

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:**

ELIAS MENDEZ, Respondent.

and

**California State Prison Corcoran, California Department of
Corrections and Rehabilitation, Respondent.**

Agency Case No. 2021-0281

OAH No. 2021060346

PROPOSED DECISION

Irina Tentser, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on March 16, 2022.

Nhung Dao, Staff Attorney, appeared on behalf of California Public Employees' Retirement System (CalPERS).

Elias Mendez (Respondent) appeared and represented himself.

No appearances were made on behalf of respondent California State Prison Corcoran, California Department of Corrections and Rehabilitation (CDCR).

Testimony and documentary evidence was received. The record was closed, and the matter was submitted for decision on March 16, 2022.

SUMMARY

The issue on appeal is whether Respondent is permanently and substantially incapacitated from the performance of his usual job duties as a Correctional Officer with respondent CDCR due to an orthopedic (right shoulder) condition. At hearing, Respondent did not present persuasive medical evidence demonstrating his substantial incapacity. Accordingly, his application for industrial disability retirement benefits is denied.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent was employed by CDCR as a Correctional Officer (CO) since September 2001. He has been on temporary total disability status since February 2019. His employment status was unclear as of the date of hearing. By virtue of his employment, Respondent is a state safety member of CalPERS, pursuant to Government Code section 21151, subdivision (a). (All further statutory references are to the Government Code unless otherwise designated).

2. On October 26, 2020, while employed as a CO by CDCR, Respondent signed an Industrial Disability Retirement Application (IDR Application). In filing the

application, the disability claimed was based on an Orthopedic (right shoulder) condition.

3. By letter dated March 4, 2020, CalPERS notified Respondent that after review of the medical evidence submitted (i.e., reports prepared by Dr. Peter Minonian, Dr. Antonio Durazo, and Dr. John Kaufman), it determined that Respondent's orthopedic (right shoulder) condition is not disabling. As a result, CalPERS found that Respondent was not substantially incapacitated from performing his job duties as a CO with the CDCR and denied Respondent's IDR Application.

4. By letter dated March 11, 2021, Respondent filed a timely appeal and requested an administrative hearing.

5. Keith Riddle, Chief of the Disability and Survivor Benefits Division of CalPERS, filed the Statement of Issues in his official capacity.

6. At the hearing of this matter, the sole issue to be resolved is whether, on the basis of an Orthopedic (right shoulder) condition, as of the time of Respondent's IDR Application, Respondent is substantially incapacitated from the performance of his usual and customary duties as a Correction Officer for CDCR.

7. As more fully set forth below, Respondent has presented insufficient evidence to establish through a preponderance of the evidence that he is substantially disabled from his usual and customary duties as a CO for CDCR.

Respondent's Injury and Treatment

8. Respondent reported that on December 25, 2018, at around 1:30 p.m., during his employment, he was working at the gun tower with a floor hatch that was connected to a rope for correction officers to get in and out of the hatch. As he pulled

the rope to open the hatch for his co-worker, he heard a pop and felt pain in his right shoulder. Respondent was able to finish his shift and was able to return to work the next day.

9. Respondent reported his injury to CDCR in February 2019, and a report was filed. He did not immediately report the incident to his supervisor because he thought the pain would resolve on its own. After reporting the injury to his employer, Respondent was referred by his employer to Palm Occupational Medicine. An x-ray of the right shoulder was performed, which was unremarkable. He was prescribed Ibuprofen and Tylenol with Codeine #3.

10. Respondent subsequently obtained legal representation and was referred by his lawyer to Dr. Antonio Durazo. He was prescribed Celebrex and physical therapy for the right shoulder was recommended. Respondent underwent 8 to 12 sessions of physical therapy for the right shoulder at Porterville Physical Therapy in California which were not beneficial.

11. Respondent was then referred by Dr. Durazo to be seen and evaluated by Dr. Peter Simonian, for a pre-operative evaluation. An MRI of the right shoulder was performed which revealed torn labrum. Surgery for the right shoulder was recommended. In February 2021, Respondent underwent right shoulder surgery performed by Dr. Simonian which was not beneficial.

12. Respondent subsequently underwent 12 sessions of physical therapy for the right shoulder at the Porterville Physical Therapy in California, which were not beneficial. Respondent continues to be under the care of Dr. Durazo. His last appointment was on March 11, 2021, for the purpose of clarifying the limitations of his right shoulder.

Job Duties of a CO

13. Respondent's relevant essential functions as a CO include the following:
- Must be able to perform the duties of all the various posts.
 - Must be able to work a minimum of 40 hour per week plus overtime.
 - Must be able to qualify on firing range.
 - Must be able to defend self and others, including disarming, subduing, applying inmate restraints, and swinging arm with force utilizing a baton.
 - Must be able to frequently lift and carry 20 to 50 pounds throughout the workday.
 - Must be able to occasionally lift and carry 125 pounds. Lift and carry an inmate and physically restrain the inmate including wrestling an inmate to the floor. Drag and carry an inmate out of a cell. Perform lifting and carrying activities while working in a very cramped space.
 - Must be able to occasionally to frequently stoop, crawl and crouch.
 - Must be able to occasionally to frequently push, pull, and press.
 - Must be able to occasionally to continuously reach at and below shoulder level, depending on duty assignment.
 - Must be able to occasionally to continuously reach at and below shoulder level, depending on duty assignments, in routing searches, cuffing of inmates, apprehension, etc.

14. Respondent testified at hearing that his injury has worsened with time, and he has limited range of motion in his right arm. He testified he cannot swing his right arm to swing a baton, which means he cannot complete baton training, a required yearly training. He further asserted that his injury precludes him from being able to perform additional essential job functions including qualifying with a weapon on the firing range, swinging his arm with full force, lifting and carrying, and pushing and pulling. He reported being unable to reach above his shoulder with his right arm and testified that his limitations of not lifting more than 40 pounds precluded him from functioning as a CO and rendered him substantially incapacitated.

Medical Evidence

RESPONDENT'S EXPERT – DR. DURAZO

15. Dr. Durazo testified as Respondent's medical expert at hearing. As described above, on March 11, 2021, Dr. Durazo examined Respondent for the purpose of clarifying the limitations of his right shoulder. Dr. Durazo prepared a report documenting his exam. (Exh. D.)

16. In examining Respondent's right shoulder, Dr. Durazo noted no muscle asymmetry, no scapular winging, and no atrophy. On the Range of Motion (ROM), Respondent's flex was measured at 130 degrees, extension was 40 degrees, abduct was 90 degrees, adduct was 45 degrees, internal rotation was 30 degrees, and external rotation was 40 degrees. On strength testing, Respondent scored five out of five on all Rotator Cuff (RTC) groups. Palpation revealed no tenderness. Tests administered were negative on Neer and Hawkin's sign. The total UE impairment for range of motion deficit was assessed at 13 percent. No explanation was provided by Dr. Durazo as to

why the objective evidence did not support Respondent's claims that he was unable to lift his right arm or swing it.

17. Based on his examination, Dr. Durazo diagnosed Respondent with Superior Glenoid Labrum Lesion of the right shoulder, Sequela. He prescribed permanent and stationary work status, precluding Respondent from reaching over his head with his right arm, swinging the right arm, and limited Respondent from lifting more than 40 pounds and engaging in inmate containment.

18. Dr. Durazo testified at hearing that Respondent's work restrictions render him substantially disabled and qualify him for IDR.

CalPERS Expert – Dr. Kaufman

19. Dr. John D. Kaufman testified as CalPERS medical expert at hearing. Dr. Kaufman performed an Initial Independent Medical Examination (IIME) of Respondent at the direction of CalPERS on February 1, 2021. The examination was limited to Respondent's right shoulder.

20. The two primary questions CalPERS directed Dr. Kaufman to answer were 1) does Respondent have an actual and present orthopedic (right shoulder) impairment that arises to the level of substantial incapacity to perform his usual job duties; and 2) considering Respondent's subjective complaints and the objective findings (or lack thereof) on exam, what findings lead you to conclude Respondent is or is not substantially incapacitated?

21. Dr. Kaufman prepared a written report documenting his February 1, 2021 IIME findings and conclusions. (Exh. 7.) Dr. Kaufman's IIME consisted of an inquiry of Respondent's work, medical, and social history; a review of Respondent's job duties

and essential functions; measurements and review of x-rays and an MRI of Respondent's right shoulder; and a physical examination which included an assessment of Respondent's right and left shoulder range of motion and stability of his upper extremity ligaments.

22. Dr. Kaufman documented Respondent's account of his pain level and mobility. At the time of the evaluation, Respondent was 45 years old. He complained of burning, stabbing, and aching pain in the right shoulder that comes and goes and varies with activity. Respondent rated his pain as 10 out of 10 on a pain scale of 1 to 10. According to Respondent, the symptoms are aggravated with reaching overhead and any right shoulder movement. Respondent reported that the symptoms are alleviated by him taking a Celebrex 200 mg pill once a day.

23. Respondent reported to Dr. Kaufman that he is independent with bathing, dressing, grooming, oral care, toileting, transferring position from sitting to standing, walking, climbing stairs, eating, managing medications, using the phone, managing money, housework laundry, driving, shopping, and cooking.

24. Dr. Kaufman conducted a physical examination of Respondent's right and left shoulder. Examination of the right shoulder yielded the following results: Respondent had moderate tenderness over the acromioclavicular joint superiorly and in the subacromial area. However, there was no swelling, deformity, or erythema. The following active range of motion was obtained in degrees: Flexion of 90; Abduction of 60; Internal rotation of 65; External rotation of 20; and Extension of 45. tenderness along the medial and lateral joint lines and full range of motion.

25. Dr. Kaufman's examination of Respondent's left shoulder yielded the following results: There were no areas of tenderness, swelling, deformity or erythema.

The following active range of motion was obtained in degrees: Flexion of 160; Abduction of 160; Internal rotation of 75; External rotation of 30; and Extension of 70.

26. Dr. Kaufman's circumferential measurements of the Respondent's upper extremities in inches resulted in the following: The right arm at maximum circumference was 13.5. The left arm at maximum circumference was 13.25. Dr. Kaufman attributed the minimal difference to the fact Respondent was right-handed. Measurements of the left and right forearm were identical at 11 inches.

27. Dr. Kaufman obtained grip measurements of Respondent's right and left arm using the Jamar Dynamometer. For the right arm, the measurements were 70-75-75. For the left arm, the measurements were 75-70-70.

28. Based on the physical examination results, Dr. Kaufman opined that there was no objective evidence of right shoulder disability for Respondent.

29. As a result, Dr. Kaufman concluded that 1) Respondent did not have an actual and present orthopedic right shoulder impairment that arises to the level of substantial incapacity, and 2) there were no objective findings to substantiate Respondent's subjective complaints; noting that the only abnormal part of the exam was range of motion, which is subjective. Dr. Kaufman further noted that Respondent's symptoms were not corroborated by examination.

30. As a result, Dr. Kaufman concluded that Respondent was not substantially incapacitated from his position as a CO.

31. On August 31, 2021, CalPERS provided Dr. Kaufman with additional medical reports and a video of Respondent at a baton training. Dr. Kaufman reviewed

the video and reviewed the reports of Dr. Durazo from March 11, 2021, and Carl Cunanan, D.C. from July 23, 2021.

32. Dr. Kaufman prepared a supplemental report on September 8, 2021 and testified at hearing that the additional information did not change his conclusion that Respondent is not disabled or substantially incapacitated from performance of his duties as a CO. Dr. Kaufman maintained his conclusion because the objective evidence he obtained through physical examination of Respondent demonstrated no disability and contained only limited subjective reports of lack of right shoulder mobility by Respondent.

Discussion

33. In balance, Dr. Kaufman's opinion that Respondent is not substantially disabled is more convincing than Respondent's unconvincing subjective self-interested testimony that he is physically unable to swing a baton and the medical opinion of his expert Dr. Durazo. At hearing, Dr. Durazo provided insufficient objective medical evidence to support a finding of substantial incapacity. The prophylactic restrictions imposed by him on Respondent are insufficient to support a finding of substantial incapacity necessary for IDR. Accordingly, Respondent failed to meet his burden of establishing his entitlement to IDR benefits, and his Application should be denied.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The party asserting the affirmative in an administrative hearing has the burden of proof by a preponderance of the evidence. (See, *McCoy v. Bd. Of Retirement*

(1986) 183 Cal.App.3d 1044; Evid. Code, § 500). Typically, the party seeking to change the status quo bears the burden of proof. In *McCoy v. Bd. Of Retirement, supra*, 183 Cal.App.3d at page 1051, and footnote 5, the court found “the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence.”

2. “Preponderance of the evidence mean evidence that has more convincing force than that opposed to it.’ [Citations omitted.] . . . The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the *quality* of the evidence. The *quantity* of evidence presented by each side is irrelevant.” (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325; italics in original.)

3. Here, Respondent seeks IDR benefits. Therefore, Respondent has the burden to prove, by a preponderance of the evidence, the grounds necessary for IDR benefits. Respondent has not met his burden.

Applicable Law

4. Government Code section 20026 provides, in pertinent part:

“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, 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.

5. Pursuant to Government Code section 21152, an application to CalPERS for disability retirement may be made by the member. Pursuant to Government Code section 21154, upon receipt of the application of a local safety member, CalPERS shall request the governing body of the contracting agency employing the member to determine whether the member is incapacitated for the performance of duty.

6. Government Code section 21156 provides, in pertinent part:

(a)(1) If the medical examination and other available information show to the satisfaction of . . . 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

(2) In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

(b)(1) The governing body of the contracting agency upon receipt of the request of the board pursuant to Section 21154 shall certify to the board its determination under this section that the member is or is not incapacitated.

(2) The local safety member may appeal the determination of the governing body. Appeal hearings shall be conducted

by an administrative law judge of the Office of Administrative Hearings pursuant to [Government Code section 11500 et seq.].

7. Government Code section 21151, subdivision (a), provides: "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, pursuant to this chapter, regardless of age or amount of service."

8. "Incapacitated for the performance of duty" has been interpreted to mean "substantial inability of the applicant to perform [his] usual duties," as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.) Accordingly, an increased risk of further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future injury are insufficient to support a finding of present disability. (*Hosford, supra*, 77 Cal.App.3d at pp. 862-863.)

9. "The weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion; its value rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion[.] Such an opinion is no better than the reasons given for it." (*White v. State of California* (1971) 21 Cal.App.3d 738, 759-760.) "It is the material from which expert opinion is fashioned and the reasoning of the expert in reaching his conclusion that is important." (*In re Marriage of Battenburg* (1994) 28 Cal.App.4th 1338, 1345.)

10. Each of the parties presented expert witness testimony. Dr. Kaufman testified for CalPERS, and Dr. Durazo testified for Respondent regarding whether Respondent was substantially incapacitated for performance of his job duties. Both experts, by their education and experience, are qualified to offer the medical opinions in their respective hearing testimonies.

11. Ultimately, Dr. Kaufman's opinion was based on objective findings, accurate information regarding Respondent's daily physical activities and abilities, examination that included testing of Respondent's physical abilities, and the proper legal standards for what constitutes substantial incapacity under the law. His opinion is therefore afforded more weight than Dr. Durazo's opinion. Though Dr. Durazo opined that Respondent was disabled and substantially incapacitated and, as a result, could not perform the duties of a CO, his opinion is not convincing because it was conclusory, based on Respondent's subjective reports of physical inability to raise his right arm, and prophylactic restrictions; a finding that is contrary to the applicable case law of *Mansperger* and *Hosford*.

12. Based on the foregoing, Respondent did not meet his burden of proving by a preponderance of the evidence that he is substantially incapacitated for performance of his job duties as Corrections Officer with the California State Prison – Corcoran, California Department of Corrections and Rehabilitation due to an orthopedic (right shoulder) condition within the meaning of the IDR laws. Consequently, Respondent is not entitled to receive IDR benefits. (Factual Findings 1-33; Legal Conclusions 1-11.)

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ORDER

The Industrial Disability Retirement Election Application seeking Industrial Disability Retirement of respondent Elias Mendez is denied.

DATE: 04/15/2022

Irina Tentser

IRINA TENTSER

Administrative Law Judge

Office of Administrative Hearings