ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for Industrial Disability Retirement of:

MARC BERGINC and

CALIFORNIA CORRECTIONAL INSTITUTION – TEHACHAPI, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondents

Agency Case No. 2021-0894

OAH No. 2021120424

PROPOSED DECISION

Sean Gavin, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on April 11, 2022, from Sacramento, California.

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

Marc Berginc (respondent) appeared and represented himself.

There was no appearance by or on behalf of the California Correctional Institution – Tehachapi, California Department of Correction and Rehabilitation (CDCR), and a default was taken pursuant to Government Code section 11520.

Evidence was received and the hearing concluded on April 11, 2022. The record was held open until April 13, 2022, to allow CalPERS to file a First Amended Statement of Issues to conform to proof, as more fully discussed in Factual Finding 6, below. Respondent did not object, the First Amended Statement of Issues was filed, marked as Exhibit 1A and admitted, and the matter was submitted for decision on April 13, 2022.

ISSUE

At the time of his application, was respondent substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer for respondent CDCR on the basis of internal (reactive airway disease) and cardiovascular (hypertension) conditions?

FACTUAL FINDINGS

Respondent's Application and CalPERS's Denial

1. On April 5, 2021, respondent signed and subsequently filed an application for service pending disability retirement with CalPERS (application). At the time of filing, respondent was employed by the CDCR as a Correctional Officer. By virtue of his employment, respondent was a state safety member of CalPERS subject to Government Code section 21151.

2. In his application, respondent identified disabilities in six categories, including, as relevant to this matter, "(Heart) Hypertension," and "(Lungs) Reactive airway disease." Regarding how his illnesses affected his ability to perform his job, respondent wrote: "Due to my psychological and physical conditions, as well as physicians [*sic*] restrictions, I am no longer able to perform the essential functions of my job." He also noted that his treating physician, Vikas Jindal, M.D., advised him to sever his employment with the CDCR due to his injuries. Respondent is not currently working in any capacity for the CDCR, having last worked on March 12, 2021.

3. After receiving respondent's application, CalPERS reviewed respondent's medical reports and sent him for an Independent Medical Examination (IME) with Robert B. Weber, M.D. Based on its review of the medical records and Dr. Weber's IME report, on September 8, 2021, CalPERS denied respondent's application because it determined: "your internal (reactive airway disease) condition is not disabling." CalPERS further noted that it requested medical documents regarding the other conditions identified in respondent's application, including the "cardiological (hypertension)" condition, but "[t]he medical evidence received is insufficient for us to make a determination on these conditions."

4. On September 17, 2021, respondent sent CalPERS a letter appealing the denial. On November 12, 2021, Keith Riddle, Chief of CalPERS's Disability and Survivor Benefits Services Division, in his official capacity, made and filed a Statement of Issues alleging respondent, at the time he filed his application, was not permanently disabled or incapacitated from performing his duties as a Correctional Officer on the basis of an internal (reactive airway disease) condition.

5. In approximately mid-March 2022, respondent submitted additional medical records to CalPERS. CalPERS sent those records to Dr. Weber for review and

asked that he supplement his IME report to address whether respondent was, at the time of his application, substantially incapacitated from performing his usual and customary duties as a Correctional Officer on the basis of a cardiovascular (hypertension) condition.

6. At hearing, CalPERS moved to amend the Statement of Issues to include facts about respondent's submission of additional medical records as well as Dr. Weber's review thereof and supplemental IME report. CalPERS also sought to amend the Statement of Issues to reflect that the issue to be resolved in this matter is whether respondent was, at the time of his application, substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer for the CDCR on the basis of either an internal (reactive airway disease) or a cardiovascular (hypertension) condition. Respondent did not object and CalPERS timely filed a written First Amended Statement of Issues that included the above information.

Duties of a Correctional Officer

7. With his application, respondent submitted a Physical Requirements of Position/Occupational Title form for his position completed by the CDCR. The form provides the following information about the physical requirements of the Correctional Officer position:

a. Occasional Tasks (between 31 minutes and 2.5 hours per day): lifting/carrying more than 50 pounds; crawling; kneeling; climbing; squatting; reaching above the shoulder; computer use; exposure to excessive noise; and working at heights.

b. Frequent Tasks (between 2.5 and 5 hours per day): lifting/carrying between 26 and 50 pounds; bending at the waist; reaching below the shoulder; pushing and pulling; walking on uneven ground; driving; and exposure to dust, gas, fumes, or chemicals.

c. Constant Tasks (more than 5 hours per day): interacting/communicating with the inmates, patients, or clients and coworkers; lifting/carrying up to 25 pounds; sitting; standing; walking; bending and twisting the neck; twisting at the waist; power grasping; handling (holding/light grasping); fine fingering (pinching/picking); and exposure to extreme temperatures.

The form also noted the position "never/rarely (less than 5 minutes per day)" required running.

8. In addition, the CDCR job description states all Correctional Officers must be able to perform all essential functions, including, as relevant to this matter: "Perform peace officer duties during adverse, stressful, or unpleasant situations"; "Defend self/others, Disarm, apply inmate restraints, Swing arm with force"; "Remain functional during gas/chemical exposure"; "Run (occasionally); and "Climb (occasionally to frequently)." The job description also includes "examples of work involved," including, as relevant to this matter:

> [Run] in an all out effort, while responding to alarms or serious incidents. Distances vary from a few yards to 500

yards. Running may take place over varying surfaces, including uneven grass, dirt, pavement, cement up or down stairs/several flights of stairs, etc.

Ascend/descend/climb a series of steps/stairs, several tiers of stars or ladders, climb onto bunks/beds while involved in cell searches, during a pursuit, on and off rooftops, and over fences.

Physically restrain, or wrestle an inmate to the floor, lift and carry an inmate out of a cell, perform lifting/carrying activities while working in very cramped space.

Respondent's Evidence

9. Respondent testified at hearing. His work for the CDCR exposed him to several environmental irritants, including pepper spray, riot-control weapons known as CS gas and CN gas, pesticides, and pollen. In addition, the prison facility where respondent was assigned was in poor physical condition. For example, in December 2019, respondent submitted multiple work requests to repair broken and leaking ceiling sections, including at least one that appeared to have white and black mold growth. Such environmental exposures caused respondent to have difficulty breathing. His breathing difficulties worsened in 2020 and 2021, when COVID-19 protocols required him to wear a facemask while at work.

10. Over time, respondent began to fear that his difficulty breathing would jeopardize his safety and his ability to do his job adequately. On one occasion, while responding to an emergency alarm, respondent had to run between one-fourth and

one-half of a mile to the site of the call. When he arrived, he was so out of breath that he was not able to assist the other correctional officers perform their job.

11. Respondent sought accommodations from the CDCR that would limit him from lifting, carrying, pushing, or pulling more than 15 pounds and would not expose him to CS or CN gas, herbicides, or construction sites. He also asked not to do excessive baton training while wearing a face mask. According to respondent's September 17, 2021 appeal letter to CalPERS:

> [The CDCR] informed me I could not work as a correctional officer with those restrictions. I was also notified they had no jobs to accommodate those restrictions therefore being taking off work Permanent Stationary. To this day I could not return to work with some of the following restrictions listed above. As COVID-19 became more prevalent in the prison system and the mask regulations increased it furthered the complications with my reactive airway disease. This is why I am appealing the decision to deny my industrial disability claim. (Grammar and punctuation original.)

12. Respondent stopped working on March 12, 2021, and used paid leave until April 16, 2021, when he turned 50 years old. Shortly thereafter he submitted his disability retirement application.

RESPONDENT'S MEDICAL RECORDS

13. At hearing, respondent submitted progress notes, an industrial status work report, and a Physician's Report on Disability form from Dr. Jindal, all dated

March 10, 2022. In his progress notes, Dr. Jindal summarized respondent's "current treatment review" as follows:

> Overall his heart condition and his lung condition is deteriorating day by day he is unable to do much of the activities, recently he did the echocardiogram which is showing ejection fraction is dropping and he has a left ventricular hypertrophy. He is unable to lift heavy unable to handle heavy duty job like a correctional officer due to development of shortness of breath. Very poor control on blood pressure. Constantly high even though he is taking the medicine. (Grammar and punctuation original.)

14. In his industrial work status report, Dr. Jindal noted, "Due to Hypertention [*sic*] and ventricular hypertrophy [respondent] should not run or lift heavy [objects], [he is] unable to sustain his job as a correctional officer, this is permanent damage." He also included work restrictions stating respondent "should not be exposed to CS gas, CN gas, Herbicide, construction site, should not be doing excessive [b]aton training while wearing the face mask," and should not lift, carry, push, or pull more than 15 pounds.

