

**ATTACHMENT A**

**THE PROPOSED DECISION**

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

**In the Matter of the Reinstatement from Industrial Disability**

**Retirement of:**

**JENNIFER A. FOUS, Respondent,**

**and**

**CALIFORNIA HIGHWAY PATROL, Respondent.**

**Agency Case No. 2021-0250**

**OAH No. 2021070205**

**PROPOSED DECISION**

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on January 6, 2022, by video and telephone conference.

Helen L. Louie, Staff Attorney, California Public Employees' Retirement System (CalPERS), represented Complainant. Respondent Jennifer A. Fous appeared and was represented by Anna Batanero, Cantrell Green, PC. There was no appearance by respondent California Highway Patrol.

Oral and documentary evidence was received. The record was held open for closing briefs, until February 22, 2022.

During the hearing, the ALJ noticed that personal information of Respondent Fous, such as her driver's license number, had not been redacted from some of her exhibits. The ALJ redacted such information.

Complainant's closing brief was timely filed and is marked for identification as exhibit 20. Respondent Fous's preliminary statement was marked for identification as exhibit AAA after the end of testimony. Her closing statement was timely received and was marked for identification as exhibit BBB.

The record closed and the matter was submitted for decision on February 22, 2022.

## **FACTUAL FINDINGS**

### **The Parties and Jurisdiction**

1. The Accusation in this matter was filed by Complainant Board of Administration, of CalPERS. It was executed by Keith Riddle, Chief of the Disability and Survivor Benefits Division of CalPERS, in his official capacity.
2. Respondent California Highway Patrol (CHP) is an agency of the State of California.
3. Respondent Jennifer A. Fous (Respondent) was previously employed by the CHP as a Public Safety Dispatcher. Because of that employment, Respondent was a state safety member of CalPERS.

4. In January 2018, the CHP submitted an employer-originated application for industrial disability retirement on Respondent's behalf. Thereafter, on or about February 23, 2018, Respondent submitted an application for disability retirement to CalPERS.

5. CalPERS approved industrial disability for Respondent on March 18, 2018, on the basis of an orthopedic condition in her right shoulder. It should be noted that Respondent is right hand dominant. Respondent retired for industrial disability effective February 14, 2018.

6. CalPERS wrote Respondent on April 21, 2020, notifying her that her industrial disability retirement benefits were under review, to determine if she remained eligible for such benefits. CalPERS did so pursuant to Government Code section 21192. (Subsequent statutory citations shall be to the Government Code unless otherwise stated.)

7. Respondent was examined by a physician appointed by CalPERS, who issued a report. CalPERS considered his report and other records and determined Respondent is no longer incapacitated or disabled from performance of the duties of a Public Safety Dispatcher. CalPERS determined Respondent would be reinstated to her job pursuant to section 21193. CalPERS notified Respondent and the CHP of this determination.

8. Respondent made a timely appeal of the determination she was no longer eligible for disability retirement benefits. This proceeding ensued, with CalPERS filing the Accusation.

9. There is no evidence that the CHP appealed from the determination that Respondent was no longer eligible for disability retirement benefits from CalPERS.

Notwithstanding that failure to appeal, the CHP was served with the original and amended notice of hearing for this matter. CHP failed to appear at the hearing despite proper notice thereof.

10. Jurisdiction to proceed was established.

## **Respondent's Job Duties as a CHP Public Safety Dispatcher**

### **WRITTEN DUTY STATEMENT AND PHYSICAL REQUIREMENTS STATEMENT**

11. A written job duty statement was received in evidence. It provides a general statement that the dispatcher's job is operation of the communications equipment to provide communications service to the CHP's mobile units and the public. A description of special personal characteristics of the dispatcher includes (but is not limited to) a willingness to work nights, weekends, holidays, overtime and unusual hours, and under stress and time pressure. A dispatcher must tolerate a confined workspace with sitting and standing for prolonged periods and needs to work productively without supervision.

12A. The duty statement provides that 50 percent of the dispatcher's time is spent operating voice radio, receiving all requests from the field, taking appropriate action on those requests, and documenting those calls and responses in logs. Further, this one-half of the work includes maintaining up-to-date status on all mobile units assigned, relaying all points bulletins, monitoring a specific frequency, receiving overflow requests for emergency services, responding to them appropriately, and documenting the actions.

12B. The duty statement provides that another 27 percent of the work is dedicated to operating service desk telephone positions, taking 911 calls, responding

to them and documenting them, processing requests for radio position relayed from the field, and documenting information from phone calls, whether incoming or outgoing.

