

**BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

In the Matter of the Application for
Reinstatement from Industrial Disability
Retirement

WILLIE STARNES,
Respondent,

And

DEPARTMENT OF CALIFORNIA
HIGHWAY PATROL,

Respondent.

Case No. 2530

OAH No. L-1999060537

PRECEDENTIAL DECISION 99-03

Effective: January 22, 2000

PRECEDENTIAL DECISION

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own decision the Proposed Decision dated [October 27, 1999](#), concerning the [application of Willie Starnes](#); hereby designates its decision as precedential; and RESOLVED FURTHER that this Board decision shall be effective 30 days following mailing of the decision.

* * * * *

I hereby certify that on [December 15, 1999](#), the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the administrative law judge's Proposed Decision is a true copy of the decision adopted by said Board of Administration in said matter.

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

Dated:

BY _____
BARBARA HEGDAL
ASSISTANT EXECUTIVE OFFICER

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

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PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Diego, California on August 30 and 31, 1999.

Paul M. Ryan, Senior Staff Counsel, represented petitioner James E. Burton, Chief Executive Officer, State of California, Public Employee' Retirement System.

Scott A. O'Mara, Esq., O'Mara & Hampton, represented respondent Willie A. Starnes.

Jason M. Heath, Deputy Attorney General, represented respondent State of California Highway Patrol.

The matter was submitted on September 27, 1999.

FACTUAL FINDINGS

1. Petitioner James E. Burton made and filed Statement of Issues, Case No. 2530, dated June 25, 1999, in his official capacity as Chief Executive Officer of the State of California Public Employees Retirement System (CalPERS).

2. The State of California Department of Highway Patrol (respondent CHP) employed Willie A. Starnes (respondent Starnes) as a State Traffic Sergeant (STS). By virtue of such employment, respondent Starnes was a patrol member of CalPERS pursuant to Government Code section 20390.

3. On February 10, 1992, respondent Starnes submitted an application for industrial disability retirement. CalPERS approved respondent Starnes' application, and he retired for disability on the basis of orthopedic (back and neck) conditions effective September 23, 1993.

4. Prior to approving the application for industrial disability retirement and prior to approving the reinstatement request of respondent Starnes, the Chief Executive officer reviewed the case of *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d. 873, 877, and determined the phrase "incapacitated for the performance of duty" in Government Code section 21151 means "substantial inability of the applicant to perform the usual job duties." Further, the Chief Executive Officer determined that, under this standard, a CalPERS member is not entitled to a CalPERS disability retirement if he/she can substantially perform his/her "usual job duties."

5. Petitioner CalPERS has interpreted Vehicle Code section 2268(a) as defining the "usual job duties" of respondent CHP members as being the complete range of duties set forth in Vehicle Code section 2400 and "other critical duties that may be necessary for the preservation of life and property."

CalPERS has interpreted Vehicle Code section 2268(c) as continuing the jurisdiction of CalPERS to determine whether a STS is "substantially disabled" from performing these "usual job duties."

The test for determining whether a STS is entitled to a CalPERS disability is whether the official is substantially unable to perform his/her full range of "usual duties" as defined by Vehicle Code section 2268.

6. By letter, dated October 23, 1997, respondent Starnes requested reinstatement through CalPERS.

7. CalPERS obtained or received medical reports concerning respondent Starnes' orthopedic (back and neck) conditions from competent medical professionals. After review of the reports, the Chief Executive Officer determined that respondent Starnes is no longer disabled (e.g., substantially incapacitated) from the performance of his usual job duties as a STS.

8. By letter, dated June 15, 1998, CalPERS notified respondent Starnes that after review of new medical reports and other information, that he was no longer disabled from the usual job duties as a STS and would be reinstated to employment.

9. By letter, dated July 1, 1998, respondent CHP appealed, pending further reinstatement testing and background review. On December 18, 1998, respondent CHP filed a timely appeal and requested a hearing.

10. This appeal is limited to the issue of whether respondent Starnes is presently capable of performing the usual job duties of a STS.

11. Respondent Starnes was born on November 22, 1942 in Arkansas. He has a four-year college degree and joined respondent CHP on November 17, 1969. Prior to that time he worked for the Los Angeles Police Department from 1966 through 1969. Prior to that time, he served in the United States Air Force from 1961 through 1965. Respondent Starnes had quadruple bypass surgery in March 1992. He medically retired in August 1993 because of his orthopedic (neck and back) conditions. When respondent Starnes last worked, he was a STS and stationed in the Oceanside area.

12. The typical tasks performed by a STS are set forth in the California State Personnel Board Specification for Sergeant, CHP (Exhibit 8a). Commander Jill Angel (Commander Angel), commander of respondent CHP's Health and Safety Section, testified as a witness in this hearing. She has been an employee of respondent CHP since 1983. During her tenure, she has served as a STS for six years and is familiar with the duties of a STS. Among other things, she described the duties of a STS. In addition, respondent Starnes described his specific responsibilities as a STS prior to his disability retirement.

When respondent Starnes last worked, among other things, he served as the training sergeant, the radar sergeant and the sergeant of the speed team. Seventy-five percent of his work involved administrative tasks. According to Commander Angel, if respondent Starnes is reinstated as a STS, for at least the first year he will work as a field sergeant. In this capacity, at least 50 percent of his job would involve administrative/supervisory duties. There are a variety of other positions to which a STS can be assigned, including a position in headquarters, division, special programs, weight stations, communications center or public affairs. Seventy-five to one hundred percent of the tasks of an STS are assigned to one of the foregoing positions, or are administrative.

According to Commander Angel, irrespective of assignment, all uniform CHP officers are required to have the ability to perform the 19 Critical Tasks (Exhibit 8b). All applicants and officers who seek reinstatement from disability retirement are administered a physical performance test. Commander Angel characterized this as a screening tool, the minimum standard, to determine if the individual has the minimum level of fitness required to perform full duties. Commander Angel testified that there is no correlation between the physical performance test administered by respondent CHP and the 19 Critical Tasks. Nevertheless, no other physical fitness test is administered to applicants,

employees reinstated after disability retirement and/or current employees to determine whether any of the members of the foregoing classes of people are capable of performing the 19 Critical Tasks. On January 23, 1998, respondent successfully completed respondent CHP's Physical Performance Test.

No evidence was offered to establish which of the 19 Critical Tasks respondent performed, if any, or how frequently he engaged in these tasks, when he last worked as a STS. During her work as a STS, Commander Angel performed at least some of the 19 Critical Tasks. She testified that, on a couple of occasions, she extracted a person from a vehicle; several times, she jumped fences; she removed hazards from the road way; and, on two occasions, she was involved in a physical altercation and required to chase and apprehend a suspect.

13. Respondent Starnes described his activities since his retirement. He has worked for companies providing investigative services, including field and office work. Since February 1996, he has worked for International Protective Services of America on robbery detail. In this capacity, he is armed and acts to intercept and subdue robbers. On more than one occasion, he has tackled, wrestled to the ground, handcuffed and detained suspects until the police arrived. In addition to the physical demands of his position, respondent Starnes described physically arduous tasks that he has performed at home and in his personal life. He has carried heavy roofing materials up a ladder to re-roof his home, has demolished and rebuilt fencing around his five acre ranch, including lifting and carrying 90-pound bags of cement, using a post hole digger to dig holes for fence posts and lifting and dragging heavy steel posts. Respondent Starnes has also cut down trees, lifted and positioned heavy tree limbs to cut them with a chain saw. Finally, for approximately two and one-half months, every week-end, respondent Starnes has taken his young daughter to Disneyland or Knotts Berry Farm and has ridden the most thrilling rides with her. According to the evidence, respondent Starnes has performed the foregoing tasks without pain or further injury and without the need for medication or medical intervention.