15. Finally, Dr. Jindal completed a CalPERS form called Physician's Report on Disability, on which he identified his medical specialty as occupational medicine. On the form, Dr. Jindal identified respondent's diagnoses as left ventricular hypertension and reactive airway disease. He further opined those conditions substantially incapacitated respondent from performing his usual job duties because "correctional officers need to carry pepper spray, lift, carry, pull, push, takle [*sic*] with inmates. No running." Dr. Jindal believes respondent's incapacity is permanent.

16. Respondent also submitted a qualified medical evaluation (QME) report from Arthur H. Fass, DPM, related to respondent's worker's compensation claim. Dr. Fass's report identifies him as a "Board certified foot and ankle surgeon." Dr. Fass physically examined respondent and reviewed a variety of his medical records from July 2020 through November 2021. Based thereon, he diagnosed respondent regarding his feet and ankles. Dr. Fass's report includes summaries of other doctors' findings about respondent's reactive airway disease and hypertension but does not include his own independent opinions or diagnoses about those conditions.

Dr. Weber's IME and Testimony

17. Dr. Weber received his medical degree in 1974 and obtained his California medical license in 1975. From 1974 through 1978, he completed an internship and two residencies in internal medicine. In 1978, he was certified by the American Board of Internal Medicine, and in 1983 was certified in the subspecialty of cardiac disease. In 1979, he started a private practice in internal medicine. From 1980 through 1982, he completed a clinical fellowship in cardiology, and from 1982 through the present, he has maintained a private practice in cardiology. He has been a fellow of the American College of Cardiology since 1997. Since approximately 2012, he has performed IMEs for CalPERS and is familiar with the CalPERS substantial incapacity standard.

18. On July 26, 2021, Dr. Weber conducted an IME on respondent. He interviewed respondent, took a medical history and an accounting of his illnesses, reviewed his medical records and job duties, and physically examined him. Thereafter, Dr. Weber wrote an IME report. He testified at hearing consistent with his report.

19. Based on the above, Dr. Weber diagnosed respondent with, as relevant to this matter, "probable reactive airway disease" and hypertension. In the IME report, he described reactive airway disease as "an asthma-like illness that develop[s] after a single exposure to high levels of an irritating vapor, fume or smoke, which in most instances the high level exposure was the result of an accident occurring in the workplace or a situation where there was poor ventilation."

20. Regarding respondent's reactive airway disease, Dr. Weber concluded:

> It is my opinion that [respondent], while probably having Reactive Airway Dysfunction Syndrome, does not have impairment that arises to the level of substantial incapacity to perform his usual job duties. The member describes wheezing, however, does not describe dyspnea, in particular exertional dyspnea that would represent a substantial incapacity to perform his usual and customary duties.

21. At hearing, Dr. Weber explained dyspnea means difficulty breathing. During respondent's physical exam, his lungs were clear, and he had no wheezing or dyspnea.

22. In mid-March 2022, Dr. Weber received additional medical records regarding respondent. He reviewed those records and prepared a supplemental IME report. In it, he noted that an August 2020 echocardiogram report found "mild left ventricular hypertrophy and preserved left ventricular systolic function, along with mild diastolic dysfunction." Dr. Weber did not contradict that finding, but stated such a condition "is very unlikely to offer a cardiac basis for a symptom such as exertional shortness of breath or fatigue." Similarly, Dr. Weber noted that a September 2021 QME

by John Sedgh, M.D., assigned respondent a 32 percent impairment rating, but explained such ratings "are not meant to reflect corresponding medical-clinical impairment." Finally, Dr. Weber noted the portion of Dr. Jindal's progress note that stated: "Overall, [respondent's] heart condition and his lung condition are deteriorating day by day. He is unable to do much of activities, recently he did the echocardiogram which is showing ejection fraction is dropping and he has left ventricular hypertrophy." In his report, Dr. Weber opined:

> [Dr. Jindal's progress note] reflects a glaring lack of understanding and/or another cause for Dr. Jindal's statement which, in my opinion, lacks any credibility whatsoever. The ejection fraction clearly was not "dropping," and as I stated, his left ventricular hypertrophy described as mild clearly would not account for his "deteriorating day by day." Accordingly, the report of the Dr. Jindal [*sic*] does not lead me in any way to modify my opinions.

23. Based on his initial IME and subsequent review of additional medical records, Dr. Weber opined in his supplemental IME report: "It is my opinion that [respondent], with regard to hypertension and mild left ventricular hypertrophy, does not have an impairment that arises to the level of substantial incapacity to perform his usual job duties."

Analysis

24. Respondent bears the burden to establish, through competent medical evidence, that at the time of his application, he was substantially incapacitated from

performing his usual job duties based on his internal (reactive airway disease) and cardiovascular (hypertension) conditions. He failed to do so. Rather, the persuasive medical evidence established that respondent's reactive airway disease and hypertension did not, at the time of his application, substantially disable him from performing his usual job duties as a Correctional Officer.

25. Dr. Weber examined respondent, reviewed his medical records, and evaluated him using the CalPERS substantial incapacity standard. Based thereon, he found that respondent's reactive airway disease and hypertension did not preclude him from performing his usual job duties. His conclusions were credible and supported by his experience and training, especially in the field of cardiology.

26. Dr. Jindal's findings and opinions, as reflected in the progress notes, industrial status work report, and Physician's Report on Disability form, were less persuasive than Dr. Weber's for two reasons. First, Dr. Jindal's medical specialty is occupational medicine, and there was no evidence that he has any specialized training or knowledge regarding cardiology. In contrast, Dr. Weber has extensive experience and training in cardiology.

27. Second, Dr. Weber testified at hearing consistently with his written reports. On cross examination, he explained his reasons for not only his own findings, but also for disagreeing with respondent's medical providers, including Dr. Jindal. Dr. Weber credibly explained why Dr. Jindal's findings do not demonstrate respondent's substantial incapacity using the CalPERS standard. In contrast, Dr. Jindal did not testify at hearing, was not subject to cross examination, and did not respond to Dr. Weber's critique of his conclusions. When weighed against one another, Dr. Weber's findings and opinions were more persuasive than Dr. Jindal's.

28. Similarly, neither respondent's own testimony nor Dr. Fass's QME report provided competent medical evidence related to respondent's reactive airway disease or hypertension. Consequently, that evidence was inadequate to rebut Dr. Weber's findings.

29. When all the evidence is considered, respondent did not prove through competent medical evidence that, at the time of his application, his reactive airway disease or hypertension substantially incapacitated him from performing his job duties for the CDCR. Therefore, his application must be denied.

LEGAL CONCLUSIONS

1. By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151. To qualify for disability retirement, respondent had to prove that, at the time he applied, he was "incapacitated physically or mentally for the performance of his duties in the state service." (Gov. Code, § 21156.) As defined in Government Code section 20026,

> "Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of competent medical opinion.

2. The party asserting the affirmative at an administrative hearing has the burden of proof, including the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Bd. of Retirement* (1986)

183 Cal.App.3d 1044, 1051.) This burden requires proof by a preponderance of the evidence. (Evid. Code, § 115, 500.) Respondent has not met his burden.

3. An applicant must demonstrate his substantial inability to perform his usual duties based on competent medical evidence, and not just the applicant's subjective complaints of pain. (*Harmon v. Bd. of Retirement* (1976) 62 Cal.App.3d 689, 697; *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. Bd. of Administration* (1978) 77 Cal.App.3d 854; *Mansperger v. Public Employees' Retirement System*, *supra*, 6 Cal.App.3d 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. Bd. of Administration*, *supra*, 77 Cal.App.3d at p. 862.)

4. As discussed in the Factual Findings as a whole, and in particular Factual Findings 24 through 29, respondent did not prove by a preponderance of competent medical evidence that he was substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer for the CDCR on the basis of internal (reactive airway disease) and cardiovascular (hypertension) conditions at the time he filed his disability retirement application. Accordingly, as explained in the Factual Findings and Legal Conclusions as a whole, respondent is not entitled to retire for disability pursuant to Government Code section 21151.

ORDER

The application for service pending disability retirement filed by respondent Marc Berginc is DENIED.

DATE: May 12, 2022

Sean Gavin (May 12, 2022 11:16 PDT)

SEAN GAVIN

Administrative Law Judge

Office of Administrative Hearings