

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Reinstatement from Industrial Disability

Retirement of:

BRYAN L. MEYER, Respondent

and

**VENTURA YOUTH CORRECTIONAL FACILITY, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent**

Agency Case No. 2020-0454

OAH No. 2020090039

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter by videoconference on February 24, 2021.

Staff Attorney Dustin Ingraham represented the California Public Employees' Retirement System (CalPERS).

Respondent Bryan L. Meyer represented himself.

There was no appearance by or on behalf of respondent Ventura Youth Correctional Facility, California Department of Corrections and Rehabilitation (CDCR), its default was entered, and the matter proceeded as a default proceeding as to that respondent pursuant to Government Code section 11520.

Evidence was received, the record closed, and the matter submitted for written decision on February 24, 2021.

SUMMARY

Mr. Meyer was granted an industrial disability retirement. Upon reevaluation, CalPERS determined he is no longer substantially incapacitated and should be reinstated to his former position. CalPERS did not present persuasive medical evidence in support of its determination, and Mr. Meyer's appeal should be granted.

FACTUAL FINDINGS

Jurisdictional Matters

1. Mr. Meyer worked for CDCR as a Youth Correctional Counselor. He is a state safety member of CalPERS by virtue of his prior employment.

2. On July 1, 2013, Mr. Meyer signed a Disability Retirement Election Application seeking an industrial disability retirement, which CalPERS received the following week. He identified his disability as a "Lower Lumbar Injury (herniated L5S1 disc) disc injury causing moderate to severe spinal stenosis causing nerve damage which also effects [sic] legs. Also, a knee injury (torn meniscus) right knee."

3. Mr. Meyer indicated his disability occurred February 8, 2012, when he was preventing an inmate from escaping. His disability precludes him from lifting moderate or heavy weight, walking more than 10 minutes, standing more than 20 minutes, and sitting more than two hours.

4. On February 25, 2014, CalPERS sent Mr. Meyer correspondence advising he was approved for an industrial disability retirement due to an orthopedic (lumbar spine) condition. The correspondence warned that he "may be reexamined periodically to determine [his] qualification for reinstatement if [he is] under the minimum age for service retirement." He was 30 years old when he retired for disability.

5. On October 30, 2019, CalPERS sent Mr. Meyer correspondence advising that his "Industrial Disability Retirement benefits [were] currently under review to determine if [he] continue[d] to meet the qualifications to receive Industrial Disability Retirement benefits pursuant to Government Code section 21192." He was asked to complete and return an enclosed disability questionnaire. He was also asked to provide an enclosed packet to any physicians who were treating his lumbar spine condition.

6. On December 2, 2019, CalPERS received Mr. Meyer's completed questionnaire. He indicated his disability has not improved because he continues to experience low back pain and weakness, numbness in both legs, and the loss of balance and bilateral leg function. He also indicated he had not sought any medical treatment for his disability during the previous 12 months.

7. Mr. Meyer wrote that his disability prevents him from returning to his prior position as a Youth Correctional Counselor because his back pain "increases with bending and lifting," and his "balance and leg function [have] not [been] normal since

[his] injury.” He also wrote he has been working full time as a receiving supervisor at Home Depot since June 1, 2019. His job duties include “supervising receiving operations, paperwork, scheduling [appointments].”

8. CalPERS referred Mr. Meyer to Robert Henrichsen, M.D., a board-certified orthopedic surgeon, for an Independent Medical Evaluation (IME). Dr. Henrichsen performed his IME on February 11, 2020, and prepared a written report documenting his findings and conclusions. He provided his report to CalPERS.

9. Based on Dr. Henrichsen’s IME, CalPERS determined Mr. Meyer is “no longer substantially incapacitated from the performance of [his] duties as a Youth Correctional Counselor with [CDCR] due to [his] orthopedic (lumbar spine) condition,” and he “will be reinstated to [his] former position.” CalPERS informed Mr. Meyer of his right to appeal its determination.

10. Mr. Meyer timely appealed CalPERS’s determination. On August 13, 2020, Keith Riddle, Chief of CalPERS’s Disability and Survivor Benefits Division, signed the Accusation solely in his official capacity.

Physical Duties of a Youth Correctional Counselor

11. A Physical Requirements of Position/Occupation Title signed by CDCR’s Health Safety Officer and Mr. Meyer indicates that a Youth Correctional Counselor with CDCR is required to perform the following physical duties with the following frequencies:

Constantly: Standing, walking, and lifting/carrying up to 10 pounds

Frequently: Lifting/carrying between 11 and 25 pounds and walking on uneven ground.

Occasionally: Sitting, running, crawling, kneeling, climbing, squatting, bending (neck), bending (waist), twisting (neck), twisting (waist), reaching (above shoulder), reaching (below shoulder), pushing and pulling, fine manipulation, power grasping, simple grasping, repetitive use of hand(s), keyboard use, mouse use, lifting/carrying more than 25 pounds, driving, and operation of foot controls or repetitive movements¹

12. A Job Analysis prepared by the California Department of Youth Authority for the Youth Correctional Counselor position provides the following:

The position of Youth Correctional Counselor, at the California Use Authority facility involves the employee being exposed to danger of attack and violence from wards ranging in age from twelve to twenty-five years of age, depending on assignment.

The Youth Correctional Counselor is responsible primarily for the supervision, custody, discipline and counseling of the wards.

¹ "Constantly" is defined as more than six hours, "frequently" as three to six hours, and "occasionally" as up to three hours.

The Youth Correctional Counselor is also responsible for responding to emergencies at any time and rendering whatever assistance necessary to eliminate the emergency. This may involve physically restraining wards, utilizing soft, hard or chemical restraints and becoming involved in physical altercations.

The Youth Correctional Counselor should be able to run for distances up to several hundred yards and must be able to protect himself/herself and other wards in altercations or acts of violence. The Youth Correctional Counselor must be alert at all times and must be in excellent physical condition.

Prior IMEs

BRENDEN McADAMS, JR., M.D.'S, IME

13. Dr. McAdams is a board-certified orthopedic surgeon. CalPERS asked him to evaluate Mr. Meyer as part of its evaluation of his initial application for an industrial disability retirement. Dr. McAdams performed his IME on December 29, 2014.

14. Mr. Meyer reported that he was injured on February 8, 2012, while subduing an inmate who was trying to escape. The inmate climbed a chain-link fence and fell when Mr. Meyer grabbed his leg and pulled him down. The inmate landed on top of Mr. Meyer. Mr. Meyer immediately felt low back pain that radiated into his legs.

15. Mr. Meyer received medical treatment through the workers' compensation system. He was diagnosed with a nucleus pulposus at the L5-S1 level, a

condition in which part or all the soft, gelatinous central portion of an intervertebral disc is forced through a weakened part of the disc, causing pain and nerve root irritation. He underwent a bilateral L5-S1 neurodiscectomy on July 17, 2012. The surgery was unsuccessful and resulted in bilateral numbness from the knees down and ankle weakness.

16. Mr. Meyer's numbness and ankle weakness improved slightly after several months, but he continued to experience numbness radiating into his heels and constant low back pain. His ankle occasionally gave way. He received acupuncture and one epidural injection, neither of which provided relief.

17. At the IME, Mr. Meyer complained of bilateral leg numbness and constant low back pain. His medication regimen consisted of an opioid pain reliever, an anti-inflammatory, and a nerve pain medication.

18. Physical examination revealed that Mr. Meyer walked with a protected gate in that he walked stiffly. Range of motion of the lumbar spine measured 20 degrees upon extension and 35 degrees upon rotation, bilaterally. Straight leg raising while supine was positive for pain in both buttocks at 45 degrees, but was negative for Lasegue's sign.

19. Dr. McAdams concluded Mr. Meyer was substantially incapacitated for the performance of his usual duties as a Youth Correctional Counselor due to an orthopedic (lumbar spine) condition. Specifically, Dr. McAdams concluded Mr. Meyer was "unable to perform the required running of 400 yards, being involved in a combative situation, lifting and carrying excessive weights over 20 pounds, crawling, climbing, and subduing an assailant."

DONALD POMPAN, M.D.'s, IME

20. Dr. Pompan is a board-certified orthopedic surgeon. CalPERS asked him to reevaluate Mr. Meyer to determine if Mr. Meyer remained eligible for industrial disability retirement benefits. Dr. Pompan performed his IME on January 10, 2018.

21. Mr. Meyer described the history of his injury and subsequent medical treatment to Dr. Pompan in the same manner as he did to Dr. McAdams. He reported no change in his symptoms since Dr. McAdams's IME. He complained of pain across the low back that settled into his right buttock. As the pain increased, pain and numbness radiated into his leg and heel, more so in his left than right. His medication regimen consisted solely of medical marijuana.

22. Physical examination revealed a range of motion in Mr. Meyer's lumbar spine of 20 to 30 degrees upon extension and lateral bending and 60 degrees upon rotation, bilaterally. Measurements of both calves showed symmetrical bilateral calf atrophy. He had "considerable weakness" in his calves, bilaterally. Straight leg raising produced pain in the buttocks and the back of the thigh, more so on the left than the right.

23. Dr. Pompan concluded Mr. Meyer remained substantially incapacitated for the performance of his usual duties as a Youth Correctional Counselor due to an orthopedic (lumbar spine) condition. Specifically, Dr. Pompan concluded Mr. Meyer could not "subdue an assailant or adequately defend himself against an attacker." Additionally, he was "unable to perform the running up and down tiers and the 400 yards of running that is required at a brisk pace." He could not lift "greater than 20-25 pounds," or "do cell searches due to the decreased range of motion and the bending that is required."

Current IME

DR. HENRICHSEN'S IME

24. Dr. Henrichsen performed his IME on February 11, 2020. Mr. Meyer described the same history of his injury and subsequent medical treatment to Dr. Henrichsen as he did to Dr. McAdams and Dr. Pompan. At the time of the IME, Mr. Meyer complained of "some pain daily." He explained that he has more stiffness upon waking in the morning, but he "loosens up" as he goes about his day. By the end of the day, he experiences bilateral numbness from the mid-buttocks down to the heels, usually more so on the left than the right. Laying down provides relief. During cold weather, he takes aspirin two to four times a day. He uses marijuana daily regardless of the weather.

25. Physical examination revealed that Mr. Meyer walked with a normal gait. The range of motion of his lumbar spine was 15 degrees upon extension, 30 degrees upon lateral bending, and 40 degrees upon rotation, bilaterally, and testing produced no nerve root symptoms. The femoral nerve traction test produced back pain, but no femoral nerve symptoms.

26. Prone examination revealed no spasms, trigger points, or nodules in the low back. Mr. Meyer had some tenderness in the left buttock, but palpation of the area did not produce nerve root symptoms. Straight leg raising while supine produced no nerve root pain at 60 degrees, bilaterally. While sitting, Mr. Meyer was able to reach full extension of his right leg, but left leg raising was 10 percent less and caused pain in the back and buttock. Measurements of both calves revealed no signs of muscle atrophy.

27. Dr. Henrichsen testified consistently with his IME report. He described the range of motion in Mr. Meyer's lumbar spine as "normal." Additionally, he explained that the femoral nerve traction test requires the patient to balance on one leg while bending the other at the knee and bringing his heel as close to his buttocks as possible. The test "loads" the femoral nerve, and pain in the front of the thigh and the knee indicates a problem in the lumbar spine. Mr. Meyer had a limited ability to perform the test, bilaterally, but no femoral nerve symptoms.

28. Dr. Henrichsen's review of medical records included an imaging summary of a December 2012 CT scan of Mr. Meyer's lumbar spine. The summary noted severe narrowing at the L5-S1 level with osteophytes in both foramina. Dr. Henrichsen commented that more recent imaging summaries were not provided.

29. Dr. Henrichsen reviewed Dr. McAdams's January 29, 2014 IME report, and commented that the range of motion in Mr. Meyer's lumbar spine was "reasonable," even though he walked with "a protected gait." Dr. McAdams did not note muscle atrophy in either calf.

30. Dr. Henrichsen also reviewed Dr. Pompan's January 10, 2018 IME report. He noted that Dr. Pompan found the range of motion in Mr. Meyer's lumbar spine upon flexion and extension "normal" and upon lateral bending "satisfactory."

31. Dr. Henrichsen concluded Mr. Meyer is not substantially incapacitated for performing his usual duties as a Youth Correctional Counselor due to an orthopedic (lumbar spine) condition. Although Dr. Henrichsen recognized Mr. Meyer would have difficulty performing some of his duties due to pain, "such as running up to several hundred yards," he recognized that pain does not constitute a substantial incapacity. He also concluded "lifting is not a routine part of the occupational duties." Dr.

Henrichsen did not express an opinion about Mr. Meyer's ability to physically defend himself from an attacker or physically restrain an inmate.

Video Surveillance

32. On June 24 and July 1, 2019, CalPERS received anonymous complaints about Mr. Meyer working at Home Depot in a capacity inconsistent with his receiving an industrial disability retirement. The matter was assigned to Benjamin Barba, an investigator with CalPERS, for investigation.

33. Mr. Barba conducted video surveillance of Mr. Meyer working at Home Depot over four days between June 26 and August 8, 2019. Mr. Barba saw Mr. Meyer "moving store products," moving and lifting lumber, and pushing "large orange carts." There was no evidence of the weight of the items Mr. Meyer was moving and lifting, nor was there evidence of the weight of the carts he was pushing.

34. Mr. Barba watched as Mr. Meyer and other employees "loaded a 'Magic Chef' brand refrigerator into the bed of a white pick-up truck." There was no evidence of the refrigerator's weight. Nor was there evidence of how the refrigerator's weight was distributed between Mr. Meyer and his coworkers.

35. Mr. Barba "observed [Mr.] Meyer as he picked up 12 bags of 'concrete mix' from a pallet located in the store loading zone, carried each bag to a customer's pick-up truck parked in the loading zone, and placed each bag into the back of the truck." Mr. Barba noted in his report that he could not determine the exact brand and weight of the concrete mix he saw Mr. Meyer loading for a customer, but he went to the loading area three hours later and took photographs of three different brands of concrete mix stored on pallets from which Mr. Meyer previously took the concrete mix. Two of the brands came in 50-pound bags, and the other came in 60-pound bags.

36. At hearing, Mr. Barba explained he did not photograph the concrete mix in the area from which he saw Mr. Meyer pick up the bags he loaded into a customer's truck sooner because he was surveilling Mr. Meyer and did not want to reveal himself. He did not continuously observe the area photographed during the intervening three hours to confirm the product display did not change.

Mr. Meyer's Testimony

37. Mr. Meyer explained that he began working for Home Depot as a sales associate in May 2019 because he and his wife separated and he had to pay child support and other bills. They reconciled five months later, and he was going to resign from Home Depot because the position was more labor-intensive than he expected. However, he was offered a less strenuous position as a receiving supervisor, and he decided to stay. He remains employed at Home Depot as of the date of hearing.

38. Mr. Meyer could not recall whether he ever loaded bags of concrete mix for a customer, but also could not deny ever having done so. He explained if he had, it was "uncommon" because Home Depot hires "loaders" to load products into customers' vehicles. He works in a different department.

Analysis

39. On February 25, 2014, CalPERS granted Mr. Meyer an industrial disability retirement based on Dr. McAdams's conclusion that he was substantially incapacitated for performing the usual duties of a Youth Correctional Counselor due to an orthopedic (lumbar spine) condition. Mr. Meyer is younger than the minimum age for service retirement, and CalPERS asked Dr. Henrichsen to reevaluate Mr. Meyer to determine if he remains substantially incapacitated. CalPERS has the burden of proving

Mr. Meyer is no longer substantially incapacitated and should be reinstated to his former position.

40. CalPERS relies on the medical opinion of Dr. Henrichsen and the video surveillance showing Mr. Meyer's physical activities while working at Home Depot. Dr. Henrichsen's opinion was not persuasive because he did not address whether Mr. Meyer was capable of protecting himself during a physical altercation with an inmate or physically subduing a combative inmate. Dr. McAdams and Dr. Pompan, on the other hand, concluded he could not perform either task. Additionally, Dr. Henrichsen concluded "lifting is not a routine part of the occupational duties." However, the Physical Requirements of Position/Occupational Title for a Youth Correctional Counselor established otherwise. Dr. McAdams and Dr. Pompan concluded Mr. Meyer cannot lift greater than 20 pounds.

41. The surveillance video of Mr. Meyer's physical activities while working at Home Depot between June 26 and August 6, 2019, did not contradict either Dr. McAdams's or Dr. Pompan's conclusions. There was no evidence of the weight of the items Mr. Meyer was seen lifting or moving, the video of Mr. Meyer supposedly loading concrete mix into a customer's truck was taken from too far away to accurately determine it was in fact concrete mix he was loading, and there was insufficient evidence that he loaded the bags of concrete mix Mr. Barba photographed three hours later.

LEGAL CONCLUSIONS

Burden/Standard of Proof

1. CalPERS has the burden of proving by a preponderance of the evidence that Mr. Meyer is no longer substantially incapacitated from performing his usual duties as a Youth Correctional Counselor with CDCR. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (January 22, 2000, Precedential Decision 99-03) <<http://www.calpers.ca.gov/eip-docs/about/leg-reg-statutes/board-decisions/past/99-03-starnes.pdf>>.) This evidentiary standard requires CalPERS to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, CalPERS needs to prove it is more likely than not that Mr. Meyer is no longer substantially incapacitated. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

Applicable Law

2. Mr. Meyer is a state safety member of CalPERS by virtue of his former employment. (Gov. Code, § 20403.) He was granted an industrial disability retirement on February 25, 2014, due to an orthopedic (lumbar spine) condition pursuant to Government Code section 21151, subdivision (a). That statute provides: "Any . . . state safety . . . member incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service."

3. Government Code section 20026 defines "disability" and "incapacity for performance of duty" as a "disability of permanent or extended duration . . . as

determined by the board . . . on the basis of competent medical opinion.” (See *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876 [“We hold that to be ‘incapacitated for the performance of duty’ within section 21022 means the *substantial* inability of the applicant to perform his usual duties”]; italics original.)

4. CalPERS’s Board of Administration may require a member who retired for disability and is under the minimum age for service retirement to undergo a medical examination to determine if he remains substantially incapacitated from his former position. (Gov. Code, § 21192.) If the determination after medical examination is that the member is no longer substantially incapacitated, he shall be reinstated to his former position. (Gov. Code, § 21193.)

5. The minimum age for service retirement is 50 years old. (Gov. Code, § 21060, subd. (a).) Mr. Meyer had not yet reached age 50 when CalPERS notified him that his disabled status was under review on October 30, 2019.

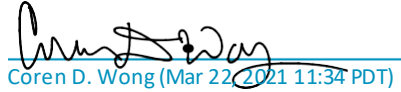
6. As discussed in Factual Findings 39 through 41, CalPERS did not establish that, based on competent medical evidence, Mr. Meyer is no longer substantially incapacitated from performing the usual job duties of a Youth Correctional Counselor with CDCR due to an orthopedic (lumbar spine) condition. Therefore, his appeal from CalPERS’s determination that he was no longer substantially incapacitated and should be reinstated to his former position should be granted.

ORDER

Respondent Brian L. Meyer’s appeal from CalPERS’s determination that he is no longer substantially incapacitated for the performance of his usual duties as a Youth

Correctional Counselor with respondent Ventura Youth Correctional Facility, California Department of Corrections and Rehabilitation due to an orthopedic (lumbar spine) condition and should be reinstated to his former position is GRANTED.

DATE: March 22, 2021



Coren D. Wong (Mar 22, 2021 11:34 PDT)

COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings