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:

TODD D. HOPKINS, and CALIFORNIA SUBSTANCE ABUSE TREATMENT FACILITY, CORCORAN STATE PRISON, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondents

Agency Case No. 2020-1080

OAH No. 2021010747

PROPOSED DECISION

Erin R. Koch-Goodman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on June 18, 2021, from Sacramento, California.

The California Public Employees' Retirement System (CalPERS) was represented by Austa Wakily, Senior Attorney, CalPERS.

Todd D. Hopkins (respondent) was present and represented himself.

There was no appearance by or on behalf of respondent California Substance Abuse Treatment Facility, Corcoran State Prison, California Department of Corrections and Rehabilitation (CDCR). The matter proceeded as a default against CDCR pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record closed, and the matter was submitted for decision on June 18, 2021.

ISSUE

Was respondent substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer (CO) for CDCR, based upon his cardiologic (heart and hypertension), internal (fatigue and sleep apnea), and/or otolaryngologic (hearing loss) conditions at the time he filed his application for industrial disability retirement (IDR)?

FACTUAL FINDINGS

Jurisdictional Matters

1. CalPERS is the State agency charged with administering retirement benefits for eligible employees. (Gov. Code, § 20000 et seq.) By virtue of his employment, respondent was a state safety member of CalPERS subject to Government Code section 21151, subdivision (a).

2. On October 8, 2019, respondent filed a service pending IDR application. From 1988 to 2019, respondent was employed by CDCR as a CO and performed all

duties/essential functions of a CO. He last worked for CDCR in October 2019. Since then, he has received service retirement benefits.

3. In his application, respondent claimed disabling cardiologic, internal, and otolaryngologic conditions. Following a review of respondent's medical documentation, CalPERS retained: James M. Schmitz, M.D., to conduct an Independent Medical Examination (IME) of respondent's cardiologic conditions; Raman Verma, M.D., to conduct an IME of respondent's internal conditions; and Donald P. Carter, M.D., to conduct an IME of respondent's otolaryngologic conditions. Based upon all documentation, on June 25, 2020, CalPERS denied respondent's IDR application, finding respondent's conditions were not disabling and respondent was not substantially incapacitated from the performance of his job duties as a CO with CDCR as of the date he filed his application. On July 20, 2020, respondent filed an appeal, requesting an administrative hearing.

4. In August 2020, at his request, CalPERS provided additional medical documentation to Dr. Schmitz for his consideration. Dr. Schmitz reviewed the same and his final opinions were unchanged. As a result, on September 11, 2020, CalPERS again denied respondent's application.

5. On January 13, 2021, Keith Riddle, Chief, Disability and Survivor Benefit Division, CalPERS, made and filed the Statement of Issues in his official capacity.

Job Duties

6. The CDCR summarizes the general duties of a CO in a Job Analysis, highlighting security as the most principal issue. As a sworn peace officer, the CO provides security to inmates in correctional institutions in accordance with established policies regulations and procedures; observes conduct and behavior of inmates to

prevent disturbances and escapes; directs inmates during work assignments and patrols assigned areas for evidence of forbidden activities, infractions of rules and unsatisfactory attitudes or adjustment of prisoners; employs weapons or force to maintain discipline and order among prisoners when necessary; may provide security to entrances to the prison, screen visitors and supervise visiting locations; escorts inmates to and from visiting rooms, medical offices and religious services; may also be involved in the transportation of inmates between the institutions and outside medical care, courtrooms, etc.; inspects locks, windows, bars, grills, doors and gates for tampering; conducts routine searches of the inmates and cells for contraband articles; and creates written reports concerning incidents of inmates disturbances or injuries or other activities requiring reporting per departmental policy. CO assignments include duty in towers, housing units, receptions centers, outside crew supervision, search and escort, control booths, yard, gun posts, and transportation.

7. The CDCR also maintains an Essential Functions document, listing requirements of the position. CDCR requires all COs to be able to perform all of the essential functions, including: work in all posts in any adult institution/camp; perform peace officer duties during adverse, stressful, or unpleasant situations; work a minimum of 40 hours/week to accomplish specific work plus overtime; wear departmentally-approved personal protective equipment; qualify on firing range; defend self/others; disarm, subdue, and apply inmate restraints, as well as swing arm with force; remain functional during gas/chemical exposure; inspect inmates from head to toe for contraband; possess visual and hearing acuity; work in various weather and temperature conditions, and a wide range of work services; read, write, and count, and possess the mental ability to understand and apply what is read; communicate effectively, verbally and in writing; possess the mental capacity to be aware/alert, to judge the appropriate use of force, and carry out that force; possess the mental ability

to recall an incident; attend required training; and drive and travel. Finally, a CO is physically required to complete activities of movement including: stand, sit, walk, move arms and reach (occasionally to continuously); climb, stoop, crawl, and crouch, push and pull, press (occasionally to frequently); run, lift and carry over 125 pounds, brace, (frequently); lift and carry 20 to 50 pounds (occasionally); and move head and neck, move hands/wrists independently of each other and finger dexterity, twist the body (frequently to continuously).

Medical Evidence

IME – JAMES SCHMITZ, M.D.

8. Dr. Schmitz is an Independent Healthcare Advisor, board-certified in internal medicine with a subspecialty in cardiovascular diseases. Dr. Schmitz earned a Bachelor of Science in biology from Marquette University in Milwaukee, Wisconsin in 1975, before completing his medical degree from the University of Wisconsin School of Medicine in Madison in 1980. Thereafter, Dr. Schmitz completed a two-year internship/residency in internal medicine at the University of Texas Health Science Center, Park Memorial Hospital, Dallas; a one-year research and a two-year practical fellowship in cardiology at the University of Texas Southwestern Medical School in Dallas, during which time Dr. Schmitz was also an instructor in internal medicine and assistant professor of medicine. Dr. Schmitz is currently licensed to practice in Louisiana, Texas, and California. He was previously licensed in New Hampshire from 1987 to 2004. Dr. Schmitz has experience working in hospitals as the director of cardiac catherization laboratories, a cardiac rehabilitation department, and cardiovascular services. CalPERS retained Dr. Schmitz to conduct an IME of respondent, focused on cardiovascular conditions. CalPERS provided Dr. Schmitz with all medical

documentation submitted by, and on behalf of respondent, documenting medical visits and testing results from December 3, 2018 through October 23, 2019.

9. Dr. Schmitz reviewed the medical documentation, respondent's job duty statement, and examined respondent on January 10, 2020. On January 21, 2020, Dr. Schmitz wrote a report. On August 27, 2020, CalPERS contacted Dr. Schmitz, seeking clarification of his findings and provided him with the requested "[d]iagnostic electrophysiology study with radiofrequency ablation of AVRNT of the common type performed on 6/13/19 [and] Jon Y Miyakawa MD Progress note dated 1/27/20." On September 3, 2020, Dr. Schmitz wrote a supplemental report. His opinions were unchanged: respondent was not substantially incapacitated by his carteological conditions. Dr. Schmitz testified at hearing consistent with his reports.

10. In his report, Dr. Schmitz provided a summary of respondent's medical history. In 2009, respondent reported the onset of rapid and irregular heartbeats (palpitations) to his primary care physician (PCP), Jon Miyakawa, MD. At about the same time, respondent was placed on blood-pressure and cholesterol medications. In 2011, respondent was diagnosed with obstructive sleep apnea and started on a CPAP (continuous positive airway pressure) machine at night. In 2016, respondent believes the palpitations became more frequent. Without relief, in March 2019, respondent reported the more frequent palpitations to Dr. Miyakawa. Respondent was referred to Sukhvinder Bhajal, MD, at Heart Rhythm Specialists of California. Following an echocardiogram and cardiac event monitor, Dr. Bhajal diagnosed respondent with supraventricular tachycardia (SVT) and referred him for an ablation procedure. Following the ablation, respondent noted some improvement. Dr. Bhajal ordered another cardiac event monitor. The results showed no significant arrythmias and Dr. Bhajal referred respondent back to his PCP. Respondent continued to report

intermittent palpitations with progressing symptoms of anxiety to Dr. Miyakawa. In August 2019, Dr. Miyakawa took respondent off work based upon his psychological incapacitation: anxiety and emotional stress related to his position as a CO.

11. Dr. Schmitz also documented his examination of respondent. Dr. Schmitz confirmed respondent's medical history and documented current complaints of hearing loss, tinnitus, and sleeping difficulties (not restful). Dr. Schmitz described respondent as "a well-appearing man in no acute distress." He is 59 years old, measures five feet, nine inches, weighs 235 pounds, with blood pressure of 182/93 and a pulse rate of 76. A cardiac examination revealed "[t]he apical impulse is nondisplaced. The first and second heart sounds are normal. There are no murmurs, rubs or gallops audible."

12. Given all of the above, Dr. Schmitz found "AV nodal reentrant tachycardia status post successful radiofrequency ablation without recurrent symptoms and no demonstrable arrhythmias." "The [respondent] has had treatment for common [SVT] arrhythmia that is associated with a high likelihood of a successful long-term outcome without recurrence." More specifically:

> following the ablation, his arrythmia could not be induced by provocative measures. According to the follow up note with his physician from July 2020, he has not experienced recurrent sustained arrhythmias and he would be considered discharged as cured from his arrhythmia.

Therefore, "I opine that there is no level of substantial incapacity for the performance of his job as a [CO]." As such, respondent is not incapacitated due to a cardiac condition.

IME – RAMAN VERMA, M.D.

13. Dr. Verma practices internal medicine at his own medical office in Visalia. He earned a Bachelor of Medicine and Bachelor of Surgery from Punjabi University, S.D. College, Barnala and University of Delhi, Maulana Azad Medical College, India, in 1987. He then completed his medical degree from the Institute of Medical Education and Research, Chandigarh, India in 1992. Thereafter, Dr. Verma completed a one-year internship and a two-year residency in pediatrics at the Medical College of Ohio, Toledo. Dr. Verma was licensed to practice in California in April 1999. He is board-certified by the American Board of Internal Medicine. Prior to owning his own practice, Dr. Verma worked as the medical director for correctional facilities and a medical center in Ohio, and practiced at a family clinic in California. CalPERS retained Dr. Verma to conduct an IME of respondent, focused on internal conditions. CalPERS provided Dr. Verma with medical documentation, with visits notes and testing results from January 14, 2019 through November 5, 2019.

14. Dr. Verma reviewed the medical documentation, respondent's job duty statement, and examined respondent on January 15, 2020. Thereafter, Dr. Verma wrote a report. Dr. Verma testified at hearing consistent with his report.

15. In his report, Dr. Verma provided a summary of respondent's medical history. In 2009, respondent started experiencing palpitations while at work and was sent to the hospital. In March 2019, the palpitations were happening every day. In April 2019, respondent was referred to Dr. Bhajal, who ordered an echocardiogram and cardiac event monitor. Thereafter, on May 22, 2019, Dr. Bhajal diagnosed respondent with SVT and sent respondent for an ablation. The ablation was on June 13, 2019; respondent noted some improvement but reported the palpitations have never gone away. In October 2019, Dr. Bhajal ordered another echocardiogram, with the results

showing "normal left ventricular function with ejection fraction of 55 percent and trace tricuspid regurgitation and mitral regurgitation."

16. Dr. Verma also documented his examination of respondent. Dr. Verma confirmed respondent's medical history, including the use of a CPAP machine for eight years with no issues, and documented no current complaints of fatigue. Given all of the above, Dr. Verma diagnosed respondent with: "1. Episodic palpitations, status post diagnosis of [SVT] and status post ablation in June 2019. 2. Hypertension. 3. Hyperlipidemia. 4. Obstructive sleep apnea on CPAP for almost eight years." Dr. Verma concluded:

> I do not find any reason that this individual is not capable of performing any of his duties. Physically he is totally capable of performing all of the duties listed in his job description as there is no documented heart disease at this time and he was found to have normal sinus rhythm as per the records from his cardiologist and his echocardiogram was within normal range as well. He does not complain of any fatigue at this time.

Further, "[t]here is no reason that he cannot perform his job duties because his blood pressure is under good control, his heart functions are normal, and he is in normal sinus rhythm and not tachycardic." In addition, "[h]e does not have any incapacitation from fatigue or sleep apnea for which he has been using CPAP for 8 years and it is working fine." Finally,

> [h]is physical examination is normal. His EKG after the ablation was in normal sinus rhythm and his

> echocardiogram was normal. According to the cardiologist's note, he did not have any evidence of any heart disease which can interfere in his job or daily living activities.

IME – DONALD P. CARTER, M.D.

17. Dr. Carter practices otolaryngology, head and neck surgery, at his own medical office in Merced. Dr. Carter earned a Bachelor of Science in chemistry and biology from Stanford University in 1982 before completing his medical degree from the Washington University School of Medicine in St. Louis in 1986. Thereafter, Dr. Carter completed a one-year internship in general surgery and a four-year residency in otolaryngology, head and neck surgery, at the University of Kansas Medical Center. Dr. Carter became licensed to practice in California in 1991. He is board-certified by the American Board of Otolaryngology. CalPERS retained Dr. Carter to conduct an IME of respondent, focused on his otolaryngology conditions. CalPERS provided Dr. Carter with the results of an earlier hearing test and the IME reports of Drs. Schmitz and Verma.

18. Dr. Carter reviewed the medical documentation, respondent's job duty statement, the IME reports from Drs. Schmitz and Verma, and examined respondent on May 7, 2020. On May 23, 2020, Dr. Carter wrote a report. Dr. Carter testified at hearing consistent with his report.

19. In his report, Dr. Carter provided a summary of respondent's medical history, including a previous hearing test, as well as his examination and testing of respondent. Dr. Carter documented respondent's current complaints as hearing loss and tinnitus.

20. At the examination, Dr. Carter administered respondent a hearing test. The results revealed: "normal low to mid frequency hearing, with mild to moderate mid to high frequency sensory hearing loss, slightly worse in the left ear. The loss begins at 2,000 Hz [hertz]. The tympanograms[1] were noted to be normal." Dr. Carter then identifed hearing acuity to be an essential function for a CO. He wrote:

> In section Five, subsection 8b, it states, the "[CO] must have hearing acuity described as normal hearing (current pure tone testing levels cannot exceed 25dB in each ear between 500 and 4000Hz and not exceed 40dB [decibel] from 6000 to 8000 Hz)." [Respondent] does not meet these hearing levels. He has more high frequency hearing loss than would be acceptable under these criteria.
>
> I have some experience in certifications of law enforcement officers with hearing loss. My understanding is that a candidate can meet the rules by using amplification to assist with hearing. [Respondent] was recommended to try hearing aids, but had not done so when I did his evaluation.
>
> In addition, due to the prevalence of hearing loss in the general population of about 15 percent, and higher in older individuals, I am concerned that many currently employed

[1] Tympanometry is an acoustic evaluation used to evaluate the condition of the middle ear eardrum and the conduction bones by creating variations of air pressure in the ear canal. Tympanometry is an objective test of middle-ear function.

> [COs] would lose their jobs if this rule were applied strictly. I think that use of hearing aids would be reasonable in the context of meeting the requirement of normal hearing. Because [respondent] would be expected to have hearing good enough to do his job, and meet the job criteria, with use of hearing aids, I find that he does not have impairment that arises to the level of substantial incapacity to perform his usual job duties due to his hearing loss.

21. Considering all of the above, Dr. Carter found respondent "has permanent hearing loss, but I feel it could be corrected well enough to perform his job and meet the job criteria with use of hearing aids." As such, Dr. Carter found respondent is not incapacitated due to his otolaryngology conditions.

Respondent's Testimony

22. Respondent testified at hearing. He recounted his 31 years of service as a CO at three different prisons, from 1988 to 2019. During his career, he was involved in many first responder incidents and exposed to stressful situations including inmate riots, fights, and killings. Respondent believes his time as a CO caused his hearing loss in 2006, and triggered his heart condition and sleep apnea in 2009. He confirms being referred by his PCP to multiple specialists: Dr. Bhajal for his heart, as well as a heart surgeon for the ablation procedure; and an audiologist for his hearing loss, where he received a referral to obtain hearing aids. Ultimately, in 2019, respondent no longer felt able to do his job because of his health conditions, so his PCP took him off work. Once respondent drained his leave balance, he was forced to retire.

23. For respondent, none of his health issues have been resolved. He still suffers with palpitations, along with high blood pressure/hypertension, and the cumulative effects having led to fatigue and restless sleep. He uses his CPAP machine every night; nonetheless, he is tired when he wakes every morning. He still has hearing loss and tinnitus and he has not obtained hearing aids because they are very expensive. Given his health conditions, respondent believes CDCR would not allow him to work as a CO at this time.

24. Today, respondent is 62 years old. He lives in Pennsylvania with his wife. He is not currently working. He believes he was a loyal CDCR employee and does not believe it is too much to ask in return to be considered a permanently disabled State employee by CalPERS.

Analysis

25. CalPERS offered the medical opinions of three board certified physicians; their findings were consistent with the medical specialists respondent has already seen (i.e., Dr. Bhajal found no significant arrythmia after the ablation procedure and the audiologist recommended hearing aids). Respondent offered no medical evidence to support his incapacity. Respondent's testimony alone is insufficient. (*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"].)

26. Considering all of the medical evidence, the opinions of Drs. Schmitz, Verma, and Carter are credited. All three physicians have experience conducting medical evaluations and providing opinions using the CalPERS standard. Their

conclusions are based on objective medical findings, as required by the CalPERS standard, and not on respondent's subjective complaints. For all the above reasons, respondent failed to establish, through competent medical evidence, he was substantially incapacitated from performing the usual job duties of a CO based on cardiologic (heart and hypertension), internal (fatigue and sleep apnea), and otolaryngologic conditions at the time he filed his application.

LEGAL CONCLUSIONS

Applicable Laws and Statutes

1. Any state safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability. (Gov. Code, § 21151, subd. (a).) Disability as a basis of retirement means disability of permanent or extended and uncertain duration. (Gov. Code, § 20026.) According to Government Code section 21156, subdivision (a)(1), "[i]f the medical examination and other available information show to the satisfaction of the board . . . 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."

2. An applicant must demonstrate their substantial inability to perform their usual duties on the basis of competent medical evidence. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854; *Mansperger v. Public Employees' Retirement System, supra*, at pp. 876-877 [fish and game warden's inability to carry

heavy items did not render him substantially incapacitated because the need to perform such task without help from others was a remote occurrence].) And mere 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. Board of Administration, supra*, at p. 862.)

Determination

3. Given the Factual Findings as a whole, respondent has not demonstrated through competent medical evidence that he was substantially incapacitated from performing the normal and usual employment duties of a CO at the time he filed his application.

4. Accordingly, as set forth in the Factual Findings and Legal Conclusions as a whole, respondent has not met his burden of proving, by a preponderance of the evidence, that he is permanently incapacitated from the substantial performance of his job duties as a CO.

ORDER

The application of Todd D. Hopkins for CalPERS Disability Retirement is DENIED.

DATE: July 29, 2021

ERIN R. KOCH-GOODMAN
Administrative Law Judge
Office of Administrative Hearings