have any specific job duties that he was unable to perform. He concluded respondent was not substantially incapacitated from the performance of his usual job duties as a YCC for the Correctional Facility.

STEVEN L. MCINTIRE, M.D.

13. Dr. McIntire is a neurologist. He has been a diplomat of the American Board of Psychiatry and Neurology from 1998 to the present. He has been practicing neurological medicine for approximately 20 years. Dr. McIntire testified at hearing. He performed an IME of respondent and prepared a report. He was provided with and reviewed respondent's prior medical records and his Duty Statement. On February 9, 2007, he met with respondent, obtained his history, and performed a physical examination.

14. Respondent described sustaining a head injury in May 1984 when three juveniles at the Correctional facility attacked him and hit him in the head with padlocks that were placed inside a sock. Although he did not lose consciousness, he saw a white flash when he was hit and it felt like an explosion. After the attack, he went to an emergency room where he received sutures and was released to go home. He developed headaches after the attack, but they essentially resolved after three years. He now has headaches two to three times a year which typically last about ten to fifteen minutes and not more than an hour. He does not have nausea or vomiting associated with the headaches.

15. Dr. McIntire performed a physical examination and a neurological examination of respondent. Respondent weighed 280 pounds and was not in distress at the time of the exam. Respondent demonstrated no physical abnormalities. His mental status was fully oriented and his concentration and recent and remote memories were intact. He was able to read and do calculations. There were no abnormalities of mood. His cranial

nerve was intact. He had normal muscle bulk and tone and had 5/5 strength in the upper and lower extremities.

16. Dr. McIntire opined that from a neurological perspective, respondent did not have any specific job duties that he was unable to perform. He concluded respondent was not substantially incapacitated from the performance of his usual job duties as a YCC for the Correctional Facility.

Respondent's Testimony

17. Respondent testified and made several arguments during his testimony. First, his heart attack occurred on January 16, 2004, so he argued that the Duty Statement should not be considered since it is dated December 2004, which is after the date of his injury. Second, he testified that the Correctional Facility policies are inconsistent with State law. The Correctional Facility issued policies requiring YCCs to use mace and wait for backup to arrive before intervening in a juvenile altercation, but, according to respondent, Penal Code section 832 requires YCCs to maintain the safety of wards in their custody. He argued the Correctional Facility's policies are inconsistent with a YCC's obligation to comply with Penal Code section 832. Third, he testified, generally, that he has had a lot of injuries over time. He argued that the cumulative effect of his injuries prevented him from performing his duties as a YCC. Fourth, he testified that he submitted his appeal on August 1, 2007, regarding CalPERS' June 29, 2007, denial of his service-pending industrial disability retirement application. He argued that CalPERS should be estopped from denying him disability retirement benefits, because CalPERS waited more than nine years to have this hearing. Finally, he testified that he received a workers' compensation award as a result of his injuries. He argued that it is inconsistent for CalPERS to deny his application when he qualified for a workers' compensation award.

Discussion

18. The relevant issue is whether respondent was permanently disabled or substantially incapacitated from performing his job duties on February 23, 2006, the date he submitted his disability application. In addition, the CalPERS standard to determine disability is not the same as the standard for worker's compensation determinations. Even still, respondent did not offer at hearing any medical reports or medical testimony by a doctor to consider. Finally, while he waited nine years for this hearing, he presented no evidence that he suffered any actual detriment as a result of CalPERS' delay and/or that he ever sought at any time during the delay to have CalPERS schedule the hearing.² As such, respondent

² The affirmative defenses do not support respondent's appeal. One of the essential elements of an equitable estoppel claim is detrimental reliance. *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305. Respondent did not establish that he relied upon CalPERS' delay to his detriment. The defense of laches requires "unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." *Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d

has not demonstrated through competent medical evidence that he was permanently disabled or substantially incapacitated from performance of his job duties as a YCC at the time he submitted his disability application.

19. Dr. McCoy, Dr. Bellinger, and Dr. McIntire's IME evaluation reports and testimony were persuasive evidence that respondent's orthopedic (knees, right ankle, right elbow, right hand and wrist, back, minor fractures of fingers), cardiovascular (heart), neurological (head injury) and psychological (work stress and depression) conditions did not render him permanently disabled or substantially incapacitated from performing his job duties as a YCC at the time he submitted his disability application. Accordingly, respondent's application for industrial disability retirement should be denied.

LEGAL CONCLUSIONS

1. Under Government Code section 21151, subdivision (a), state safety members incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability regardless of age or amount of service. Government Code section 20026 provides that "'Disability' and 'incapacity for performance of duty' as a basis of retirement, means disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion."

2. In *Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, the court construed the term "incapacitated for the performance of duties" to mean a substantial inability to perform the employee's usual duties. (*Id.* at p. 876.) The applicant in *Mansperger* was a warden with the Department of Fish and Game whose physician opined that he could no longer perform heavy lifting and carrying. The evidence established that such tasks were an infrequent occurrence, and the applicant's customary activities were the supervision of hunting and fishing. The *Mansperger* court found that the applicant was not entitled to disability retirement because, although he suffered some physical impairment, he could perform most of his usual job duties.

3. Subsequently, in *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, the Court of Appeal applied the *Mansperger* test to the disability retirement claim of a California Highway Patrol sergeant who sustained injuries to his back and leg, which restricted his ability to carry out some of the functions of a patrol officer, including driving a patrol car for lengthy periods. Regarding whether there must be actual present disability or whether fear or possibility of future injury is sufficient to find disability, the court noted that "Hosford relied and relies heavily on the fact that his condition increases his chances for further injury ... this assertion does little more than

351, 359. Here, CalPERS' nine year delay was unreasonable, but respondent did not establish either acquiescence or prejudice. CalPERS did not acquiesce in respondent receiving disability benefits because it did not pay respondent disability benefits during the nine year delay.

demonstrate that his claimed disability is only prospective (and speculative), not presently in existence.” The *Hosford* court held that the disability or incapacity must presently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient. (*Id.* at p. 862.)

4. Respondent has the burden of proving entitlement to disability retirement. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691; *Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.3d 234, 238.) It is well accepted that CalPERS may rely on decisions affecting other pension plans when the laws are similar, and since Government Code section 31724 (County Employees’ Retirement Law) is similar to Government Code section 21151 (California Public Employees’ Retirement Law), the rule concerning burden of proof shall be applied to cases under CalPERS law. (*Bowman v. Board of Pension Commissioners for the City of Los Angeles* (1984) 155 Cal.App.3d 937, 947.) Evidence of the employee’s permanent disability must be based on competent medical evidence. (Gov. Code § 31720.3.)

5. The matters set forth in Factual Findings 4 through 19 have been considered. It was not established through competent medical evidence that respondent’s orthopedic (knees, right ankle, right elbow, right hand and wrist, back, minor fractures of fingers), cardiovascular (heart), neurological (head injury) and psychological (work stress and depression) conditions were permanently disabling or substantially incapacitated respondent from performing his job duties at the time he submitted his disability application.

ORDER

The application of James D. Greer for industrial disability retirement is DENIED.

DATED: August 1, 2016

DocuSigned by:

Gene Cheever

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GENE K. CHEEVER

Administrative Law Judge

Office of Administrative Hearings