ATTACHMENT A

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:

PATRICK A. HODAK and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, DIVISION OF ADULT PAROLE OPERATIONS, Respondents

Agency Case No. 2020-1363

OAH No. 2021030463

PROPOSED DECISION

Tiffany L. King, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on September 29 and October 20, 2021, from Sacramento, California.

Helen Louie, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Steven Kaiser, Attorney at Law, represented Patrick Hodak (respondent), who was also present.

There was no appearance by or on behalf of respondent California Department of Corrections and Rehabilitation, Division of Adult Parole Operations (CDCR). At the hearing, CalPERS established that CDCR was properly served with the Statement of Issues and Notice of Hearing. This matter therefore proceeded as a default against CDCR pursuant to Government Code section 11520.

Oral and documentary evidence was received, the record closed, and the matter submitted for decision on October 20, 2021.

ISSUE

Is respondent still disabled or substantially incapacitated for the performance of his usual job duties as a Parole Agent I for CDCR on the basis of his orthopedic (left wrist) condition?

FACTUAL FINDINGS

Background

1. Respondent was employed by California Department of Corrections and Rehabilitation, Division of Adult Parole Operations (CDCR), as a Parole Agent I, from January 1998 until December 2016. By virtue of his employment, respondent was a state safety member of CalPERS.

2. On June 28, 2016, respondent submitted an application for industrial disability retirement (IDR), on the basis of an orthopedic (left wrist) condition resulting from a workplace incident on January 7, 2015. CalPERS approved

respondent's IDR application on December 27, 2016, and respondent disability retired effective December 31, 2016.

3. By letter dated August 7, 2018, CalPERS informed respondent that his IDR benefits were under review pursuant to Government Code section 21192, to determine if he continued to qualify for IDR benefits. Following its review, by letter dated December 14, 2018, CalPERS informed respondent of its determination that he continued to be disabled or incapacitated for performance of his duties as a Parole Agent I due to his left wrist.

4. By letter dated January 3, 2020, CalPERS informed respondent that his IDR benefits were again under review pursuant to Government Code section 21192, to determine if he still continued to qualify for IDR benefits.

5. On June 24, 2020, respondent underwent an independent medical evaluation (IME) by Harry Khasigian, M.D., an orthopedic surgeon. Dr. Khasigian prepared an IME report summarizing his findings. Upon review of the IME report and other competent medical reports concerning respondent's left wrist condition, CalPERS determined respondent is no longer disabled or substantially incapacitated for the performance of his usual duties as a Parole Agent I. By letter dated October 16, 2020, CalPERS notified respondent and CDCR of its determination and informed both parties of their right to appeal. Respondent timely appealed.

6. On May 9, 2021, Keith Riddle, Chief of CalPERS' Disability and Survivor Benefits Division, acting in his official capacity, filed the Accusation for purposes of the appeal. The matter was then set for an evidentiary hearing before an

Administrative Law Judge of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Duties of a Parole Agent I

7. As set forth in respondent's duty statement, his primary duties as a Parole Agent I included, in relevant part: disarming, subduing, and applying restraints; defending self or others; searching subjects for contraband in buildings, dwellings, homes or vehicles, and conducting body searches; range-qualifying every quarter with department-approved weapons and using existing weaponry in accordance with established policy; qualifying with expandable baton; utilizing appropriate safety equipment and protective clothing; identifying an emergency situation, determining appropriate use of force, and carrying out that use of force; physically restraining, including wrestling someone to the floor; and, lifting or dragging a person out of a dangerous situation. Additionally, a Parole Agent I must have the ability:

> ...to move hands and wrists as well as grasp and squeeze with his or her hands and wrists. Appropriate finger dexterity is required in the performance of administrative type duties and in the loading and unloading of weapons, searching subjects, and in the operation of various communication devices. Move/use hands and wrists independently of each other.