12C. The balance of the work is dedicated, generally, to processing and documenting various types of information and communications.

13. In February 2018, Respondent filled out a CalPERS form to set out the physical requirements of her position. She described tasks that occurred “constantly” or over six hours per day to include sitting, twisting her neck, reaching below the shoulder, fine manipulation, and computer mouse use. Frequent activities, those performed for three to six hours per day included bending her neck and operation of foot controls or repetitive movements. Occasional tasks—those that took up to three hours per day—included standing, walking, bending at the waist, reaching above the shoulder, lifting up to 10 pounds, walking on uneven ground, and driving.

### **RESPONDENT’S DESCRIPTION OF HER TASKS AS A CHP PUBLIC SAFETY DISPATCHER**

14. In her testimony, Respondent described her work in a manner that depicted it as fast-paced, demanding, and unyielding, with physical demands that would not first come to mind when thinking about a police dispatcher’s job. It was not the type of sedentary desk work contemplated by Complainant’s expert, Dr. Kaufman when he formulated his opinions.

15. Respondent described two main tasks in her former employment. First was the call-taking work, and the other working in a radio position or radio side. In either, the dispatcher works with three or four large computer monitors, set above a desk-like surface. The dispatcher works in a rolling chair, and needs to move that chair

about the workspace. The job requires constant typing, and demands complete accuracy in what is typed, as there are significant safety and liability issues flowing from the CHP's activities.

16. When a call comes in, it is dropped into the dispatcher's phone, and the dispatcher must type the call information into a log, the call conversation typed into the log verbatim. The call is transferred into radio and becomes a task. The dispatcher assigns a CHP unit and must read the log information to the officer. The conversation with the officer is typed into the log as well. (A call purely pertaining to a medical issue is transferred the to the fire department or ambulance service.) The constant typing begins as soon as the call is dropped into the dispatcher's ear. The dispatcher must cope with background noise, stress in the caller's voice, and other potential distractions all while making verbatim transcription of the call, and any communications with officers or others.

17. However, typing is not the only task for a CHP public safety dispatcher. As noted above, the dispatcher works in a U-shaped work station, and when taking calls works with three keyboards, three mice, a head set, and three other phones. On the radio side, four computer screens are used, plus radio gear, which is set away from the work surface, so that the dispatcher must roll toward it. The radio equipment has buttons that must be held down at certain times; this requires a reach by the dispatcher to that equipment. According to Respondent, about half of the time that a dispatcher is working on the radio station, they must have their hands on the equipment.

18. The monitors display different information. One is for logs as they pop up, another displays maps, while another displays information such as the location of hospitals. While constantly typing, a dispatcher also is using one of the three or four

computer mice to work with information on the computer displays, and the dispatcher may have to work the radio equipment.

19. Respondent's work week consisted of three 12-hour shifts along with an eight-hour shift, with two 15-minute breaks, and one 30-minute break during the long days. However, on busy days, or where there were serious emergencies, a dispatcher might receive no breaks. She once handled 3,000 calls in one day.

20. Respondent's work involved much motion, and constant use of her arms to type, manipulate the mice, and to control the radio equipment.

### **Respondent's Injuries and Disabilities**

21. Respondent has had three surgeries on her right shoulder, two before her retirement, and one after that time. She has also had surgeries on both hands, to treat trigger finger or carpal tunnel syndrome, the last hand surgery taking place in November 2021.

22. After her first two shoulder surgeries, which took place in April 2016 and March 2017, Respondent returned to work. However, after her second shoulder surgery, Respondent continued to suffer from problems with her right shoulder. She could not keep up with her work, and the CHP took her out of dispatch work, as Respondent's inability to keep pace caused the officers to be concerned for their safety, and her supervisors plainly shared that concern. CHP placed Respondent in a clerical-type position. Within a few weeks after taking her out of the dispatch work, the CHP submitted her disability retirement papers. In doing so, the CHP relied on a report from a Panel Qualified Medical Evaluation performed by Alice Martinson, M.D., dated December 4, 2017. In a letter to Respondent the CHP described Dr. Martinson's evaluation as "clearly indicat[ing] you are precluded from you usual and customary



occupation of a California Highway Patrol, Public Safety Dispatcher.” (Ex. WW.) In her report, Dr. Martinson’s recommended that Respondent should stay out of dispatching, and that she should be precluded from right arm, over shoulder movements or repetitive movements. (Ex CC.)

23. In November 2018, Respondent underwent her third shoulder surgery, for a subscapularis tendon repair; going into the surgery there was also indication of labral tearing in the shoulder. The third surgery occurred approximately 11 months after the CHP sought disability retirement, and about 10 months after the disability retirement was approved.

24. On May 23, 2019, Respondent presented to Brad Cohen, M.D. complaining of shoulder pain at level six of 10, and sometimes up to level eight. She described the pain as aggravated by lifting, movement, and pushing. Associated symptoms were decreased mobility and joint instability, weakness, and tenderness. This was approximately six months after Respondent’s third surgery.

25. Respondent credibly testified she continues to have pain and discomfort in her right shoulder. She has difficulty stretching or lifting her right arm. She has trouble performing household chores such as doing the laundry. Respondent is quite clear she cannot perform the usual and customary duties of a CHP Public Safety dispatcher.

26. When Respondent submitted to an Independent Medical Exam by Dr. Kaufman in November 2020, she reported pain that averages seven on the one to 10 scale, and described a popping sensation in her right shoulder, with weakness and a lack of mobility of her shoulder. The problems with her shoulder impinged on activities

of daily living, including bathing, dressing, cooking, housework of all stripes. She was unable to carry her then 10-month-old grandson.

27. In April 2021, Respondent reported to Domenick J. Sisto, M.D. that she had recurring pain in her right shoulder, along with marked weakness in overhead activities. She felt weak in her grip, and had added pain if she laid on her right side, a problem she reported to previous doctors.

### **The Opposing Opinions of the Medical Professionals**

28. John D. Kaufman, M.D., conducted the independent medical exam for CalPERS on November 5, 2020. He is board-certified in orthopedic surgery. As noted above, Respondent reported to Dr. Kaufman that she had pain in her right shoulder and limitations on her use of it. She also reported she enjoyed sewing, crocheting, and shopping, but had difficulties with those activities after she was injured.

29. In his report, exhibit 13, Dr. Kaufman's states that there was slight to moderate tenderness over the superior aspect of the right shoulder but no swelling or deformity. As to range of motion, the right shoulder was diminished as compared to the left (uninjured) shoulder. Hence flexion was 120 degrees on the right shoulder as compared with 180 degrees on the left; abduction was 110 degrees on the right as compared to 170 degrees on the left. Internal and external rotation differed, but not to the same extent, with right internal rotation measured as 75 degrees compared to 80 degrees for the left shoulder, and external rotation as 25 degrees on the right, 40 degrees on left. Passive flexion and abduction differed between the two shoulders, with 150 degrees for both flexion and abduction in the right shoulder, while passive flexion was 180 degrees and abduction was 170 degrees on the left shoulder.

30. Dr. Kaufman found no atrophy, as arm maximum circumference was virtually identical, with the forearm measurements equal. Grip measurements were lower for the right arm than the left, 30-30-28 as compared to 50-60-60.

31. In his testimony, Dr. Kaufman acknowledged the decreased range of motion was significant, but he opined there were no objective indications of symptoms. He testified he did not find a shoulder problem, describing Respondent's right shoulder as fully functional. He relied on his findings of a lack of atrophy to indicate there was no pain, as he would expect atrophy if there was pain. Dr. Kaufman maintained the opinion he had stated in his written report, to the effect Respondent is not substantially disabled from her usual and customary job duties.

32. While Dr. Kaufman described Respondent's job duties in his report, and had some detail about the workstation, the multiple computer keyboards and radio gear, he opined Respondent's job amounted to desk work, of a sedentary nature; he stated as much more than once during his testimony.

33. In his report, Dr. Kaufman found Respondent had been putting forth her best effort, and he testified she was credible. He testified he found no malingering.

34. Dr. Sisto also testified in this matter. Dr. Sisto is a board-certified orthopedic surgeon, and has practiced since 1985. He has been treating Respondent since April 2021. His most recent treatment was a surgery in November 2021 where he performed trigger release surgery on Respondent's right arm.

35. As noted in Factual Finding 27, when Dr. Sisto first saw Respondent in April 2021 she complained of shoulder pain. Like Dr. Kaufman, Dr. Sisto finds Respondent to be credible, and he described her as sincere. He agrees with Dr. Kaufman that Respondent has not been malingering.

36. When Dr. Sisto examined Respondent in April 2021, he assessed her as having impingement syndrome in her right shoulder post arthroscopic surgery “x 3.” (Ex. H, p. B21.) During that exam he measured significant diminished grip strength on the right side, and he found weakness in the deltoid muscle and the supraspinatus, a rotator cuff muscle.

37. Dr. Sisto testified to his opinion that Respondent has a progressive condition unlikely to improve, and he cited weakness in her deltoid and rotator cuff. He pointed out that every time Respondent went back to work, her condition worsened, an indication she has progressive problems in her right shoulder. Dr. Sisto opined that the pain and weakness in Respondent’s rotator cuff will impinge on her ability to reach below her shoulder, and he believes her weakened grip strength to be a function of her shoulder problems; in Dr. Sisto’s experience three shoulder surgeries will lead to diminished grip strength. To the extent her symptoms are not as bad as they have been in the past, Dr. Sisto pointed out Respondent is not working at her job, 12 hours per day, three days per week.

38. At bottom, Dr. Sisto is confident that Respondent cannot return to work as a CHP Public Safety Dispatcher and perform her usual and customary duties.

## **Other Matters**

39. The witnesses—Respondent and the two physicians—were credible in their demeanor, answering questions in a straight-forward way. Doctors Kaufman and Sisto know each other, and they testified in a professional manner, essentially agreeing to disagree.

40. Respondent’s credibility, and thus her testimony about her condition and current limitations, is bolstered by the fact that both physicians found her to be

credible, sincere, and not a malingerer. That she is not a malingerer is further bolstered by the fact that she came back to work after her second surgery and worked her job until her supervisors took her out of that position.

41. The weight of the evidence supports a finding that Dr. Sisto's opinion must be given more weight than the opinion of Dr. Kaufman. Both physicians found objective evidence of limitations on grip strength and the ability to use the right arm. Both heard subjective complaints from a credible person. That Dr. Kaufman does not perceive sufficient objective findings when some exist, is problematic. Respondent's reports of her pain and limited ability to use her arm are credited and cannot be ignored. Further, Dr. Kaufman came into this hearing with a lack of understanding of just what Respondent did for work, not understanding the demanding nature of the work she would have to do again if returned to her duties as a Public Safety Dispatcher. Plainly, the job is not a sedentary desk job, which, during the pandemic, could define the ALJ's work. It is obvious that the work of a CHP Public Safety Dispatcher is more physically demanding than Dr. Kaufman understood, and operation of three or four computer mice, and physically operating the radio equipment while using telephones (even with headsets) would quickly strain a shoulder that now inhibits Respondent from performing housework and dressing herself. It should be noted that the documentation of the physical requirements of the job show constant—over six hours per day—reaching under the shoulder, an activity Dr. Sisto opines will be delimited by Respondent's rotator cuff problems.

42. Respondent remains substantially unable to perform her usual and customary duties as a CHP Public Safety Dispatcher.

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## LEGAL CONCLUSIONS

1. Respondent was a state safety member of CalPERS within the meaning of section 21151, and thus was eligible for disability retirement in 2018 upon the appropriate showing she was disabled within the meaning of the laws that govern CalPERS. However, CalPERS has the authority to determine whether a former member remains disabled, and upon an appeal from its determination, jurisdiction exists to determine whether Respondent remains entitled to such disability retirement benefits. This Conclusion is based on sections 21192 and 21193. California Code of Regulations, title 2, sections 555 through 555.4, allow for an appeal from the determination, and a hearing on that determination. This Conclusion is based on Factual Findings 1 through 10.

2. CalPERS bears the burden of proving that Respondent is no longer eligible for disability retirement benefits. (Evid. Code, § 500.) The standard of proof is preponderance of the evidence. (Evid. Code, § 115.) A preponderance of the evidence means "'evidence that has more convincing force than that opposed to it.' [Citation.]" (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

3. A disability, within the meaning of the public employees' retirement law, is a condition that is permanent or of extended and uncertain duration, as determined by the Board on the basis of competent medical opinion. (§ 20026.)

4. Whether a person is incapacitated or disabled must be judged based upon an examination of the regular and customary duties assigned to that person. (*Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, 876.) To be disabled, it must be established that the employee in question is substantially unable to perform his or her usual duties. (*Mansperger, supra*, 6 Cal.App.3d at 876;

*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.) Written job descriptions alone do not control the analysis of what a member's usual job duties are; other evidence may be examined as well. (*Hosford v. Board of Administration*, (1978) 77 Cal.App.3d at pp. 861-862.)

5. Respondent remains entitled to industrial disability retirement benefits because she remains substantially unable to perform her usual and customary duties as a CHP Public Safety Dispatcher, based on Factual Findings 11 through 42.

## **ORDER**

The appeal of Respondent Jennifer A. Fous from the determination that she is no longer eligible for disability retirement is granted, and she shall remain entitled to industrial disability retirement benefits.

DATE: 03/29/2022

*Joseph Montoya*

JOSEPH D. MONTOYA

Administrative Law Judge

Office of Administrative Hearings