

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:

LISA M. SAMPSON,

Respondent,

and

**CALIFORNIA CORRECTIONAL INSTITUTION, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,**

Respondent.

Agency Case No. 2023-0788

OAH No. 2024020398

PROPOSED DECISION

Taylor Steinbacher, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on August 28, 2024.

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

Respondent Lisa M. Sampson represented herself.

There was no appearance on behalf of respondent California Correctional Institution, California Department of Corrections and Rehabilitation (CDCR). CalPERS proved it properly served CDCR with a notice of hearing. Therefore, this matter proceeded as a default against respondent CDCR only under Government Code section 11520, subdivision (a).

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on August 28, 2024.

SUMMARY

Respondent appeals CalPERS' denial of her application for disability retirement benefits. Respondent, a Correctional Officer for CDCR, alleged a cumulative injury while at work resulting in an orthopedic condition called thoracic spine arthropathy. However, respondent failed to meet her burden of establishing by a preponderance of the evidence that she is substantially incapacitated from performing her usual and customary duties as a Correctional Officer. 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 (PERL). (Gov. Code, § 20000 et seq.; subsequent undesignated statutory references are to the Government Code.)

2. Respondent was employed by the CDCR as a Correctional Officer (CO). By virtue of her employment, respondent became a state safety member of CalPERS subject to the disability retirement provisions of section 21151. (Ex. 1, p. A1.)

3. On February 21, 2023, respondent submitted a notarized application for disability retirement to CalPERS, claiming disability based on an orthopedic condition called thoracic spine arthropathy. (Ex. 3.)

4. By letter dated July 14, 2023, CalPERS notified respondent that her application had been denied and she was advised of her appeal rights. (Ex. 4.)

5. By letter dated July 21, 2023, respondent appealed the denial of her application. (Ex. 5.)

6. The issue in this appeal is whether respondent is substantially incapacitated from the performance of her usual and customary duties as a CO for CDCR based on thoracic spine arthropathy. (Ex. 1, p. A3.)

Complainant's Case

CALPERS' MEDICAL EVALUATION OF RESPONDENT

7. On June 12, 2023, CalPERS sent respondent to John Kaufman, M.D., a board-certified orthopedic surgeon, for an independent medical examination (IME). (Exs. 6, 7.)

8. As part of the IME, Dr. Kaufman interviewed respondent, examined her, and reviewed her medical records. Dr. Kaufman prepared a report of his examination and findings. (Ex. 8.) Dr. Kaufman also testified at the hearing.

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9. During the IME interview, respondent attributed her back condition to “cumulative trauma injury in the upper and mid back as a result of her repetitive and prolonged work activities such as lifting, wearing the duty belt and bulletproof vest, climbing stairs, standing, and walking around the facility.” (Ex. 8, p. A66.) Respondent also complained of “pain in the low back and thighs that radiates from the upper and mid back.” (*Ibid.*) Respondent reported that this pain worsened in 2021. (*Ibid.*)

10. Dr. Kaufman reviewed medical imaging of respondent’s lumbar and thoracic spine. When respondent first reported back pain in October 2021, X-ray imaging of her lumbar and thoracic spine was conducted and that imaging was interpreted by Ralph Ho, M.D. and Gail Nalls, M.D., respectively. (Ex. 8, pp. A74–A75.) Dr. Ho concluded the X-ray imaging of respondent’s lumbar spine was unremarkable. (*Id.*, p. A75.) Dr. Nalls concluded the X-ray imaging of respondent’s thoracic spine showed mild spondylosis. (*Id.*, p. A74.) In December 2021, an MRI of respondent’s lumbar and thoracic spine was conducted and was interpreted by Michael Rozenfeld, M.D. (*Id.*, p. A75.) Dr. Rozenfeld compared the MRI results with the X-ray imaging conducted in October 2021. He concluded the MRI of respondent’s lumbar spine was unremarkable and the MRI of her thoracic spine showed “mild facet arthropathy in the lower thoracic spine,” but was otherwise unremarkable. (*Ibid.*)

11. Dr. Kaufman examined the muscles in respondent’s back during his physical examination. He noted respondent had tenderness “over the mid thoracic area” and that there was “slight spasm in the thoracic and lumbar paraspinous muscles.” (Ex. 8, p. A68.) He also noted respondent’s range of motion was somewhat limited, although her reflexes were symmetric. (*Ibid.*) A straight leg raising test for sciatica was negative. (*Ibid.*) Dr. Kaufman took circumferential measurements of respondent’s lower extremities, which resulted in the same measurements on both

legs at four inches above the patella and at the leg's maximum circumference. (*Ibid.*) Respondent's muscle strength was good in both lower extremities, and respondent performed a toe and heel standing test satisfactorily. (*Id.*, p. A69.) Dr. Kaufman also noted respondent had a normal range of motion in both hips, and there was no sensory deficit in either lower extremity. (*Ibid.*)

12. Dr. Kaufman opined that respondent's slight back spasms and general orthopedic conditions were fairly mild. He explained that slight back spasms are common in someone of respondent's age and do not necessarily suggest a serious pathologic condition. On the other hand, significant findings revealing a serious pathologic condition would include asymmetric reflexes, muscle atrophy, differing sizes in leg circumference, sensory disturbances, or numbness and decreased sensation in the nerves. But after examining respondent, Dr. Kaufman found none of these conditions suggesting a more serious diagnosis.

13. Dr. Kaufman diagnosed respondent with mild thoracic spine arthritis. In his testimony, he explained that arthritis is a typical degeneration of body tissue found in many people. Dr. Kaufman opined that respondent's presentation of thoracic spine arthritis was mild; he based this diagnosis on his examination and on medical imaging of respondent's lumbar and thoracic spine, which were unremarkable. Respondent's presentation of thoracic spine arthritis was also mild compared to other patients Dr. Kaufman has treated. According to Dr. Kaufman, in more severe cases of thoracic spine arthritis, especially where there is a pinched nerve, tissue degeneration would be observable in medical imaging. However, the imaging of respondent's spine showed no such degeneration.

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14. Although respondent self-reported a pain level of 7/10, Dr. Kaufman could not substantiate respondent's subjective report with objective evidence from his examination or from respondent's medical imaging.

15. Dr. Kaufman opined that a presentation of mild thoracic spine arthritis like respondent's is treatable with: (1) anti-inflammatory medication such as ibuprofen and naproxen; (2) topical ointments such as Bengay or a lidocaine patch; and (3) physical therapy and home stretching exercises. Respondent had been previously prescribed narcotic pain medication and a muscle relaxer to treat her back pain. Dr. Kaufman stated that respondent could use topical ointments while she was on duty, and narcotic pain medications or muscle relaxers could be taken after work, given their possible side effects and the need for respondent to maintain "alert awareness" while on duty.

16. Dr. Kaufman reviewed respondent's job duty statement and a statement of the physical requirements of the CO position. (Exs. 9, 10.) In his IME report, Dr. Kaufman concluded there were no specific job duties or physical requirements of respondent's position as a CO that she cannot perform due to her mild thoracic spine arthritis. (Ex. 8, p. A70.)

17. Dr. Kaufman opined respondent's mild thoracic spine arthritis does not substantially incapacitate her from performing the usual job duties of a CO for the CDCR.

CALPERS' DETERMINATION

18. CalPERS obtained and reviewed medical evidence submitted in support of respondent's request for a disability retirement, including from Dr. Kaufman, as well

as Dr. Ho and Sumit Rana, M.D. Based on the evidence in those reports, CalPERS determined that respondent's condition was not disabling. (Ex. 4.)

Respondent's Case

RESPONDENT'S TESTIMONY

19. Respondent testified that she has been on medical leave from her position as a CO since September 2021. Respondent intended to return to work, but her condition worsened and she could not do so. According to respondent, she has an open workers' compensation case, which has concluded her degree of impairment is 50 percent.

20. Respondent stated that Dr. Rana, the doctor who drafted the Qualified Medical Evaluator (QME) report for purposes of her workers' compensation case, found that her condition was permanent and stationary and has reached maximum medical improvement. Although Dr. Rana concluded respondent's condition allowed her to perform "desk work," respondent is uninterested in doing that work—she was hired to be a CO, and that is the job she would like to perform but for her disability.

QME REPORT

21. Respondent introduced Dr. Rana's QME report into evidence. (Ex. A.) The report summarizes respondent's workplace injury and medical treatment history, much like Dr. Kaufman's report and testimony. The QME report documents Dr. Rana's findings, which generally align with Dr. Kaufman's findings. These include, for example, that medical imaging of respondent's spine was "essentially normal" and "unremarkable," and that, aside from tenderness on examination, there were no objective findings to substantiate respondent's subjective reports of pain. (*Id.*, p. B7.)

Dr. Rana also concluded respondent sustained an injury to her mid-back “arising out of and caused by cumulative trauma working as a CO for CDCR[.]” (*Id.*, p. B8.) Dr. Rana recommended that, for periods of exacerbation or “flare-ups” of her thoracic spine pain, respondent should use muscle relaxers, nonsteroidal anti-inflammatory drugs and narcotic pain medications, and undergo physical therapy. (*Id.*, p. B9.)

22. Because Dr. Rana did not testify, his QME report was admitted as hearsay upon CalPERS’ hearsay objection. Thus, under section 11513, subdivision (d), the QME report may be used only to supplement or explain other evidence and is insufficient by itself to support a factual finding on its own.

23. The QME report contains Dr. Rana’s opinions on respondent’s level of disability, including that she “is unable to return to her usual and customary occupation without restriction,” and is “incapable of returning to full duty.” (Ex. A, pp. B7–B8.) Dr. Rana noted that, if respondent does return to work, her duties should be “limited to desk work.” (*Id.*, p. B8.). But because there is no other evidence supplementing or explaining this hearsay evidence, Dr. Rana’s opinion is insufficient by itself to support a finding of disability under section 11513, subdivision (d).

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant seeking a service-connected disability retirement has the burden of proving her eligibility for such benefits. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn. 5.) Although state law regarding pensions must be liberally construed in favor of the applicant, this liberal construction “does not relieve a party of meeting the burden of proof by a preponderance of the evidence.”

(*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) 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.)

Applicable Law

2. "A public employee has a fundamental vested right to a disability pension if he or she is in fact disabled." (*Beckley v. Board of Administration (Beckley)* (2013) 222 Cal.App.4th 691, 697, citation omitted.)

3. "Any . . . state peace officer . . . 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." (§ 21151, subd. (a).) As a CO, respondent was a state peace officer. (§ 20392.)

4. Applicants for a disability retirement must show a substantial inability (or an incapacity) to perform their usual duties based on competent medical evidence. (*Mansperger v. Public Employees' Retirement System (Mansperger)* (1970) 6 Cal.App.3d 873, 876; § 21156.) PERL defines "disability" and "incapacity for performance of duty" as "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." (§ 20026.)

5. Applicants must demonstrate their incapacity affects their "usual duties." Usual duties are based on duties of the last job classification held and applicable law. (*Beckley, supra*, 222 Cal.App.4th at pp. 699-700 [California Highway Patrol (CHP) officer assigned to public affairs role had to be capable of carrying out complete range of tasks required of CHP officers under Vehicle Code section 2268].) The inability to

perform a rarely performed, albeit necessary duty of a position does not automatically render an applicant disabled. (*Mansperger, supra*, 6 Cal.App.3d at pp. 876-877 [fish and game warden was not incapacitated where he could do all normal activities except lift and carry heavy objects, tasks which rarely occurred]; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862 [CHP sergeant with physical limitations was not incapacitated where the physically demanding activities of his job were performed much less often by someone in his supervisory role].) Even so, in certain public safety positions, an uncommon activity can be a “usual duty” if the employee “must be capable of and prepared for the worst” every day. (*Thelander v. City of El Monte* (1983) 147 Cal.App.3d 736, 742; *Beckley, supra*, 222 Cal.App.4th at pp. 699-700.)

6. Discomfort or difficulty in performing usual duties is insufficient to establish a permanent incapacity. (*Smith v. City of Napa (Smith)* (2004) 120 Cal.App.4th 197, 204, citation omitted; *Mansperger, supra*, 6 Cal.App.3d at pp. 876-877.)

Analysis

7. Section 21156, subdivision (a)(1), requires competent medical evidence to show an applicant is substantially incapacitated from performing his or her job duties. In this case, the only competent medical evidence on this topic is from Dr. Kaufman, who opined respondent is not substantially incapacitated from performing her duties. (Factual Findings 16-17.)

8. Although the QME report was admitted into evidence, Dr. Rana’s specific conclusion about respondent’s level of disability is hearsay, which is insufficient by itself to support a factual finding over CalPERS’ objection. (Factual Findings 22-23.) And even if Dr. Rana’s conclusions that respondent is “incapable of returning to full duty” and “unable to return to her usual and customary occupation without restriction”

could support a finding of disability, they are not determinative in this case. A workers' compensation ruling or settlement is not binding on the issue of eligibility for disability retirement because the two systems exist for entirely different reasons and they were established to attain wholly independent objectives. (*Smith, supra*, 120 Cal.App.4th at p. 207.) As explained in *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, 215, a "finding by the [Workers' Compensation Appeals Board] of permanent disability . . . does not bind the retirement board on the issue of the employee's incapacity to perform his duties[.]"

9. In sum, respondent failed to meet her burden of establishing by a preponderance of the evidence that she is substantially incapacitated from the performance of her duties as a CO for the CDCR, and therefore she is ineligible for a disability retirement.

ORDER

CalPERS' denial of respondent Lisa M. Sampson's application for a disability retirement is affirmed.

DATE: 09/24/2024

Taylor Steinbacher

TAYLOR STEINBACHER

Administrative Law Judge

Office of Administrative Hearings