14. Over the years, respondent Starnes has been examined and treated by a number of physicians and chiropractors, including David L. Flood, M.D. (Dr. Flood), Anthony Markarian, M.D. (Dr. Markarian) and Reed Strahan (Dr. Strahan), D.C.

Respondent Starnes has not received medical treatment for his orthopedic condition since September 7, 1994. He sees Dr. Strahan every three to four months for an adjustment but not for any specific problem.

15. The medical evidence in this case consisted of:

A. The testimony of Stephen P. Abelow (Dr. Abelow) and Robert F. Vandell, M.D. (Dr. Vandell); and

B. Reports issued by David L. Flood, M.D. (Dr. Flood), dated September 7, 1994 and September 23, 1997, Dr. Vandell, dated May 8, 1998; Dr. Abelow, dated December 7, 1998; Dr. Vandell, dated March 6, 1999. All of the foregoing reports were admitted as direct evidence, except the reports of Dr. Flood, admitted as administrative hearsay.

16. Dr. Vandell was retained by CalPERS to evaluate respondent Starnes' medical condition and to determine whether he is capable of performing his duties as a STS. His medical evaluation consisted of taking a history, performing a physical examination, reviewing his magnetic resonance imaging (MRI) reports, dated April 7, 1989, July 7, 1989, July 24, 1989, September 25, 1991 and September 23, 1997. In addition, Dr. Vandell ordered a full series of x-rays of his cervical spine and his lumbosacral spine.

During the evaluation by Dr. Vandell, respondent Starnes reported no subjective complaints, i.e., no complaints about lumbosacral or cervical pain. He administered specific tests to verify objectively respondent Starnes' lack of symptomatology.

Based on the foregoing, Dr. Vandell's diagnosis was "history of episodic low back pain with right L5-S1 radiculopathy, resolved without any residual physical findings with the exception of absent right posterior tibial and Achilles tendon reflexes".

17. In rendering his opinion regarding respondent Starnes' ability to return to work, Dr. Vandell considered a number of factors, including, but not limited to: (1) the review of medical records, the MRI and x-rays, his general physical condition, including his lack of subjective complaints; (2) the job description for STS (Exhibit 8a), the STS Task Statement (Exhibits 8b and 8d); (3) his current physical activities, that he is gainfully employed and that he engages in strenuous physical activities at home and at work; and there are no activities that respondent Starnes is unable to perform (Finding 13); (4) the lack of evidence of neuropathy or persistent radiculopathy, other than absent reflexes; and (6) his readiness and willingness to return to work.

Based on the criteria set forth in the foregoing paragraph, Dr. Vandell opined that there are no critical tasks that respondent Starnes is unable to perform and is substantially able to return to his usual and customary duties as a STS. Dr. Vandell's opinion is consistent with that of Dr. Flood, respondent Starnes' treating physician issued September 23, 1997.

Following his medical evaluation and consideration of the foregoing, Dr. Vandell issued his report, dated May 8, 1998.

18. Respondent CHP retained Dr. Abelow to perform a medical evaluation of respondent Starnes to determine whether he was capable of

performing his duties as a STS. He also took a history, performed a physical examination and reviewed the medical records, the MRI reports and the x-rays enumerated in his report.

Respondent Starnes presented with no subjective complaints. Dr. Abelow obtained minimal information about his current activities. Dr. Abelow testified that he did not pursue this information because “he knew that respondent Starnes wanted to return to work”, implying that respondent Starnes would exaggerate his physical activities and abilities.

Dr. Abelow opined that respondent Starnes had a history and radiographic evidence of significant degenerative lumbar disc disease and cervical spine disc disease. The MRI of his lumbar spine, September 25, 1991, revealed a herniated nucleus pulposus at L4-5. The MRI of his cervical spine, April 7, 1989, revealed moderate central canal stenosis at C5-6 with an extruded disc to the right of the midline and anterior cord impression at C6-7 level with moderate right-sided ventral defect and a small dorsal defect in the midline. The x-rays of his lumbosacral spine, May 6, 1998, revealed anterior osteophytes L4 and L5; narrowing L4-5 and L5-S1 disk space; and straightening of lumbosacral spine. X-rays of his cervical spine, May 6, 1998, revealed anterior osteophytes C5-C6 and neural foraminal encroachment C5-6.

