

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:

**ROBERTO MARTINEZ, JR., and CENTRAL CALIFORNIA
WOMEN'S FACILITY, CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, Respondents**

Case No. 2021-0615

OAH No. 2021110418

PROPOSED DECISION

Marcie Larson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on August 3, 2022, from Sacramento, California.

Helen Louie, Attorney, appeared on behalf of the California Public Employees' Retirement System (CalPERS).

Respondent Roberto Martinez Jr. appeared at the hearing and represented himself.

There was no appearance by or on behalf of respondent Central California Women's Facility, California Department of Corrections and Rehabilitation (Department). The Department was duly served with a Notice of Hearing. The matter proceeded as a default against the Department pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record closed, and the matter submitted for decision on August 3, 2022.

ISSUE

The issue on appeal is whether at the time respondent filed his application for industrial disability retirement, based on his right wrist (orthopedic condition), respondent was substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer (CO) for respondent Central California Women's Facility, California Department of Corrections and Rehabilitation.

FACTUAL FINDINGS

Procedural History

1. On March 30, 2021, respondent signed and thereafter submitted an application for industrial disability retirement (application) with CalPERS. At the time, respondent was employed as a CO at the Department. By virtue of his employment, respondent is a safety member of CalPERS subject to Government Code section 21151.

2. In filing the application, respondent claimed that his specific disabilities were "(Right wrist) Large central tear of the triangular fibrocartilage complex (TFCC)

extending from the ulnar insertion to radial insertion and from dorsal radial ulnar ligament to volar radial ligament. Moderate chondromalacia in the triquetrum and chronic synovitis in the radial and ulnar recess was noted as well." Respondent also wrote that he had plantar fasciitis in his left foot. His restrictions included "[n]o inmate contact and no forceful gripping or grasping."

Respondent wrote that his injury occurred on June 20, 2019, while searching for narcotics at the Valley State Prison. He became "engaged in a struggle with an assaultive inmate and fell to the ground along with the inmate and several other staff members." Respondent injured his right wrist.

3. On April 14, 2021, respondent spoke to CalPERS staff regarding his left foot condition. Respondent stated that he did not want to pursue disability retirement based on this condition.

4. CalPERS obtained medical records and reports prepared by Ricardo Avena, M.D., William Previte, M.D., Sanjay Deshmukh, M.D., Jere Ozaeta, M.D., and Don Williams, M.D., who conducted an Independent Medical Evaluation (IME) of respondent concerning his orthopedic condition. After reviewing the reports, CalPERS determined that respondent's orthopedic condition was not disabling. As a result, he was not substantially incapacitated from the performance of his job duties as a CO for the Department. By letter dated June 16, 2021, CalPERS notified respondent that his application for industrial disability retirement was denied. Respondent was advised of his appeal rights.

5. Respondent filed an appeal and request for hearing with CalPERS by a letter dated June 30, 2021.

6. On October 26, 2021, Keith Riddle, in his official capacity as Chief, Disability and Survivor Benefits Division, CalPERS, signed and thereafter filed the Statement of Issues.

Respondent's Employment History and Duties as a CO

7. Respondent worked as a CO for the Department's Investigative Services Unit. He conducted investigations related to narcotics and assaults in Department prisons. He was stationed at Central California Women's Facility.

8. As set forth in the Essential Functions statement, a CO in respondent's position was required to perform the following relevant duties: perform peace officer duties during adverse, stressful, or unpleasant situations; qualify on firing range; defend self/others; disarm, subdue, and apply inmate restraints; swing arm with force; inspect inmates from head to toe for contraband; lift and carry up to 125 pounds; push, pull and press; and move hands/wrists independently of each other.

9. On October 21, 2020, respondent signed a "Physical Requirements of Position/Occupational Title" form (Physical Requirements form). The Physical Requirements form was submitted to CalPERS. According to the Physical Requirements form, when working as a CO, respondent: (1) constantly (over 6 hours) walked on uneven ground, drove, was exposed to excessive noise, extreme temperature, humidity, and wetness, and operated foot controls or made repetitive movements; (2) frequently (three to six hours a day) sat, stood, walked, bent, and twisted his neck, bent and twisted his waist, reached below his shoulders, pushed and pulled, engaged in fine manipulation, power and simple grasped, repetitively used his hands, carried up to 50 pounds, and worked at heights; (3) occasionally (up to three hours), ran, crawled, kneeled, squatted, reached above his shoulders, used a keyboard and mouse, lifted

between 51 and over 100 pounds, worked with heavy equipment, was exposed to dust, gas, fumes or chemicals, used special visual or auditory protective equipment, and worked with biohazards.

Independent Medical Evaluation by Don Williams, M.D.

10. On May 22, 2021, at CalPERS's request, Dr. Williams conducted an IME of respondent and issued a report. Dr. Williams testified at hearing consistent with his report. Dr. Williams obtained his medical degree from Case Western Reserve Medical School, Cleveland, Ohio, in 1977. Thereafter, he completed a general surgery internship and orthopedic residency. Dr. Williams is a Diplomate of the American Board of Orthopedic Surgery. Since 1986, Dr. Williams has operated an orthopedic surgery private practice treating patients with orthopedic conditions. Dr. Williams specializes in treating various orthopedic conditions including hands and wrists. Dr. Williams has performed IMEs for CalPERS for approximately seven years.

11. As part of respondent's IME, Dr. Williams asked respondent to complete a questionnaire, interviewed respondent, obtained a personal and medical history, conducted a physical examination, and reviewed respondent's medical records and reports related to his orthopedic condition. Dr. Williams also reviewed respondent's essential functions as a CO and the physical requirements of his position.

RESPONDENT'S HISTORY OF INJURY AND COMPLAINTS

12. Respondent was 53 years old when Dr. Williams conducted the IME. Respondent informed Dr. Williams that he was originally injured at work on June 20, 2019. He was "trying to restrain a combative inmate. The inmate had drugs in his sock. He became involved in an altercation and fell, injuring the right wrist." Respondent was

sent to Madera Community Hospital for an evaluation. X-rays were taken, which determined respondent did not have a fracture of his wrist.

13. Respondent sought additional care through Kaiser Permanente (Kaiser). Respondent was placed on modified duty for one month. Respondent had an "MRI scan that was done with a question of a scapholunate injury as well as fraying of the flexor carpi ulnaris tendon and degenerative fraying of the TFCC as well as multiple ligament tears about the radiocarpal joint." As a result, respondent was referred to Dr. Avena, who "performed an arthroscopy of the wrist on April 24, 2020, with a synovectomy and a TFCC debridement." After the surgery respondent was placed on temporarily totally disabled status until June 11, 2020. He was then placed on modified duties that continued through September 10, 2020.

14. On November 4, 2020, respondent underwent an ulnar shortening procedure, which involved cutting out a portion of the ulna bone to help take pressure off the right wrist. Plating was also inserted. Dr. Williams explained that respondent was born with a right ulnar bone that was slightly longer, which may have contributed to his wrist pain after his work injury.

15. Respondent reported that his "right wrist still hurts on the ulnar side all the time." He also felt tingling sensation and numbness on the top of his hand. His "thumb hurts from grabbing." Respondent also reported that "his power grip has not fully returned, but he has been improving." Respondent felt that "he still cannot do his job, but has not tried. He gets stabbing sensation when gripping and his hands feel swollen and painful."

PHYSICAL EXAMINATION AND REVIEW OF MEDICAL RECORDS

16. Dr. Williams conducted a physical examination of respondent, including his upper extremities and right wrist. The extension of respondent's right wrist was 60 degrees versus 80 degrees on the left. His right wrist volar flexion 70 degrees versus 80 degrees on the left. The radial deviation was 20 degrees. Ulnar deviation was 30 degrees. Dr. Williams noted respondent had an "ulnar scar with some local tenderness along the ulnar plate." Respondent's "grip strengths are diminished, but still in the normal range of 60, 60, 60 pounds force on the right versus 140, 140, 140 pounds force on the left using the Jamar dynamometer." He also noted respondent's "right wrist is tender dorsally, but no instability, no clicking."

Dr. Williams opined that respondent had "some loss of motion" on his right wrist. However, he still had functional range of motion and his strength was in a good range. Although he had tenderness on the right wrist, he had no wrist instability, which demonstrates that the ligaments are intact. Dr. Williams also opined that respondent had good results from the two surgeries and he has a normal functioning right wrist.

17. Dr. Williams reviewed medical records and reports related to respondent's orthopedic condition, including reports from Electromyography (EMG) nerve conduction studies. The first study, performed in January 2020, showed that respondent had a normal electrodiagnostic study of his right upper extremity. The November 2020 study showed an "abnormal findings of right motor neuropathy across the elbow." The "EMG of the right upper extremity" was normal.

DIAGNOSIS AND OPINIONS

18. Dr. Williams diagnosed respondent with a "[p]artial scapholunate tear and TFCC tear post arthroscopic decompression [and] [p]ost ulnar shortening for right

wrist/ulna, positive variants." Dr. Williams explained that respondent's first arthroscopic surgery on April 24, 2020, was a debridement, which was a repair of the tear of the TFCC. The second surgery on November 4, 2020, was an ulnar shortening procedure, which decompressed the wrist with some improvement.

19. In response to the question posed by CalPERS to Dr. Williams concerning whether there were specific job duties that respondent was unable to perform because of his orthopedic condition, Dr. Williams answered "No." Dr. Williams opined that respondent "does not have an impairment that rises to the level of substantial incapacity." Dr. Williams explained that the following formed the basis of his opinions:

He did have two surgeries to help stabilize the wrist and has improved. He is not fully back to normal, but his grip strengths are good, within reasonable range and his wrist motion remains good.

20. Dr. Williams concluded that respondent is not substantially incapacitated from the performance of his duties as an CO due to his orthopedic condition. Dr. Williams added that while respondent "stated that he would have trouble with power gripping, [...] [his] grip was within the range allowing him to work..."

JULY 2022 SUPPLEMENTAL REPORT

21. Dr. Williams issued a supplemental report dated July 27, 2022, after he reviewed a "follow-up" Workers Compensation Qualified Medical Examination (QME) performed by William J. Previte, D.O. Dr. Williams noted that on March 23, 2022, respondent had the plating removed from his right wrist. Dr. Williams noted that the "ulnar bone was healed [and] [h]e had removal of the ulnar plate, basically a soft tissue procedure. He has had 4 months to recover and return to work."

Dr. Williams opined that respondent had "good motion and good strength." He added that at the time of respondent's IME, "his grip strength was 60 pounds and his motion was within normal limits." Dr. Williams felt that "he had sufficient strength to hold and use the baton." None of the information reviewed by Dr. Williams changed his opinions set forth in his May 22, 2021 report.

Respondent's Evidence

22. Respondent explained that as a member of the Investigative Services Unit, he was expected to travel to prisons to conduct investigations. The incident that caused his wrist injury occurred when six officers were trying to restrain an inmate. Three officers fell when trying to restrain the inmate, including respondent. Despite undergoing surgery and several injections in his wrist, he still suffers from grip weakness and pain. Respondent does not have additional treatment scheduled at this time and he does not take medication for pain or inflammation. Rather he "deals with the pain."

23. Respondent disagrees with Dr. Williams's opinion that he is not substantially incapacitated from the performance of his duties as a CO. Respondent explained that although his right-hand grip strength has improved to 90 pounds since the IME, he would not be able to hold on to an inmate. Respondent experiences pain when he grips and rotates his right wrist. The pain causes him to open his hand. As a result, respondent does not believe he is able to perform the essential functions of his job.

Analysis

24. When all the evidence is considered, Dr. Williams's opinion that respondent is not substantially incapacitated from the performance of his usual and

customary duties as an CO for the Department based upon his orthopedic condition was persuasive. Dr. Williams based his opinion on his review of respondent's essential functions, the physical requirements of his job as a CO, review of his medical records and reports, and a physical examination. Dr. Williams opined that respondent had two successful surgeries that stabilized his right wrist. While his grip strength is reduced in his right hand, it is within the normal range and does not prevent respondent from performing the duties of CO.

Additionally, none of the medical records reviewed by Dr. Williams contradict his opinion that respondent is not substantially incapacitated from the performance of his usual and customary duties as an CO. There is no indication in the records that any of the doctors determined that respondent was permanently disabled or substantially incapacitated from the performance of his usual and customary duties as a CO for the Department, based on his orthopedic condition.

25. Respondent failed to present competent medical evidence to demonstrate he is permanently disabled or substantially incapacitated from the performance of his usual and customary duties as an CO for the Department based upon the legal criteria applicable in this matter. Consequently, respondent failed to establish that his industrial disability retirement application should be granted based upon his orthopedic condition.

LEGAL CONCLUSIONS

1. Respondent seeks industrial disability retirement pursuant to Government Code section 21151, subdivision (a), which provides in pertinent part, that "[a]ny 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, pursuant to this chapter, regardless of age or amount of service.”

2. As defined in Government Code section 20026:

‘Disability’ and ‘incapacity for performance of duty’ as a basis of retirement, mean 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 board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

3. Government Code section 21152, subdivision (d), provides that an application for disability retirement may be made by the member.

4. Government Code section 21154 provides in relevant part that:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for disability retirement of a member, [...] the board shall, or of

its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. [...]

5. Government Code section 21156, subdivision (a)(1), provides in relevant part that:

If the medical examination and other available information show to the satisfaction of the board, [...], the governing body of the contracting agency employing the member, that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.

6. Incapacity for the performance of duty "means the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Substantial inability to perform usual duties must be measured by considering applicant's abilities. Discomfort, which makes it difficult to perform one's duties, is insufficient to establish permanent incapacity from performance of one's position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194,

207, citing *Hosford v. Bd. of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 862.) A condition or injury that may increase the likelihood of further injury, as well as a fear of future injury, do not establish a present "substantial inability" for the purpose of receiving disability retirement. (*Hosford v. Bd. of Administration, supra*, 77 Cal. App. 3d at pp. 863–864.)

7. Findings issued for the purposes of Workers' Compensation are not evidence that respondent's injuries are substantially incapacitating for the purposes of disability retirement. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; *English v. Bd. of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal.App.3d 839, 844; *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563.)

8. The burden of proof is on respondent to demonstrate that he is permanently and substantially unable to perform his usual duties such that he is permanently disabled. (*Harmon v. Bd. of Retirement of San Mateo County* (1976) 62 Cal. App. 3d 689; *Glover v. Bd. of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) To meet this burden, respondent must submit competent, objective medical evidence to establish that, at the time of his application he was permanently disabled or substantially incapacitated from performing the usual duties of his position. (*Harmon v. Bd. of Retirement, supra*, 62 Cal. App. 3d at p. 697.)

Respondent did not present competent, objective medical evidence to establish that he was permanently disabled or substantially incapacitated from performance of his duties as a CO for the Department at the time he filed his industrial disability retirement application. Therefore, based on the Factual Findings and Legal Conclusions, respondent is not entitled to retire for disability pursuant to Government Code section 21151, subdivision (a).

ORDER

Respondent Roberto Martinez Jr.'s application for industrial disability retirement is DENIED.

DATE: August 17, 2022

Marcie Larson

Marcie Larson (Aug 17, 2022 08:49 PDT)

MARCIE LARSON

Administrative Law Judge

Office of Administrative Hearings