

ATTACHMENT E

THE PROPOSED DECISION

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

**In the Matter of the Appeal of Reinstatement from Industrial
Disability Retirement of:**

PAIGE N. RODERICK and

**KERN VALLEY STATE PRISON, CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, Respondents**

Agency Case No. 2022-0210

OAH No. 2022060395

PROPOSED DECISION

Danette C. Brown, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on January 5, 2023, from Sacramento, California.

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

Paige N. Roderick (respondent) was present and represented herself.

Respondent Kern Valley State Prison, California Department of Corrections and Rehabilitation (KVSP), did not file a Notice of Defense. The matter proceeded as a default against respondent KVSP, pursuant to Government Code section 11520.

Evidence was received, the record closed, and the matter was submitted for decision on January 5, 2023.

ISSUE

Did CalPERS establish that respondent is no longer substantially incapacitated from performing the usual duties of a Sergeant for the KVSP and should therefore be reinstated from industrial disability retirement?

FACTUAL FINDINGS

1. Respondent was employed as a Correctional Sergeant at KVSP from approximately 2006 to 2012. By virtue of her employment, respondent was a state safety member of CalPERS. On March 23, 2009, respondent was running to an alarm when her feet became tangled in a cord and she fell onto her right shoulder. The fall resulted in the separation of respondent's acromioclavicular (AC) joint, which is the joint connecting the shoulder blade to the collarbone or clavicle.

2. On November 19, 2010, respondent signed and thereafter filed her Disability Retirement Election Application (application) for industrial disability retirement on the basis of an orthopedic (right shoulder) condition.

3. On April 26, 2011, CalPERS approved the application, and respondent's industrial disability retirement became effective immediately. CalPERS informed

respondent that she would be reexamined periodically to verify her continued eligibility for disability if she was under the minimum age for service retirement. Respondent was approximately 29 years old at the time she submitted her application.

4. On June 28, 2021, CalPERS notified respondent it was reviewing her industrial disability retirement benefits for continued eligibility. CalPERS requested respondent provide the Treating Physician Packet for completion by her physician, within 30 days, with his or her medical opinion on respondent's orthopedic (right shoulder) condition. It was respondent's responsibility to ensure the requested information was received by CalPERS by July 28, 2021; otherwise, she risked her industrial disability retirement being discontinued. If the medical information from the treating physician was insufficient, or if respondent had no treatment in the past year for her disabling condition, CalPERS would schedule an examination by an Independent Medical Examiner.

5. On October 10, 2021, respondent signed and thereafter submitted a Retiree Questionnaire for CalPERS Disability Re-Evaluation. In it, respondent indicated her condition has not improved, explaining her right shoulder has less strength, aches, and "is weak with what I call catching when I move it certain ways." Respondent did not feel she could return to her position because her range of motion is limited and she would not be able to swing a baton, defend herself, or protect another officer from danger. With respect to her physical activity, respondent wrote "I work at an office, writing and typing all day." Respondent previously played softball but "it has become increasingly painful to throw the ball." Respondent played "first base" when she could, but can no longer unless she takes her pain medication consisting of eight to 10 Tylenol pills, 500 milligrams each.

6. On January 25, 2022, CalPERS notified respondent that it had completed its reevaluation of her continued eligibility for industrial disability retirement and determined respondent was no longer substantially incapacitated from the performance of her duties as a Correctional Sergeant with KVSP due to her orthopedic (right shoulder) condition. CalPERS further informed respondent she would be reinstated to her former position.

7. On February 4, 2022, respondent timely appealed CalPERS's determination. On June 6, 2022, Keith Riddle, Chief of CalPERS's Disability and Survivor Benefits Division, signed and thereafter filed the Accusation in his official capacity, setting forth the basis for CalPERS's determination. Respondent timely filed a Notice of Defense, and this hearing followed.

Essential Functions and Physical Requirements

8. The essential functions of a Correctional Sergeant for KVSP are set forth in a document titled "Correctional Sergeant Essential Functions." A Correctional Sergeant's general duties are to work in minimum and maximum-security institutions as well as male and female institutions, non-institutional settings such as headquarters or field offices, and the ability to be supervised by a supervisor or manager. A Correctional Sergeant is a peace officer whose duties include: wearing protective clothing such as stab proof vests and breathing apparatus; range qualification with a handgun, rifle, and shotgun; disarming, subduing, and applying restraints to an inmate; self-defense against an armed inmate, and inmate inspection for contraband.

9. A CalPERS form entitled "Physical Requirements of Position/Occupational Title" sets forth the physical requirements for a Correctional Sergeant at KVSP. A

Correctional Sergeant occasionally¹ performs the following activities: sitting; standing; running; walking; crawling; kneeling; climbing; squatting; reaching (above and below shoulder); pushing and pulling; keyboard use; mouse use; lifting and carrying 50 to 100 pounds; walking on uneven ground; driving; working with heaving equipment; exposure to excessive noise; extreme temperature, humidity, and wetness; exposure to dust, gas, fumes; working at heights; use of special visual or auditory protective equipment; and working with bio hazards.

A Correctional Sergeant frequently² performs the following activities: sitting; standing; running; walking; climbing; bending (neck, waist); twisting (neck, waist); reaching (below shoulder); pushing and pulling; fine manipulation; power grasping; simple grasping; repetitive use of hands; keyboard use; mouse use; lifting/carrying; walking on uneven ground; driving; exposure to extreme temperature, humidity, and wetness; exposure to dust, gas, fumes, or chemicals; and working at heights.

A Correctional Sergeant constantly³ performs the following activities: sitting; standing; running; walking; bending (neck, waist); twisting (neck, waist); fine manipulation; power grasping; simple grasping; repetitive use of hands; lifting and carrying 0 to 50 pounds; and driving.

Independent Medical Examination by Don T. Williams, M.D.

10. CalPERS sent respondent to Don T. Williams, M.D., for an Independent Medical Examination (IME) scheduled for December 10, 2021. Dr. Williams is a board-

¹ "Occasionally" is defined as up to three hours.

² "Frequently" is defined as three to six hours.

³ "Constantly" is defined as over six hours.

certified orthopedic surgeon. He received his medical degree from Case Western Reserve Medical School in 1977, and completed his residency in orthopedic surgery at New York Orthopedic Hospital and Columbia Presbyterian Medical Center in New York. He also completed an internship in general surgery at St. Vincent Hospital in New York City, and a clerkship in orthopedic surgery at the Mayo Clinic in Rochester, Minnesota. Dr. Williams served in the United States Army from 1982 to 1986 as an orthopedic surgeon. He has engaged in private practice in orthopedic surgery since 1986, specializing in the shoulders, elbows, hands and knees. He also treats cervical and lumbar spines.

11. Dr. Williams performed his IME of respondent December 10, 2021. In doing so, he interviewed respondent, conducted a physical examination, and reviewed respondent's medical records. He thereafter wrote an IME Report, dated December 10, 2021, and testified at hearing consistent with his IME Report.

12. Dr. Williams described respondent's injury resulting from her March 23, 2009 trip and fall as follows: Respondent heard an alarm going off, tried "to run over and inform the staff of the general alarm; was running and tripped and fell, but it turned out to be a false alarm." Respondent sustained an injury to her right shoulder. She was seen at Kaweah Delta Medical Center on the same day for the "right acromioclavicular separation." Respondent was "seen by Dr. Michael Solis," when the x-ray showed a "grade 3 acromioclavicular separation." Respondent was "referred to the orthopedic consult with Dr. Ronald Castonguay." Dr. Castonguay was "leaving town," and he referred respondent to "another orthopedic surgeon, Dr. Michael Schulz." "Dr. Schulz went ahead with the elective surgery on April 13, 2009, with a right shoulder acromioclavicular joint reconstruction with a modified Weaver-Dunn procedure."

13. Respondent had physical therapy after her surgery and returned to work for approximately six months. She had "problems and pain wearing the vest as well as doing daily activities." On April 22, 2010, respondent was placed on modified duty, and on May 12, 2010, she had a "repeat operation . . . with the right shoulder AC joint reconstruction with an allograft tendon and then [post-operative] therapy." Respondent's right shoulder problems persisted after the second surgery.

In May 2011, respondent had a CT⁴ scan of her right shoulder which showed her "glenohumeral joint and surrounding muscles were intact." Respondent also had a magnetic resonance imaging (MRI) scan on her right shoulder, showing "focal tendinosis of the supraspinatus tendon and surgical changes in the distal clavicle." Respondent consulted with Mark Schamblin, M.D., for evaluation of a possible third surgery, but learned that "the chances of returning to work after a third surgery were only 30%." Respondent decided not to have a third surgery.

14. During the physical examination, Dr. Williams examined respondent's cervical spine, finding "good motion; flexion 50 degrees, extension 50 degrees, and rotation of 80 degrees to each side." He examined respondent's upper extremities, finding respondent's right shoulder had decreased motion, with "painful arc of motion." Furthermore, "she has tenderness at the AC joint with a palpable clicking with certain pushing and pulling type motions." He further noted:

External rotation strength is 5/5. Palpable sutures on the right shoulder at the A-C joint and by palpation, the A-C joint is in the normal reduced position.

⁴ Computerized tomography.

Elbow motion is good, 0 to 140 degrees.

Wrist motion is normal; 80 degrees extension and 80 degrees of flexion. She can make full fist.

15. Dr. Williams reviewed respondent's medical records, as well as respondent's non-medical records such as her job description, essential functions, and questionnaire for CalPERS Disability Re-Evaluation. He briefly summarized all of respondent's medical records from March 23, 2009, to June 27, 2018. The records consisted of respondent's orthopedic medical treatment, her surgeries, and a June 27, 2018 report by Donald C. Pompan, M.D. Dr. Williams noted:

Dr. Pompan noted range of motion on the right was flexion to 110 degrees, very firm endpoint, extension to 40 degrees, 20 degrees on the right . . .

Dr. Pompan's diagnoses was [*sic*] status post right shoulder grade 3 acromioclavicular separation, status post two Weave-Dunn type procedures, persistent deformity and pain. Dr. Pompan noting [*sic*] the failed surgery and felt that she is unable to perform specific job, substantial incapacity, permanent basis. No embellishment.

16. At hearing, Dr. Williams opined about Dr. Pompan's medical conclusion that respondent is substantially incapacitated. Dr. Williams testified that respondent has improved her flexion 160 degrees from her 2018 range of motion. The "other five motions" have improved since Dr. Pompan's examination. He added that he has seen "AC separation in a lot of athletes." They are "disabled for awhile and are able to return

to their normal functions." Respondent has "sufficiently recovered and can now perform her usual duties."

17. Dr. Williams' impression was "right acromioclavicular separation post acromioclavicular repair x 2." He summarized: respondent was 40 at the time of the examination; she sustained a "grade 3 AC separation" on March 23, 2009, when she fell on her right shoulder at work; she returned to work after her first surgery but still had pain; she had a second surgical repair; has not returned to work; and her motion has slowly improved. Moreover, respondent achieved a "functional result" after her two surgeries.

18. Dr. Williams concluded that respondent "does not have actual and present orthopedic right shoulder impairment arising to substantial incapacity." Dr. Williams stated that CalPERS's disability standards are defined as "substantial incapacity to perform job functions." He opined that respondent "may have had some preclusions in the past," but they do not constitute substantial incapacity.

Respondent's Evidence

19. Respondent testified that she has no strength in her right shoulder joint and her right shoulder is "bothering [her] really bad." She cannot swing a baton and would not be able to protect herself at work. She stated that "more medical stuff needs to happen before they say" she can return to work. Her shoulder hurts, it is not normal, and it is not right that she must return to work.

20. Respondent recently saw another doctor, Mark Schamblin, M.D., at the Southern California Orthopedic Institute in Bakersfield, California. Dr. Schamblin "never really" examined her right shoulder because he wanted to order an MRI, and respondent's medical insurance carrier would not approve it. Respondent does not

want to undergo a third surgery "for it to fail again." Other than her existing medical records reviewed and summarized by Dr. Williams, respondent did not provide additional medical records or medical testimony to establish substantial incapacity from her usual duties.

Analysis

21. To be substantially incapacitated, there must be competent medical evidence that respondent cannot perform the usual and customary duties of a Correctional Sergeant. Dr. Williams testified credibly that respondent is not substantially incapacitated to perform her job duties based upon his physical examination of respondent and his review of respondent's medical records. Respondent's only evidence was her testimony that her right shoulder still hurts, and that she cannot swing a baton nor protect herself at work. She did not provide any competent medical evidence to establish that her orthopedic (right shoulder) condition would prevent her from performing the usual duties of a Correctional Sergeant.

22. When all the evidence is considered, the opinion of Dr. Williams that respondent is not substantially incapacitated from performing the usual duties of a Correctional Sergeant was persuasive, credible, and reliable. Dr. Williams is a board-certified orthopedic surgeon and has specialized knowledge from an orthopedic standpoint, having those skills, experience, and knowledge concerned with conditions involving the musculoskeletal system.

23. Respondent's complaints of continued pain in her right shoulder and fears of future injury are not supported by any objective findings, and are insufficient to establish substantial incapacity. In the absence of sufficient competent medical

findings to support respondent's pain complaints, it cannot be found that respondent is substantially incapacitated from performing the usual duties of a Correctional Sergeant. (*Peter Kiewitt Sons v. Industrial Accident Commission* (1965) 234 Cal.App.2d 831, 838 ["Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a commission finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence"].)

24. CalPERS bears the burden of establishing that respondent is no longer substantially and permanently disabled from performing the usual duties of a Correctional Sergeant. CalPERS presented sufficient competent medical evidence to meet its burden of proof. Consequently, its request that respondent be reinstated from industrial disability retirement is granted.

LEGAL CONCLUSIONS

1. CalPERS has the burden of proving respondent is no longer substantially incapacitated from performing the usual duties as a Correctional Sergeant. (Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence of nonexistence of which is essential to the claim for relief or defense that he is asserting."].) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Bd. of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

2. In accordance with Government Code section 21192, CalPERS re-evaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examinationThe examination shall be made by a physician or surgeon, appointed by the board Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agencywhere he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

3. Government Code section 21193, governing the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty, provides, in relevant part:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability

retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

4. Government Code section 20026 defines "disability" and "incapacity for performance of duty," as follows:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

5. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.) In *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 862 the court held that a disability or incapacity must currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient. Moreover, discomfort, which may make 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, supra*, 77 Cal.App.3d 854, 862.)

6. As set forth in the Factual Findings as a whole, CalPERS met its burden of proof that respondent is no longer substantially incapacitated from performing the usual duties of a Correctional Sergeant. Consequently, CalPERS's request that respondent be reinstated from industrial disability retirement should be granted.

ORDER

CalPERS's determination that respondent Paige N. Roderick is no longer disabled or substantially incapacitated from the performance of the usual duties of a Correctional Sergeant due to an orthopedic (right shoulder) condition is AFFIRMED. Respondent's appeal is DENIED.

DATE: February 2, 2023

Danette C. Brown

DANETTE C. BROWN

Administrative Law Judge

Office of Administrative Hearings