Dr. Abelow stated that the nature of the degenerative cervical disk disease and lumbar disk disease is chronic progressive degeneration of the spinal elements with increasing disability over time.

19. In addition to his medical evaluation, Dr. Abelow considered additional information prior to rendering his opinion regarding whether respondent Starnes should be reinstated to his position as a STS. The information included the job specification for STS, dated 9/6/95 (Exhibit 8a) and State traffic officer task statement, i.e., 19 Critical Tasks (Exhibits 8b and 8d). Prior to his medical evaluation of respondent Starnes, Dr. Abelow had been trained by respondent CHP regarding the tasks that a CHP officer is required to perform.

Dr. Abelow stated in his report and confirmed in his testimony that almost any of the State traffic officer tasks would cause problems for respondent Starnes' back and neck because of his significant underlying degenerative cervical spine disk disease and lumbosacral spine disease. In his opinion, respondent Starnes should not be involved in job duties that require static strength, explosive strength, dynamic strength, trunk strength, stamina, and dynamic flexibility, as defined in the State Traffic Officer Task Statement. When questioned regarding respondent Starnes' ability to engage in administrative duties, Dr. Abelow testified that it was limited in that his last injury occurred when he was moving a file cabinet.

Based on his medical evaluation, and the above-mentioned records and training, Dr. Abelow opined "...with reasonable medical probability... that respondent Starnes would not be a candidate for reinstatement to the California Highway Patrol." He concluded that respondent Starnes' medical condition would not allow him to return to duty as a law enforcement officer with respondent CHP.

Following his evaluation and consideration of the foregoing, Dr. Abelow issued a report, dated December 7, 1998, that set forth the foregoing opinion.

20. After reviewing Dr. Abelow's December 7, 1998 report and considering that respondent Starnes had taken and passed the Physical Performance test on January 23, 1998, Dr. Vandell issued a supplemental report, dated March 6, 1999. He notes Dr. Abelow's discussion of some activities that respondent Starnes engages in with no apparent problems. He also mentions Dr. Abelow's diagnoses as degenerative lumbar disc disease with HNP at L4-5 and cervical spine degenerative disc disease and review of the MRI. However, after this review, Dr. Vandell does not change his opinion regarding reinstatement of respondent Starnes.

21. Dr. Vandell does not dispute that respondent Starnes has degenerative disc disease of his cervical spine and degenerative disc disease of his lumbosacral spine, and that, over time, degenerative changes have occurred. However, he opined that degenerative disc disease, in and of itself, does not prevent respondent Starnes from performing his duties as a STS; degenerative disc disease is only important if it causes neuropathy, if it causes pain precipitated by activities that he is required to do as part of his work or if his functional examination indicates that his progress is worsening together with his x-rays and his symptoms. As set forth in Findings 16 and 17, Dr. Vandell considered the foregoing factors when he rendered his opinion. As set forth in Findings 18 and 19, Dr. Abelow relied on more objective evidence without consideration of the foregoing subjective factors.

22. Pursuant to Government Code section 20026, determinations of entitlement to reinstatement from disability retirement must be based on competent medical evidence. The competency of the medical opinion under this section is evidenced by the physician's knowledge and application of the CalPERS disability retirement standard to the particular job duties required of the applicant.

In this case, two qualified, experienced, orthopedic surgeons evaluated respondent Starnes to determine if he could return to work and both testified at the hearing. Dr. Abelow evaluated respondent Starnes for respondent CHP. Dr. Vandell evaluated him on behalf of CalPERS. Dr. Vandell opines that he can perform the substantial duties of a uniformed member of respondent CHP, while Dr. Abelow maintains the opposite.

An examination of each physician's report reveals that Dr. Vandell knew and applied the CalPERS disability retirement standard. In his March 6, 1999 report, Dr. Vandell stated:

"It is my understanding that substantial disability is based on how the person presents at the time of evaluation and not what future disability could occur.

One cannot predict what circumstances will cause any future disability nor how the course of his underlying disc disease will run if he returns to being an Officer.

It remains my medical opinion that he can return to the position of a California Highway Patrol Officer."

Dr. Abelow's report does not reflect the CalPERS standard, but a view from the employer's perspective that respondent Starnes should not return to work because of a risk of injury. Despite his testimony during the hearing, it is clear that he never applied the CalPERS standard. In addition, his opinion leaves unexplained the uncontraverted evidence that respondent Starnes engages in strenuous physical activities on a daily basis and has been for a substantial length of time and that his employment and ranch duties require that he engage in similar tasks to those identified in the 19 Critical Tasks.

For the foregoing reasons, the opinion of Dr. Vandell is determined to be more credible than Dr. Abelow's opinion.

23. For the reasons set forth in Findings 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22, respondent CHP did not establish that respondent Starnes is disabled or incapacitated from performing his usual duties as a STS.

24. Respondent Starnes is not substantially incapacitated from performance of his usual duties as a STS on the basis of his orthopedic (neck and back) conditions.

LEGAL CONCLUSIONS

1. On August 26, 1999, petitioner filed Motions to Determine Burden of Proof and to Bar Consideration of Government Code section 1031(f). On August 27, 1999, respondent CHP filed a Memorandum of Points and Authorities in Opposition to petitioner's motions. Immediately prior to commencement of the evidentiary hearing, each party made his legal argument in support of his position; and, respondent Starnes requested additional time to file a written response to the motions. The administrative law judge granted respondent Starnes' motion for additional time to file his written response.

2. Following the evidentiary hearing, the record remained open to allow expert witnesses to review x-rays, respondent Starnes to file a written response to petitioner's motions and respondent CHP's objections thereto, and the parties to file written closing argument.

By letter, dated September 13, 1999, marked Exhibit 22, petitioner notified the administrative law judge that the parties agreed that it would not be necessary for the expert witnesses to review x-rays, as requested during the hearing.

On September 21, 1999, respondent Starnes filed Respondent's Post-Hearing Brief, marked Exhibit 23; petitioner filed Petitioner's Closing Argument, marked Exhibit 24, on September 24, 1999; respondent California Highway Patrol's Closing Argument was filed on September 27, 1999 and marked Exhibit 25.

3. Petitioner asserts that respondent CHP has the burden of proof. CHP objects, arguing that the burden of proof is on petitioner and respondent Starnes.

According to the Administrative Procedure Act (APA), the burden of proof flows from the type of process initiated. If CalPERS moves to take away a person's right, e.g., involuntarily discontinuing his/her disability retirement, the process is initiated by an Accusation, and CalPERS has the burden of proving that the person is no longer disabled. Where CalPERS moves to grant or deny a benefit to a member applying therefor, the proceeding is initiated by a Statement of Issues, and the applicant/respondent has the burden of proof.

It is appropriate to 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) 155Cal.App.3d 937, 202 Cal.Rptr. 505. Since Government Code section 31724 (County Employees' Retirement Law) is similar to Government Code section 21151 of the Public Employees Retirement Law, the rule concerning the burden of proof should be applied to cases under CalPERS law.

Based on the foregoing and other persuasive arguments of petitioner, it is determined that respondent CHP has the burden of proof in this matter.

4. Petitioner asserts that respondent CHP is barred from litigating the applicability of Government Code section 1031(f) and moves for a ruling therefor. Respondent CHP argues that Government Code section 1031(f) should be considered by the trier of fact in determining whether respondent remains substantially incapacitated from performing the duties of a CHP STS.

The Public Employees' Retirement Law (Retirement Law) governs disability retirement and reinstatements and grants sole jurisdiction to CalPERS to make such determinations. Government Code sections 20026, 20125, 21150, 21154, 21156, 21190, 21192 and 21193.

CalPERS is required to utilize only the test set forth in the Retirement Law to determine eligibility for disability retirement or for reinstatement from such retirement. Government Code section 1031(f) is not found within the Retirement Law, but in the general provisions of the Government Code governing public officers or employees who perform peace officer duties. Government Code section 1031(f) is an employment statute. It is inconsistent with the Retirement Law and cases interpreting it. The proper standard to be applied is the test set forth in *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877, 86 Cal.Rptr. 450, and *Hosford v. Board of Administration* (1978) 77Cal.App.3d 854, 143 Cal.Rptr. 760, not the standard set forth in Government Code section 1031(f).

A state disability retiree is only temporarily separated from employment. Title 2, California Code of Regulations, section 446, provides, in pertinent part: "Temporary separations from state service shall include... disability retirement." Temporary separations do not result in a loss of permanent civil service status. When the temporary separation ends, the person remains a permanent civil service employee whose status remains that of a permanent civil service employee whose status may only be changed, qualified or removed as provided by law. In this case, the evidence is clear and convincing that permanent employees are not subjected to the standard set forth in Government Code 1031(f). Therefore, there is no justification for applying this standard to respondent Starnes. After reinstatement, if it is determined that as a returning employee respondent Starnes fails to meet applicable personnel requirements, appropriate personnel action can be taken with proper remedies and protections afforded by personnel rules. *Cansdale v. Board of Administration, Public Employees Retirement System* (1976) 59 Cal.App.3d 656, 130 Cal.Rptr. 880.

Government Code section 21193, formerly numbered 21029, compels a State employer to reinstate a disability retiree if he/she is no longer disabled. In *Phillips v. County of Fresno* (1991) 225 Cal.App.3d 1240, 277 Cal.Rptr 531, a case arising under the County Employees' Retirement Act of 1937, under a statutory scheme similar to Government Code section 21193, the court held that after the retirement system denies a disability retirement application, the employer is obligated to reinstate the employee, leaving the decision to the retirement board. The court recognized the employer's authority to meet relevant physical and mental standards, but nonetheless determined that the retirement law governs the employer's procedure. *Phillips, supra*, at 1257.

In the *Phillips* case, the court further held that Government Code “ Section 31725 does not except from mandatory reinstatement those employees who are not permanently disabled according to the retirement board, but who are not presently ready to return to work according to the employer. Nor does it appear from the legislative history that the Legislature intended such an exception. To provide for such an exception, the Legislature could have included language to that effect.” Once a finding of lack of disability becomes final, the employee must be reinstated; Government Code “Section 31725 recognizes no middle ground”. *Raygoza v. County of Los Angeles* (1993) 17 Cal.App.4th 1240, 21 Cal.Rptr.2d 896.

Based on the forgoing analogy, once CalPERS makes the determination that respondent Starnes is able to substantially perform his usual duties, he must be reinstated; at that time, respondent CHP has an obligation to reinstate him, even if the employer believes that he is not ready to return to work.

It is determined that in considering whether respondent Starnes continues to be disabled, the administrative law judge must apply the Retirement Law and the case law construing it, not Government Code section 1031(f).

5. The issue in this proceeding is limited to whether respondent Starnes is incapacitated on the basis of his orthopedic conditions, from performing the usual and customary duties of a STS with respondent CHP. The courts have had numerous opportunities to rule on the meaning of the term “incapacitated for the performance of duty” and have been in full agreement to its scope. For nearly 30 years, the courts have consistently and uniformly held that Government Code section 20026, formerly Government Code section 21022, requires “substantial inability” to perform the applicant’s “usual duties,” as opposed to mere discomfort or difficulty. *Mansperger, supra*.

The *Mansperger* court found that Mr. Mansperger was not disabled because, although he suffered some physical impairment, he could still substantially perform most of his usual job duties. Thus, it is clear from the *Mansperger* case that a crucial distinction exists between a person who suffers some impairment and one who suffers substantial impairment sufficient to become eligible for disability retirement. To continue to be eligible for a disability retirement, respondent Starnes must be “substantially unable” to perform his usual duties.

The *Mansperger* test was applied in *Hosford* case. Horace Hosford, a state traffic officer with the California Highway Patrol, suffered a back injury lifting an unconscious victim. This injury aggravated previous injuries suffered in two prior accidents. The court examined Mr. Hosford’s case in terms of his rank as a sergeant, and the duties required of this position, as well as the degree to which any physical problem might impair the performance of his duties.

As in *Mansperger*, the court found that, although Hosford suffered some physical impairment, he could still substantially perform his usual duties.

Thus, it is clear from the case law that the difficulty in performing certain tasks is not enough to support a finding of disability. A person must be substantially incapacitated from performing his or her usual duties.

6. In *Hosford*, the court held that in determining whether an individual was substantially incapacitated from his “usual duties”, the court must look to the duties actually performed by the individual, and not exclusively at the job descriptions. In determining eligibility for disability retirement, the actual and usual duties of the applicant must be the criteria upon which any impairment is judged. Generalized job descriptions and physical standards are not controlling, nor are actual but infrequently performed duties to be considered.

7. In the *Hosford* case, the court rejected a contention frequently raised by disability applicants, i.e., many injuries or medical conditions create an increased risk that the person will suffer a further injury or aggravation at a later time. The medical opinion is that the person is presently capable of performing a certain task, but the task should be avoided as a prophylactic restriction. In the *Hosford* case, Mr. Hosford presented the argument that his back injuries created an increased risk for further injury. In rejecting his contention that this increased risk rendered him presently disabled, the court stated:

“As the Board correctly points out, however, this assertion does little more than demonstrate his claimed disability is only prospective (and speculative), not presently in existence.” (*Id.* at p. 863)

Thus, the disability must be presently existing and not prospective in nature. The person must be presently incapable of performing the duties of a position. Prophylactic restrictions that are imposed only because of risk of future injury are insufficient.

8. *Wolfman v. Board of Trustees* (1983) 148 Cal.App.3d, 196 Cal.Rptr. 395 involved facts similar to the *Hosford* case but clearly distinguishable. In the *Wolfman* case, the court found that reinstatement of Ms. Wolfman would initiate a vicious circle of infection, leading to severe pulmonary attack the need for dangerous steroid therapy. Disability was not merely a prospective probability, but a medical certainty (emphasis added).

9. In the instant case, in order to determine whether respondent Starnes is substantially incapacitated from performing his “usual duties” as a STS, it is necessary to evaluate the “usual duties” of the position (Finding 12), the physical requirements of the job (Finding 12), and the medical evidence related to his orthopedic (neck and back) conditions (Findings 14, 15, 16, 17, 18, 19, 20, 21 and 22).

It is undisputed that respondent Starnes has degenerative cervical disc disease and degenerative lumbosacral disc disease. This medical condition caused respondent Starnes' retirement in 1993. According to the radiographic evidence, over time, degenerative changes have occurred. He has received no indication on treatment from his conditions since 1994. Nevertheless, respondent Starnes had no subjective complaints at the time of his medical evaluations. He has engaged in strenuous physical activities, including tasks similar to those required of a STS. At this time, respondent Starnes has the ability to perform the tasks of a STS.

Insufficient competent medical evidence was offered to establish that respondent Starnes' orthopedic (neck and back) conditions would prevent him from performing the usual duties of a STS. The evidence did not establish that if respondent Starnes were returned to duty as a STS engaging in the usual duties of a STS would cause him disability to a medical certainty.

10. Respondent Starnes is capable of performing the usual duties of a STS, by reasons of Findings 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24.

11. All factual and/or arguments not addressed herein are unsupported by the evidence, without merit and therefore rejected.

ORDER

1. The decision of James E. Burton, Chief Executive Officer of the California Employees' Retirement system is affirmed.

2. The application for the denial of reinstatement of respondent Willie A. Starnes filed by respondent Department of California Highway Patrol is denied.

DATED: October 27, 1999

VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings