

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES RETIREMENT ASSOCIATION

In the Matter of the Proposed FINDINGS OF
FACT,
Discontinuation of the Disability
CONCLUSIONS AND
Benefits of Robert J. Colombe.
RECOMMENDATION

The above-entitled matter was the subject of a. Fact
Finding Conference
before George A. Beck, Administrative Law Judge, on Thursday,
January 22, 1987
at 9:00 a.m. in the conference room of the Public
Employees Retirement
Association, Suite 200, 514 St. Peter Street, in the City
of St. Paul,
Minnesota. The record closed on January 29, 1987 upon
receipt of written
argument.

Robert Colombe, 4621 West Chicago Street, Chandler,
Arizona 85226,
appeared, representing himself. Jon K. Murphy, Special
Assistant Attorney
General, 90 West Plato Boulevard, St. Paul, Minnesota
55107, appeared,
representing the staff of PERA. Also present was
State Representative
Stephen G. Wenzel, 291 State Office Building, St. Paul, Minnesota
55155.

This Report is a Recommendation only, not a final
decision. Pursuant to
Minn. Stat. 353.03, the Board of Trustees of the Public
Employees Retirement
Association (PERA) will make the final decision in this matter-
after a review
of the record. The parties may contact James Hacking,
Executive Director,
Public Employees Retirement Association, Suite 200, 514 St. Peter
Street, St.
Paul, Minnesota 55102, (612) 296-7460, to inquire about the
consideration of
this matter by the Board of Trustees.

STATEMENT OF THE ISSUE

The issue in this case is whether or not the- disability benefits being paid by PERA to Robert Colombe should be discontinued on the grounds that he is no longer disabled and physically unfit to perform the duties of -a police officer.

Based upon the record in this case, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On March 16, 1983, Robert J. Colombe was employed as a police officer with the City of Spring Lake Park. He had been so employed since September 11, 1978. Exhibit 3. On March 16, 1983, Officer Colombe was In the process of chasing and subduing a suspect when he suffered an injury to his lower- back. As a result of the injury, Mr. Colombe had to resign from the Spring Lake Park Police Force, effective December 31, 1983. Exhibit 3, Exhibit A.

2 Mr. Colombe was diagnosed as having a herniated LS-SI intervertebral disc resulting in a lumbar radicular syndrome and chronic back pain. Exhibit 1, Exhibit 4, Exhibit A-1.

3. Mr. Colombe was examined on December 5, 1983 by Dr. Philip H. Haley, an orthopedic physician in Coon Rapids, who reported to the PERA that Mr. Colombe was physically unable to perform the duties of a police officer as a result of his injury in March of that year. Exhibit 4. Dr. Haley concluded that Mr. Colombe had a 15 percent permanent partial disability and should not be engaged in repetitive bending, lifting, pushing or pulling and that he should not be lifting objects weighing more than 25 pounds. Exhibit A-1.

4. On March 5, 1984, PERA's medical consultant, Dr. Lundquist, advised PERA that, based upon Dr. Haley's report, it was his opinion that Mr. Colombe was "totally and permanently disabled and as such complies with the provisions of Minnesota Statutes 353.656, subds. 1, 3 and 5." Exhibit 5.

5. In January of 1984, Mr. Colombe applied to the PERA for disability benefits. Exhibit 1. In February of 1985, he began receiving a monthly disability benefit in the amount of \$896.83. Exhibit 2.

6. Prior to August of 1985, Mr. Colombe moved to Arizona. He became employed there as a security officer with Motorola, Inc. where he was required to man an entry desk and an alarm system, and to walk an assigned route inside the plant.

7. On August 26, 1985, Mr. Colombe was examined by Dr. Christianson, an orthopedic physician in Scottsdale, Arizona, who certified to PERA that Mr. Colombe remained disabled, was unable to serve as a police officer, and had shown no improvement. Exhibit 6, Exhibit 7.

8. In July of 1985, Mr. Colombe applied to the Arizona Department of Public Safety for a position as a motor carrier investigator. The State of Arizona referred him to Medical Support Systems, Inc. for a medical

examination. Mr. Colombe reported a herniated disc at: L5-S1 to Dr. Evans at Medical Support Systems, Inc. in Phoenix. An x-ray taken at that time was interpreted to show "scoliosis with convexity to the left. There is very slight narrowing of the lumbosacral interspace. Spina Bifida occulta is noted at S-1. No other significant osseous or joint abnormalities are seen."

Exhibit 13. Dr. Evans concluded that Mr. Colombe's physical fitness was excellent and that his physical program should be unrestricted. Exhibit 13.

9. On July 19, 1985, Mr. Colombe's personal physician, Dr. Reinhart in Mesa, Arizona, submitted a letter in support of his job application which stated in part that: "It is my opinion Mr. Colombe has had a good recovery from any back condition that he may have had. I do not find any evidence of any weakness of the back, and especially I do not find any evidence of any disc disease." Dr. Reinhart indicated that Mr. Colombe would be able to perform the job of motor carrier investigator without restriction. Exhibit 11.

10. In September of 1985, Mr. Colombe was re-evaluated by Medical Support Systems, Inc. by Dr. Pont at the request of the Arizona Department of Public Safety, based on information received from Minnesota concerning Mr. Colombe's back injury. Dr. Pont concluded that there were no significant abnormalities and that Mr. Colombe was capable of performing duties described in the job description for motor carrier investigators. Exhibit 13. Nonetheless, the

Department of Public Safety decided not to hire Mr. Colombe due to his back problems.

11. On October 10, 1985, Dr. Palm, a medical consultant to PERA, advised PERA that based upon the report from Dr. Christianson dated September 20, 1985, it was his opinion that Mr. Colombe remained "totally and permanently disabled" and, therefore, complied with Minnesota Statutes 353.656. Exhibit 8. PERA advised Mr. Colombe on October 15, 1985 that his disability benefits would be continued. Exhibit 9.

12. In May of 1986, the Arizona Department of Public Safety forwarded to PERA the 1985 medical reports by Dr. Pont and Dr. Reinhart. Exhibit 11.

13. On July 29, 1986, PERA received a July 15, 1986 report from Dr. Colson, a physician with Medical Support Systems, Inc. in Phoenix, Arizona. enclosing the results of Mr. Colombe's physical examination with that office in 1985. Dr. Colson who is indicated as the acting custodian of records for the clinic, also completed a medical disability report for PERA which stated in part that: "Patient reports total resolution of symptoms by the end of 1984. He reported full normal activity with no pain, weakness, numbness, stiffness, or bowel or bladder difficulty. Careful physical exam was normal in all ways." Exhibit 13. Dr. Colson gave the opinion that Mr. Colombe was not physically unfit to perform the duties of a police officer, 'since his condition showed apparent resolution. Dr. Colson did note, however, that the history of a herniated disc on back injury put him at greater risk for a re-injury in the future. Exhibit 13.

14. In June of 1986, Dr. Trow, a medical consultant to PERA, advised PERA that, based upon Dr. Reinhart's report, PERA should schedule a current examination for Mr. Colombe. He suggested that Mr. Colombe be referred to a Dr. Johnson in Mesa, Arizona. Exhibit 12. This request was never communicated to Mr. Colombe and the examination was never made.

15. On August 15, 1986, Dr. Palm, a medical consultant to PERA, advised PERA that, based upon the July 15, 1986 report of Dr. Colson, it was now his opinion that Mr. Colombe was no longer disabled. Exhibit 14.

16. On September 2, 1986, PERA advised Mr. Colombe by mail that his benefits were being discontinued. Mr. Colombe wrote to PERA on September 2, 1986, and advised them that his injury remained and that he was willing to have additional medical reports from an orthopedic physician. He stated that the Department of Public Safety medical exam did not include an examination by an orthopedic physician or a CAT scan type of x-ray. Exhibit 15.

17. On September 15, 1986, Mr. Colombe was examined by Dr. Christianson, an orthopedic physician in Scottsdale, Arizona, who stated that Mr. Colombe was physically unfit to perform the duties of a police officer and that Mr. Colombe will have pain, and disability as a result of the pain, which will limit his stooping, lifting and bending. The examination included a CAT scan. Exhibit 16, Exhibit B.

18. On October 27, 1986, Dr. Trow, a medical consultant to PERA, advised PERA that after examining Dr. Christianson's report dated September 19, 1986, it was Dr. Trow's opinion that Mr. Colombe did not meet "our standards for total and permanent disability" and that his application should, therefore, be denied. Exhibit 20.

19. On October 27, 1986, Mr. Colombe was examined by Dr. Safrin, an orthopedic physician in Tempe, Arizona. He observed that the x-rays showed marked disc space narrowing of L5, S1. He stated that Mr. Colombe had a herniated disc and that his disability remained unchanged, namely 15 percent permanent partial disability of his back. He suggested that Mr. Colombe continue working as a security watchman with limitation not to lift over 25 pounds and to do whatever he can within the limitation of pain. Exhibit 22.

20. On November 14, 1986, Dr. Palm a medical consultant to PERA, advised PERA that it was his 'impression that "This patient has a 15 percent permanent partial disability of his back. I do not believe that this patient fulfills the requirements for -total and permanent disability." Dr. Palm had reviewed the report of Dr. Safrin before writing this letter. Exhibit 23.

21. CM November 14, 1986, PERA advised Mr. Colombe that his 'application for a continuation of disability benefits was being denied based upon Dr. Palm's opinion. It stated, however, that it would initiate a hearing so that Mr. Colombe could appeal this decision. It also agreed to issue Mr. Colombe disability benefits for the months of September, October and November of 1986. Exhibit A-5. Subsequent to this letter, Mr. Colombe was granted continuing disability benefits pending the outcome of this proceeding.

22. IV. Colombe is currently employed as a motor, vehicle field officer for the State of Arizona. His job duties include drivers license testing, inspection of motor carrier, school bus, and other vehicles entering the state, and the sale of abandoned vehicles. Exhibit C. Mr. Colombe currently has a dull toothache type of pain in his back which he has learned to live with. He does not believe that his condition has changed since he was first injured. On December 22, 1986, Mr. Colombe suffered a heart attack from which he is now recovering. Exhibit A.

23. CM June 20, 1986, (A. Palm advised PERA that he felt that he did not

have enough information on the reports that he was receiving from examining physicians in order to make a determination concerning the relationship between an accident and an applicant's work for police disability determinations. Exhibit .25. In a July 18, 1986 memo from Dr. Palm to PERA, he stated that his communications regarding a worker's disability being related to employment was merely an opinion based on the reports received and should in no way be considered a final determination. Exhibit 26.

24. On December 29, 1986, PERA issued a notice of a Fact Finding Conference regarding the continuation of disability benefits for Robert Colombe and set the hearing date for January 22 1987. Exhibit 24.

Based upon the foregoing Findings of Fact. the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Board of Trustees -and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. 353.03.
2. That PERA gave proper notice of the hearing in this matter and has fulfilled all relevant substantive and procedural requirements of law or rule.
3. That the PERA member receiving disability benefits has the burden of

proof to show that he is entitled to the continuation of benefits.

4. Minn. Stat. 353.656, subd. 1. provides as follows:

Any member of the police and fire fund less than 55 years of age, who shall become disabled and physically unfit to perform duties as a police officer or firefighter subsequent to June 30, 1973, as a direct result of an injury, sickness, or other disability incurred in or arising out of any act of duty, which shall render the member physically or mentally unable to perform duties as a police officer or firefighter, shall receive disability benefits during the period of such disability.

5. That Robert Colombe has proved by a preponderance of the evidence that he was disabled in the line of duty and that he is physically unable to perform the duties of a police officer.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Board of Trustees issue an Order continuing the disability benefits payable to Robert J. Colombe.

Dated: January 29, 1987.

GEORGE A. BECK
Administrative Law Judge

NOTICE

It is requested that the Board of Trustees serve a copy of its find decision upon the Administrative Law Judge.

Reported: No record made.

MEMORANDUM

PERA's medical advisor made its determination to discontinue Mr. Colombe's disability benefits based upon two written reports received from Arizona. Dr. Reinhart, Mr. Colombe's family physician, wrote a letter in support of Mr. Colombe's application to the Arizona Department of Public Safety in which he stated that Mr. Colombe had had a good recovery from his back condition. Dr. Reinhart took no x-rays and made a brief examination. The report was made at Mr. Colombe's request. Additionally, Dr. Colson apparently summarized notes in the medical record at Medical Support Systems, Inc. to the effect that Mr. Colombe's condition showed an apparent resolution. Again, this examination was in furtherance of It. Colombe's application for employment in Arizona. The examination was supported by an x-ray but not a CAT scan. Mr. Colombe denies telling either doctor that he had recovered or that he had no symptoms.

Based upon these written reports, PERA's medical advisors concluded that Mr. Colombe was no longer disabled. These determinations, however, issued by Dr. Trow and Dr. Palm, cannot be relied upon for their legal conclusions since each references standards or requirements for "total and permanent disability." PERA made no further evaluation and simply relied on the opinions issued by its medical advisors in denying a continuation of benefits. However, the statute applicable to policemen contains no requirement of total and permanent disability. This is the standard that applies to PERA members other than police and firefighters. The statute quoted in the conclusions makes it clear that in order to receive disability benefits, a policeman must show only that he became disabled as a result of an injury arising out of his duties as a police officer and which rendered him unable to perform duties as a police officer. Dr. Palm noted in his final determination that it was his impression that Mr. Colombe had a 15 percent permanent partial disability but not a total and permanent disability.

Even if PERA's medical advisors had applied the -appropriate statutory language to this case and arrived at the same decision, it must still be concluded that the medical examinations of Dr. Christianson and Dr. Safrin should be given more weight than those of Dr. Reinhart or Dr. Colson. The former are both orthopedic surgeons and their examination was supported by a CAT scan. Their detailed reports establish that Mr. Colombe continues to have a 15 percent permanent partial disability, a fact that PERA's medical advisor does not dispute. They each state that Mr. Colombe's physical condition is essentially unchanged since his injury. Mr. Colombe himself testified that he continues to have a dull toothache-type pain at all times which he has learned to live with. He states that he is able to keep his condition under control by watching his weight and exercising, but that the situation is unlikely to ever go away. IN described his condition as a ruptured disc in which the disc

is shattered into several pieces which makes it a difficult situation to correct by surgery. Mr. Colombe also suffered a heart attack in December of 1986. It is his opinion that currently no police force would hire him to work as a police officer.

The record preponderates in favor of a conclusion that Mr. Colombe's disability has not resolved itself, but continues much as it has in the past and prevents him from performing the duties of a police officer within the meaning of the statute.

At the hearing, the question of which party had the burden of proof in a case where disability benefits are discontinued was discussed. PERA contended that the burden of proof remained upon the member receiving disability benefits even though PERA initiated the termination. Mr. Colombe agreed that he would have at least some burden concerning his medical condition. It appears that in social security disability cases, the claimant has the burden of proving that the disability continues where disability benefits have been terminated. C.J.S., Social Security, 65, p. 119. Because of the similarity of that program and the PERA disability benefit program, a similar rule would seem to be appropriate in this case. It should be noted, however, that in social security cases there is authority for the view that the burden of proof in termination cases is on the agency to prove that the claimant is able to work.

G.A.B.