

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Amended Statement of Issues
Concerning the Application for Industrial Disability**

Retirement of:

TINOMENETA M. TAUPAU, Respondent

and

**R.J. DONOVAN CORRECTIONAL FACILITY, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent**

Agency Case No. 2018-0760

OAH No. 2018100477

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter virtually utilizing the Microsoft Teams application, on July 12, 2021, due to the ongoing COVID-19 public health emergency.

Helen Louie, Staff Attorney, represented petitioner, Keith Riddle, Chief, Disability and Survivor Benefits Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

There was no appearance by respondents Tinomeneta M. Taupau or the California Department of Corrections and Rehabilitation (CDCR). Upon proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default against respondents pursuant to Government Code section 11520.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on May 20, 2021.

ISSUE

Did competent medical evidence establish that respondent¹ was permanently disabled or substantially incapacitated from performing the usual and customary duties of a correctional officer for CDCR on the basis of neurological (brain, head, viral meningitis, headaches, neck, cognitive and dizziness) and psychological conditions, at the time he filed his application for industrial disability retirement on June 1, 2017?

SUMMARY OF DECISION

Respondent had the burden to prove that, at the time of his application, he was permanently disabled or incapacitated from performing his usual and customary job

¹ Hereinafter, the word "respondent" refers solely to Tinomeneta M. Taupau.

duties as a correctional officer based on the claimed medical and psychological conditions. Respondent did not appear and did not present any evidence. CalPERS, even though it did not have the burden of proof, presented competent medical evidence that established respondent was not permanently disabled or incapacitated from performing his usual and customary job duties as a correctional officer based on the claimed neurological and psychological conditions at the time he filed his application. Accordingly, respondent's application for an industrial disability retirement is denied.

FACTUAL FINDINGS

Preliminary Matters

1. Respondent was employed by CDCR as a correctional officer. By virtue of his employment, he is a state safety member of CalPERS subject to Government Code section 21151.

2. On June 1, 2017, respondent signed an application for industrial disability retirement with CalPERS. Respondent claimed a disability based on neurological (brain, head, viral meningitis, headaches, neck, cognitive and dizziness) conditions. Respondent claimed his disability arose from a diagnosis of viral meningitis he contracted after coming into contact with an inmate at work. He claimed:

(Head/brain and neck) Viral Meningitis which has crated
[sic] swelling of the lining to the brain and stiffness in the
cervical region. Additionally I have a numbness and
throbbing of the head . . . severe headaches . . . memory
lapse and occasional vision impairment.

3. Respondent claimed his limitations/preclusions from working were (cited as written):

No inmate contact working in a correctional setting or environment where high focus and concentration is required avoid ladders and working above the ground or areas where a fall could occur due to a loss of focus or a blackout

4. CalPERS obtained medical records and reports related to respondent's claimed disability. CalPERS had respondent undergo an evaluation with Shen Ye Wang, M.D., on October 5, 2017. Dr. Wang concluded respondent was not permanently disabled or incapacitated from performing the usual and customary duties of a correctional officer.

5. On December 13, 2017, CalPERS issued a determination and notified respondent that his application for an industrial disability retirement was denied. Respondent timely appealed that determination.

6. The matter was set for hearing on May 17, 2019. At the commencement of hearing, respondent provided CalPERS with a report regarding psychological conditions respondent contended further support his eligibility for an industrial disability retirement. That report addressed conditions not listed in respondent's original June 1, 2017, application, as that application only addressed neurological conditions. The parties agreed on the record that the matter was not yet ripe for an administrative hearing and that respondent should be allowed to submit an amended application so that CalPERS may consider his eligibility based on the claimed psychological conditions.

7. On May 22, 2019, respondent filed with CalPERS a letter "amending" his original application, claiming he was entitled to an industrial disability retirement based on psychological conditions, which he did not specify.

8. On July 24, 2019, Matthew Carroll, M.D., evaluated respondent and concluded he was not permanently disabled or incapacitated from performing the usual and customary duties of a correctional officer.

9. Before rendering a final determination, and because it had been several years since Dr. Wang's original examination, CalPERS sent additional records to Dr. Wang and asked if his opinion had changed. Dr. Wang reviewed the additional records and stated his original opinion, that respondent was not permanently disabled or incapacitated from performing the usual and customary duties of a correctional officer based on neurological conditions, had not changed.

10. On August 29, 2019, CalPERS issued a second determination notifying respondent that his application for an industrial disability retirement, based on the claimed psychological condition, was denied. CalPERS also notified respondent that, since he already appealed the original determination, he did not need to appeal this subsequent determination denying his application.

11. All applicable notices of hearing, remote hearing, and instructions for how to submit evidence through the electronic filing system were sent to respondent's address of record. On the day of the hearing, respondent did not appear. The matter proceeded as a default.

Job Description Documents

12. The CDCR's list of usual and customary job duties and essential functions of a correctional officer, which is a sworn peace officer position, require that a correctional officer must: work in minimum and maximum security institutions; wear personal protective equipment such as stab proof vests and breathing apparatus; qualify with firearms; swing a baton with force; defend against inmates armed with weapons; subdue inmates; and apply restraints. A correctional officer also must supervise inmates in housing units, during meals, at recreation time, during various testing procedures, and other scenarios; escort inmates to and from activities, stand on armed posts or patrols, walk perimeter and security details, and oversee work details; search visitors and other individuals entering the institution; participate as a leader in group counseling of inmates, perform some non-custodial duties; and write reports.

Some of the physical requirements listed are: run occasionally and walk in an all-out effort when responding to alarms or serious incidents; crawl, crouch, stoop, and bend; search cells and other tightly enclosed spaced; stand continuously for long periods of time; lift and carry 20 to 50 pounds on a regular basis, perhaps up to 100 pounds on an occasional basis; reach overhead occasionally while performing cell or body searches; twist the body frequently and continuously while performing regular duties; and engage in frequent hand and wrist movement.

Testimony and Report of Dr. Wang

13. The following factual findings are based on the testimony of Dr. Wang, Dr. Wang's curriculum vitae, a report completed by Dr. Wang, and two supplemental reports completed by Dr. Wang.

Dr. Wang received his Bachelor of Medicine degree (B.M.) in Taiwan in 1972 and became licensed by the California Medical Board in 1978. He is board-certified in neuropathology and neurology. He is a member of several professional organizations; a qualified medical examiner for the worker's compensation system; and has held multiple positions in neurology and neuropathology. He has been in private practice since 1980. Dr. Wang is an expert in neurology and neuropathology.

Dr. Wang examined respondent on October 5, 2017. Dr. Wang reviewed 36 medical reports pertaining to respondent and also interviewed respondent. Respondent reported the following: Respondent was 38 years old. He had worked as a correctional officer since 2010. He was transferred to the R.J. Donovan Correctional Facility in 2015. On August 4, 2015, an inmate had a slip-and-fall injury. Respondent helped the inmate into an ambulance. The inmate was very sick and coughing. Respondent was sitting in the back of the ambulance with the inmate and the inmate was coughing while facing him directly. About a week after that incident, respondent developed flu-like symptoms that included a fever, chills, headaches, muscle aching pain, and joint pain. These symptoms got worse, but respondent continued to work. On August 16, 2015, respondent had a severe headache with nausea and vomiting. Respondent was diagnosed with viral meningitis. Respondent complained of continuing lightheaded sensations, dizziness, severe headaches, pain in the lower back, slurred speech, and a diminished attention span. Respondent had not been back to work since the contact with the inmate in August of 2015. Respondent filed a workers' compensation claim that was accepted. Respondent claimed that in the two years prior to Dr. Wang's evaluation he continued to have residual symptoms as previously described and his workers' compensation doctor recommended no direct contact with inmates.

Dr. Wang's physical examination of respondent included both a cognitive and a balance component. He took note of respondent's physical stature and muscle tone. Respondent was awake, attentive, and cooperative. His speech was clear. Respondent had no indications of hallucination or paranoia. On the mini-mental status examination, respondent scored 30 out of 30 points.

On the cranial nerve examination, Dr. Wang noted the following: Cranial nerves I through XII were all within normal limits, including funduscopic examination. Sense of smell was intact bilaterally. The pupils were round, equal and reactive to light. There was no retinal hemorrhage. Visual fields were full to confrontation testing. Extraocular movements were full. Facial movements were symmetrical. Facial sensations were symmetrical. Hearing was normal bilaterally. Air conduction was greater than bone conduction bilaterally. Gag reflex was present. The sternocleidomastoid muscles showed perfect strength bilaterally. The tongue protruded midline with no atrophy.

On the motor system examination, there was no definite pronator drift. Muscle bulk, tone, and strength were normal in both upper and lower extremities. There was no muscle atrophy. There were also no fasciculations; no resting tremors; no action tremors; and no spasticity or rigidity of the upper or lower extremities.

On the sensory system examination, respondent had sensation (on symmetrical pin prick, light touch, vibration, and position) in both upper and lower extremities.

On the coordination testing, respondent showed no dysmetria. Rapid alternating movements were normal with both hands. Rapid foot tapping was normal. Gait was steady. Tandem walk was normal. Rapid side-to-side head turning caused no vertigo or nystagmus. The Romberg test was negative. Respondent was able to walk on his heels and toes and was able to stand on either foot.

Regarding respondent's deep tendon and pathological reflexes, the brachioradialis reflexes were symmetrical. The biceps reflexes were symmetrical. The triceps reflexes were symmetrical. The knee jerks were symmetrical. The ankle jerks were symmetrical. Hoffinan's signs were absent bilaterally. Babinski's signs were also absent bilaterally.

In sum, there were absolutely no objective signs to support any of respondent's subjective complaints. Based on his October 5, 2017, evaluation, Dr. Wang said he did not believe the permanent work restriction by respondent's workers' compensation physician (no direct contact with inmates) was reasonable. Dr. Wang also concluded respondent should be able to return to his usual and customary work as a correctional officer even if he still continued to have headaches and neck pain. There was no evidence that respondent was permanently incapacitated from the usual and customary duties of a correctional officer.

Given that two years had passed since his original examination, prior to the hearing, Dr. Wang was asked to review additional medical records that post-dated his original examination and make a determination about whether his opinion had changed. Also included were additional records that pre-dated respondent's exposure to the inmate in 2015 prior to the time he contracted viral meningitis. Dr. Wang noted that, based mostly on medical reports from 2012, it was "clear" that respondent had "pre-existing cervical spine and left upper extremity symptoms prior to the viral meningitis exposure of August 4, 2015." In other words, respondent's claim of head and neck pain was not industrial. Nonetheless, nothing in the additional medical records caused Dr. Wang to change his opinion that respondent was not permanently incapacitated from the usual and customary duties of a correctional officer.

Testimony and Reports of Dr. Carroll

14. The following factual findings are based on the testimony of Dr. Carroll, Dr. Carroll's curriculum vitae, and a report completed by Dr. Carroll.

Dr. Carroll received his Doctor of Medicine degree from George Washington University School of Medicine in 1989. He completed his internship and residency at the Naval Medical Center in San Diego, California. He is licensed to practice medicine in California. Dr. Carroll is board-certified in forensic psychiatry. Dr. Carroll has held many positions in the field of psychiatry, including positions with the United States Department of Veterans Affairs and Naval Medical Center in San Diego. He still serves as a forensic psychiatrist with the San Diego County Forensic Evaluation Unit. Dr. Carroll serves as a qualified medical evaluator for the workers' compensation system in California and an expert for the Medical Board of California. Dr. Carroll has served as an assistant clinical professor at the University of California, San Diego, and an adjunct professor at the University of San Diego School of Law. Dr. Carroll has lectured extensively on mental disorders, post-traumatic stress disorder, and many other topics in the fields of psychiatry. He is a fellow of the American Psychiatric Association. Dr. Carroll is an expert in the field of psychiatry.

Dr. Carroll examined respondent on July 14, 2019. Dr. Carroll reviewed at least five reports that had to do with respondent's claimed psychological condition. He noted that one doctor in 2016 indicated he felt respondent had major depressive disorder with secondary cognitive and somatic features, but that the doctor specifically stated that there was no objective evidence to show respondent had any cognitive impairments that would render him unable to perform his job.

Dr. Carroll administered the Minnesota Multiphasic Personality Inventory - II (MMPI-II). Dr. Carroll noted that the test showed exaggeration. There was nothing that showed respondent had any psychological impairment that would prohibit him from doing his job. He interviewed respondent who told him if the incident involving the patient who infected him with viral meningitis. Dr. Carroll concluded, however, that respondent's adjustment disorder (which is an unreasonable response to a specific situation) did not preclude respondent from performing the usual and customary duties of a correctional officer. He also concluded there was no objective medical evidence to show respondent had any memory or cognitive problems.

LEGAL CONCLUSIONS

Burden and Standard of Proof

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

Applicable Statutes

2. Government Code section 20026 defines "disability" and "incapacity for performance of duty," for purposes of a retirement, to mean "disability of permanent or extended and uncertain duration" based on "competent medical opinion."

3. Government Code section 21150, subdivision (a), provides that a member who is "incapacitated for the performance of a duty" shall receive a disability retirement. Section 21151, subdivision (a), provides that such incapacitated member shall receive a disability retirement regardless of age or amount of service.

4. Government Code section 21152, provides in part: Application to the board for retirement of a member for disability may be made by:

(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

[¶] . . . [¶]

(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

(d) The member or any person in his or her behalf.

5. Government Code section 21153 provides:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirements as provided in section 20731.

6. Government Code section 21154 provides in part:

The application [for disability retirement] shall be made only (a) while the member is in state service, . . . On receipt

of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

7. Government Code section 21156 provides that if the medical evaluation or other evidence demonstrates that an eligible member is incapacitated physically or mentally, then CalPERS shall immediately retire the member for disability. The determination of incapacitation shall be based on competent medical opinion.

Appellate Authority

8. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. The board must consider the duties actually and usually performed by the applicant, and not simply examine a job description or a list of job demands prepared by an employer, to determine if the applicant is incapacitated for the performance of duty. (*Hosford v. Bd. of Administration* (1977) 77 Cal.App.3d 854, 860-861.) Disability is not an inability to perform fully every function of a given position. When an applicant can perform his or her usual and customary job duties, even though doing so may be difficult or painful, the employee is not substantially incapacitated and does not qualify for an industrial disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6

Cal.App.3d 873, 886-887.) Mere difficulty in performing certain tasks is also not enough to support a finding of disability. (*Hosford, supra*, 77 Cal.App.3d at p. 854.) Further, the claimed disability must be presently disabling; a disability that may be aggravated with time or that is speculative does not satisfy the requirements of the Government Code. (*Id.* at 863.)

Evaluation

9. Respondent did not appear and presented no evidence to support his application for a disability retirement. Respondent therefore did not meet his burden.

Dr. Wang and Dr. Carroll both testified and offered the only competent medical opinions in this matter. Dr. Wang found absolutely no objective evidence to corroborate any of respondent's complaints of neurological problems. Dr. Carroll concluded respondent had an adjustment disorder as a result of the incident with the inmate wherein he contracted viral meningitis, but psychologically, there was nothing that rendered respondent unable to perform his work.

Both experts were credible and concluded that respondent was not permanently disabled or substantially incapacitated (based on the claimed neurological and psychological conditions) from performing the usual and customary duties of a correctional officer at the time he filed his application for an industrial disability retirement. The reports and supplemental reports discussed above in Factual Findings supported this conclusion. Accordingly, cause exists to deny respondent's application for an industrial disability retirement.

ORDER

The application for industrial disability retirement filed By Tinomeneta M. Taupau for with the California Public Employees' Retirement System on June 1, 2017, and supplemented on May 22, 2019, is denied. California Public Employees' Retirement System's denial of Tinomeneta M. Taupau's application, due to neurological and psychological conditions, is affirmed.

DATE: August 9, 2021

Kimberly J. Belvedere

KIMBERLY J. BELVEDERE

Administrative Law Judge

Office of Administrative Hearings