

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for Industrial Disability

Retirement of:

JOEL OCAMPO,

Respondent,

and

DEPARTMENT OF STATE HOSPITALS – PATTON,

Respondent.

Agency No. 2023-0458

OAH No. 2023100807

PROPOSED DECISION

Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on March 25, 2024.

Bryan Delgado, Attorney, represented California Public Employees' Retirement System (CalPERS).

Joel Ocampo (respondent) represented himself.

No appearance was made by or on behalf of the Department of State Hospitals – Patton (Department), and the matter proceeded by default as to this respondent.

The record closed and the matter was submitted for decision at the conclusion of the hearing.

SUMMARY

Respondent appeals CalPERS' denial of his application for industrial disability retirement benefits. Respondent, a psychiatric technician for the Department before he retired, suffered an injury to his right elbow while on duty. However, respondent failed to meet his burden of establishing by a preponderance of the evidence that he is substantially incapacitated from performing his usual and customary duties as a psychiatric technician. Therefore, respondent's appeal is denied.

FACTUAL FINDINGS

Parties and Jurisdiction

1. CalPERS is a defined benefit plan administered under the California Public Employees' Retirement Law. (Gov. Code, § 20000 et seq.; subsequent undesignated statutory references are to this code.) CalPERS is governed by its Board of Administration (Board). (Ex. 1.)

2. Respondent was employed by the Department as a psychiatric technician. By virtue of his employment, respondent is a state safety member of CalPERS subject to section 21151. (Ex. 1, p. A1.)

3. On October 19, 2022, CalPERS received respondent's signed application for industrial disability retirement (application), claiming disability on the basis of three areas of orthopedic condition, i.e., his right elbow, shoulder, and wrist. (Ex. 3.)

4. On January 11, 2023, respondent advised CalPERS he no longer wanted to pursue an industrial disability retirement based on his right shoulder and wrist. Therefore, CalPERS did not evaluate respondent's application based on an alleged orthopedic condition to his right shoulder and wrist. (Ex. 4, p. A44.)

5. By letter dated March 23, 2023, CalPERS notified respondent that his application had been denied, and he was advised of his appeal rights. (Ex. 4.)

6. On or after April 15, 2023, respondent submitted to CalPERS an appeal of the denial of his application. (Ex. 5.)

7. Based on the above, the issue on appeal is whether respondent is substantially incapacitated for the performance of his usual and customary duties as a psychiatric technician for the Department on the basis of an orthopedic (right elbow) condition. (Ex. 1.)

Respondent's Work History and Job Duties with the Department

8. Respondent began his employment with the Department as a psychiatric technician on January 31, 2019. Prior to that, respondent had worked as a psychiatric technician with various other employers, dating back to 2009. (Ex. 8, p. A67.)

9. Respondent's job duties as a psychiatric technician for the Department consisted of caring for mentally disabled patients, administering medications, assisting patients with their activities of daily living, attending to patients that needed assistance, and responding to medical emergencies or any patient in crisis. (Exs. 8, 9.)

10. According to the Department's Job Duty Statement for respondent's psychiatric technician position, 10 percent of the major tasks for the position involved providing patient care, including escorting patients intra-hospital and to outside community services; 5 percent involved providing emergency care; and 5 percent involved safety/security, including patient crisis intervention. (Ex. 9.)

11. In October 2022, an unidentified employee of the Department completed a Physical Requirements of Position form regarding respondent's position. Respondent signed the form without suggesting any revision. According to the form, respondent was infrequently required to lift objects weighing 50 pounds or more; occasionally required to lift objects weighing 11 to 50 pounds; and frequently required to lift objects weighing 0 to 10 pounds. (Ex. 10.)

Respondent's Workplace Injury and Medical Treatment

12. On September 13, 2021, respondent and coworkers were performing a containment maneuver on a violent patient. There was a struggle during this maneuver. Respondent fell to the floor, hit his right elbow, and felt immediate pain. Respondent was able to finish his shift, but he was not able to return to work the following day. The incident was reported to the Department the same day and a report was filed. (Testimony [Test.] of respondent; Ex. 8.)

13. On September 14, 2021, the Department referred respondent to an occupational health care clinic. Respondent was evaluated there by Dr. Roger Fox. X-rays taken showed no fracture of the elbow joint. Respondent was prescribed Ibuprofen 800 milligrams (mg) to take as needed, provided with a right elbow brace, and recommended for physical therapy. (Test. of respondent; Ex. 8.)

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14. Dr. Fox initially placed respondent off work for two weeks. Respondent also began physical therapy soon after treating with Dr. Fox. Respondent returned to work with modified duty within two weeks. His work restrictions included avoiding or limiting patient contact, and weightlifting restrictions. Respondent continued physical therapy for several months. Dr. Fox later referred respondent to orthopedic surgeon Ramy Elias. (Test. of respondent; Exs. A, 8.)

15. On December 8, 2021, Dr. Elias evaluated respondent. Dr. Elias recommended an MRI scan, and prescribed for respondent Aleve 500 mg and Ibuprofen 800 mg to take as needed. (Test. of respondent; Exs. A, 8.)

16. On December 15, 2021, an MRI scan was taken of respondent's right elbow. The results were positive for extensor tendonitis with a low-grade partial tear. (Test. of respondent, Dr. Leisure Yu; Ex. 8.)

17. The Department again placed respondent off duty on January 18, 2022. Respondent never returned to work for the Department. (Test. of respondent; Ex. 8.)

18. On February 2, 2022, respondent received a cortisone injection into his right elbow. The treatment was beneficial. (Test. of respondent, Dr. Yu; Exs. A, 8.)

19. On May 6, 2022, respondent received a Platelet Rich Plasma (PRP) injection into his right elbow. The treatment was beneficial. (Test. of respondent, Dr. Yu; Exs. A, 8.)

20. On June 30, 2022, respondent had a second MRI scan of his right elbow. The results showed improvement in the area with minimal tearing of the tendon. (Test. of respondent, Dr. Yu; Ex. 8.)

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21. On August 31, 2022, Dr. Elias issued a report placing respondent on permanent and stationary status. Respondent's work restrictions were no patient contact, and no lifting, pushing, or pulling more than 15 pounds. (Test. of respondent, Dr. Yu; Exs. A, 8.)

22. In connection with a worker's compensation claim respondent filed in connection with his workplace injury discussed above, respondent was referred to Dr. Darren Bergey, an orthopedic surgeon, for a Qualified Medical Evaluation (QME). Respondent was evaluated by Dr. Bergey on March 1, 2023. (Test. of respondent; Ex. A.) The results of the QME are discussed below.

23. Respondent testified he had surgery on his right elbow. He did not specify a date or the procedure. Dr. Bergey's QME report, dated March 1, 2023, suggests the surgery was debridement of the right lateral epicondylar elbow tendon. (Ex. A, p. B15.) Respondent testified the surgery did not improve his right elbow, and he is now seeing a different doctor. Respondent also testified he had a second cortisone injection on March 1, 2024, with limited relief.

Surveillance of Respondent

24. On a date not established, Sarah Garcia, an investigator for CalPERS' Disability Validation Team, was assigned to conduct approximately 40 hours of surveillance of respondent, taking sub rosa video of respondent's physical activity, if any. (Test. of Garcia; Ex. 11.)

25. Investigator Garcia, and for one day her supervisor, conducted surveillance of respondent for four days in January 2023 and one day in February 2023, for a total of 36.75 hours. Investigator Garcia and her supervisor took sub rosa video of the surveillance totaling 39 minutes and 29 seconds; the total video was edited down

to 29 minutes 39 seconds and presented at hearing in two video files. (Test. of Garcia; Exs. 12, 13.) Investigator Garcia also wrote a report describing the surveillance. (Ex. 11.)

26. In the video of activity observed on January 17, 2023, respondent is seen in the front yard of his home using his right hand to lift a potted plant and then place it back on the ground, without any noted impairment in his right upper extremity. (Test. of Dr. Yu; Ex. 12.)

27. In the video of activity observed on January 27, 2023, respondent is seen doing work in his front yard for approximately 30 minutes. The work involved respondent digging, pulling weeds, and doing grass work. These activities mostly were done in a squatted position. Respondent is seen multiple times using his right hand to rake and sweep up weeds and dump them into a trash can. Respondent also held and used a blower in both hands without difficulty. (Test. of Dr. Yu, respondent; Ex. 13.)

CalPERS' Medical Evaluation of Respondent

28. On February 1, 2022, respondent was sent for an independent medical examination (IME) by board-certified orthopedic surgeon Leisure Yu. (Ex. 8.)

29. As part of the IME, Dr. Yu interviewed respondent, examined respondent's body (including his right elbow), reviewed pertinent medical records, and watched the two video files of respondent's surveillance. Dr. Yu prepared a report of his examination and findings. (Ex. 8.) He also testified at hearing.

30. Dr. Yu reviewed both MRI scans taken of respondent's right elbow, and concluded those scans show a partial tear that has almost healed, which now can be characterized as chronic common extensor tendinosis, improved, with minimal residual

intrasubstance tearing at the origin, and no fracture. Dr. Yu testified the tear is “tiny” or “minimal.” (Test. of Dr. Yu; Ex. 8.)

31. During his physical examination, Dr. Yu noted respondent only had slight localized tenderness over the lateral epicondylar region of his right elbow. Dr. Yu saw no sign of secondary muscle problem or swelling in the area. (Test. of Dr. Yu; Ex. 8.)

32. Dr. Yu diagnosed respondent with a right elbow sprain/strain, with lateral epicondylitis, which is commonly known as “tennis elbow.” (Test. of Dr. Yu; Ex. 8.)

33. Dr. Yu believes the sub rosa video somewhat contradicts respondent’s statements about his ability to perform certain physical activities, in that he was observed to be doing yard work and handling tools with his right hand and arm without difficulty. (Ex. 8.)

34. In his IME report, Dr. Yu concluded there were no specific Job Duties or Physical Requirements of the Position that respondent was unable to perform due to his right elbow orthopedic condition. (Ex. 8, p. A73.)

35. Based on the above, Dr. Yu opined respondent does not have actual and present orthopedic right elbow impairment that substantially incapacitates him for performance of the usual job duties of a psychiatric technician for the Department. (Test. of Dr. Yu; Ex. 8.)

CalPERS’ Determination

36. CalPERS obtained medical reports concerning respondent's orthopedic (right elbow) condition from competent medical professionals, including reports from Drs. Fox, Elias, and Yu. (Ex. 4.)

37. After reviewing the medical reports, CalPERS concluded respondent is not permanently disabled or incapacitated for the performance of his duties as a psychiatric technician with the Department. (Ex. 4.)

Respondent's Evidence

RESPONDENT'S TESTIMONY

38. Respondent testified he cannot perform many of his former duties "without difficulty" and is unable to carry heavy weights. Even after his recent surgery, respondent continues to have pain, difficulty lifting heavy objects, or putting pressure on his right hand.

39. In his testimony, respondent offered several critiques of Dr. Yu's opinions. For example, respondent testified Dr. Yu spent as much time "preaching the Bible as evaluating my injury," which he contends calls into question Dr. Yu's competence and objectivity. Respondent also testified Dr. Yu failed to appreciate the daily duties of a psychiatric technician for the Department or how respondent was unable to fulfill those duties without difficulty.

40. Respondent testified Dr. Yu's reliance on the sub rosa video to support his opinions was misplaced. For example, respondent testified the two videos do not show him engaged in heavy lifting or strenuous activity. Respondent noted the blower he held in one video weighs only six pounds; that video also shows he dragged the trash can only with his left hand and arm, not his right. Respondent's testimony is consistent with what is depicted in the videos.

41. Respondent testified Dr. Elias's work restrictions are still in place, i.e., he is to avoid patient contact, and he cannot lift, push, or pull anything over 15 pounds.

Respondent's testimony in this regard was corroborated by documentation in the record and therefore is persuasive.

42. Respondent further testified he cannot return to his former position with the current work restrictions in place. He only was allowed to work on modified duty for 60 days. After that period expired, the restrictions prevented him from applying for any other positions within the Department, and the Department refused to provide him with a permanent accommodation. Respondent's testimony in this regard was not corroborated, as he presented no evidence from the Department on this issue, such as letters, memos, or other human resource documentation.

QME REPORT

43. Respondent submitted Dr. Bergey's QME report. (Ex. A.) The report summarizes respondent's workplace injury and medical treatment similar to Dr. Yu's report and respondent's testimony. The QME report documents Dr. Bergey's findings on his full-body examination of respondent, which were generally consistent with Dr. Yu's findings. The QME report summarizes many of the same medical records summarized by Dr. Yu in his report. Dr. Bergey concludes respondent's right elbow injury was caused by an industrial incident, which is not in dispute in this case. Dr. Bergey recommended that respondent have a right elbow tendon debridement procedure, should his elbow pain continue. Respondent confirmed in his testimony he had a procedure, which probably was what Dr. Bergey recommended. While Dr. Bergey confirmed the continuing applicability of the work restrictions issued by Dr. Elias, he offered no meaningful explanation why they are necessary. Dr. Bergey noted respondent "had not yet reached his Maximum Medical Improvement as he requires further treatment." Respondent confirmed in his testimony he is now seeing a new doctor for his elbow. (Ex. A, p. B15.)

44. Because Dr. Bergey did not testify at hearing, his QME report was admitted as administrative hearsay upon CalPERS' hearsay objection. Pursuant to section 11513, subdivision (d), the QME report only may be used for the purpose of supplementing or explaining other evidence and is not sufficient in itself to support a finding. Here, Factual Finding 43 above is made from the QME report supplementing and explaining the other evidence noted therein.

45. The QME report also contains a paragraph discussing respondent's level of disability. Because that paragraph is the only source of the opinion expressed in it, it cannot support a finding pursuant to section 11513, subdivision (d). Moreover, a diagnosis or opinion in a medical report is inadmissible hearsay, upon timely objection, if the person making it arrived at it from the consideration of many different factors. (*People v. Reyes* (1974) 12 Cal.3d 486, 503.) Here, Dr. Bergey's opinion concerning respondent's level of disability is based on various factors discussed in his report and therefore is inadmissible hearsay.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for an industrial disability retirement has the burden of proving by a preponderance of the evidence that he is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

2. The preponderance of the evidence standard requires respondent to present evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Industrial Disability Retirement

3. Section 20026 provides:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board, . . . on the basis of competent medical opinion.

4. 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.

5. "If the medical examination and other available information show to the satisfaction of the board, . . . that the member . . . 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." (§ 21156, subd. (a)(1).)

Incapacitated for the Performance of Duty

6. The term "incapacitated for the performance of duty" has been defined to mean "the substantial inability of the applicant to perform his usual duties."

(Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 876–877 (Mansperger).)

7. An applicant does not qualify for a disability retirement when he can perform the essential duties, even though he is unable to perform some duties that are rarely required; or when performing his duties sometimes may be difficult or painful. (*Mansperger, supra*, 6 Cal.App.3d at pp. 876-877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 856-857 (*Hosford*).

8. The applicant in *Mansperger* was a fish and game warden who had suffered work-related injuries to his right arm that prevented him from lifting and carrying heavy loads. (*Mansperger, supra*, 6 Cal.App.3d at p. 875.) He remained able to perform most of his usual duties, including apprehending a prisoner, but could not lift heavy weights or carry a prisoner away. (*Ibid.*) CalPERS concluded he was not physically incapacitated for performance of his duties as a fish and game warden. The trial court denied his petition for writ of mandate, and the Court of Appeal affirmed. (*Id.*, pp. 874, 877.)

9. The *Mansperger* court held that although the applicant was not able to lift or carry heavy objects, the evidence showed he "could substantially carry out the normal duties of a fish and game warden. The necessity that a fish and game warden carry off a heavy object alone is a remote occurrence." (*Id.*, pp. 876-877.) Because the applicant could carry out most of his duties, CalPERS and the trial court properly found he was not incapacitated for the performance of duty, and he was therefore not entitled to disability retirement. (*Id.*, p. 877.)

10. The court in *Hosford* reached a similar result. The applicant there was a CHP sergeant who had sustained injuries, including to his back, in three separate incidents. (*Hosford, supra*, 77 Cal.App.3d at pp. 856-857.) As a result, he experienced continuing pain, and believed he was in danger of further injury when he had to overpower people who resisted arrest. (*Id.*, p. 857.) PERS determined he was not

incapacitated for his duties. The applicant petitioned for a writ of mandate, and the trial court, exercising its independent judgment, found he was “substantially able to perform the normal duties of a sergeant in the California Highway Patrol,” and denied the petition. (*Id.*, p. 859.)

11. The court in *Hosford* concluded substantial evidence supported the trial court's determination. (*Hosford, supra*, 77 Cal.App.3d at pp. 859, 865.) The *Hosford* court noted a CHP sergeant's supervisory role meant he might need to make arrests and subdue prisoners but that he would be subjected to such physical demands less frequently than would state traffic officers. (*Id.*, pp. 860–861.) In concluding the evidence supported the trial court's finding, the *Hosford* court noted that sitting for long periods of time would probably bother the applicant's back, but that did not mean he was unable to do so, particularly since he could stop and exercise as needed. (*Id.*, p. 862.) As to more strenuous activities, such as running and apprehending a fleeing suspect, the court relied on “[t]he rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the function.” (*Ibid.*)

Analysis

12. Section 21156, subdivision (a)(1), requires competent medical evidence to show an applicant is substantially incapacitated from performing his or her duties. In this case, the only admissible medical evidence on this topic is from Dr. Yu, who opined respondent is not substantially incapacitated from performing his duties. Dr. Yu's opinion is supported by the fact that respondent suffered a minor tear to his elbow, without fracturing the joint, which tear has substantially healed. On its face, that level of modest injury would not suggest respondent is substantially unable to perform the duties of his former position. While the sub rosa videos are not dispositive, they still show respondent is able to engage in common physical activity.

13. The only other medical report discussing disability is Dr. Bergey's QME report, which was partially admitted, but the paragraph regarding disability was excluded. Even if the QME report was admitted entirely, it is axiomatic that the standard of disability in a worker's compensation case is lower and different than the standard in this case and thus would not support a finding that respondent is substantially incapacitated for the performance of his usual and customary duties as a psychiatric technician for the Department.

14. The current applicability of respondent's work restrictions was not established. The reports from Drs. Fox and Elias are not in evidence, and neither doctor testified to explain or defend the validity of the work restrictions. Dr. Bergey appears in his QME report to copy Dr. Elias's prior work restrictions without any meaningful discussion why they remain necessary. This is important because Dr. Yu opined there is no duty respondent is unable to perform.

15. Even if respondent's work restrictions remain valid, this case is similar to the *Mansperger* and *Hosford* cases. Respondent's work restrictions essentially prevent him from having to pick up a fallen patient or become involved in any physical restraint of a patient in crisis. According to the Job Duty Statement, such activity constitutes less than 20 percent of a psychiatric technician's overall duties. According to the Physical Requirements of Position document, respondent infrequently or only occasionally was required to lift an object heavier than 15 pounds. Respondent did not testify that currently he is unable to perform any of these duties; he testified he cannot do so without difficulty. Like in *Mansperger* and *Hosford*, respondent would be able to carry out the vast majority of his duties; his discomfort or difficulty in exercising the other duties does not necessarily mean he cannot perform them.

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16. Section 20026 requires the subject disability to be of permanent or extended duration. Respondent's complications from his elbow injury have lasted longer than 12 consecutive months. However, respondent has changed doctors and recently had surgery to his elbow. Dr. Bergey noted in his QME report that respondent had not attained maximum medical improvement as of March 2023, well after respondent submitted his application. This is not to say that respondent was ineligible to seek an industrial disability retirement when he did, but rather that respondent's condition currently may not be permanent or extended.

17. Finally, respondent's testimony indicates he could be in the awkward situation of not being offered a suitable position at work, while not being eligible for disability retirement. Because the Department did not appear in this matter, and respondent presented no documentation from the Department, the extent of that situation was not established. However, a situation similar to respondent's depiction of his situation is discussed in the cases of *Leili v. County of Los Angeles* (1983) 148 Cal.App.3d 985, 988-989, and *Raygoza v. County of Los Angeles* (1993) 17 Cal.App.4th 1240, 1245-1246. In those cases, the courts decided that following a final decision denying an application for disability retirement, the involved employer is required to reinstate its employee to his or her former position. Here, this means that, if respondent's description of the situation is correct, the Department would be required to reinstate him to his former position. If the Department refuses, respondent's remedy would be to file a petition for writ of mandate compelling the Department to do so.

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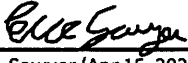
Disposition

18. Respondent failed to meet his burden of establishing by a preponderance of the evidence that he is substantially incapacitated for the performance of his duties as a psychiatric technician for the Department, and therefore he is ineligible for an industrial disability retirement. (Factual Findings 1-45; Legal Conclusions 1-17.)

ORDER

CalPERS' denial of respondent Joel Ocampo's application for industrial disability retirement is affirmed.

DATE: 04/15/2024


Eric C. Sawyer (Apr 15, 2024 14:51 PDT)

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings