

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 S. TAYLOR and DEUEL VOCATIONAL INSTITUTION,
CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION, Respondents**

Agency Case No. 2022-0417

OAH Case No. 2022080258

PROPOSED DECISION

On December 21, 2022, Wim van Rooyen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference from Sacramento, California.

Nhung Dao, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Roy S. Taylor (Taylor) appeared and represented himself.

There was no appearance by or on behalf of respondent Deuel Vocational Institution, California Department of Corrections and Rehabilitation (CDCR). CDCR was

duly served with the Notice of Hearing in this matter. Consequently, the matter proceeded as a default hearing against CDCR pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record closed, and the matter submitted for decision on December 21, 2022.

ISSUE

Was Taylor permanently and substantially incapacitated from performing his usual and customary duties as a Material and Stores Supervisor II for CDCR on the basis of an orthopedic (back) condition at the time of filing his application for industrial disability retirement?

FACTUAL FINDINGS

Procedural History

1. Taylor was previously employed by CDCR, most recently as a Material and Stores Supervisor II at Deuel Vocational Institution. By virtue of his employment, Taylor was a state safety member of CalPERS.
2. On September 9, 2021, Taylor signed and thereafter filed an application for industrial disability retirement (IDR). The IDR application claimed disability on the basis of an orthopedic (back) condition.
3. On March 11, 2022, CalPERS determined that Taylor was not permanently and substantially incapacitated from performing his usual and customary duties as a

Materials and Stores Supervisor II for CDCR on the basis of an orthopedic (back) condition at the time he filed his application. Consequently, it denied Taylor's IDR application.

4. In an April 8, 2022 letter, Taylor appealed CalPERS' denial of his IDR application. On July 18, 2022, Keith Riddle, Chief of CalPERS' Disability and Survivor Benefits Division, in his official capacity, signed and thereafter filed the Statement of Issues for purposes of the appeal. The matter was then set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Taylor's Prior Work at CDCR

5. A CDCR Duty Statement, last revised June 2012, provides that a Material and Stores Supervisor II at Deuel Vocational Institution was responsible for clothing room and maintenance warehouse operations. That included supervising subordinate employees and inmate workers.

6. According to a Physical Requirements of Position/Occupational Title form completed by CDCR, the position required constantly supervising staff; occasionally walking on uneven ground; infrequently sitting, standing, walking, twisting at the neck and waist, handling, using a computer, and being exposed to extreme temperatures; and never or rarely lifting or carrying any weight, running, crawling, kneeling, climbing, squatting, bending at the neck or waist, reaching, pushing or pulling, power grasping, fine fingering, driving, operating hazardous machinery, being exposed to excessive noise or dust/gas/fumes/chemicals, and working at heights.

7. On August 18, 2020, Taylor sustained an injury while attempting to open a heavy roll-up door in a secured area of Deuel Vocational Institution. Following that

injury, he complained of pain in his lower back and between his shoulder blades, with pain and numbness also radiating to his buttocks and legs. He felt unable to perform his usual job duties. He worked a light duty position until CDCR could no longer accommodate his work restrictions. Taylor has since been granted a service retirement by CalPERS. He is currently receiving service retirement benefits pending the outcome of the appeal concerning his IDR application.

Independent Medical Evaluation

8. CalPERS requested Anthony Francis Bellomo, M.D., to perform an independent medical evaluation (IME) of Taylor. Dr. Bellomo testified at hearing. He has been a California-licensed physician since 1994 and is a board-certified orthopedic surgeon. He continues treating patients in private practice for various orthopedic conditions, including back and spinal conditions. He has also been performing IMEs for CalPERS since 2008.

INITIAL JANUARY 10, 2022 EXAMINATION AND REPORT

9. Dr. Bellomo first evaluated Taylor on January 10, 2022. As part of his evaluation, Dr. Bellomo reviewed Taylor's available medical records, job duty statement, and job physical requirements; obtained a history from Taylor; and performed a thorough physical examination. Dr. Bellomo authored a report of his IME dated that same day.

