

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:

JOE C. MARTINEZ,

Respondent,

and,

DEPARTMENT OF CORRECTIONS AND
REHABILITATION (CALIFORNIA
STATE PRISON, CORCORAN),

Respondent.

Case No. 8879

OAH No. 2011031341

PROPOSED DECISION

This matter was heard before Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings, State of California, on October 16, 2012, in Fresno, California.

Renee Salazar, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Joe C. Martinez (respondent) appeared and was represented by Peter O. Slater, Attorney at Law.

There was no appearance by or on behalf of the Department of Corrections and Rehabilitation (California State Prison, Corcoran) (CDCR).

Evidence was received, the record was closed, and the matter was submitted for decision on October 16, 2012.

ISSUE

Based upon respondent's orthopedic (low back) condition, is respondent permanently disabled or incapacitated from performing the usual duties of a Medical Technical Assistant for CDCR?



FACTUAL FINDINGS

Duties of a Medical Technical Assistant

1. At the time of his application for disability retirement, respondent was employed as a Medical Technical Assistant (MTA) for CDCR. CDCR's Job Description/Duty Statement (Duty Statement) describes the essential duties and responsibilities of the job classification as follows:

35% Participates in the nursing process, including assisting with emergency medical, mental health, and routine sick call. Assists physicians and nurses with routing nursing care which includes taking vital signs, collecting patient data, and carrying out physician's orders within the scope of practice.

25% Instructs inmate workers in routing housekeeping procedures and maintains responsibility for their custody while engaged in these tasks. Conducts custodial/security inspections of the work area. Conducts inmate searches and escorts inmates. Responds to emergency custodial/medical alarms and administers first aid and cardiopulmonary resuscitation.

25% Conducts inventories of controlled substances, equipment, instruments, needles, and syringes. Prepares, administers, and records oral and intramuscular medicines.

10% Collects specimens, conducts sanitation inspections, and prepares reports on findings.

5% Maintains current 832 PC requirements, maintains Licensed Vocational Nurse license. Attends a minimum of 40 hours of In-Service Training annually.

2. The "Physical Demands" of the job classification include: constantly (2/3 or more of workday) hand/wrist movement, hearing/speech to assess patients and maintain awareness and safety, sight to review records, identify medications, assess patients and maintain awareness and safety; frequently (1/3 to 2/3 of workday) standing, walking, sitting, lifting, reaching in front of body, pushing, pulling, fine finger dexterity; and occasionally (1/3 or less of workday) carrying, bending/stooping, reaching overhead, climbing, balancing. An MTA is not required to crawl, or drive cars/trucks/forklifts/other moving equipment.

3. At hearing, respondent did not dispute CDCR's Duty Statement for an MTA. He added that depending on the situation, he might have to carry an inmate by himself. He also had to assist in restraining inmates. During a period of six months in 2004 to 2005, respondent performed supervisor duties. This job involved management of personnel, rather than his regular day-to-day duties.

4. In addition to respondent's job duties set forth in Findings 1 to 3, respondent added that he opened the "sick line" and would also have to take medications to patients on "lockdown." He is required to climb stairs when delivering medications. Respondent was involved in several riots, and had to move injured persons out of the danger zone. Once, he was required to move an inmate 25 yards. Inmates weigh up to 250 pounds. Respondent was also involved in cell extractions. He assisted correctional officers in removing inmates from their cells. He asserted that "they" would sometimes have 12 extractions in a day. The correctional officers would get tired, and he would help. Respondent is familiar with the duties of a correctional officer. "We go through the same training except [we do not] use the baton. I had 10 years to observe what correctional officers did on the job."

Respondent's Employment History

5. Respondent began his employment as an MTA at CDCR in or about 1996. At the time respondent filed his application for disability retirement, he was employed as an MTA at Corcoran State Prison. Respondent performed supervisor duties as set forth in Finding 3. By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151. Respondent last worked on September 23, 2006, having been placed on temporary total disability by his treating physician for a low back injury.

Respondent's Disability Retirement Application

6. On May 1, 2007, CalPERS received respondent's Disability Retirement Election Application (Application). In response to the Application's question about his specific disability, and when and how it occurred, respondent stated, "Nerve Impingement lower back. This injury occurred on 05/01/06. When I was responding to an alarm, at the California State Prison, Corcoran. While responding to the alarm, I twisted my back, causing my injury."

7. On December 27, 2007, Donna Ramel Lum, Chief of the Benefit Services Division, notified respondent that his Application had been denied based upon a finding that his orthopedic (low back), was not substantially disabling. Respondent timely appealed the denial.

Respondent's Injuries, Treatment and Assistance

8. At hearing, respondent confirmed that on May 1, 2006, respondent responded to an alarm on the prison yard. As he heard the alarm, respondent got out of his chair, reached over to the left side, and grabbed his bag on the floor. His bag weighed approximately 30 to 40 pounds. Respondent felt back pain. Respondent continued and completed the call, which was determined to be a false alarm. Later that day and the next day, respondent started to experience pain in his lower back, which worsened. Unable to resolve his back pain with treatment by his primary care physician, Dr. Hutchison in Selma,

respondent filed a worker's compensation claim and began seeing worker's compensation physicians in Hanford, California.

9. On June 9, 2006, in relation to his worker's compensation claim, respondent was first treated by Paul Rudolph, DO, (Dr. Rudolph) for his back pain. After the first examination, Dr. Rudolph prescribed Darvocet and provided chiropractic treatment. Dr. Rudolph deemed respondent able to perform his usual work, and respondent was released to return to work. Respondent continued working without restrictions until September 5, 2006, when, due to lack of improvement in symptoms, Dr. Rudolph determined that respondent's condition was one of full temporary disability from September 5 to September 11, 2006, and took him off of work.

10. On October 10, 2006, respondent was referred by Dr. Rudolph to undergo a Magnetic Resonance Imaging (MRI) scan by Martin Rauch, M.D. (Dr. Rauch). Dr. Rauch performed an MRI Lumbar Spine Without Contrast examination on respondent. Dr. Rauch concluded that respondent had "L3-4 degenerative disc changes with 3 mm right paracentral disc protusion," and "L5-S1 right foraminal disc broad based disc protrusion producing some mass effect on the right L5 foraminal nerve root sleeve."

11. At the request of Dr. Rudolph's partner, John M. Riddle, M.D., (Dr. Riddle), respondent was evaluated on or about December 11, 2006, by neurosurgeon Thomas E. Hoyt, M.D., FACS (Dr. Hoyt). Dr. Hoyt concluded that "It is my impression that we are dealing with a lumbar strain syndrome, sacroilitis, and a chronic low back pain. Neurologically he is normal and there are no acute sciatic findings. His MRI scan is normal as well." Dr. Hoyt determined that respondent was not a surgical candidate for his lumbar spine condition.

12. On August 20, 2007, Dr. Rudolph completed an Injury Status Report, modifying respondent's work as follows: "occasional bending or stooping; occasional lift/carry maximum 50 pounds; occasional pulling/pushing 50 pounds; unable climbing of ladders; unable crawling; unable shoveling or digging; no running or jumping." Dr. Rudolph indicated that respondent was able to return to modified work on August 20, 2007, and discharged respondent, with no further treatment anticipated.

13. On September 10, 2007, Dr. Riddle completed a Primary Treating Physician's Permanent and Stationary Report (PR-4) for respondent in respondent's workers' compensation case. In the PR-4, Dr. Riddle determined that respondent's medical condition pertaining to his back injury was permanent and stationary. Dr. Riddle checked "Yes" to the question which asked "Is the permanent disability directly caused, by an injury or illness arising out of and in the course of employment?" Dr. Riddle also checked "Yes" to the question which asked, "Is the permanent disability caused, in whole or in part, by other factors besides this industrial injury or illness, including any prior industrial injury or illness?" Dr. Riddle explained, "This patient has long standing chronic back disease. The cause of his continue [sic] trouble with mild low back pain is 95% preexisting disease and 5% acute injury on the job." Dr. Riddle made the following assessment of functional

capacity, solely for the purpose of determining respondent's ability to return to his job, and was not to be considered in the permanent disability rating: "Maximum capacities to lift and/or carry were limited to 50 or more pounds; Stand and/or Walk less than eight hours per eight hour day; Sit a total of less than eight hours per eight hour day; and Push and Pull unlimited." Under the "Activities Allowed" section of the PR-4, there are three columns: Frequently, Occasionally, and Never. Dr. Riddle checked the "Frequently" column for all of the listed activities: Climbing; Balancing; Stooping; Kneeling; Crouching; Crawling; Twisting; Reaching; Handling; Fingering; Feeling; Seeing; Hearing; and Speaking. Dr. Riddle determined that respondent was able to return to his usual occupation.

14. Respondent disagreed with the findings on the PR-4, asserting that a physician that did not examine him completed the PR-4¹, and, feeling this was inappropriate, respondent sought the care of his present primary care physician, Yash Pal Verma, M.D. (Dr. Verma) on September 20, 2007. Dr. Verma modified respondent's work status, stating, "No heavy lifting and no prolonged walking, bending or twisting."

15. On October 15, 2007, , Frederick Newton, M.D., (Dr. Newton), the agreed medical examiner in respondent's workers' compensation case, conducted a neurologic evaluation of respondent. Respondent reported to Dr. Newton his constant back pain, with radiating pain down to his left foot. Respondent experienced numbness and tingling onto the outside of his foot, and his left leg tended to fatigue. With a lot of walking, respondent indicated that he starts to limp. After running 20 to 30 yards, respondent reported that he experiences sharp left-sided low back pain. He is unable to carry out simple house chores like vacuuming or light yard work due to increased back pain. His standing tolerance is 20 to 30 minutes, walking tolerance is 30 minutes, and sitting tolerance is 60 to 90 minutes. Respondent's lifting tolerance is 50 pounds. Dr. Newton determined that respondent is neurologically intact, in that respondent did not have any motor, reflex or sensory deficit in his lower limbs. Respondent's electrodiagnostics (muscular reaction to electrical stimulus) were also normal in both limbs. Dr. Newton procured another MRI (Finding 17) in an abundance of caution, and found no evidence of progressive discopathy that would account for respondent's left leg pain. In view of the chronic persistence of respondent's various complaints, Dr. Newton requested a Pain Assessment Battery for respondent (Finding 16).

16. On October 15, 2007, respondent was referred by Dr. Newton to Sandra H. Klein, Ph.D. (Dr. Klein), who performed a pain assessment battery on respondent. Dr. Klein's results of the Pain Battery suggested that psychological factors may be affecting respondent's pain behavior and response to treatment to a moderate degree. Patients are rated on a scale from one to five with regard to the likelihood of a successful outcome, from a psychological point of view, from surgery or other traditional medical intervention. A

¹ Dr. Verma's September 20, 2007 report indicated that "respondent's regular treating physician, Dr. Rudolph, felt that respondent was still injured and had modified his work, but because the in-charge physician, Dr. Riddle felt there was nothing more to be done, respondent was forced to return to his regular job. As such, a conflict of opinion."

score of one represents the best candidate for traditional medical intervention, while a score of five represents the poorest candidate. Dr. Klein rated respondent as a "3/4."

17. On or about November 1, 2007, a lumbar spine MRI was performed by Gail M. Schlesinger, M.D., (Dr. Schlesinger), as referred by Dr. Newton. Dr. Schlesinger found disk dessication, without narrowing, at L3-L4. No nerve root compression was identified.

18. In putting together the neurological assessment, the pain battery assessment, and the lumbar spine MRI, Dr. Newton concluded that respondent sustained a lumbosacral strain with prominent sciatica. The disc changes in his lumbar spine are quite minor, and "probably unrelated to his presenting symptom complex." Dr. Newton also concluded that respondent's condition "is permanent and stationary." Dr. Newton indicated that the point of maximum medical improvement was achieved in September 2007 by Dr. Verma. Respondent would have to be "vocationally realigned." Dr. Newton advised that respondent be restricted from activities that involve heavy lifting, repeated bending, and stooping. Dr. Newton indicated that future medical care would be reasonable, limited in scope and duration. Respondent would need to see a physician three to four times a year for oversight of prescribed pharmaceuticals.

19. On October 12, 2012, Dr. Verma wrote a letter on behalf of respondent to support his workers' compensation claim with the State Compensation Insurance Fund. Dr. Verma stated that respondent had been seen by Robert G. Salazar, M.D. (Dr. Salazar), a pain management doctor, who is planning to do a pump implant for pain medication delivery to the local area. Dr. Verma indicated that respondent has had persistent pain to his low back, and respondent is not able to sit or walk for any prolonged period of time. Respondent had complaints of pain radiating to his left leg, which feels slightly weak at times. During Dr. Verma's management of respondent's back injury, respondent has been on multiple pain medications, including chronic use of opiates such as Norco. Respondent's pain is relatively controlled with his present medication, however, at the end of the day, he has increased pain, especially working as a home health nurse where he has to visit people. His current job does not involve much walking, although respondent has to travel in his car from one residence to another. Dr. Verma opined that, as a correctional officer, respondent would not be able to respond to any kind of emergency run, take down an aggressive inmate, or defend himself or another worker. After evaluating respondent's past and present condition, Dr. Salazar does not see respondent "being able to gainfully work as a correctional officer at all."

CalPERS's Expert – Kenneth L. Baldwin, M.D.

20. On October 24, 2007, Kenneth L. Baldwin, M.D. (Dr. Baldwin), conducted an independent medical examination of respondent at the request of CalPERS due to his continued low back pain from the incident of May 1, 2006. Dr. Baldwin is a board certified orthopedic surgeon. He did not testify at hearing. Dr. Baldwin obtained respondent's medical, social, occupational and treatment history, performed a physical examination, reviewed respondent's medical records, reviewed respondent's job description, and prepared a report dated October 24, 2007. According to Dr. Baldwin, respondent described his pain as

constant, localized non-radiating lumbar pain, though respondent occasionally experienced discomfort in his anterior left thigh associated with increased or sustained levels of activity. Respondent also described to Dr. Baldwin his difficulties with standing or sitting for prolonged periods of time. Respondent also reported to Dr. Baldwin that he had trouble sleeping at night.

21. On physical examination, Dr. Baldwin noted no apparent distress in respondent's general appearance; normal heel-to-toe progression, in that toe and heel walking was performed without difficulty; no signs of pain; slight guarding in range of motion; normal deep tendon reflexes and muscle strength in ankles, knees and hips; poor muscle strength in abdomen; normal sensation in L3-4, L4-5, and L5-S1; and normal range of motion in sitting and supine positions. Dr. Baldwin also noted lower extremity girth of the thigh at 47/48, and the calf at 36/36. Lastly he noted "multiple surgical scars of the right knee are visible."

22. In his October 24, 2007 report, Dr. Baldwin diagnosed respondent with "chronic low back pain." Dr. Baldwin stated:

Review of the medical records documents the absence of objective findings or substantiated diagnostic studies confirming the presence of acute or chronic conditions that would impair the examinee's ability to perform his normal activities. He was reported to be able to return to his usual work activities on 08/20/2007 by his treating physician.

Dr. Baldwin further noted:

Mr. Martinez has the physical capacity to perform all of the activities required of the job position as listed in the document, "Physical Requirements of Position/Occupational Title." ... Mr. Martinez does not demonstrate an actual or present inability to substantially perform his actual and usual job duties. There is no evidence of present disability, nor is there a suggestion that such a disability will develop in the future. While Mr. Martinez's condition may make performing certain tasks difficult by causing some pain or discomfort, there are not sufficient abnormal physical findings to suggest that the examinee would be unable to perform the usual and customary functions of the actual and present job duties. By performing the duties required of the member's job, there is no evidence that Mr. Martinez would likely experience symptoms so severe as to preclude effective performance of the activity or make further injury a medical probability ... The findings of degenerative disc disease would be considered preexisting and age-related, and not related with industrial causation ... The

condition was, more likely than not, aggravated by the incident ... The complaints of low back pain would have been present had he not been employed by the State of California.

23. On May 1, 2008, Dr. Baldwin issued a supplemental report, upon review of numerous medical records provided by CalPERS. After reviewing the supplementary medical reports, Dr. Baldwin concluded that "there is no documented evidence of objective findings supporting the conclusion that Mr. Joe Martinez is 'substantially incapacitated' for performing the usual and customary work activities required of the position of medical/technical assistant. My opinions, as report on 10/24/2007, remain unchanged."

24. On June 23, 2009, Dr. Baldwin issued another supplemental report, upon review additional medical records². Dr. Baldwin concluded that based on his evaluation of respondent on October 24, 2007, "there were no objective findings in the low back which would have precluded him from performing the job duties required for either the position of 'medical/technical assistant' or 'correctional officer.' Though his low back condition may have made performing certain tasks difficult by causing pain, there was no clinical evidence that Mr. Martinez would have likely experienced symptoms so severe as to preclude effective performance of the activities or make further injury a medical probability." Dr. Baldwin further stated that "[s]ince I have not evaluated Mr. Martinez since 10/24/2007, I cannot opine whether his present condition, as reported in his most recent medical evaluations, makes him substantially incapacitated from performing the job duties of a 'correctional officer.'"

Discussion

25. Respondent recognizes that there is a substantial difference of opinion between the State Compensation Insurance Fund Agreed Medical Examiner, Dr. Newton, and CalPERS's expert, Dr. Baldwin, as to whether respondent is substantially incapacitated from performing his duties as an MTA or correctional officer. Respondent contends that Dr. Baldwin's opinion is incomplete, and therefore, not substantial evidence, in that Dr. Baldwin has not offered his opinion as to the nature of respondent's "impairments and disabilities relating to his industrial injury and the impact of those impairments and disabilities on respondent's ability to perform all the duties required of either an MTA or correctional officer." Respondent asserts that the evaluations by his treating doctors in the worker's compensation matter were much more thorough than Dr. Baldwin's examination, and that the conclusions reached by his worker's compensation doctors present a more accurate description of respondent's disabilities and impairments related to his injury, and how those disabilities and impairments prevent him from performing his duties as a medical technical technician or correctional officer.

² Respondent presented some evidence relating to his psychiatric condition. Because respondent did not seek disability retirement based upon his psychiatric condition, this evidence is not relevant.

26. Despite respondent's contentions that Dr. Baldwin did not offer his opinion regarding respondent's impairments and disabilities, the evidence showed the contrary. Dr. Baldwin reviewed respondent's occupational history, medical history, and social history, and conducted a physical examination. In addition, Dr. Baldwin reviewed all of the numerous medical records related to respondent's medical treatment from the date of respondent's injury to June 23, 2009, when Dr. Baldwin submitted his second supplemental report. Dr. Baldwin rendered his professional opinion regarding respondent's abilities to perform his job duties, and his present disabilities, in his Independent Medical Examination Report of October 24, 2007. His opinion that respondent did not demonstrate an actual or present inability to substantially perform his actual and usual job duties did not change, as set forth in his supplemental reports of May 1, 2008, and June 23, 2009. Dr. Baldwin also formed the opinion that respondent had no present disability, nor was there a suggestion that a disability would develop in the future. (Finding 22.) It is important to note that the criteria for finding a person disabled in a workers' compensation case are different from the criteria in a CalPERS case. The information set forth in respondent's workers' compensation's reports do not show that respondent qualifies for disability retirement under CalPERS's criteria.

27. CalPERS contends that respondent's disability does not rise to the level of substantial incapacity for the performance of his duties as an MTA. In determining whether respondent was substantially incapacitated from his usual duties, CalPERS noted that it is necessary to examine respondent's duties actually and usually performed by him, not just his job description. CalPERS argues that, based on the medical evidence, any physical impairment suffered by respondent may cause some pain or difficulty performing his duties, but did not prevent him from performing the usual duties of an MTA (Findings 1 and 2). CalPERS contends that the restrictions imposed by Dr. Newton (Finding 18) were not incompatible with the physical demands of an MTA. Additionally the modified duties outlined in the August 20, 2007 report from respondent's treating physician, Dr. Rudolph, appear consistent with the physical demands of the MTA duties. CalPERS also contends that despite any physical difficulties, respondent is still capable of performing the usual and customary duties of the MTA position, as Dr. Baldwin opined. CalPERS's contentions are persuasive. The evidence showed that respondent suffered a lower back injury with pain to his low back, radiating to his left leg, and degenerative disc disease related to age. Despite respondent's impairments, he was not substantially incapacitated from his actual duties as an MTA.

28. As to respondent's ability to perform the usual duties of a correctional officer, CalPERS noted that the applicant must be "presently incapable of performing the duties of a position." Restrictions which are imposed only because of a risk of future injury are insufficient. CalPERS contends that since respondent never performed the duties of a correctional officer, any finding of substantial incapacity based on his inability to perform the correctional officer duties would be speculative. CalPERS's contention is persuasive. Respondent's job classification at the time he applied for disability retirement was that of an MTA. Therefore, the issue to be decided in this matter is whether respondent is permanently disabled or incapacitated from performing the usual duties of an MTA, not a correctional officer.

29. All the evaluating physicians agree that respondent sustained a work-related injury to his lower back on May 1, 2006, for which he underwent conservative treatments consisting primarily of physical therapy, chiropractic treatments, and medications. He was intermittently taken off work, but ultimately returned to work with restrictions. However, over the course of five years, none of the evaluating physicians, including Dr.'s Rudolph and Verma, found respondent to be substantially incapacitated from the performance of his usual and customary duties as an MTA. When viewed in light of the work restrictions from June 2006 through his disability retirement application date of May 1, 2007, respondent has not demonstrated through competent medical evidence that his orthopedic condition substantially incapacitates him from the performance of his usual and customary duties as an MTA.

LEGAL CONCLUSIONS

1. Respondent has the burden of proof to establish by a preponderance of evidence that he is "incapacitated for the performance of duty,"³ which courts have interpreted 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, 877.) Discomfort, which may make it difficult to perform one's duties, is insufficient to establish permanent incapacity from performance of one's position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability retirement. (*Hosford, supra*, 77 Cal.App.3d at p. 863.)

2. Pursuant to Government Code section 21150, members incapacitated for the performance of duty shall be retired for disability. Government Code section 20026 provides that "'Disability' and 'incapacity for performance of duty' as a basis of retirement, means disability of permanent or extended and uncertain duration, as determined by the board... on the basis of competent medical opinion." In *Mansperger, supra*, 6 Cal.App.3d at p. 873, the court construed the term "incapacitated for the performance of duties" to mean a substantial

³ Although no court construing CalPERS law has ruled on this issue, courts applying the County Employees' Retirement Law have held that the applicant has the burden of proof. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691.) CalPERS may rely on decisions affecting other pension plans when the laws are similar. (*Bowman v. Board of Pension Commissioners for the City of Los Angeles* (1984) 155 Cal.App.3d 937, 947.) In this case, Government Code section 31724 (County Employees' Retirement Law) is similar to Government Code section 21151 (California Public Employees' Retirement Law), and the rule concerning the burden of proof is therefore applicable. Furthermore, Evidence Code section 664 creates the general presumption that a public agency has performed its official duty. Here, CalPERS has fulfilled its duty to determine respondent's eligibility for disability retirement, and the burden falls on respondent to rebut the presumption of Evidence Code section 664 by proving incapacitating disability.

inability to perform the employee's usual duties. (*Id.* at p. 876.) As the court explained in *Hosford*, prophylactic restrictions 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. (*Hosford, supra*, 77 Cal.App.3d at p. 863.) An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697 [finding that a deputy sheriff was not permanently incapacitated from the performance of his duties, because "aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the [the sheriff's] condition are dependent on his subjective symptoms."].)


3. *Mansperger, Hosford* and *Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date he applied for disability retirement, he was substantially unable to perform the usual duties of an MTA due to his orthopedic (low back) condition. Respondent did not present sufficient evidence to meet this burden.

4. In sum, respondent failed to show that, when he applied for disability retirement, he was permanently and substantially incapacitated from performing the usual and customary duties of an MTA for CDCR. His application for disability retirement must, therefore, be denied.

ORDER

The application for disability retirement filed by respondent Joe C. Martinez is DENIED.

DATED: November 26, 2012



DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings