

BEFORE THE BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal
Concerning the Application of
Government Code Section 21417
to the Industrial Disability Retirement
Allowance of

CARL R. ROBINSON, JR.,

Respondent,

and

CITY OF DOWNEY,

Respondent.

CASE NO.: 1087
OAH NO.: L-9703132

BOARD DECISION
No. 98-01

(Precedential)

Effective June 28, 1998

This matter was heard before the Board of Administration of the California Public Employees' Retirement System at its regular meeting on [April 15, 1998](#), at [Sacramento](#), California, pursuant to the Board's determination at its meeting of [February 19, 1998](#), to decide the matter itself rather than adopt the Proposed Decision of the administrative law judge.

Respondent Carl R. Robinson was represented by Michael T. Roberts, Esq. The Respondent City of Downey made no appearance. F. Javier Plasencia, Senior Staff Counsel, appeared on behalf of the Chief Executive Officer of the Public Employees' Retirement System.

After reviewing the record, and considering arguments, the Board of Administration, adopted its own Decision as follows:

FINDINGS OF FACT

I

Respondent Carl R. Robinson, Jr. (hereafter respondent Robinson) was employed as a Police Officer by respondent City of Downey (hereafter respondent City). By virtue of his employment, respondent Robinson is a local safety member of the California Public Employees' Retirement System (CalPERS) subject to Government Code section 21151. His membership date in CalPERS is September 3, 1985.

II

Respondent Robinson applied for industrial disability retirement on or about September 14, 1995. By letter dated October 4, 1995, CalPERS requested that respondent City make a determination of his disability (Gov. Code sec. 21154). Thereafter, by letter dated March 27, 1996, respondent City certified to CalPERS its finding that respondent Robinson was disabled within the meaning of the California Public Employees' Retirement Law by reason of hypertension, and that his disability was job-related. Respondent City also noted that his disability did not meet the exceptions of Government Code section 21417.

III

Respondent Robinson's membership date was after January 1, 1980. Consequently, CalPERS staff determined that Government Code section 21417 applied in calculating his retirement benefit. Government Code section 21417 states as follows:

Notwithstanding any other provision of this part, the industrial disability retirement allowance of a member whose membership commenced after January 1, 1980, in the category of membership in which the member was serving at the time of suffering the disability or incurring the disease causing retirement for industrial disability, shall not exceed the service retirement allowance that would be payable as a result of service in that category of membership if the member's service had continued to age 55, if a patrol, state peace officer/firefighter, state safety, or local safety member, age 65, if service is subject to Section 21076, or age 63, if any other category of member.

This section shall not be applicable to a member who is subject to Section 21430, or a member whose disability results from an injury that is a direct consequence of a violent act perpetrated upon his or her person or occurs during the performance of those portions of his or her duties that are particularly hazardous and dangerous.

IV

Respondent Robinson's disability, as determined by respondent City, is job-related hypertension. In filing his claim for workers' compensation benefits, based on hypertension, respondent Robinson noted the injury occurred as a result of repetitive and cumulative trauma occurring from September 5, 1985 through September 15, 1995.

V

Respondent Robinson had a greater than five year history of hypertension. Respondent had several non-industrial factors for hypertension (family history, obesity, physical deconditioning, regular alcohol intake, previous history of smoking). Industrially, respondent Robinson experienced stress by lawsuits following a 1990 incident involving an altercation when he shot an armed suspect. After a review of the medical reports and available records, the Chief Executive Officer determined that respondent did not meet the exceptions of section 21417.

VI

By letters dated April 11, 1996 and September 5, 1996, CalPERS notified respondent Robinson that his application for industrial disability retirement was approved and that Government Code section 21417 would apply, limiting his benefits to approximately 29 percent of final compensation. Respondent Robinson was notified of his right to appeal the Chief Executive Officer's determination.

VII

By letter dated September 16, 1996, respondent Robinson filed an appeal of CalPERS' decision to apply Government Code section 21417 to the calculation of his industrial disability retirement allowance. Respondent Robinson alleged that the incident in which he discharged his weapon in an attempt to disarm a man who had a knife, and the lawsuits stemming from the incident, caused extreme stress and resulting hypertension. More specifically, he alleged that the severe hypertension was a result of the continued stress ensuing from his disarming the suspect, and that this disability was a direct consequence of a violent act perpetrated upon him or occurring during the performance of duties which were particularly hazardous and dangerous.

DETERMINATION OF ISSUES

I

In the absence of a statutory provision to the contrary, the moving party has the burden of proof, and that burden is unaffected by the general rule that pension statutes are to be liberally construed. (1 California Public Agency Practice, sec. 39.03 [9].)

In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, the Court of Appeal considered the issue of burden of proof in an administrative hearing concerning retirement benefits, and found as follows: "As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence."

II

Respondent Robinson argues that the rule of liberal construction of pension statutes should be applied to this matter in interpreting Government Code section 21417, and that he should be granted the relief he seeks. However, for that rule to apply he must first show that the statute is ambiguous.

Respondent Robinson's reliance on the liberality to be accorded to pension legislation is misplaced. In *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, [35 Cal.Rptr.2d 574] (discussed *infra*), the court rejected the argument that the rule of liberal construction should be relied on in interpreting section 21417. The court held that "While that rule is an aid to construction, it cannot vest a statute with a meaning it clearly lacks." (Id. at p. 545.)

The Supreme Court has considered the rule of liberal interpretation. In *City of Huntington Beach v. Board of Administration, Public Employees' Retirement System* (1992) 4 Cal.4th 462, at page 472, the Court addressed this principle as follows:

We take no issue with the general rule that ambiguities should be resolved in favor of the employee. We observe, however, that 'the purpose of this rule is to effectuate the legislative intent which, in this case is express.' We therefore adhere to the principle that the rule of liberal construction 'should not be blindly followed so as to eradicate the clear language and purpose of the statute and allow eligibility for those whom it was obviously not intended.

III

Respondent Robinson's disability retirement benefits are limited by section 21417, unless he falls within one of the specified exceptions. Section 21417 expressly provides that the limit does not apply to:

[A] member whose disability results from an injury which is a direct consequence of a violent act perpetrated upon his or her person or occurs during the performance of those portions of his or her duties which are particularly hazardous and dangerous.

(Emphasis added.)

A fundamental principle of statutory construction requires, wherever possible, giving effect to every word and clause in a statute so that no part or provision will be useless or meaningless. The courts presume that every word, phrase, and provision of a statute were intended to have some meaning and perform some useful function. (58 Cal.Jur.3d (1973) Statutes, sec. 105, pp. 479-480.)

IV

To come under the first exception of section 21417, a member's disability must result from an injury that is a direct consequence of a violent act perpetrated upon his or her person. Consequently, any construction of section 21417 must also address the meaning of "direct consequence." Black's Law Dictionary (Revised Fourth Edition (1968) at pp. 546 -547) defines "direct" as follows:

Immediate; proximate; by the shortest course; without circuitry; operating by an immediate connection or relation, instead of operating through medium; the opposite of indirect. (Citations omitted.)

The phrase "direct consequence" means that the disability must be the direct and immediate result of a violent act perpetrated on his or her person. A cumulative injury or condition does not meet this exception.

Respondent Robinson's shooting incident occurred in 1990. Although there is evidence of a violent act when respondent Robinson reportedly disarmed a man who had a knife in his possession, it was the suspect who was shot and not respondent Robinson. There was no violent act perpetrated on Mr. Robinson. Furthermore, there is no evidence that Robinson was disabled by an injury which was a direct consequence of a violent act perpetrated on him. There was no disability which resulted from an injury that was a direct and immediate consequence of a violent act perpetrated upon his person. Respondent Robinson continued to do patrol work until October 1995, and just prior to that, in September 1995, he applied for disability retirement.

The disability in this case arose long after the alleged act and is both indirect and cumulative. Accordingly, Mr. Robinson does not meet this first exception.

V

To fall within the second exception of section 21417, a member must establish that his or her disabling injury occurred during the performance of those portions of his or her duties which are particularly hazardous and dangerous.

By including the qualifying word "particularly" in the phrase, the Legislature clearly meant to require more than the ordinary hazards and dangers of the position. The court in *People v. Smith*, 1979, 94 Cal.App.3d 433, interpreting the phrase "particularly vulnerable" as used in the California Rules of Court, rule 421(a)(3), defined the term "particularly" as "...in a special or unusual degree, to an extent greater than in other cases." That definition is very much in agreement with the definition found in an ordinary dictionary for the word "particularly". In fact, the definition in the unabridged version of Webster's Third New International Dictionary uses exactly the same words as the court in *People v. Smith*.

Similarly, the second edition of the Websters New World Dictionary defines particularly as “especially”, “unusually” and “extraordinarily.”

Except for the one incident when respondent Robinson subdued a suspect with a weapon, the evidence reveals no incidents that were “in a special or unusual degree” or “to an extent greater than in other cases” more hazardous and dangerous than the ordinary hazards and dangers that his job required.

Section 21417 further requires that the disability must have “occurr[ed] during” the “performance of those portions of his or her duties which are particularly hazardous and dangerous.” The use of the word “portion” requires that the purportedly “hazardous and dangerous” activity which caused the disability be compared to the general degree of hazard and danger required by the member’s position. Mr. Robinson was not disabled (i.e. the disability did not occur) at the time that he was involved in the shooting incident.

Had the Legislature intended to carve out an exception for members whose injuries occurred in the course of hazardous and dangerous duties, it would have done so. Instead, it created an exception only for cases in which injuries occur during those portions of duties which are particularly hazardous and dangerous.

Mansell, supra, is the only appellate case to date interpreting Government Code section 21417. In *Mansell*, the issue was whether the requirement that Mansell move boxes containing “potentially destructive instruments,” in her prison classroom, constituted the performance of “particularly hazardous and dangerous portions of her duties.” Mansell argued that if she had allowed the inmates to move the boxes, they could have stolen the scissors or razor blades from the boxes and used them to harm her or other individuals. She argued that she sought to protect herself and others from potential harm that might arise should the inmates steal such instruments.

The court rejected Ms. Mansell’s argument and held that the cause of the injury that led to her disability did not meet the exception. It held:

The argument is unpersuasive. Mansell errs in focusing on the hazards she sought to prevent by moving the boxes personally. The issue under section 21292.6 [now 21417] was whether the injury occurred “*during* the performance of those portions of [her] duties which are *particularly hazardous and dangerous*.” (21292.6, italics added.) The mere act of moving boxes was not particularly more dangerous than engaging in such activity in any other setting.

Under Mansell’s interpretation, the statute would be emasculated. Virtually any employee activity within the confines of a prison would be deemed particularly hazardous and dangerous due to the potential dangers in that setting.

Mansell, supra, 30 Cal.App. 4th at p. 545.

The disabling injury must occur while performing particularly hazardous and dangerous duties which are actual and present and not to merely have the potential of being particularly hazardous and dangerous.

There is no evidence to suggest that respondent Robinson was doing anything other than performing his usual duties at all times leading up to the diagnosis of hypertension. The job of all police officers carries a degree of risk because of the very fact that they are engaged in law enforcement activities. The statute does not contemplate that respondent Robinson's usual duties of law enforcement, without more, would be considered a "particularly hazardous and dangerous" "portion" of his duties.

VI

Respondent Robinson failed to establish that his disability resulted from an injury that was a direct consequence of a violent act perpetrated upon his person or occurred during the performance of those portions of his duties which are particularly hazardous and dangerous.

ORDER

1. Respondent Robinson failed to establish that he qualified for any of the exceptions to Government Code section 21417.
2. Respondent Robinson's request for an exception under Government Code section 21417 is denied.
3. This Decision is certified for publication as a Precedential Decision in its entirety. (Government Code section 11425.6.)

I certify that on May 20, 1998, The Board of Administration, California Public Employees' Retirement System, at its meeting at [Sacramento](#), California, made and adopted the foregoing Decision.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
JAMES E. BURTON, CHIEF EXECUTIVE OFFICER

BY

BARBARA HEGDAL

ASSISTANT EXECUTIVE OFFICER