10. In the January 10, 2022 IME report, Dr. Bellomo diagnosed Taylor with thoracic sprain with thoracic spondylosis and chronic lumbar sprain with lumbar spondylosis and radiculopathy. He observed that, despite conservative treatment with physical therapy, medication, and epidural steroid injections, Taylor continued to be symptomatic. Upon physical examination, Taylor appeared to be "in some distress"

sitting on the examination table. He had thoracic and lumbar spine tenderness as well as significantly reduced range of motion. There was also evidence of paraspinous muscle spasming. Taylor had difficulty ambulating and was unable to heel and toe walk.

11. Taylor's neurological examination revealed normal sensation, muscle strength, and reflexes in his lower extremities. Additionally, reports from MRIs of Taylor's thoracic and lumbar spine noted mostly normal age-related degenerative changes. Nevertheless, based on his other clinical findings on physical examination, Dr. Bellomo opined that Taylor was permanently and substantially incapacitated from performing his usual and customary work duties due to his orthopedic (back) condition. He noted that Taylor was unable to perform job duties that require standing, walking, climbing, bending at the waist, twisting at the waist, squatting, running, crawling, lifting or carrying, and pulling or pushing. He further opined that Taylor's substantial incapacity began in August of 2020 when Taylor was injured.

SUPPLEMENTAL REPORTS

12. Following Dr. Bellomo's January 2022 examination of Taylor, CalPERS provided Dr. Bellomo with *sub rosa* surveillance videos of Taylor and accompanying surveillance reports created by: (1) Adam Gomez Jimenez, a Special Agent with CDCR's Office of Internal Affairs, Worker's Compensation Fraud Unit; and (2) VRC Investigations (VRC) on behalf of the State Compensation Insurance Fund.¹ The

¹ Mr. Jimenez testified at hearing, and his surveillance videos and reports were admitted for all purposes. No representative from VRC testified at hearing, and the

surveillance videos primarily depict Taylor engaging in various activities at the Arnaiz Softball Complex in Stockton, California, including preparing and maintaining the softball fields while standing on and driving a specialized vehicle, carrying and setting up an easy-up canopy, carrying and lifting up wooden pallets, pushing a small office-type refrigerator on a dolly, loading and unloading items from a vehicle, bending and lifting storage containers, barbecuing food and cleaning grills, using a leaf blower, sweeping with a broom, carrying trash bins, and installing trash bags.

13. Dr. Bellomo reviewed the surveillance videos and reports and drafted supplemental IME reports dated February 24, 2022, and August 9, 2022. In his supplemental reports, Dr. Bellomo changed his prior opinion and concluded that Taylor was not permanently and substantially incapacitated from performing his usual and customary work duties. He explained that the surveillance videos were a substantial factor in changing his prior opinion:

The member was seen standing and walking for extended periods of time without any difficulties, bending fully at the waist and twisting at the waist without difficulties in addition to lifting and carrying apparently heavy objects.

As depicted in the video footage, Taylor “did not appear to be debilitated in any way.”

By contrast:

[T]he member had a significantly different presentation on examination with difficulty with ambulation as well as loss

VRC surveillance videos and report were admitted as administrative hearsay only pursuant to Government Code section 11513, subdivision (d).

of range of motion. This would indicate that there was evidence of significant symptom magnification during the examination.

14. At hearing, Dr. Bellomo explained that certain portions of the physical examination involve a more subjective component. For example, findings of tenderness or limited range of motion depend at least in part on the examinee's subjective reports, evaluated in the context of all the other clinical findings and evidence. Although Dr. Bellomo initially credited Taylor's subjective reports at the time of the physical examination, they were later significantly undermined by the video surveillance footage.

Taylor's Evidence

15. Taylor testified at hearing. He is presently 68 years old and had a lengthy career in the private sector prior to joining state service. He first worked as a production supervisor for a local hot dog meat company for 37 years. He was then employed by United Rentals for approximately one and a half years before starting at CDCR. Taylor served approximately eight and a half years at CDCR. He has always been a hard worker, going "over and above."

16. Following his injury at work, Taylor found the worker's compensation process very frustrating. The first assigned doctor told Taylor that he was "just old with arthritis," and should take ibuprofen and return to work. Taylor was dissatisfied with that doctor's opinion because Taylor "could barely get out of the car." After Taylor got a worker's compensation attorney, Taylor started treatment with a new doctor, Frank Fine, M.D. Dr. Fine prescribed physical therapy, daily stretching, muscle relaxers, and

epidural injections. Dr. Fine also imposed work restrictions, which CDCR was unable to accommodate long term.

17. Taylor does not currently take prescription pain medication. He takes over-the-counter ibuprofen and performs a daily stretching regimen to control his pain.

18. Taylor does not dispute that he engaged in the activities depicted in the surveillance videos. In 1988, he started a non-profit organization that operates a competitive girls' softball program and secures academic scholarships for the players. He currently serves as the program's director and treasurer and also manages the program's operations at the Arnaiz Softball Complex. Because Taylor has insufficient staff to help him, he "did the things that needed to be done" for the program. He also has "good days and bad days." Although he is generally able to perform the depicted activities, he can only do so when he takes ibuprofen and then still experiences significant pain.

19. Taylor questions Dr. Bellomo's opinion regarding his ability to work. Taylor reasons that Dr. Bellomo is not his treating physician and only spent approximately one hour evaluating Taylor. Dr. Bellomo also only reviewed the reports of Taylor's MRIs and not the MRI images themselves. Additionally, Dr. Bellomo does not know how heavy the items were that Taylor picked up and carried as depicted in the video surveillance footage.

LEGAL CONCLUSIONS

1. As the applicant, Taylor has the burden of proving by a preponderance of the evidence that he is entitled to IDR benefits. (Evid. Code, § 500 ["Except as otherwise

provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"]; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) A preponderance of the evidence means "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.)

2. "'Disability' and 'incapacity for performance of duty' as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion." (Gov. Code, § 20026.)

3. Courts have interpreted the phrase "incapacitated for the performance of duty" 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.) It is not necessary that the person be able to perform any and all duties, because public policy supports employment and utilization of the disabled. (*Schrier v. San Mateo County Employees' Retirement Association* (1983) 142 Cal.App.3d 957, 961.) Furthermore, mere discomfort, which may make it difficult for one to perform his duties, is insufficient to establish incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

4. Here, Dr. Bellomo, a qualified orthopedic surgeon, reviewed Taylor's medical records, obtained Taylor's history, conducted a thorough physical examination, and reviewed the surveillance videos and reports. Contrary to Taylor's argument, Dr. Bellomo spent a reasonable amount of time evaluating Taylor and a

prior treatment relationship is not a prerequisite to forming a valid medical opinion. CalPERS frequently solicits opinions from impartial, non-treating evaluators to assist with adjudicating applications from members. Additionally, Taylor's argument that Dr. Bellomo does not know how heavy the items were that Taylor picked up and carried as depicted in the video surveillance footage is unpersuasive. Dr. Bellomo is capable of making reasonable estimates of weight based on the type and nature of the items. In any event, Taylor's prior job rarely or never required lifting or carrying any weight.

5. After considering all the evidence, Dr. Bellomo opined that Taylor is not substantially incapacitated. That opinion is consistent with the MRI report findings; certain portions of the physical examination; and the surveillance videos, which depict Taylor engaged in numerous activities that contradicted his performance on the more subjective portions of the physical examination. Even if he experienced some discomfort or needed to take ibuprofen to perform the activities, that does not render him substantially incapacitated under the applicable law.

6. Moreover, even if Taylor's lay testimony is fully credited, he failed to offer a contrary competent medical opinion to support his application. He did not offer a report or testimony by his treating physician Dr. Fine or any other provider. IDR benefits cannot be granted on lay evidence alone.

7. In sum, Taylor has not demonstrated by a preponderance of the evidence that he was permanently and substantially incapacitated from performing his usual and customary duties as a Material and Stores Supervisor II for CDCR on the basis of an orthopedic (back) condition at the time of filing his IDR application. Thus, his appeal must be denied.

ORDER

The appeal of respondent Roy S. Taylor is DENIED. CalPERS' decision to deny his application for industrial disability retirement is AFFIRMED.

DATE: January 13, 2023

Wim van Rooyen

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings