ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for Industrial Disability Retirement of:

OSCAR E. DIAZ, Respondent

Agency Case No. 2020-1308

OAH No. 2021030224

PROPOSED DECISION

Alan R. Alvord, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on January 12, 2022, by video conference due to the ongoing coronavirus pandemic public health emergency.

Nhung Dao, Staff Attorney, represented Keith Riddle, Chief, Disability and Survivor Benefits Branch, California Public Employees' Retirement System (CalPERS).

Oscar E. Diaz, respondent, represented himself.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on January 12, 2022.

SUMMARY

Respondent applied for industrial disability retirement from his job as a correctional officer. CalPERS denied the application. The competent medical opinion evidence in this case supported denying respondent's application.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent was employed as a correctional officer for the California Department of Corrections and Rehabilitation. By virtue of this employment, respondent is a state safety member of CalPERS.

2. On February 20, 2020, respondent signed and later submitted an application for industrial disability retirement based on a claimed disability for an orthopedic back injury.

3. After its evaluation, CalPERS determined that respondent was not permanently disabled or substantially incapacitated from performing the usual and customary duties of a correctional officer. On September 24, 2020, CalPERS mailed respondent a letter notifying him of CalPERS's decision.

4. Respondent filed a timely appeal letter. This hearing followed for the sole purpose of determining whether respondent is substantially incapacitated from the performance of his usual and customary duties as a correctional officer due to his orthopedic back condition.

Robert J. Kolesnik, M.D., Independent Medical Evaluation

5. Robert J. Kolesnik, M.D. graduated from the University of Southern California with a Bachelor of Science degree in biology, summa cum laude, in 1975. He received a Doctor of Medicine degree from the University of Southern California in 1979. He was certified as a diplomate of the American Board of Orthopedic Surgery in 1985. He has been a staff physician at San Antonio Community Hospital in Upland, California, Pomona Valley Hospital Medical Center in Pomona, California, and Rancho Specialty Hospital in Rancho Cucamonga, California. Dr. Kolesnik has been board-certified in orthopedic surgery since 1985. He has also made multiple academic presentations in the field of orthopedics and has published in a peer-reviewed journal. He has served as an independent medical examiner for seven years. Dr. Kolesnik is an expert in orthopedics.

6. CalPERS retained Dr. Kolesnik to perform an independent medical evaluation (IME). He evaluated respondent on August 19, 2020, at CalPERS's request. The following factual findings are based on Dr. Kolesnik's reports and his testimony during the hearing.

MEDICAL RECORD REVIEW AND HISTORY

7. On January 22, 2016, respondent was working as a correctional officer at Ironwood State Prison in Blythe, California. He was attacked by an inmate. Respondent lifted the inmate off the ground and threw him back to the ground. He began to experience progressively worse low back pain later that day. He reported the injury to his employer the following day and was referred to Palo Verde Hospital. On January 23, 2016, he received a CT scan of the lumbar spine which showed small, broad based disc bulges at L4-L5 and L5-S1. There were no fractures or dislocations. He received an

injection of Toradol, a nonsteroidal anti-inflammatory medication, and was discharged home.

8. Respondent was seen at Kaiser Permanente Occupational Health Services on January 27, 2016. He was diagnosed with rib muscle and lumbar muscle strains, was prescribed Motrin and Flexoril and advised to apply Bengay or Aspercreme as needed. X-rays of the lumbar spine taken on February 18, 2016, showed facet osteoarthritis at L4-L5 and L5-S1. He received physical therapy, but remained symptomatic.

9. On March 18, 2016, respondent was evaluated by anesthesiologist Michael M. Kim, M.D., who diagnosed lumbar radiculopathy and lumbar facet arthropathy. In May 2016, Dr. Kim administered a lumbar epidural steroid injection. During his IME appointment with Dr. Kolesnik, respondent reported to Dr. Kolesnik that this was of no benefit, but Dr. Kolesnik's report noted that a progress report dated May 31, 2016, quoted respondent as saying "I am feeling a lot better. I was sore for a day and a half. Every day it feels better." He was discharged from care on August 30, 2016 with no permanent ratable disability.

10. Respondent's symptoms increased in 2019, although there was no new traumatic event reported. He had an MRI of the lumbar spine in February 2019 that showed mild to moderate disc bulges and some neural foraminal stenosis, but no nerve root compression. Respondent received chiropractic and acupuncture treatments. He reported to Dr. Kolesnik that both of these treatments resulted in increased pain, but a progress note on April 8, 2019 by Arash Yaghoobian, M.D. stated that there was 75 percent improvement in symptoms from the acupuncture. In April 2019, a pain management specialist, Atef Rafla, M.D., assumed respondent's care. He diagnosed lumbar sprain/strain, lumbar paraspinal muscle spasm, lumbar radiculitis and radiculopathy of the lower right extremity, and right sacroiliac joint inflammation

secondary to inflammatory spondyloarthropathy. Nerve conduction studies in April 2019 were normal, with no evidence of peripheral neuropathy or lumbosacral radiculopathy.

11. Dr. Rafla administered lumbar epidural steroid injections in June and November 2019. Respondent reported to Dr. Kolesnik that these injections did not relieve his symptoms, but Dr. Rafla noted in June that there was a 50 percent improvement and in August and September a 60 to 70 percent improvement.

12. Dr. Rafla declared respondent permanent and stationary in January 2020 with a 5 percent whole person impairment. He noted respondent could perform his usual and customary job duties with restrictions for limited lift, pull, and push not to exceed 30 pounds. Michael Chuang, M.D., an orthopedic surgeon, evaluated respondent in April 2020. Dr. Chuang diagnosed lumbar radiculopathy, intervertebral disc degeneration, and sprain of ligaments of the lumbar spine. Dr. Chuang declared respondent at maximal medical improvement in May 2020 with a 6 percent whole person impairment and a prohibition from lifting more than 15 pounds and from repetitive stooping and bending.

13. After his injury in January 2016, respondent was on temporary total disability from January 27, 2016, through February 3, 2016. He returned to modified duty and later to full duty in June 2016. In 2019, he was placed on modified duty, but no modified duty assignments were available. His last date of work was January 31, 2019. He officially retired in January 2020. He has not worked since January 2019.

DR. KOLESNIK'S AUGUST 2020 EXAMINATION

14. Respondent reported almost constant sharp pain in the midline and right paraspinal areas of the lumbosacral spine. He stated that heat, aspirin and

acetaminophen diminish the pain; standing, walking more than 15 to 20 minutes, sitting more than 15 minutes and lifting more than 25 pounds magnify the pain. He reported the symptoms as stable over the last seven months. He reported pain and some difficulty with bathing, dressing, negotiating stairs, cooking, driving, and performing laundry and housework. He stated he is unable to shop.

15. During the physical examination, Dr. Kolesnik observed respondent's lumbar spine range of motion of 50/30/20 degrees flexion and 5/5/<5 degrees extension. Lateral bending was 10/15/10 degrees to the right and 5/10/10 degrees to the left. Dr. Kolesnik's report noted "He sighs, closes his eyes, and complains of low back pain with all motion, which is performed slowly and with submaximal effort." During his hearing testimony, Dr. Kolesnik explained that he asked respondent to do each range of motion movement three times. The variance in range of motion findings showed that respondent was exaggerating his complaints and not giving full effort during the exam. Dr. Kolesnik also noted the inconsistencies between respondent's reports of how prior treatments helped him and how his providers described the treatments at the time. For example, respondent told Dr. Kolesnik that his epidural steroid injections in 2016 were of no benefit, but a progress report at the time noted respondent stated he was feeling a lot better.

ADDITIONAL MEDICAL RECORDS – SUPPLEMENTAL REPORT

16. After he completed his initial report, Dr. Kolesnik received additional records to review. The following findings are based on Dr. Kolesnik's report and testimony concerning the additional records.

Evaluation by James Fait, M.D.

17. On February 19, 2021, James Fait, M.D. saw respondent for an initial orthopedic qualified medical evaluation. Dr. Fait noted respondent claimed cumulative trauma from 2007 through February 2019 as a result of repetitive work activities. Dr. Fait noted respondent had no back pain until he slipped and fell at work in 2012 during an altercation with an inmate. His pain gradually worsened in January 2016 due to repetitive bending, twisting, altercations with inmates, and wearing personal protective equipment. He complained to Dr. Fait of stabbing, popping, locking, and aching low back pain. Dr. Fait noted there was a degree of symptom magnification during his exam; lumbar spine range of motion was severely restricted however this was far beyond what one would expect with relatively mild findings on diagnostic studies. He also found the weakness in lower extremities was not consistent with the normal nerve conduction studies. Dr. Fait determined respondent was not a candidate for surgery, and would need work restrictions given the experience of pain, "however, it should be recognized that the physical exam findings are felt to be unreliable given the lack of full effort put forth on the part of the patient." Dr. Fait stated that permanent work restrictions are indicated "given the complaints of pain and restricted range of motion, although I do admit that these findings may be less that entirely accurate due to the lack of full effort put forth on the part of the applicant and the suspicion of some degree of symptom magnification." He concluded, based on the degenerative changes across the entire lower lumbar spine, that respondent is permanently precluded from lifting greater than 45 pounds, pushing or pulling greater than 45 pounds and is precluded from bending and twisting at the waist for more than four hours per shift.

Evaluation by George Watkin, M.D.

18. George Watkin, M.D. saw respondent on February 5, 2021, for a qualified medical orthopedic evaluation and issued a report dated April 7, 2021. Dr. Watkin ordered a nerve conduction study and lumbar spine MRI. Jeffrey Tan Ho, D.O. performed the nerve conduction study on February 22, 2021. The study showed active denervation potentials in the bilateral L5-S1 myotomes consistent with active bilateral lumbosacral radiculopathy in the corresponding nerve roots, worse on the left side. Sonja Moelleken, M.D. reported on the MRI study on March 11, 2021, which showed severe right neural foraminal narrowing contacting the exiting L3 nerve root, moderate bilateral neural foraminal narrowing with circumferential bulging/bilateral lateral protrusions contacting the L4 nerve roots, and left paracentral/lateral protrusion with mild canal stenosis narrowing the left lateral recess contacting the left S1 nerve root and with moderate left neural foraminal narrowing.

DR. KOLESNIK'S OPINION

19. Based on his records review and examination, including review of the supplemental records, Dr. Kolesnik testified to his opinion that respondent does not have an actual and present orthopedic back impairment that rises to the level of substantial incapacity to perform his usual and customary job duties as a correctional officer. The basis for this opinion is that there was no focal neurologic deficits and no muscle atrophy on examination. Although there was decreased range of motion, respondent did not expend a full effort and there was a wide variation of his flexion range of motion. The imaging studies showed mild degenerative disc disease and small disc bulges at multiple levels, but no nerve root compression at any level. Initial nerve conduction studies were entirely normal with no evidence of lumbosacral radiculopathy, peripheral neuropathy, or peripheral nerve compression. Although more

recent nerve conduction studies showed some denervation consistent with radiculopathy and a more recent MRI study showed some foraminal narrowing contacting the nerve roots, there was no nerve root compression. The supplemental studies did not change Dr. Kolesnik's opinion that respondent is not substantially disabled from performing his duties as a correctional officer.

Respondent's Testimony

20. Respondent testified that he hurt his back in January 2016 at work. He has pain that lasts all day, every day. He takes Tylenol daily. He can no longer do any activities he could do in the past. He cannot lift weights. He cannot lift his children. The injury has affected his life completely. He gave full effort when doctors evaluated him and he does not understand why they did not think so.

21. Respondent believes that he would be a liability to the state and to his partners if he returned to work as a correctional officer with the limitations that he experiences from his back injury.

LEGAL CONCLUSIONS

1. An applicant for a disability retirement has the burden of proving that the applicant is entitled to it by a preponderance of the evidence. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) In this matter, respondent is seeking an industrial disability retirement. For that reason, respondent has the burden of establishing that he is substantially incapacitated from performing the usual and customary duties of his job as a correctional officer.

2. "Disability" and "incapacity for performance of duty" as a basis for retirement are defined as disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the CalPERS board on the basis of competent medical opinion. (Gov. Code § 20026.)

3. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his customary duties, even though doing so may be difficult or painful, the applicant is not incapacitated and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Bd. of Administration (*1978) 77 Cal.App.3d 854.) Further, respondent must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Id.* at 863.)

4. Any patrol, state safety, state industrial, state peace officer, firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, regardless of age or amount of service. (Gov. Code § 21151.)

5. On receipt of an application for disability retirement, the board may order a medical examination to determine whether the applicant is incapacitated for performance of duty. (Gov. Code § 21154.) If the medical examination and other available information show to the satisfaction of the board that the applicant 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. The board must make the determination based on competent medical

opinion and shall not use disability retirement as a substitute for the disciplinary process. (Gov. Code § 21156.)

Evaluation

6. Respondent has the burden of providing competent medical opinion that he is substantially disabled from performing the usual and customary duties of a correctional officer. The only competent medical opinion in this case was provided by Dr. Kolesnik, who testified that respondent is not substantially disabled. The reports from Dr. Watkins and Dr. Fait were issued in the workers' compensation context. The standards for disability in workers' compensation cases are different than the standard in industrial disability retirement cases. Those reports, standing alone, do not meet the burden of proof required in this case. Respondent has not met his burden of establishing that he is substantially disabled from performing the usual and customary duties of a correctional officer and is entitled to industrial disability retirement.

ORDER

Respondent Oscar E. Diaz's application for industrial disability retirement is denied.

DATE: February 8, 2022

Alan R. Alvord

ALAN R. ALVORD

Administrative Law Judge

Office of Administrative Hearings