

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 Disability
Retirement of:

JAMES BIEG,

Respondent,

and

RANCHO MURIETA COMMUNITY
SERVICES DISTRICT,

Respondent.

Case No. 2015-1245

OAH No. 2016060795

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on September 14, 2016, in Sacramento, California.

Charles H. Glauber, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

There was no appearance by or on behalf of James Bieg (respondent) or Rancho Murieta Community Services District (District). CalPERS established that it duly served respondent and the District with a Notice of Hearing. Consequently, this matter proceeded as a default hearing against respondent and the District pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and this matter was submitted for decision on September 14, 2016.

ISSUE

On the basis of low back, waist, leg and ankle conditions, is respondent permanently disabled or substantially incapacitated from performing his usual and customary duties as a Security/Patrol Sergeant for the District?

FACTUAL FINDINGS

1. Respondent was employed as a Security/Patrol Sergeant for the District. On April 24, 2015, CalPERS received a Disability Retirement Election Application (Application) from respondent. In his Application, respondent stated that he was applying for "Service Pending Disability Retirement." Respondent retired for service effective December 1, 2014, and has been receiving his service retirement allowance since that date.

Respondent's Application

2. In his Application, respondent described his disability as: "low back injury L3-L4-L5-S1 issues affecting back, waist, leg, ankle." He stated that his disability occurred as a result of "cumulative trauma use of Sam Brown gun belt." He described his limitations/preclusions as "no prolonged sitting, standing, repetitive stooping, twisting, bending, lifting (30 pds)." He stated that he was "unable to perform job or any other job currently."

3. By letter dated October 2, 2015, CalPERS notified respondent that, after reviewing the medical evidence, it had determined that his "orthopedic (low back, waist, leg and ankle) condition" was "not disabling." Consequently, it denied respondent's Application.

4. On November 2, 2015, CalPERS received respondent's appeal from its denial of his Application. In his appeal, respondent criticized the Independent Medical Evaluation (IME) conducted by Robert Henrichsen, M.D., CalPERS's expert, as "minimal" and Dr. Henrichsen's review of respondent's medical records as "cursory." He asserted that an "extensive examination," including an MRI, was conducted by Dr. Michael Charles in his workers' compensation case, which established that he was disabled.

Duties of a Security/Patrol Sergeant

5. CalPERS submitted two exhibits that described the duties of a Security/Patrol Sergeant: (1) a description of the position prepared by the District; and (2) a completed Physical Requirements of Position/Occupational Title form signed by respondent and an Account Supervisor.

6. As set forth in the District's position description, a Security/Patrol Sergeant supervises the activities of assigned gate control and patrol personnel and participates in

traffic control, incident reporting, training, administration, crime prevention, community relations and other assigned programs and functions. The essential duties of a Security/Patrol Sergeant include patrolling on an assigned shift, conducting property checks on businesses and homes for burglary and other security problems, and requesting and recording information from observers and other persons. The position is a first level supervisory position with responsibility for assigning, supervising, and participating in the work of staff assigned to a specific area of security and crime prevention functions. As set forth in the District's position description, the physical demands of the job include:

... The employee frequently is required to stand and sit. The employee is occasionally required to walk, climb, or balance, and stoop, kneel, crouch, or crawl. [¶] The employee must occasionally lift 50 and/or move up to 100 pounds.

7. As set forth in the Physical Requirements of Position/Occupational Title form, a Security/Patrol Sergeant: (1) is never required to power grasp, repetitively use his hands, lift over 100 pounds, work with heavy equipment, be exposed to excessive noise, gas fumes, or chemicals, work at heights, operate foot controls or engage in repetitive movement, or use special visual or auditory protective equipment; (2) occasionally (up to three hours a day) runs, walks, crawls, kneels, climbs, squats, bends at the neck and waist, twists at the neck and waist, reaches above and below the shoulder, pushes and pulls, engages in fine manipulation, uses a keyboard and mouse, lifts and carries up to 100 pounds, walks on uneven ground, is exposed to extreme temperature, humidity and wetness, and works with bio-hazards; and (3) frequently (three to six hours a day) sits, stands, simple grasps, and drives.

Expert Opinion

8. CalPERS retained Dr. Henrichsen to conduct an IME of respondent. Dr. Henrichsen is board-certified as an orthopedic surgeon. Dr. Henrichsen examined respondent on September 8, 2015, took a medical history, reviewed the duties of a Security/Patrol Sergeant and respondent's medical records, and issued an IME report. At the time of the IME, respondent was 52 years old, five feet 11 inches tall, and weighed 240 pounds. Respondent told Dr. Henrichsen that he had a history of chronic low back pain for many years, with increased pain in 2011 and 2012. By mid-2013, his pain was the worst in his low back, and he had some difficulty with his ankle. Respondent attributed his pain to wearing a duty belt, so he used a vest and was able to continue working for a period of time. When he was told he had to wear a duty belt, he did so, but it caused the pain in his low back to increase. At the time of the IME, respondent complained of low back pain on a daily basis, and sometimes experienced a "knife-like sensation" in his right leg and into his ankle.

9. After examining respondent, Dr. Henrichsen diagnosed him as follows:

1. Chronic low back pain.
2. Degenerative disc disease with disc budging at L3-L4 and L4-L5.

3. Stable anterior spondylolisthesis L5-S1.
4. Unfavorable power-to-weight ratio.
5. Controversial examination findings.

10. In his IME report, Dr. Henrichsen stated that the examination and history of respondent indicated that he did not suffer a specific work injury that caused his complaints. Instead, respondent experienced a “gradual increase in pain while working.” Given respondent’s ability to flex his lumbar spine, Dr. Henrichsen found that there was “no significant ongoing nerve impingement and no muscle spasticity.” The medical records that Dr. Henrichsen reviewed noted that respondent believed that his duty belt was the cause of his back problems. Dr. Henrichsen found that respondent’s duty belt was not the cause of respondent’s problems; it “just aggravate[d] the underlying pathology of his degenerative disc disease of his low back.” The examination did not demonstrate any evidence of ongoing inflammatory disease in respondent’s low back. Dr. Henrichsen found that respondent’s low back function was “good,” but he had pain in his low back and into his leg, more on the right than the left. Dr. Henrichsen advised that individuals with respondent’s low back issues were “best functional if they can change their position of sitting, standing, or walking, and intermittently change from one to the other.” It was Dr. Henrichsen’s understanding that respondent had the option to do this in his position.

11. Dr. Henrichsen concluded that respondent was not substantially incapacitated from performing the usual duties of a Security/Patrol Sergeant. Dr. Henrichsen opined further that there were no specific Security/Patrol Sergeant job duties that respondent was not able to perform. Dr. Henrichsen explained that, although respondent complained of pain, he could “actually accomplish” his occupational functions. According to Dr. Henrichsen, “any restrictions of [respondent’s] duties because of pain then becomes a prophylactic restriction, which does not reach the threshold of substantial incapacity” under the definition applicable in CalPERS cases. Dr. Henrichsen found that respondent’s degenerative disc disease in his low back did “not rise to the level of substantial incapacity as defined by CalPERS.” Dr. Henrichsen’s testimony at the hearing was consistent with his IME report.

Discussion

12. Dr. Henrichsen’s opinion that respondent was not substantially incapacitated from performing his usual job duties as a Security/Patrol Sergeant was persuasive. The results of Dr. Henrichsen’s physical examination of respondent and his review of respondent’s medical records supported his opinion.

13. Respondent failed to appear at the hearing and offer any evidence to support his Application. Although he asserted in his appeal letter that an examination conducted by Dr. Charles in his workers’ compensation case established that he was disabled, no reports authored by Dr. Charles were offered into evidence. The standards in CalPERS disability retirement cases are different from those in workers’ compensation cases. (*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].) Thus, any determination of disability that may have been made in respondent's workers' compensation case cannot be given any weight in this proceeding.

14. In sum, because respondent failed to appear at the hearing and offer competent medical evidence to establish that, at the time he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Security/Patrol Sergeant for the District, his Application must be denied.

LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Security/Patrol Sergeant for the District, respondent is a local miscellaneous member of CalPERS, subject to Government Code section 21151.¹

2. To qualify for disability retirement, respondent had to prove that, at the time he applied, he was "incapacitated physically or mentally for the performance of [his] duties." (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.

3. 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.) The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, 863, explained that 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

¹ Government Code section 21151, in relevant part, provides:

(a) 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.

(b) This section also applies to local miscellaneous members if the contracting agency employing those members elects to be subject to this section by amendment to its contract.

nature. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, the court found that discomfort, which may make it difficult for an employee to perform his duties, is not sufficient in itself to establish permanent incapacity. (See also, *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.)

4. When all the evidence in this matter is considered in light of the analyses in *Mansperger, Hosford, Smith, and Keck*, respondent did not establish that his disability retirement application should be granted. He failed to appear and submit evidence based upon competent medical opinion that, at the time he applied for disability retirement, he was permanently and substantially incapacitated from performing the usual duties of a Security/Patrol Sergeant for the District. Consequently, his disability retirement application must be denied.

ORDER

The application of respondent James Bieg for disability retirement is DENIED.

DATED: September 16, 2016

DocuSigned by:
Karen Brandt
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KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings