

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:**

ROY LEE, JR., Respondent,

and

**AVENAL STATE PRISON, CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, Respondent,**

Agency Case No. 2021-1149

OAH No. 2022020740

PROPOSED DECISION

This matter was heard before Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, via videoconference from Sacramento, California, on June 14, 2022.

Staff Attorney Austa Wakily represented the California Public Employees' Retirement System (CalPERS).

Respondent Roy Lee, Jr., represented himself.

RECEIVED

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CalPERS Legal Office

CalPERS properly served Avenal State Prison, California Department of Corrections and Rehabilitation (CDCR), with the Statement of Issues and Notice of Continued Hearing. CDCR made no appearance. This matter proceeded as a default against CDCR pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record closed, and the matter was submitted for decision on June 14, 2022.

ISSUE

Was respondent permanently disabled and substantially incapacitated from performing his usual and customary duties as a Materials and Stores Supervisor I for CDCR based on orthopedic (left hip and low back) conditions when he applied for industrial disability retirement?

FACTUAL FINDINGS

Background

1. Respondent is employed by CDCR as a Materials and Stores Supervisor I. According to the Statement of Issues, respondent is a state safety member of CalPERS subject to Government Code section 21151.

Respondent's Application for Disability Retirement

2. On September 2, 2021, respondent signed and thereafter filed with CalPERS a Disability Retirement Election Application (application). On the application,

respondent identified "Industrial Disability Retirement" as the type of disability retirement sought. He described his disability as:

(Back) Mild to moderate disc height loss with a 2mm diffuse disc bulge at L3/4. A 2mm to 3mm diffuse disc bulge predilection for the left neural foramen at L4/5 with moderate to severe left neural foraminal narrowing. A 2mm broad based disc protrusion with epidural fat renders and moderate to severe spinal canal stenosis with mild bilateral neural foraminal stenosis at L5/S1. (Left hip) Combined type femoral acetabular impingement and chondral labra separation.

3. Respondent also specified on the application that his disability occurred on December 19, 2017, "while collecting confidential paperwork ... from containers and placing it in bins, then pushing the bins on a cart to a van. [He] bent down to lift a bin off the cart and felt a popping/straining sensation in [his] back/left hip."

4. Respondent described his limitations and preclusions due to this condition as: "[C]urrently unable to twist, turn, or bend at the waist and sit or stand for prolonged periods without significant pain and stiffness" and that he has been limited to "no lifting, pushing, pulling or carrying over ten (10) lbs." He specified that his condition affects his ability to perform his job because "[d]ue to [his] physical condition and physicians [work] restrictions, [he is] no longer able to perform the essential functions of [his] job." Respondent also specified that as of the date he submitted his application, September 2, 2021, he had been working full-time in his Materials and Stores Supervisor position, with restrictions, since August 23, 2021.

5. CalPERS obtained medical records and reports, including reports prepared by Janet Dunlap, M.D., who conducted a Qualified Medical Evaluation (QME) in respondent's workers' compensation action, William Foxley, M.D., respondent's treating physician, and Don Williams, M.D., who conducted an Independent Medical Evaluation (IME) of respondent concerning his orthopedic conditions and application for disability retirement. After reviewing the reports, CalPERS determined that respondent was not substantially incapacitated from the performance of his duties as a Materials and Stores Supervisor I.

6. By letter dated December 1, 2021, CalPERS notified respondent that his application for industrial disability retirement had been denied. Respondent timely appealed from the denial and this hearing followed.

Duties of a Materials and Stores Supervisor I

7. CDCR produces a document titled "Avenal State Prison, Materials and Stores Supervisor I, Essential Functions," that identifies the essential job functions of respondent's position. Those functions include:

(1) maintain sufficient strength, agility, and endurance to perform during stressful (physical, mental and emotional) situations encountered on the job without compromising the health or well-being of themselves, or others;

(2) assist inmates in maintaining cleanliness of warehouse, clothing, canteen, and culinary work areas;

(3) maintain security of work areas, merchandise and work materials and conduct regular searches of premises;

(4) distribute and inspect received items, clothing, and canteen goods;

(5) receive, search and inventory all required items in all areas of warehousing, canteen, clothing, and culinary;

(6) frequently walk while overseeing warehouse activities from one to two miles per day on concrete, asphalt, soil, or other uneven surfaces and demonstrate sufficient stamina to walk briskly to a satellite site in event of accident, injury, security issue or equipment problem, and lift to perform loading/unloading of delivery vehicles, adjust forks on material handling equipment, reposition pallets, stock shelves and manually operating material handling equipment weighing up to 50 pounds;

(7) occasionally sit to review or complete reports, draft correspondence, conduct telephone conversations, and observe performance of inmates and staff, breaking down pallets containing cases with items weighing 50 pounds, carry and deliver documents or small parcels between the warehouse and the administration building or facilities, reach overhead and push and pull to position stock, fill orders, search for contraband or perform inventory verifications, and crouch, kneel, or crawl while conducting contraband searches or inspecting shipments or equipment;

(8) occasionally to frequently bend and stoop during inmate contraband searches and reach in front of body while boarding, operating, dismounting, or otherwise using forklifts, trucks, vans, and ladders; and

(9) constantly engage in hand and wrist movements when performing office and warehouse duties.

8. Respondent submitted a Physical Requirements of Position/Occupational Title form with his application, completed by a CDCR return-to-work coordinator, that details the type, duration, and frequency of physical task a Materials and Stores Supervisor I must perform. An incumbent must infrequently (five to 30 minutes a day) run and occasionally (31 minutes to 2.5 hours a day) sit, crawl, kneel, climb, squat, bend and twist at the waist, push and pull, drive, operate hazardous machinery, and work at heights. A Materials and Stores Supervisor I must frequently (2.5 to 5 hours a day) lift over 50 pounds, stand, walk, bend and twist at the neck, and reach above and below shoulder height, and must constantly (more than five hours a day) power grasp, lightly grasp, engage in fine finger manipulation, and use a computer keyboard and mouse.

Respondent's Evidence

RESPONDENT'S TESTIMONY

9. Respondent is 48 years old and has worked for CDCR for approximately 20 years. He was last assigned to Avenal State Prison as a Materials and Stores Supervisor. While working on December 17, 2017, lifting and shredding confidential documents from a plastic bin, respondent lifted a bin and felt a "pop" and experienced pain in his lower back and left hip. His pain increased over the next several days. While

delivering supplies in February 2018, respondent experienced increased pain and sought medical care. He has received and continued to work under various work restrictions since February 2018.

10. On March 16, 2020, respondent had left hip arthroscopy with arthroscopic debridement of the labrum and bone shaving. He was off work from the date of his surgery through an unspecified date in August 2021.

11. CDCR grants Limited Term Light Duty Assignments (LTLDA) or Temporary Modified Work Assignments (TMWA) to employees for 90-day periods, as a temporary job accommodation due to temporary or permanent work restrictions. The 90-day assignment can be extended upon request if the extension does not cause the total duration of LTLDA, TMWA, or any combination thereof, to exceed 360 calendar days for the same injury or illness. On or about February 10, 2022, CDCR temporarily assigned respondent to work in the records office and subsequently assigned him to work in the mail room, as a temporary accommodation, based on information communicated to them by respondent's physicians.

12. On May 24, 2022, Dr. Dunlap, the qualified medical evaluator in respondent's workers' compensation case, issued a Supplemental QME Report. In the "Discussion/Causation," portion of that report, Dr. Dunlap determined that respondent had "undergone appropriate evaluation and treatment [and] may be considered permanent and stationary as of the date of [her] QME reevaluation."¹ In the "Work

¹ Dr. Dunlap's Supplemental QME Report does not specify the date of respondent's reevaluation. The report does identify April 4, 2022 as respondent's date of evaluation.

Restrictions” portion of that report, Dr. Dunlap specifies that respondent “should be restricted from lifting over 25 pounds, squatting and kneeling, climbing, or ambulating for more than two hours out of an eight-hour [work] shift.”

13. Respondent testified that Dr. Dunlap’s work restrictions are designed to avoid putting himself at risk of further injury while performing his job duties. Respondent also testified that Dr. Dunlap’s restrictions, regarding duties he “should be” restricted from performing, establish that he, in fact, cannot perform those duties for purposes of determining whether he is substantially incapacitated and qualifies for disability retirement. He emphasized that his job requires him to lift up to 50 pounds and to squat, kneel, and climb ladders, and that he has been unable to perform those tasks for more than a year due to the work restrictions issued by Dr. Dunlap.

14. Respondent reached the maximum allowable LTLDA/TMWA on June 9, 2022, and was taken off work the following day, based on Dr. Dunlap’s stated work restrictions. CDCR agreed to allow respondent to return to his regular job duties on the condition that he sign a “Ready, Willing and Able Memo,” indicating his desire and ability to return to his normal assignment.

15. Respondent is unwilling to sign the “Ready, Willing and Able Memo” that will allow him to return to full duty as a Materials and Stores Supervisor. He contends that if he signs that document it will permit his employer to “disregard [his] medical records and treatment” and will preclude him from obtaining any “treatment or [injury] compensation” in the future if he is injured while working. Respondent contends he is precluded from returning to work, based on Dr. Dunlap’s work restrictions, unless he agrees to sign “a waiver.”

DOCUMENTS SUBMITTED BY RESPONDENT

16. Respondent did not call a medical expert to testify on his behalf. Instead, he submitted documents to support his application, which included: (1) Excerpts from the CDCR Operations Manual related to limited term light duty assignments and return-to-work processes; (2) the May 24, 2022 Supplemental QME Report of Dr. Dunlap; (3) a letter, dated June 9, 2022, from a certified workers' compensation specialist regarding his case status; (4) email communications between respondent and the return-to-work coordinator at Avenal State Prison; and (5) a signed CDCR Limited Term Light Duty or Temporary Modified Work Assignment – Offer form, reflecting respondent's modified work assignments. These documents were admitted into evidence as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).²

Expert Opinion

17. CalPERS called Don Williams, M.D., as its expert at hearing. Dr. Williams is a certified diplomate of the American Board of Orthopedic Surgery and a certified Fellow of the American Academy of Orthopedic Surgeons. He obtained his medical degree from Case Western Reserve Medical School in 1977. He is in private practice at the Monterey Peninsula Surgery Center, specializing in treatment of the shoulder,

² Government Code section 11513, subdivision (d), in relevant part, provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

hand, and knee. His practice also involves performing Independent Medical Evaluations (IMEs) and Qualified Medical Evaluations for a variety of entities.

18. On November 12, 2021, Dr. Williams performed an IME on respondent to determine whether he was substantially incapacitated from performing his job duties, based on his reports of low back and left hip pain. Dr. Williams' evaluation included interviewing respondent, reviewing his medical history, family history, social history, and current symptoms. The evaluation also included physically examining respondent's spine, hips, and extremities, and a review of respondent's job functions and medical records. Dr. Williams detailed his evaluation, along with his findings and conclusions, in a nine-page IME report.

19. During the interview, respondent reported lower back pain, lower back strain, and lower back stiffness. He also reported left hip pain, left hip strain, and left hip weakness. Respondent complained of left leg numbness that improves with rest and worsens with activity. He stated he is unable to perform physical activities and experiences pain with prolonged walking or standing. Respondent reported that he can only walk a distance of 60 feet and can only lift up to 15 pounds without experiencing pain. He also reported experiencing pain when walking more than 30 minutes or climbing stairs. He is able to engage in cooking at home, and also vacuums his floors and otherwise cleans his home without issue.

20. Dr. Williams physical examination revealed that respondent's cervical spine had good motion with 40 degrees of flexion and extension and rotation of 80 degrees to each side. Dr. Williams examined the muscles in respondent's lumbar spine and lower extremities and found no abnormality. Respondent could walk on his heels and on his tiptoes and had lumbar spine strength of a five on a scale of zero to five. Respondent could squat 50 percent of normal and was able to kneel on his left or his

right knee. Respondent had full range of motion in his hips. He walked with a slight limp that appeared to resolve after taking a few steps. He produced hip motion with flexion of 120 degrees, extension of zero degrees, external rotation of 40 degrees, and internal rotation of 30 degrees bilaterally. Hip abduction measured 30 degrees and adduction measured 20 degrees.

21. Dr. Williams confirmed through his review of respondent's records, that respondent suffers from degenerative disc disease and a repaired labral tear resulting in back and hip pain. Imaging studies showed that respondent had 1 to 2 millimeter disc bulges at L2/3, L3/4, and L4/5, and a 7 millimeter disc extrusion at L5/S1. There was mild to severe neuroforaminal narrowing with impingement at L4/5, mild to moderate neuroforaminal narrowing at L5/S1 with a disc extrusion that abuts the S1 nerve root and compression of the thecal sac. There was also nerve impingement at L4/5. Respondent's condition was treated with lumbar epidural spinal injections, arthroscopic debridement and bone shaving, and physical therapy. Respondent's records indicate that his March 2020 left hip surgery produced a "good result." He began physical therapy six weeks thereafter and reported that his condition improved with time and that he was in considerably less pain. He was off work for nine months following surgery and then returned to a light duty assignment.

22. After completing the interview, physical examination and reviewing respondent's medical records, Dr. Williams reached the following diagnostic impressions: (1) Post-arthroscopy femoral head shaving for left hip labral tear and cam impingement, and (2) Lumbar spondylosis.

23. Dr. Williams determined respondent suffered some back and hip discomfort due to his conditions. He added that the pain was not incapacitating and that respondent's discomfort was significantly reduced with surgical intervention,

epidural injections and physical therapy. He noted that respondent 's condition had improved with treatment over time and that respondent has full range of motion of the hip, no "major limp," and no major hip pathology. He also noted that respondent continued to work and perform his regular job duties for several months after his reported injury, and that respondent had return to work, post-surgery, and was performing his job duties when the IME was completed.

24. Dr. Williams could identify no medical bases for respondent's reported inability to perform his job duties. He surmised that respondent's reported inability resulted from prophylactic medical restrictions issued by Dr. Dunlap in respondent's workers' compensation action or respondent's fear of possibly further injuring himself in the future while performing his current job duties. Accordingly, Dr. Williams concluded that respondent was not substantially incapacitated from performing his usual and customary duties as a Materials and Stores Supervisor I for CDCR.

Analysis

25. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, when he applied for industrial disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Materials and Stores Supervisor I for CDCR. Dr. Williams testified in detail about his evaluation and review of respondent's medical history and records. His opinion that respondent was not substantially incapacitated from performing his usual job duties was persuasive. His IME report was detailed and thorough, and his testimony at hearing was clear and comprehensive. His opinions were well-supported by the evidence, including the evaluations performed by several other medical professionals since November 2014.

26. The burden was on respondent to offer sufficient competent medical evidence at hearing to support his industrial disability retirement application. Respondent did not meet his burden. He called no medical expert to provide competent medical evidence to support his claimed inability. Respondent's testimony was puzzling. He provided very little testimony regarding his actual abilities. Instead, he repeatedly referred to being deemed "permanent and stationary" in his workers' compensation action, and that his medical evaluator in that case, Dr. Dunlap, told him he "should not" perform certain job functions.

27. Whether an employee has a permanent disability under the workers' compensation system is unrelated to the issue of whether he is incapacitated for the performance of duty for the purposes of disability retirement. (*Winn v. Board of Pension Commissioners* (1983) 149 Cal.App.3d 532, 539-540.) By respondent's own admission, Dr. Dunlap's restrictions appear to be prophylactic in nature. There was no indication in respondent's medical reports that Dr. Dunlap evaluated respondent according to the standards applicable to a CalPERS disability retirement proceeding. To the extent Dr. Dunlap applied evaluation standards applicable in workers' compensation cases, her opinions can be given little weight. The standards in CalPERS disability retirement cases differ 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].)

28. Respondent's reasons for his unwillingness to sign the "Ready, Willing and Able Memo" that would allow him to return to full duty were also perplexing. He

did not assert that he would not sign the memorandum due to his inability to perform his duties. Instead, for reasons he could not establish, he concluded that he could not sign the document because doing so would somehow waive his right to future medical treatment and potential injury compensation and permit CDCR to disregard his entire medical history. This conclusion was entirely unsupported by the evidence.

29. Because respondent failed to offer sufficient evidence at hearing to establish that, when he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Materials and Stores Supervisor I for CDCR, his industrial disability retirement application must be denied.

LEGAL CONCLUSIONS

1. Respondent seeks disability retirement pursuant to Government Code section 21151, subdivision (a), which provides in pertinent part, that “[a]ny 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.”

2. To qualify for disability retirement, respondent had to prove that, when he applied, he was “incapacitated physically or mentally for the performance of his duties in the state service.” (Gov. Code, § 21156.)

3. “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. (Gov. Code, § 20026.)

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.) 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 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.)

5. When all the evidence is considered in light of the analyses in *Mansperger, Hosford, Smith, and Keck*, respondent did not establish that his industrial disability retirement application should be granted. He failed to submit sufficient evidence based upon competent medical opinion that, at the time he applied for industrial disability retirement, he was permanently and substantially incapacitated from performing the usual duties of a Materials and Stores Supervisor I for CDCR. Consequently, his industrial disability retirement application must be denied.

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ORDER

The application of respondent Roy Lee, Jr., for industrial disability retirement is DENIED.

DATE: July 15, 2022

Ed Washington

ED WASHINGTON

Administrative Law Judge

Office of Administrative Hearings