8. The "Physical Requirements of Position/Occupational Title" form (Physical Requirements form), signed by respondent and submitted to CalPERS in May 2016, states a Parole Agent is expected to: (1) constantly (over six hours a

day) sit, stand, walk up to 1.5 miles, bend and twist at the neck, twist at the waist, engage in fine manipulation, power and simple grasping, and repetitive use of the hands and keyboard, lift or carry up to 25 pounds for up to 1.5 miles, drive up to eight hours, and be exposed to extreme temperature, humidity, or wetness; (2) frequently (three to six hours a day) reach below the shoulder, push and pull, lift or carry up to 50 pounds for 200 yards, work at heights, walk on uneven ground, and be exposed to dust, gas, fumes, or chemicals; and, (3) occasionally (up to three hours a day) run up to 300 yards, crawl, kneel, squat, reach above the shoulder, use a keyboard and mouse, lift and carry from 51 to over 100 pounds for 200 yards, operate foot controls or engage in repetitive movement, be exposed to excessive noise, use special visual or auditory protective equipment, and work with biological hazards.

Medical Evidence

HARRY A. KHASIGIAN, M.D. – INDEPENDENT MEDICAL EVALUATION

9. Dr. Khasigian is board-certified in orthopedic surgery with a subspeciality certification in orthopedic sports medicine. He has practiced medicine for over 40 years at his own private practice in Sacramento. His primary focus is complex total joint surgery, general surgery, hand and wrist surgery and other typical orthopedic practice.

Initial IME

10. At CalPERS's request, Dr. Khasigian conducted a comprehensive orthopedic IME of respondent's left wrist on June 24, 2020. He took respondent's history, reviewed his medical records as well as the job duties and physical

requirements of a Parole Agent I. Following the IME, Dr. Khasigian authored an initial IME report and testified at hearing consistent with that report.

11. Respondent presented with complaints regarding his left wrist and right shoulder. In 2015, he underwent surgery on his left wrist for a triangular fibrocartilage complex (TFCC) tear.[1] Due to compensation for the wrist injury, he also developed "impingement syndrome" in his right shoulder and had a right shoulder arthroscopy in 2016.

Regarding his right shoulder, respondent indicated some slight decreased range of motion but "overall he is improved." Respondent's chief complaints regarding his left wrist included: loss of motion; inability to do forceful twisting; required use of a brace for heavy lifting; periodic numbness and tingling in all five digits; sharp and dull pain; numbness and tingling in wrist; painful motion; and painful grasping.

At the time of the IME, respondent was not receiving any specific medical treatment for his wrist. He occasionally went to physical therapy, but has not gone since 2019 because "it made him worse." He had last treated with Natalya Shtutman, M.D., in relation to his workers compensation case. In March 2020, Dr. Shtutman referred respondent to a hand surgeon who advised that "no further surgery was indicated and no other treatment was indicated." Respondent complained that the sutures used in his 2015 TFCC surgery did not hold and he "can still feel the stitch." He used a "large cock-up brace" for heavy lifting or when

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[1] The TFCC is a small piece of tissue located at end of wrist near the fifth (pinky) finger, and is similar to the meniscus in the knee.

his arm is painful. He also had a "very small, thin band of elastic" to wear around the brace, but he did not find it useful. Respondent is allergic to nonsteroidal anti-inflammatory drugs (NSAIDs). His only prescribed medication is lisinopril to control his blood pressure.

At the time of the IME, respondent was working in a managerial position for an executive protection agency. He was able to do some form of lifting and activities with a straight wrist; however, any type of dorsiflexion or volar flexion produced pain. Painful activities included lifting, pushing, and pulling. He felt worse in the mornings, riding in a vehicle, and in the middle of the night.

12. Dr. Khasigian next physically examined respondent. A review of systems was normal, except for a history of hypertension, asthma, and gastric reflux. Respondent stood six feet and one inch tall, and weighed 230 pounds. Dr. Khasigian described him as "a well-developed, well-nourished, large, muscular mesomorphic male, very athletic in appearance." Respondent did not wear any orthopedic devices or appliances at the IME. He was able to stand and sit without difficulty. He had normal longitude, alignment, and gait. His left wrist showed no gross abnormalities, deformities, or distortion. Examination of the cervical spine and shoulders was unremarkable.

Respondent's left wrist had a 0.5 centimeter (cm) scar on the lateral side of the TFCC area, and a small mass, approximately one to two millimeters (mm) in size, under the skin. The wrist was not swollen, red, pustular, or fluctuant. There was no significant atrophy in the left hand or forearm. A Tinel test (nerves) was negative at the left wrist and elbow. Phalen's test (carpal tunnel syndrome) produced pain but no numbness on the left wrist, and was normal on the right. Respondent indicated numbness in all five fingers upon rotation of the wrist and

palpation of the TRC area and ulnar styloid[2]; respondent withdrew, pulled away, and tensed up with any type of light touch near the ulnar styloid or TFCC area. The ulnar styloid had no redness or swelling. Supination and pronation were normal. Dorsiflexion and volar flexion (backward and forward bending) were 70/25 and 80/25 degrees, respectively, "with muscle tightening and restriction voluntarily on the left." Radial deviation was 20/20 degrees and ulnar deviation was 40/20 degrees, "again with muscular tightening for restriction." There was no indication of carpal tunnel syndrome on the left wrist. Nor was there subluxation of, or tendinous movement over, the ulnar styloid. The TFCC area did not have any swelling, fluctuance, masses or cystic changes.

A neurological examination was normal, though respondent said he could "feel the stitch" and light touch produced pain causing him to withdraw and prevent maximal function. Respondent's upper and forearms measured equally bilaterally. Results of the Jamar dynameter showed significantly more grip strength on the right than the left.

13. Dr. Khasigian remarked that respondent had no atrophy in his wrist, despite complaints of pain and hesitancy to produce full activity, withdraws, restricts and tenses when demonstrating range of motion. Dr. Khasigian also found "inconsistencies in that palpating the ulnar styloid produces numbness in all five digits, which is not anatomically consistent." In his review of the medical records provided, Dr. Khasigian noted they largely related to respondent's right shoulder condition even though the focus of the IME was his left wrist. They also did not

[2] Dr. Khasigian defined the ulnar styloid as "the bump that sticks out on the wrist near the fifth finger [pinky]."

include the most updated opinion by respondent's treating physician, Natalya Shtutman, M.D., nor any updated x-rays or diagnostic tests. Based thereon, he concluded:

> Presently, there is a very high level of subjective complaints associated with a relatively modest orthopedic problem. The information applicable to his condition is not available at this time, nor any of the most recent diagnostic tests. At this time, based solely on the historical findings regarding his diagnosis, we do not have the information that indicates the updated status of this condition which is not usually associated with significant disability.

14. At hearing, Dr. Khasigian noted the treatment options available to respondent to improve his left wrist condition. These include cortisone injections, use of a brace, arthroscopic surgery to repair the TFCC tear, excising the TFCC to completely remove it, or shortening of the ulnar to reduce pressure. However, he reaffirmed that respondent is not substantially incapacitated for the performance of his duties if he has no further treatment.

15. In response to specific questions posited by CalPERS, Dr. Khasigian opined that respondent was able to perform his job duties as a Parole Agent I without limitation and was not substantially incapacitated for such performance. He explained:

> Based on the current information present and historical knowledge of TFCC tears and the need for information

that is described, such as records applying to his left wrist and the current records applying to his most recent follow-ups and diagnostic tests regarding x-rays and MRI, most recent on his left wrist, **[respondent] does not appear to be substantially incapacitated for his duties at this time. He is temporarily incapacitated pending further information as described.**

(Emphasis added.)

Supplemental Reports

16. On July 30, 2020, Dr. Khasigian authored a supplemental report in which he clarified his prior opinion that respondent was "temporarily incapacitated pending further information as described." Dr. Khasigian confirmed his conclusion that respondent was not substantially incapacitated for the performance of his usual duties based on the history, medical records, and physical examination available to him at that time. Dr. Khasigian wrote "temporary impairment" because he wanted to review further records as described in his initial report.

17. On September 2, 2020, Dr. Khasigian authored a second supplemental report in which he opined that respondent was not substantially incapacitated for the performance of his usual duties on the basis of his right shoulder condition. Dr. Khasigian explained he did not include this opinion in his initial report because CalPERS's request to him was limited to the left wrist only.

18. On October 8, 2020, Dr. Khasigian authored a third supplemental report after CalPERS provided an October 22, 2019 qualified medical evaluation (QME) report by Mohinder Nijjar, M.D., for his review. Dr. Khasigian noted that Dr.

Nijjar found respondent had "close-to-normal range of motion of the wrist and essentially normal function of the shoulder." Dr. Khasigian concurred with Dr. Nijjar's findings, and based thereon, reaffirmed his opinion that respondent was not substantially incapacitated for the performance of his usual duties on the basis of his left wrist or right shoulder conditions.

19. On September 2, 2021, CalPERS provided Dr. Khasigian an additional 321 pages of medical records and a surveillance tape for his review. Dr. Khasigian reviewed these records and authored a fourth supplemental report dated September 8, 2021. The records included a 2017 QME report and 2018 supplemental report authored by Leo van Dolson, Jr., M.D. The supplemental report indicated Dr. van Dolson reviewed a surveillance video from 2016 and noted that respondent: used both hands and wrists to move things around a garage; used both hands, wrists, and shoulders without difficulty; used his left wrist and hand to ride, steer and handle a bicycle without difficulty. Based on the surveillance video, Dr. van Dolson concluded: "It appears [respondent] functions very well. No physical limitations were evidence in the left or right upper extremity at this time."

Dr. Khasigian also reviewed a sub rosa video of respondent's activities on March 15, 2021, and depicting respondent:

> ... walking and holding clothes in his left arm. Opening the door to his pickup with his left hand without difficulty. Apparently he was using his left hand to close the gas container on his pickup. Opened the pickup door with his left hand. Standing using both arms inside his pickup. Holding a cell phone or something in his left

> hand. Tossed it from the right hand to the left hand, catching it without any difficulty. Holding and swinging his arm symmetrically with no evidence of any type of restriction or protection. Again, walking with the left hand holding a cell phone, swinging it naturally without protection.

Dr. Khasigian confirmed that the medical records and sub rosa video did not alter his opinion that respondent is not substantially incapacitated for the performance of his usual duties of a Parole Agent I, and there are no written job descriptions which he cannot perform due to his left wrist. Additionally, Dr. Khasigian commented:

> Based upon his evaluation and the review of the subsequent records, and a review of the surveillance video and a review of the description of the surveillance reviewed by Dr. van Dolson, there appears to be elaboration in respect to left wrist function.

20. On September 15, 2021, Dr. Khasigian authored a fifth supplemental report following his review of additional medical records from Gregory Horner, M.D., Dr. Shtutman, and the physical therapy clinic. Following his review, Dr. Khasigian commented:

> The additional information that has been reviewed provides no physical findings or objective presentation that would alter or change my previously expressed opinions. There does not appear to be any significant

> changes in his condition from current to previous records. There is no new objective or diagnostic testing that would change or alter my previously expressed opinions. My opinions and conclusions remain unchanged because there has been no presentation of new objective findings that alter or modify the previous information submitted. Therefore, based upon this additional information, my opinions remain the following: (1) [respondent] is not substantially incapacitated; (2) [respondent] can perform all of his usual and customary activities.

NATALYA SHTUTMAN, M.D. – TREATING PHYSICIAN

21. Dr. Shtutman has been practicing medicine for over 30 years. She is board-certified in physical medicine and rehabilitation, and primarily treats patients with muscular-skeletal injuries, spine disorders, and nerve issues, as well as brain and spinal cord injuries. Dr. Shtutman has been respondent's primary care physician and workers' compensation physician since approximately October 2018.

22. At his initial visit with Dr. Shtutman on October 17, 2018, respondent presented with chief complaints of left wrist and right shoulder pain. Dr. Shtutman noted respondent's surgeries on his left TFCC (2015) and right shoulder (2016). While respondent's right shoulder had "significantly improved," he still lacked full use of his left wrist. Specifically, he experienced wrist pain when forcefully twisting and grasping, dropped things, and had a tingling sensation in his fourth and fifth fingers and forearm. He also felt popping and a bone "loose in the wrist."

Dr. Shtutman diagnosed respondent as follows: left wrist TFCC tear; status post arthroscopic surgical repair of left TFCC; re-tear of left TFCC; right shoulder impingement; status post right shoulder arthroscopic surgery with persistent pain. She recommended an electromyography (EMG) / nerve conduction study of the bilateral upper extremities and six sessions of hand therapy. She also prescribed LidoPro, an anesthetic ointment for pain.

23. Dr. Shtutman saw respondent again for a follow-up visit on November 19, 2018. Respondent again reported left wrist pain "so severe" that he dropped things. Upon examination, he had decreased grip strength and tenderness to palpation in his left wrist, and "limited range of motion to wrist flexion, wrist extension, ulnar and radial deviation." Dr. Shtutman reviewed the EMG / nerve conduction study, which indicated a left wrist sprain and numbness in the fourth and fifth fingers. Based thereon, Dr. Shtutman concluded respondent had bilateral mild carpal tunnel syndrome.

24. Dr. Shtutman saw respondent four times in 2019, at least once in 2020, and "a few times" in 2021. In January 2020, respondent presented with continuing left wrist pain that affected his daily activities. If he is sweeping or mopping, he may feel a sudden and severe pain, along with tingling in the tip of his fingers. Upon examination, respondent's left wrist was weaker than the right, though respondent could still use it and grip with it. It was tender to palpation and he had limited range of motion to wrist flexion, wrist extension, ulnar and radial deviation. Dr. Shtutman scheduled an appointment for respondent to consult with hand surgeon, David Broderick, M.D. Respondent subsequently met with Dr. Broderick who advised surgery would not be beneficial.

25. Over the course of 2021, Dr. Shtutman saw the same deficits persist with respondent's left wrist, "slightly limited range of motion to flexion and extension, ulnar and radial deviation, decreased grip strength, and tenderness to palpation." He cannot engage in power-grasping, twisting or manipulating a weapon, repetitive use of his wrist, or lifting over 50 pounds. She has observed no noticeable changes since she began treating him in 2018. She disagreed with Dr. Khasigian that respondent's symptoms are exaggerated, explaining they are consistent with an unsuccessful surgery. She further opined that his symptoms are unlikely to resolve on their own and there is no available treatment at this time that would enable him to return to his job. For all of these reasons, she opined that respondent is substantially incapacitated for the performance of his usual duties as a Parole Agent I.

MOHINDER NIJJAR, M.D. – QUALIFIED MEDICAL EVALUATOR

26. On October 22, 2019, Mohinder Nijjar, M.D., conducted a QME of respondent's left wrist in relation to his workers' compensation claim. Dr. Nijjar obtained respondent's history, performed a medical examination, reviewed his relevant medical records, and prepared a QME report.

Respondent presented with slight pain in his left wrist "20% to 40% of the time," with occasional popping and crackling. The pain has no correlation with activity. Respondent further reported a decreased range of motion and grip weakness. Finally, he complained of occasional slight pain in his right shoulder. These conditions "slightly affected" his activities of daily living (ADL) of lifting, grasping, gripping, and tactile discrimination.

On physical examination, respondent presented as a moderately-built, well-nourished male. Examination of his bilateral lower extremities, shoulders, and elbows was normal. Right wrist examination was unremarkable. Regarding his left wrist, Dr. Nijjar noted:

> Left wrist examination shows surgery scars, portals of entry and exit for arthroscopic debridement of TFCC and repair. Scar is well healed with no area of anesthesia along the portal and no nerve damage is identified. No effusion is present in the wrist joint. No tenderness is noted over the dorsum of the wrist. No tenderness over the anatomic snuffbox. Mild tenderness is present over the ulnar complex. No subluxation or dislocation is noted at the distal radioulnar joint, radiocarpal joint, or intercarpal joints. There [is] no instability noted. He has no crepitus in the transverse carpal ligament. Negative Tinel's sign, negative Phalen's test, negative Finkelstein test, and negative Durkin test is noted bilaterally.

Range of motion was as follows: extension 50/60; flexion 40/60; radial deviation 15/20; and ulnar deviation 20/30.

A bilateral hand examination showed no atrophy of the thenar or hypothenar eminence nor intrinsic muscles. Respondent had "no triggering that can be reproduced at this time." Range of motion of the metacarpophalangeal and interphalangeal joints of the fingers and thumb was normal. Neurological examination was normal.

27. Dr. Nijjar concluded that respondent had reached maximum medical improvement with respect to his left wrist. He further opined respondent was able to return to work "without using excessive force for retaining violent parolees and no lifting over 50 pounds with the left wrist." He did not recommend further medical treatment for either the right shoulder or left wrist, noting "occasional over-the-counter non-narcotic analgesic may be appropriate."

Respondent's Evidence

28. Respondent is 46 years old. While serving as a Parole Agent I, his duties included arresting adult parolees who had violated their parole and returning them to state custody. At all times, he was required to qualify on and carry a firearm.

29. Respondent described the workplace incident resulting in his left wrist injury. He was notified a parolee at large had been spotted by a neighbor at a former residence. Respondent and his partner responded to the call in coordination with local law enforcement and a canine unit. The officers set up outside the residence. After a few minutes, they observed the parolee and his son walking a pit bull dog. After the parolee spotted the police squad car, he turned around and ran, ignoring orders to stop. Respondent and his partner chased the parolee and caught him. The parolee's son then released the pit bull which attacked the police dog. Officers shot the pit bull and the parolee "became irate" and began resisting arrest. The parolee was a large man, approximately 320 pounds, and respondent could not get his arms behind his back despite several orders. As they struggled, respondent felt his wrist "pop" but was able to keep going based on adrenaline. After securing the parolee in a safety wrap, respondent

still had to use force to get the parolee into the back of the vehicle. At that point, respondent's left wrist was "very painful" and he had to let go of the parolee.

30. In 2015, respondent had left wrist surgery which was unsuccessful. When the cast was removed, he still had pain and swelling. The doctor observed a lump at the outside of the wrist, and concluded that the sutures had broken, separated the tissue and bundled at that location. None of respondent's doctors recommended additional treatment unless he elected to have the sutures removed, but the cartilage was too damaged. In 2020, respondent consulted with an orthopedic surgeon who advised that further surgery would not return his left wrist to normal.

31. Respondent loved his job and did not want to disability retire. Serving in law enforcement, as his grandfather and other relatives had before him, was "all [he] ever wanted to do." He contacted the return-to-work coordinator repeatedly, but was advised he could not return to his job unless his doctors released him. Respondent still cannot use his left wrist to forcibly twist, grasp, or effect an arrest.

32. At the June 24, 2020 IME with Dr. Khasigian, respondent brought two braces with him: a larger one to immobilize his wrist; and, a smaller one to prevent throbbing and pain in the wrist. Both braces interfere with his ability to use his wrist. Furthermore, he is not able to wear it on the job as it inhibits his ability to forcibly twist and grab, or effect an arrest, and a parolee could grab it creating a danger. Dr. Khasigian was dismissive of the braces and told respondent he did not need them.

Dr. Khasigian then began reviewing the medical records and asked respondent where the rest of the records were. When respondent said CalPERS

should have provided them, Dr. Khasigian said it was respondent's responsibility. During the left wrist examination, respondent felt pain upon palpation near the sutures area. Dr. Khasigian stopped the examination, stating he needed more records. He did not conduct any further tests.

33. Currently, respondent is unable to make a fist or lift more than five pounds with his left wrist. He has difficulty with minor motor movements, such as typing. Prior to his injury, he could type fully. Today, he types using his right index finger only. He also has trouble driving long distances and avoids using his left hand on the steering wheel. Regarding the essential functions of a Parole Agent I, respondent cannot qualify on a baton or apply mechanical restraints as both require use of both hands. He cannot crawl, crouch, bend his left wrist, or perform a push-up. He cannot carry up to 50 pounds, push or pull while opening locked gates or doors, engage in an altercation or restrain another person, perform a body search, grasp and squeeze with both hands, or load and unload a weapon.

34. Respondent has not opted for additional surgery as Dr. Broderick advised it would not repair the injury, which is permanent, and would only offer pain relief by removing the sutures. He also does not do well with anesthesia as it causes him nausea and vomiting. He has never been offered cortisone injections. He cannot take NSAIDs for pain or swelling.

35. Currently, respondent is employed as a project manager by Eagle Eye International Protective Services (Eagle Eye), a private security company. His duties include hiring and terminating employees and acting as a liaison between the company and clients. He primarily works from home, using a laptop for emails, but mostly communicating by telephone or Zoom. He occasionally drives to a client's residence to check on security operations and address any issues.

Analysis

36. Dr. Khasigian's opinion that respondent is no longer substantially incapacitated due to his left wrist condition is persuasive. His IME report and supplemental reports documented a thorough review of respondent's medical records and a detailed physical examination, and persuasively explained the factual bases for his conclusions and opinion. He testified consistently with his reports. Dr. Khasigian's opinion was also consistent with the findings of Drs. van Dolson and Nijjar following their QMEs of respondent in 2018 and 2019, respectively. Dr. Shtutman's finding that respondent is still permanently and substantially incapacitated was largely based on respondent's subjective reports of pain and inability to perform certain functions. Her examinations of respondent were not as comprehensive as the IME performed by Dr. Khasigian. Though she did physically examine his left wrist, Dr. Shtutman admitted she performed no diagnostic tests to corroborate respondent's subjective complaints of pain and lack of function.

37. That is not to say respondent does not suffer from pain or ailments which may make it more difficult for him to perform her job duties. But discomfort alone, even if it makes performance of one's duties more difficult, is insufficient to establish a substantial incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207 (*Smith*); citing, *Hosford v. Bd. of Admin.* (1978) 77 Cal.App.3d 854, 862 (*Hosford*).) Similarly, an increased risk of further injury is insufficient to demonstrate a present disability. (*Hosford, supra*, 77 Cal.App.3d at p. 863.)

38. Respondent's testimony that Dr. Khasigian did not perform a comprehensive IME was unpersuasive. Dr Khasigian's IME report and five supplemental reports detail the extensive physical examination and medical record review he conducted in reaching his conclusions.

39. When all the evidence is considered, CalPERS met its burden of establishing that respondent is not presently substantially incapacitated for the performance of his usual duties as a Parole Agent I. CalPERS' determination that respondent is no longer substantially incapacitated and should be reinstated to his former position should be affirmed, and respondent's appeal therefrom should be denied.

LEGAL CONCLUSIONS

1. CalPERS has the burden of proving by a preponderance of the evidence that respondent is no longer substantially incapacitated for the performance of his usual job duties as a Parole Agent I, and he should therefore be reinstated in his former position. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (January 22, 2000) CalPERS Precedential Dec. 99-03 <https://www.calpers.ca.gov/docs/99-03-starnes-chp.pdf>.)

2. Once respondent retired for industrial disability, CalPERS' Board of Administration had authority to require him to undergo medical evaluation at any time prior to him reaching the minimum age for voluntary retirement for service. (Gov. Code, § 21192.) "If the determination pursuant to Section 21192 is that [he] is not so incapacitated for duty in the position held when retired for disability . . . and his . . . employer offers to reinstate [him], his . . . disability retirement allowance shall be canceled immediately....." (Gov. Code, § 21193.) The minimum age for voluntary retirement for service applicable to respondent is 50. Based on Factual Finding 28, he had not reached that age. (Gov. Code, § 21060, subd. (a).)

3. The analysis of whether a recipient of IDR is "still incapacitated" for the performance of his usual job duties under Government Code section 21192 "is limited to determining whether the conditions for which disability retirement was granted continue to exist." (*Cal. Dept. of Justice v. Bd. of Admin. of Cal. Public Employees' Retirement System* (2015) 242 Cal.App.4th 133, 141 [the analysis of "still incapacitated" is limited to consideration of the disability for which disability retirement was originally granted, and any substantial incapacity due to a different disability is irrelevant].) The outcome of that analysis must be based on competent medical evidence. (Gov. Code, § 21192.)

4. The courts have interpreted the phrase "incapacitated for the performance of duty" to mean "the substantial inability of the applicant to perform [his] usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) It is not necessary that the person be able to perform any and all duties, because public policy supports employment and utilization of the disabled. (*Schrier v. San Mateo County Employees' Retirement Association* (1983) 142 Cal.App.3d 957, 961.) Furthermore, mere discomfort, which may make it difficult for one to perform his duties, is insufficient to establish incapacity. *(Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

5. Based on the Factual Findings as a whole, and specifically Factual Findings 36 through 38, CalPERS established by competent and persuasive medical evidence that respondent is no longer substantially incapacitated for the performance of his usual job duties as a Parole Agent I due to an orthopedic (left wrist) condition. Therefore, his appeal should be denied.

ORDER

1. The appeal of respondent Patrick A. Hodak is DENIED.

2. CalPERS' determination that respondent is no longer substantially incapacitated for the performance of his usual job duties as a Parole Agent I due to an orthopedic (left wrist) condition, and that he should be reinstated to his former position, is AFFIRMED.

DATE: December 6, 2021

TIFFANY L. KING
Administrative Law Judge
Office of Administrative Hearings