

DEPARTMENT: Personnel

BY: Richard J. Benson

PHONE: 966-3222

RECOMMENDED ACTION AND JUSTIFICATION:

09-276

Accept the Administrative Law Judge's (ALJ) proposed decision, with technical changes as delineated, to set aside the disability retirement of Bryce Johnson effective June 10, 2009. After hearing additional evidence, the ALJ determined that Johnson was not incapacitated to perform his duties as a Deputy Probation Officer III on April 3, 2007.

The County received medical evidence from Johnson's physician just days after the first hearing which indicated that Johnson could not physically perform in his position as a Deputy Probation Officer; this evidence was presented to the ALJ at the second hearing. Shortly before the second hearing, however, that same physician changed his opinion and testified at the hearing that Johnson was fit to return to work. After hearing all of the evidence, the ALJ issued his proposed decision which, in essence, stated that Johnson was not disabled for purposes of retirement. However, the proposed decision incorrectly focuses on the actions of the County in filing the application with CalPERS for disability retirement, rather than the Board's Resolution finding Johnson incapacitated from the performance of his duties with the County on April 3, 2007. County Administration's act of filing an application for disability retirement with CalPERS on behalf of an employee is a ministerial act which the ALJ does not have jurisdiction to review. The ALJ's jurisdiction is limited to reviewing the adjudicatory action of the Board in finding Johnson disabled for purposes retirement. It is recommended the Board accept the ALJ's proposed decision, with the technical changes to reflect the Board's decision to retire Johnson for disability as outlined in the attached proposed decision, and direct staff to follow the procedural requirements of the appropriate Government Code and Penal Code sections which govern the required fitness for duty of peace officers in this State and further, follow CalPERS' requirements to reverse the previous disability retirement and to reinstate Johnson to duty from a disability retirement.

BACKGROUND AND HISTORY OF BOARD ACTIONS:

The Board of Supervisors adopted Resolution No. 07-119 on April 3, 2007 approving the disability retirement of Bryce Johnson for physical and psychological reasons. Johnson appealed the disability retirement to the Administrative Office of Hearings and the matter was heard by an ALJ. Subsequent to the hearing and before the ALJ issued his proposed decision, additional medical evidence was received by the County that indicated Johnson could not perform his usual and customary duties. The ALJ issued his proposed decision without reviewing the additional medical evidence and determined that Johnson's disability retirement should be set aside, i.e., Johnson was not incapacitated to perform his duties as a Deputy Probation Officer III. The Board rejected the ALJ's proposed decision on August 5, 2008 because the County had this medical evidence from Johnson's physician that he could not perform in the capacity of a Deputy Probation Officer III. The Board returned the matter back to the ALJ so that the ALJ could take additional medical evidence relative to Johnson's physical fitness for duty.

ALTERNATIVES AND CONSEQUENCES OF NEGATIVE ACTION:

The other alternatives that the Board can choose from other than what is being recommended are: 1) adopt the decision in its entirety; 2) reject the proposed decision and refer the case back to the ALJ for additional evidence; or 3) reject the proposed decision and the Board can decide the case itself based upon the record with or without additional evidence. Choosing one of these other alternatives is not in the best interests of the County at this time.

Financial Impact? () Yes () No Current FY Cost: \$ Annual Recurring Cost: \$

Budgeted In Current FY? () Yes () No () Partially Funded

Amount in Budget: \$

\$

List Attachments, number pages consecutively

Add'l Funding Needed: \$

\$

ALJ's Proposed Decision with amendments

Source:

Internal Transfer _____
 Unanticipated Revenue _____ 4/5's vote
 Transfer Between Funds _____ 4/5's vote
 Contingency _____ 4/5's vote
 () General () Other

CLERK'S USE ONLY:

Res. No.: 09-276 Ord. No. _____
 Vote - Ayes: 5 Noes: _____
 Absent: _____

AMW Approved
 () Minute Order Attached () No Action Necessary

The foregoing instrument is a correct copy of the original on file in this office.

Date: _____
 Attest: MARGIE WILLIAMS, Clerk of the Board
 County of Mariposa, State of California

By: _____
 Deputy

COUNTY ADMINISTRATIVE OFFICER:

Requested Action Recommended
 No Opinion
 Comments:

CAO: *AGB*

BEFORE THE
BOARD OF SUPERVISORS
COUNTY OF MARIPOSA
STATE OF CALIFORNIA

In the Matter of the Involuntary Disability
Retirement Application of:

OAH No. 2007080558

BRYCE JOHNSON,

Respondent.

PROPOSED DECISION

This matter was heard before Trevor Skarda, Administrative Law Judge, Office of Administrative Hearings, State of California, on February 6, 2008, in Sacramento, California.

Alison Alpert, Attorney at Law, represented the Board of Supervisors of the County of Mariposa (Mariposa County).

Steven W. Welty, Attorney at Law, represented appellant Bryce Johnson (respondent).

At the request of the parties, the record was left open for the parties to submit written closing arguments and complete hearing transcripts. Mariposa County's closing argument was received on April 4, 2008, and marked as Exhibit 52. Respondent's closing argument was received on April 3, 2008, and marked as Exhibit E. Thereafter, the record was closed and the matter submitted on April 4, 2008.

On May 2, 2008, a proposed decision was issued by the undersigned Administrative Law Judge favorable to respondent Bryce Johnson. On August 5, 2008, Mariposa County rejected the decision and referred the matter back to the ALJ to take additional evidence pursuant to Government Code section 11517(c)(2)(D). Thereafter, Mariposa County filed a First Amended Statement of Issues.

The hearing on the First Amended Statement of Issues convened before the undersigned Administrative Law Judge on February 9 and 10, 2009.

Frances E. Rogers, Attorney at Law, represented Mariposa County.

Steven W. Welty represented respondent.

At the request of the parties, the record was left open for the parties to submit written closing arguments and complete hearing transcripts. Mariposa County's closing argument was received on April 17, 2009, and marked as Exhibit 81. Respondent's closing argument was received on April 16, 2009, and marked as Exhibit I. Thereafter, the record was closed and the matter submitted for decision on April 17, 2009.

ISSUE

Does respondent have a psychological and/or physical condition which incapacitates him from performing his usual duties as a Deputy Probation Officer III for Mariposa County?

FACTUAL FINDINGS

Procedural History

1. On September 26, 2006, Mariposa County filed with the California Public Employees' Retirement System (CalPERS) a Disability Retirement Application on behalf of respondent Bryce Johnson requesting a disability retirement from his position as Deputy Probation Officer III with Mariposa County. Mariposa County's application is now pending before CalPERS.
2. On April 3, 2007, Mariposa County's Board of Supervisors acting on behalf of Mariposa County issued Resolution 07-119. In the resolution, Mariposa County determined that appellant was "incapacitated within the meaning of the Public Employees' Retirement Law for performance of his duties in the position of Deputy Probation Officer III." The Resolution further stated that appellant would be "separated from his employment ... after the expiration of his leave rights ... effective March 31, 2007."
3. Respondent appealed Mariposa County's decision that he was incapacitated for performance of his duties in the position of Deputy Probation Officer III in a letter dated April 30, 2007.
4. Mariposa County served a Statement of Issues and other documents, including a blank Notice of Defense, on respondent on July 30, 2007. Respondent timely filed a Notice of Defense and this hearing ensued on February 6, 2008.
5. ALJ Trevor Skarda filed a proposed decision. ALJ Skarda found that cause was not established to sustain Mariposa County's determination that respondent was

incapacitated for the performance of his duties in the position of Deputy Probation Officer III due to a *psychological* condition.¹

6. On August 5, 2008, Mariposa County rejected the decision and referred the matter back to the ALJ to take additional evidence pursuant to Government Code section 11517(c)(2)(D).

7. On September 2, 2008, Mariposa County filed a First Amended Statement of Issues. The First Amended Statement of Issues alleges for the first time that respondent was incapacitated for the performance of his duties in the position of Deputy Probation Officer III due to both a physical and a psychological condition.

8. Respondent timely filed a Notice of Defense and this hearing ensued on February 9 and 10, 2009.

Respondent's Employment History

9. Respondent has been employed by Mariposa County in the Probation Department continuously since September 2, 1986. He has held several positions in the Probation Department since he was hired, including Deputy Chief Probation Officer.

10. In March 2002, Gail Neal was promoted to Chief Probation Officer (CPO). Respondent had a poor working relationship with Gail Neal before she was promoted to CPO, and the relationship deteriorated further after her promotion. Respondent filed several complaints and grievances about CPO Neal's promotion process and Neal's conduct as CPO. Respondent also filed a harassment complaint against Neal.

11. In August 2004, Mariposa County's Probation Department was reorganized at the behest of Chief Neal and two existing Deputy Chief Probation Officer positions were eliminated and consolidated into one Assistant Chief Probation Officer (ACPO) position and one Deputy Probation Officer III position. Respondent applied for the ACPO position, but another individual was hired.

12. Respondent requested and was granted a four week leave for stress beginning on September 13, 2004. Respondent's treating physician, Dr. Amador, prescribed the leave of absence. On October 25, 2004, Dr. David Browne, another treating physician, extended respondent's leave to April 1, 2005. Thereafter, Dr. Browne continued to extend respondent's leave until February 1, 2006.

¹ The Statement of Issues contained no factual allegations regarding respondent's *physical* condition as a basis for Mariposa County's action. Likewise, no evidence regarding respondent's physical condition was presented or admitted at the first hearing – and Mariposa County did not proffer any. The sole issue was whether respondent was incapacitated for the performance of his duties in the position of Deputy Probation Officer III due to a *psychological* condition.

13. In April 2006, Mariposa County, upon the recommendation of Dr. Richard Blak who cleared respondent to return to work, asked respondent to return to work as a Deputy Probation Officer III on May 1, 2006. Mariposa County later rescinded its request. Respondent has not yet returned to work.

Duties of a Deputy Probation Officer III

14. Dr. Richard Blak, who performed a fitness-for-duty evaluation of respondent at the request of Mariposa County in February 2006, testified persuasively regarding the duties of a Deputy Probation Officer III. He explained that the duties include: (1) conducting background investigations, also called probation officer reports, of individuals accused of crimes; (2) interviewing individuals who are charged with crimes to identify risk factors and to determine background issues; (3) making recommendations to courts relative to sentencing; (4) supervising juveniles and adults who have been placed on probation; (5) making home visits; (6) training other officers on the use of firearms; and, (7) other administrative duties related to tracking conduct and reporting said conduct to courts.

Competent Medical Opinions regarding Respondent's Psychological Disability

15. As developed below, Mariposa County is required to establish that respondent is disabled based on competent medical opinions. Two psychologists provided competent medical opinions and both ultimately concluded that respondent *is not* disabled and that he can return to work as a Deputy Probation Officer III.

Dr. Richard Blak

16. Dr. Richard Blak holds a bachelor's degree, a master's degree and Ph.D. in psychology from Wayne State University. Dr. Blak specializes in forensic psychology. He has maintained a clinical practice in Fresno, California since 1983. From 1980 to 1987, Dr. Blak was the Director of Psychological Services for the Fresno Sheriff's Department. He has conducted approximately 240 fitness-for-duty evaluations of peace officers in the State of California at the request of the employer, and approximately 10 at the request of the employee. Dr. Blak has conducted fitness-for-duty evaluations for Mariposa County Sheriff's Department for 24 years.

17. Dr. Blak evaluated respondent on February 23, 2006, at the request of Mariposa County. Dr. Blak's evaluation consisted of completion of a background history questionnaire, a mental status examination, and administration of the Minnesota Multiphasic Personality Inventory II (MMPI II), which is a standard psychological inventory.

18. Dr. Blak drafted a report of his findings dated February 23, 2006. Dr. Blak determined that respondent was fit for duty as a deputy probation officer. However, he also recommended that Mariposa County provide an intermediary between him and his supervisor, CPO Gail Neal.

19. In April 2006, Mariposa County requested clarification from Dr. Blak. Mariposa County inquired, in pertinent part, whether Dr. Blak was “imposing a medical opinion regarding an intermediary.”

20. By letter dated April 17, 2006, Dr. Blak clarified that respondent was not disabled. He also explained that he was not imposing a medical restriction. Dr. Blak suggested an intermediary between respondent and CPO Neal for the following reasons:

The opinion rendered by me on 02-23-06, had to do with a suggestion in regard to “limitations” relative to the interaction between DPO Johnson and CPO Neal. Given this evaluator’s understanding of the history of the difficulties between the two parties, and the inference that this negative friction between the two led to a lack of fitness for duty for Mr. Johnson, it seemed prudent to provide another link in the chain of the command between the two.

Dr. Blak further clarified that the “limitation” of an intermediary between respondent and CPO Neal should be in effect for 90-days “to allow for both parties to adjust to the re-entry of DPO Johnson to the work flow.”

21. Dr. Blak testified at the hearing. Regarding his recommendation for a 90-day intermediary, he explained that should Mariposa County determine that an intermediary was not possible, he would “come to the conclusion that [respondent] was fit, and [he] would not feel happy about them not following [his] recommendations, but it was not mandatory.”

Dr. Karen A. Hutchinson

22. Dr. Karen A. Hutchinson, Ph.D., is a board-certified psychologist. She received a Ph.D. from the Professional School of Psychology in 1992. She was licensed as a marriage family therapist (MFT) in 1976, as a registered nurse in 1970, and as a licensed psychologist in 1998. She was licensed as a Qualified Medical Evaluator in 1999. Dr. Hutchinson specializes in workers’ compensation evaluations (qualified medical evaluations or QME), and gastric bypass pre-surgical clearance evaluations. She also maintains a small psychotherapy practice.

23. Dr. Hutchinson first examined respondent at respondent’s attorney’s request in connection with an application for workers’ compensation benefits, on November 15, 2005. Her evaluation consisted of an interview of the patient, a mental status observation and a life-history review, and a medical record review. She also administered psychological tests, including the Pain Appreciation Test, the Pain Questionnaire, the Wahler Physical Symptoms Inventory, and the Live Change Index Impact of Events Scale. Finally, Dr. Hutchinson administered personality tests including the MMPI-II, the Millon Clinical Multiaxial Inventory-III (MCMI-III), the Bell Object Relations and Reality Testing Inventory, and the Intellectual Screening Test.

24. Dr. Hutchinson prepared a report of her findings five months later on April 18, 2006. Based on her November 15, 2005 evaluation and record review, she determined that respondent had a “prophylactic permanent work restriction against returning to law enforcement,” which means that under the workers’ compensation law, she believed that he could not return to work. She did not make any determination of whether respondent was disabled under disability retirement standards. Dr. Hutchinson explained that she was “not familiar with those retirement standards.”

25. Dr. Hutchinson examined respondent a second time on May 12, 2006. Her second evaluation of respondent included a clinical interview, mental status observations, a life history update, and a second administration of the MMPI-II and the MCMI-III. She also reviewed additional medical records, including another workers’ compensation examination conducted by another doctor on January 23, 2006. Based on her evaluation and record review, Dr. Hutchinson opined that respondent could return to work. At the hearing, she explained:

[When I re-evaluated him in May 2006] ... he looked really good. He was not anxious, he was not depressed, ... he felt he could work with Ms. Neal ... [On the] psychological testing on the second evaluation, he had improved considerably. ...

26. Mariposa County argued that Dr. Blak’s first report recommending a 90-day intermediary, and Dr. Hutchinson’s first evaluation report establish that respondent has a disability and that he is currently unable to perform the usual duties of a deputy probation officer. Mariposa County’s arguments were not persuasive, because both experts credibly testified that respondent could return to work as of May 2006. Indeed, both provided their opinions *before* Mariposa County applied for disability retirement on behalf of respondent.

27. Mariposa County did not present competent medical evidence to verify that respondent had a permanent *psychological* disability which prevented him from performing the usual duties of deputy probation officer at the time it ~~filed the application on respondent's behalf~~ ^{retired respondent for disability} in April 2007. Indeed, the only competent medical evidence it had at that time came to the opposite conclusion, that respondent had for some time been fit to return to duty.

Competent Medical Opinions regarding Respondent's Physical Disability

28. As developed below, Mariposa County is required to establish that respondent is disabled based on competent medical opinions. Regarding whether respondent was physically disabled, two medical doctors provided competent medical opinions. Neither opined that the respondent had a disability that was permanent or extended and uncertain in duration at the time the ~~application for a disability was filed.~~

County retired Johnson for disability in April 2007.

Dr. Robert Arthur Blau

29. Dr. Blau has been a licensed physician in the State of California since 1961. He has provided thousands of opinions as a QME in California workers' compensation matters.

30. Dr. Blau examined respondent on September 7, 2005. That was the only time he examined respondent. Following his examination, Dr. Blau prepared a report dated November 3, 2005. His examination included taking respondent's medical history, reviewing records, and a physical examination. Dr. Blau's physical examination included taking respondent's vital signs, examining his skin, ears, nose, heart, abdomen, checking for hernias, an electrocardiogram, a pulmonary function study and a urine analysis.

31. Based on his examination, Dr. Blau found that respondent was suffering from periodic palpitations, psychophysiologic reactions from stress including high blood pressure, insomnia, acid reflux, tachycardia, headaches, blurred vision, lightheadedness and vertigo. He felt that these conditions were most likely related to stress. Dr. Blau also noted that respondent had recently had abdominal surgery for a reason not disclosed by the evidence in July 2005.

32. In the context of his QME, Dr. Blau opined that respondent had an industrially-derived period of temporary total disability on September 11, 2004 to the time of his examination of September 7, 2005

33. Dr. Blau never formed an opinion that respondent was permanently disabled. He was not able to opine as to the status of respondent's physical disability in 2006, a year prior to the Board's decision to ~~file a retirement application on behalf of respondent~~ retire Johnson for disability.

Dr. Michael Adelberg

34. Dr. Adelberg is a licensed physician and a board-certified neurologist.

35. Dr. Adelberg evaluated respondent on November 14, 2005, for the purpose of providing an opinion regarding then-pending workers' compensation claims. He prepared a report of his opinions in February 2008, more than two years after his evaluation. Dr. Adelberg concluded in his report that respondent was medically precluded from returning to his "original" job as a probation officer and that he was "permanent and stationary."

36. On October 30, 2008, Dr. Adelberg wrote a supplemental report at the request of Mariposa County. In the report he opined that, in relevant part, respondent: (1) was not substantially precluded from performing the duties of a Deputy Probation Officer III; was not medically precluded from reporting to Ms. Neil as a superior officer; and, (3) that he was medically cleared to return to work as a Deputy Probation Officer III.

37. Dr. Adelberg was unable to opine regarding the status of respondent's disability at the time the Board ~~filed the application on respondent's behalf~~ in April 2007.
retired Johnson for disability

38. At the time it ~~filed a disability retirement application on behalf of respondent,~~ found Johnson disabled for purposes of retirement with CalPERS, Mariposa County had no knowledge of Dr. Adelberg's findings.

Other Competent Medical Opinion

39. Although Mariposa County could have required respondent to undergo a medical examination to determine if he had a physical disability, it did not do so prior to its decision to ~~file an application on behalf of respondent.~~ retire respondent for disability.

40. Mariposa County did not present competent medical evidence to verify that respondent had a permanent *physical* disability which prevented him from performing the usual duties of deputy probation officer at the time it ~~filed the application on respondent's behalf~~ in April 2007.
found respondent disabled

LEGAL CONCLUSIONS

1. The court in *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, held that the party asserting the affirmative at an administrative hearing has the burden of proof, including the initial burden of going forward and the burden of persuasion. Mariposa County seeks to involuntarily retire respondent as unfit for duty as a deputy probation officer due to an alleged "psychological and/or physical condition which incapacitates him from performing his usual duties." Mariposa County is asserting the affirmative in this matter by claiming that respondent is unfit for duty. Therefore, Mariposa County has the burden of proof by a preponderance of the evidence.

2. Government Code section 21152 provides that applications to the board for retirement of a member for disability may be made by, in pertinent part, the following:

(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.

3. Government Code section 21154 provides in pertinent part:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or

while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. . . . 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.

4. Government Code section 20026 provides in pertinent part:

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

5. Government Code section 21150 provides:

(a) A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076 or 21077.

(b) A member subject to Section 21076 or 21077 who becomes incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with 10 years of state service, regardless of age, except that a member may retire for disability if he or she had five years of state service prior to January 1, 1985.

(c) For purposes of this section, "state service" includes service to the state for which the member, pursuant to Section 20281.5, did not receive credit.

6. 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 retirement as provided in Section 20731.

7. Government Code section 21156 provides:

If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability, unless the member is qualified to be retired for service and applies therefore prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service. The governing body of a contracting agency upon receipt of the request of the board pursuant to Section 21154 shall certify to the board its determination under this section that the member is or is not incapacitated. The local safety member may appeal the determination of the governing body. Appeal hearings shall be conducted by an administrative law judge of the Office of Administrative Hearings pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of this title.

8. The phrase "incapacity for the performance of duty" is interpreted to mean "substantial inability of the applicant to perform his or her usual job duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal. App. 3d, 873, 877.)

9. Cause was not established to sustain Mariposa County's determination that respondent Bryce Johnson was incapacitated for the performance of his duties in the position of Deputy Probation Officer III by virtue of Factual Findings 1 through 40.

ORDER

The appeal of Bryce Johnson to set aside his involuntary disability retirement is granted.

DATED: May 1, 2009



TREVOR SKARDA
Administrative Law Judge
Office of Administrative Hearings