

ATTACHMENT A

THE PROPOSED DECISION

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

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

OLIVIA IVEY, and

**CORRECTIONAL TRAINING FACILITY, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,**

Respondents.

Case No. 2021-1009

OAH No. 2022040289

PROPOSED DECISION

Administrative Law Judge Michael C. Starkey, State of California, Office of Administrative Hearings, heard this matter on November 29, 2022, via videoconference.

Staff Attorney Nhung Dao represented complainant California Public Employees' Retirement System (CalPERS).

Respondent Olivia Ivey (Ivey) represented herself.

There was no appearance on behalf of respondent Correctional Training Facility, California Department of Corrections and Rehabilitation.

The record closed on November 29, 2022.

On December 21, 2022, the undersigned issued an order reopening the record through January 17, 2023, to allow Ivey the opportunity to submit a complete and legible copy of Exhibit B because the copy of Exhibit B submitted during the hearing was missing numerous pages and contained one page that was illegible. The record was also held open through January 23, 2023, for CalPERS to submit a response. No further documents were received from either party and the record again closed and the matter was submitted on January 23, 2023.

ISSUE AND SUMMARY

Whether Ivey was incapacitated to perform her usual and customary duties as a correctional officer for respondent Correctional Training Facility, California Department of Corrections and Rehabilitation (CDCR), on the basis of orthopedic (low back, neck, bilateral feet, bilateral wrists) conditions, at the time of her application for industrial disability retirement.

Ivey contends that these orthopedic conditions rendered her substantially incapacitated from performing her usual and customary duties as a correctional officer. However, Ivey's evidence was insufficient to prove incapacity in light of the more persuasive evidence to the contrary submitted by CalPERS.

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FACTUAL FINDINGS

1. On March 10, 2022, Keith Riddle, Chief of the Disability and Survivor Benefit Services Division of CalPERS, filed the statement of issues in his official capacity on behalf of complainant CalPERS.

2. Respondent Olivia Ivey was employed by respondent California Department of Corrections and Rehabilitation (CDCR) as a correctional officer. By virtue of that employment, Ivey was a state safety member of CalPERS, subject to Government Code section 21151.¹

3. On October 21, 2020, Ivey submitted an application for service retirement pending industrial disability retirement. She claimed industrial disability on the basis of orthopedic (low back, neck, bilateral feet, bilateral wrists) and psychological (PTSD) conditions. She listed her disability date as February 28, 2019. Ivey was retired for service effective November 8, 2020, and has been receiving her retirement allowance since that date.

4. At hearing the parties stipulated that Ivey's claim for industrial disability retirement based upon PTSD is not ripe for determination and is excluded from this proceeding.

5. On May 21, 2021, CalPERS sent Ivey a letter denying her application for industrial disability retirement. Ivey timely appealed and this proceeding followed.

¹ All statutory references are to the Government Code unless otherwise stated.

Ivey's Background and Job Duties

6. Ivey was 52 years old as of the date she applied for industrial disability retirement, October 21, 2020. She started working for CDCR in 1998.

7. The essential functions and job duties of Ivey's position as a correctional officer included: being a sworn peace officer; working 40 or more hours per week; wearing a protective vest similar in thickness and weight to a ballistic vest; qualifying quarterly or annually on a firing range; defending herself and others, including disarming, subduing, and applying restraints to armed and unarmed inmates; standing, sitting, and walking occasionally to continuously; running occasionally; climbing occasionally to frequently; lifting and carrying 20 to 50 pounds throughout the workday and more than 125 pounds occasionally; opening and closing heavy locked doors occasionally to frequently; performing cell searches three times per day, including lifting mattresses; running to alarms, including up and down three flights of stairs; and grasping and squeezing with hands and wrists. Ivey reports that she worked in an older prison and was required to unlock, open, and close approximately 150 heavy doors per hour.

Ivey's Workplace Injuries

8. Ivey began feeling aches and pains in her back and bilateral feet in February 2019. On March 27, 2019, after kneeling at the firing range, she stood up and felt her right foot tingling. The next day her right foot was bruised. She was able to walk but sought treatment. The treating physician prescribed a cast for the right foot. That was her last day working full duty.

9. On March 17, 2020, an MRI study of Ivey's cervical spine was conducted and it showed "mild changes" at level C5-6, but was otherwise normal.

10. Ivey filed workers' compensation claims for her back, neck and bilateral wrists. She reports that she was having difficulty opening and closing prison doors because of pain in her wrists. She also reports that she was having trouble running to alarms because of pain in her legs and feet.

11. In early 2021, after her workers' compensation claims were approved, she began receiving treatment for these conditions. She was diagnosed with plantar fasciitis in both feet and prescribed stretching and insoles. She experienced temporary relief from a cortisone injection in her right heel and elected to have surgery on that foot.

12. Ivey was completely off work until she attempted to work modified duty in the mail room. She testified this occurred in August 2021 and that she tried for three or four days, but it was physically difficult, and she was unable to do the work. She never returned to work in any capacity for any employer.

13. On August 9, 2021, Ivey underwent a plantar fascial release surgery on her right foot. After a period of post-surgery recovery, she received physical therapy and was released to return to sedentary work. Ivey reports that her foot improved, but not as much as anticipated, and this is why she did not elect to have a similar surgery on her right foot. She reports that her right foot still hurts when she walks fast, and especially when she runs. She testified that she cannot run.

14. Ivey reports that her bilateral foot conditions were the main problem in performing her duties because she was required to run up or down three flights of stairs to respond to alarms four or five times per day and she could not do it. Sometimes she had to walk instead and was late in responding.

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15. Ivey reports that her back condition was the secondary challenge to performing her duties. She believes that she likely hurt her back lifting mattresses during cell searches three times per day and that her back became too painful to perform this duty.

16. Ivey reports that the vest she was required to wear at work restricted her neck movement and was “hard on her back.”

17. Ivey testified that her job as a correctional officer required her to “be 100 percent” to perform her duties because her life and that of her fellow officers would otherwise be in jeopardy. Ivey does not contend that anyone at work—peer or supervisor—ever told her that her work performance was inadequate or that she was incapable of fulfilling her duties.

Dr. Woodcox’s Report

18. Ivey submitted a report of Larry H. Woodcox, D.P.M., D.C., dated July 26, 2022. Dr. Woodcox examined her on December 9, 2020, and again on June 29, 2022, in the capacity of a qualified medical examiner, in connection with her workers compensation claims related to her bilateral feet conditions only. Dr. Woodcox also reviewed many 2021 and 2022 medical records of Ivey. Dr. Woodcox reported that he did not review a formal job analysis of Ivey, but she described the requirements of her position.

19. Dr. Woodcox did not testify at hearing. Nor was his resume or curriculum vitae offered into evidence. Pursuant to the letterhead of his July 26, 2022, report, he is board certified in foot and ankle surgery, and certified by the American Board of Disability Analysts.

20. Dr. Woodcox reports that Ivey's current complaints are pain in both feet, greater in the left than right, and significantly greater with weightbearing activities. He reports that June 2, 2022, MRI studies of her ankles revealed chronic tendinosis of the central band and plantar fascia, no bone spurs in the left lower extremity, and moderate diffuse thickening of the central band of the plantar fascia near the calcaneal insertion consistent with moderate chronic plantar fasciitis in the right lower extremity. Ivey reported that she "does exercise. She performs low-impact walking," but does not participate in any sports.

21. Dr. Woodcox observed moderate tenderness to the plantar medial aspect of Ivey's right and left heels and "mild induration." He observed that her range of motion in the "forefoot, midfoot, hindfoot and ankle is equal and bilaterally symmetrical," with no observable vascular or neurological abnormalities. He reported observing two centimeters of right calf atrophy.

22. Dr. Woodcox diagnosed chronic plantar fasciitis/fasciosis in both of Ivey's feet, the right foot being post-endoscopic plantar fascial release.

23. Dr. Woodcox opined that Ivey's bilateral foot conditions were industrial. He further opined that she was permanently precluded from performing her usual and customary duties as a correctional officer and opined that she was permanently restricted from standing, walking, walking on uneven terrain, and squatting for more than four hours per day.

Dr. Patel's Report

24. Ivey submitted portions of a report dated July 23, 2020, by Naeem M. Patel, D.C. Approximately half of the pages of what appears to be a 23-page report are missing from the copy Ivey submitted, and one page is illegible. As discussed in the

introduction to the proposed decision, Ivey was given the opportunity to submit a complete and legible copy of this document, but did not. It appears from the pages submitted that Dr. Patel opined that Ivey's neck, low back, and wrist injuries were permanent and stationary, industrial, and resulted in some "permanent disability" under a workers' compensation analysis. It is not clear whether Dr. Patel opined that Ivey was incapable of performing her usual and customary duties as a correctional officer due to these conditions. Also, due to the number of pages missing or illegible, it is impossible to assess the reliability of Dr. Patel's opinions. For these reasons, Dr. Patel's report is given no weight in this proposed decision.

Expert Testimony and Report of Dr. Williams

25. At CalPERS's request, Don T. Williams, M.D., evaluated Ivey's low back, neck, bilateral feet, and bilateral wrist conditions in the capacity of an independent medical examiner (IME). Dr. William reviewed Ivey's job description and job duty statement and her medical records and he interviewed and examined Ivey. He issued a report dated March 19, 2021, and testified at hearing.

26. Dr. Williams earned his medical degree in 1977, completed a clerkship in orthopedic surgery at the Mayo Clinic, served as an orthopedic surgeon for the United States Army from 1982 through 1986, and has been in private practice as an orthopedic surgeon since 1986. He is board-certified by the American Board of Orthopedic Surgery and specializes in shoulder, elbow, hand, and knee conditions. He also treats cervical and lumbar spine conditions. For the last seven years, Dr. Williams has also regularly served as an IME for CalPERS.

27. Dr. Williams reports that Ivey was cooperative during his examination. He observed normal range of motion in all aspects of Ivey's neck, bilateral feet, and

bilateral wrists. He observed that Ivey's flexion at the waist was 70 degrees and she experienced pain if she attempted to flex farther. He opined this indicates a possible problem at the L5/S1 level. He also observed that Ivey's squatting range of motion was only 90 percent of normal and she experienced some pain in the midfoot when entering a kneeling position of the right knee. He observed some tenderness in Ivey's plantar fascia, more on the right foot at the insertion of the plantar fascia into the heel. Ivey told Dr. Williams that a cortisone injection helped the right heel and custom molded orthotic inserts had "helped a lot."

28. Dr. Williams observed that Ivey had no clicking or pain with rotation of her wrists and no specific areas of tenderness, but she reported mild discomfort. Ivey reported some numbness in her right long finger when locking and unlocking prison doors, but Dr. Williams observed normal reflexes and good grip strength (measured by a Jamar dynamometer) in both hands. Dr. Williams reports that Ivey had positive Tinel's and Phalen's tests (tests for irritated nerves). He opined that this could warrant investigation of potential carpal tunnel syndrome. However, he notes that August 15, 2020, EMG and nerve conduction studies of her upper extremities were normal and indicated no carpal tunnel problems.

29. Dr. Williams opines that Ivey suffered a cervical strain; lumbar strain; pescausus (high arch or hollow foot) in her bilateral feet; plantar fasciitis in the right foot; resolved great toe locking; and wrist sprain. He opines that she is not substantially incapacitated from performing her full former duties as a correctional officer by these low back, neck, bilateral feet, and bilateral wrist conditions. He opines that her subjective complaints are greater than the objective findings. Dr. Williams acknowledges Ivey's bilateral feet problems, but opines that the treatment, specifically arch supports, was effective enough that this condition does not prevent her from

performing her former duties. He cites the normal MRI studies, EMG, and nerve conduction studies as objective evidence that she can perform her former duties.

Ultimate Factual Findings

30. Ivey did not establish that she was substantially incapacitated for the performance of her former duties as a correctional officer at the time of the application. Ivey's claim of incapacity is plausible and she appeared to be a credible witness. However, the testimony and report of Dr. Williams were more persuasive than the report of Dr. Woodcox, primarily because Dr. Williams testified at hearing and was available for cross-examination. Additionally, Dr. Woodcox's qualifications as an expert were not established, although he appears to be board certified in relevant disciplines. Finally, Dr. Woodcox opined only as to incapacity based upon applicant's feet and Ivey presented no persuasive medical evidence of incapacity based upon the other claimed conditions—low back, neck, and bilateral wrists. The medical evidence did not establish incapacity.

LEGAL CONCLUSIONS

1. The applicant for a disability retirement has the burden of proving an incapacitating condition, and the standard of proof is a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051; Evid. Code, § 115.).

2. A CalPERS state safety member may retire for industrial disability if she becomes "incapacitated for the performance of duty" as the result of an industrial disability. (§ 21151.) The term "incapacitated for the performance of duty" is defined as a "disability of permanent or extended and uncertain duration . . . on the basis of

competent medical opinion.” (§ 20026.) An applicant is “incapacitated for performance of duty” if she is substantially unable to perform the usual duties of her position.

(Mansperger v. Public Employees’ Retirement System (1970) 6 Cal.App.3d 873, 876; accord Hosford v. Board of Administration (1978) 77 Cal.App.3d 854, 859-860.)

3. Ivey did not establish that she was substantially incapacitated for the performance of her former duties as a correctional officer based on orthopedic (low back, neck, bilateral feet, bilateral wrists) conditions, at the time of the application. (Factual Finding 30.)

ORDER

1. It is found that respondent Olivia Ivey was not, at the time of her application for industrial disability retirement, substantially incapacitated for the performance of her former duties as a correctional officer based on orthopedic (low back, neck, bilateral feet, bilateral wrists) conditions.

2. At hearing the parties stipulated that Ivey’s claim for industrial disability retirement based upon post-traumatic stress disorder was not ripe for determination and that claim was excluded from this proceeding.

DATE: **02/21/2023**



MICHAEL C. STARKEY

Administrative Law Judge

Office of Administrative Hearings