

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

LYDIA B. FRANCIS,

Applicant/Respondent

and

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION,  
STATE PRISON – SOLANO,

Respondent.

Case No. 2013-0006

OAH No. 2013031144

**PROPOSED DECISION**

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on November 13, 2013, in Sacramento, California.

Rory J. Coffey, Senior Staff Attorney, represented the California Public Employees Retirement System (CalPERS).

Applicant Lydia B. Francis represented herself.

No one appeared for or on behalf of respondent California Department of Corrections and Rehabilitation, State Prison – Solano.

Evidence was received, the record was closed, and the matter was submitted for decision on November 13, 2013.

**SUMMARY**

This appeal is limited to determining whether applicant is substantially incapacitated for the performance of her usual job duties as a Correctional Officer with the California Department of Corrections and Rehabilitation, State Prison – Solano due to a physical or

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

11-13-2013  
*[Signature]*

mental disability. Applicant applied for service pending industrial disability retirement benefits on the basis of lower back pain, bilateral carpal tunnel syndrome, and high blood pressure. The competent medical evidence established that she is substantially incapacitated for the performance of her usual job duties due to lower back pain. Therefore, applicant's application for disability retirement benefits should be granted.

## FACTUAL FINDINGS

### *Procedural History*

1. On August 31, 2011, applicant signed a Disability Retirement Election Application for Service Pending Industrial Disability Retirement (application) that was received by CalPERS on the same day. In her application, applicant identified her specific disabilities as chronic low back pain, carpal tunnel both hands, and high blood pressure.
2. At the time applicant filed her application for disability retirement, she was employed by respondent California Department of Corrections and Rehabilitation, State Prison – Solano as a Correctional Officer. By virtue of her employment, applicant is a state safety member of CalPERS subject to Government Code section 21151, subdivision (a).<sup>1</sup>
3. CalPERS obtained or received medical reports concerning applicant's claimed disabilities from competent medical professionals. After review of those documents, CalPERS determined that applicant was not permanently disabled or incapacitated for the performance of her duties as a Correctional Officer with the California Department of Corrections and Rehabilitation, State Prison – Solano at the time she filed her application. Therefore, CalPERS denied her application to the extent it sought industrial disability retirement, but approved her application to the extent it sought service retirement.
4. Applicant was notified of CalPERS's determination and advised of her appeal rights by letter dated September 11, 2012.
5. Applicant filed a timely appeal from the denial of industrial disability retirement by letter dated September 25, 2012, and requested a hearing.
6. Anthony Suine, Chief of the Benefit Services Division of CalPERS, filed the Statement of Issues in her official capacity on April 26, 2013.

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<sup>1</sup> Government Code section 21151, subdivision (a), states: "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."

7. Respondent California Department of Corrections and Rehabilitation, State Prison – Solano was properly served with the Statement of Issues and the Notice of Hearing.

8. This matter was called for hearing on that date and at the location and time stated in the Notice of Hearing. No one appeared for or on behalf of respondent California Department of Corrections and Rehabilitation, State Prison – Solano, and an evidentiary hearing was conducted as a default proceeding, as to that party only, pursuant to Government Code section 11520.

### *Job Duties*

9. The essential functions of a Correctional Officer are as follows:

In a correctional institution, conservation center, camp, parole facility, or other custodial assignment: disarms, subdues and applies restraints to an inmate; runs to the scene of a disturbance or emergencies; supervises the conduct of inmates or parolees in housing units, during meals and bathing, at recreation, in classrooms, and on work and other assignments, and escorts them to and from activities; stands watch on an armed post or patrols grounds, quarters, perimeter security walls and fences, or shops; walks or stands for long periods of time; runs up or down stairs; maintains visual surveillance of institutional grounds from observation tower or central security area; defends self against an inmate armed with a weapon; listens for unusual sounds that may indicate illegal activity or disturbances such as whispering, scuffling, or rattling of chain link [*sic*] fence; watches for indications of illegal activity or disturbance in relative darkness or in normal lighting; reads daily journal, facility rules, procedures, regulations, post orders, and other formal written materials relevant to job performance; writes various reports, memoranda, and correspondence; oversees the work of a group of inmates detailed to mechanical or industrial operations, or to farm, maintenance, or other activities; escorts inmates or parolees on trips or other movements outside institution or facility grounds; operates motor vehicles to perform routine and emergency transport of inmates; takes periodic counts of inmates; prepares count slips for all types of counts and clears counts with control; inspects quarters of inmates for contraband, and checks unsanitary conditions and orderliness; conducts clothed/unclothed body searches; examines incoming and outgoing mail; promotes acceptable attitudes and behavior of inmates or parolees; grades inmates on conduct and productivity; acts as entrance gate officer and searches visitors and transport vehicles for contraband, admits

visitors with proper credentials; supervises visits to inmates, and escorts visitors through the institution facilities; reports infractions of rules and regulations and irregular and suspicious occurrences, and takes or recommends appropriate action; prevents escapes and injury by inmates or parolees to themselves, employees, and to property; searches for and recaptures escaped inmates; carries, lifts, or drags heavy objects such as a disabled or unconscious inmate/staff; performs patrol duties primarily by vehicle and foot patrols; conducts criminal and administrative investigations; receives, checks, and issues guns, ammunition, and other supplies and equipment; keeps firearms in good working condition; fires weapons in combat/emergency situations; and may perform noncustodial duties as a minor part of the custodial assignment.

### *Applicant's Injury and Subsequent Work History*

#### *Lower back pain*

10. Applicant first began experiencing lower back pain when she injured her back at work on July 22, 2004. She reported her injury, filed a worker's compensation claim, and was treated by Dr. Kaj Anderson. Dr. Anderson diagnosed applicant with a low back strain/sprain. Applicant reported that wearing her duty belt exacerbated her back pain, and Dr. Anderson returned her to work with the modification that she not wear her duty belt.

11. Applicant continued to experience lower back pain during the subsequent years, which she consistently reported was aggravated by wearing her duty belt. At hearing, she estimated that her back would "go out" about once every year. Her husband, who is also a correctional officer at the same prison, described four or five instances during which they were both at work and he was called away from his post because his wife was experiencing severe pain in her lower back. He described one instance where he had to place applicant in a desk chair and roll her out of the prison to their car so he could take her to the hospital.

12. Applicant explained that her lower back pain has been steadily increasing over the years. She is currently taking ibuprofen for pain and another medication, the name of which she could not pronounce, to counteract the effects of ibuprofen on her stomach. She is also taking amitriptyline to help her sleep at night because of the pain.

#### *Carpal tunnel syndrome*

13. Applicant first reported left hand and arm pain on May 20, 2009, and was diagnosed with left carpal tunnel syndrome by her worker's compensation doctor. Three months later, she was also diagnosed with right carpal tunnel syndrome.

14. Applicant eventually underwent surgery in an attempt to relieve the pain she was experiencing in her left hand and arm due to carpal tunnel syndrome. She was also recommended for surgery to address the carpal tunnel syndrome in her right hand, but explained at hearing that she does not want to undergo that surgery "because that's the only hand I have left." She also explained that she has scar tissue in her left hand from her prior surgery and continues to experience severe pain in her left hand and arm. She described the pain in her right hand and arm as continuing to worsen and almost as bad as it is in her left hand and arm. Applicant's husband described occasions on which she would come home from work and both of her wrists and hands were swollen because of all the keyboarding she did at work. He also described instances when applicant lacked sufficient grip strength to turn the key in the ignition of her car.

*High blood pressure*

15. Applicant began experiencing problems with high blood pressure in November 2005. At hearing, she explained that she believes her high blood pressure is a direct result of the pain she experiences in her lower back. She is currently on the medication Atenolol.

*Most recent work restrictions*

16. Applicant has had the work restriction of not wearing her duty belt since 2004. She has also had work restrictions limiting the length of time she can stand or sit and the amount of weight she can lift. However, the evidence was unclear as to the specifics of those limitations and when they were first imposed. Applicant opined at hearing that she was capable of performing her job with those restrictions.

17. Applicant testified that her last day at work was April 18, 2011. She explained that prior to that date she had received numerous letters from her employer's disability coordinator stating that her employer could no longer accommodate her work restrictions. Therefore, according to applicant, she was given the options of resigning or retiring for service. Applicant's last day on payroll was August 31, 2011.

*CalPERS's Medical Evidence*

18. At CalPERS's request, applicant underwent an Independent Medical Examination with Edward M. Katz, M.D., an orthopedic surgeon, on May 7, 2012. In forming his opinions about applicant, Dr. Katz relied on his personal interview and examination of her, review of her medical records from July 23, 2004, through August 24, 2011, and his understanding of the normal duties of a Correctional Officer based on the description of such duties provided in the applicable job bulletin and by applicant.

19. Dr. Katz did not testify at hearing, and the parties stipulated to his medical reports being admitted into evidence for all purposes.

20. In his report of his May 7, 2012 Independent Medical Examination of applicant, Dr. Katz noted that applicant's range of motion in her lumbar spine revealed "tenderness at the lumbosacral junction." He also noted that she had flexion of 75 percent,<sup>2</sup> extension of 50 percent, lateral bending to the right and left of 30 percent, and rotation to the right and left of 30 percent. Applicant had paraspinal muscle spasm and tenderness during the exam. Dr. Katz diagnosed applicant with chronic low back pain, secondary to wearing the duty belt, and carpal tunnel syndrome, which has been treated.

21. Dr. Katz concluded that applicant was physically unable to wear her duty belt while working as a correctional officer because of her physical condition and exacerbation of her low back pain. Therefore, he concluded that she was permanently incapacitated for the performance of her usual duties as a correctional officer as of April 18, 2011, because "a correctional officer is required to wear the duty belt described as weighing over 30 pounds with all the gear in place and there is no modified duty without the duty belt for a correctional officer."

22. On June 11, 2012, CalPERS sent Dr. Katz correspondence requesting that he offer an opinion about whether applicant is permanently incapacitated for the performance of her usual duties as a result of carpal tunnel syndrome.

23. In response to CalPERS's request, Dr. Katz reviewed Rita B. Bermudez, M.D.'s December 29, 2011 EMG nerve conduction study of applicant's back and left leg, Dr. Harry Khasigian's April 27, 2012 medical report regarding his assessment of applicant's lumbar spine and left hip, and a July 1, 2011 MRI of the left wrist. Dr. Katz did not conduct a further physical examination of applicant. He then wrote the following in his June 14, 2012 supplemental report:

On review of these recent reports and the MRI, I would state that her carpal tunnel bilaterally is not incapacitating in this case. Also, the notification and findings by Dr. Khasigian have been reviewed and noted that all the findings were normal.

My previous report indicated that the basis for her disability was that she was unable to wear the duty belt, which weighs of over 30 pounds. She is unable to perform this because of her physical condition and exacerbation of her low back pain.

My findings based on Dr. Khasigian's report and these records would be that Ms. Francis is not substantially incapacitated on the basis of carpal tunnel.

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<sup>2</sup> Dr. Katz later explained in a supplemental report that his references to "percent" were in error, and he should have referred to "degrees" instead.

24. On July 2, 2012, CalPERS again sent Dr. Katz correspondence requesting that he clarify his June 14, 2012 supplemental report. In particular, CalPERS wrote "Dr. Khasigian's 11/14/11 and 4/2/12 reports only addresses [sic] Ms. Francis' back condition. Please indicate whether or not the additional medical records reviewed changed your opinion and provide an explanation."

25. On July 5, 2012, Dr. Katz responded to CalPERS's inquiry by way of a supplemental report. He answered the inquiry by stating, "I did review all of the records in this case and the medical records of the back condition. They did not change my opinion. [¶] Again, I reviewed all of the medical records in this case and they did not change my opinions in this case." Furthermore, he explained:

The lumbar MRI was described by Dr. Laura Anderson on 10/14/2011. The diagnostic study of the MRI was reviewed dated September 2011. It showed a left sided disc protrusion at L3-L4 measuring 5 mm. At L5-S1, there was a left-sided disc protrusion. The assessments were the following: 1) Chronic low back pain and left lower extremity L4-L5 radiculopathy; 2) Hypertension; 3) Diabetes; 4) Allergies to tetracycline in monocycline. At that time, it was recommended that a left L3-L4 and L4-L5 laminectomy and discectomy be carried out. This was not carried out at that time. The patient was fully committed at that time and she was apparently discharged from Dr. Anderson.

The etiology of her back pain is due to chronic ligamentous strain. The Elk Grove Diagnostic Imaging impressions described on page 8 on 9/16/2011 showed diffuse disc bulges that were present, accounting for her pain. This is true symptomatology with bilateral spondylolysis, L5, with grade spondylolisthesis of L5/S1 noted.

This is the etiology of her pain described on page 8 in paragraph 9/16/2011 and 10/14/2011, which is the Elk Grove Diagnostic Imaging and Dr. Laura Anderson's evaluation of 10/14/2011.

26. On July 23, 2012, Dr. Katz prepared a second supplemental report purporting to respond to CalPERS's July 2, 2012 inquiry a second time. He wrote: "I did review all of the records in this case and the medical records of the back condition. I did indicate that I reviewed Dr. Harry Khasigian's findings and noted that all of the findings were normal according to his examination." Then, Dr. Katz changed his opinion about applicant's disability status and concluded that there were no specific duties she was unable to perform because of a physical or mental condition and she was therefore not substantially incapacitated. He did not indicate that he reviewed additional medical records for applicant or conducted a second physical examination of her. Nor did he provide any other factual

basis for changing his opinion, other than explaining that he reviewed Dr. Khasigian's records and re-reviewed his original report. CalPERS explained at hearing that it does not have a copy of Dr. Khasigian's April 27, 2012 report.

### *Applicant's Medical Evidence*

27. Applicant did not call any physicians to testify at hearing in support of her application, instead relying on medical records from NCI Medical Clinic, Inc., (carpal tunnel syndrome); UC Davis Health System (high blood pressure); and State Compensation Insurance Fund, Center for Interventional Spine, and Ronald Whitmore, M.D. (lower back pain). The medical records were admitted into evidence as administrative hearsay only.

28. The medical records applicant submitted regarding her lower back pain supplemented or explained Dr. Katz's initial opinion that she was substantially incapacitated due to lower back pain.<sup>3</sup> Dr. Whitmore noted in a July 22, 2011 progress note that applicant had a reduced range of motion in her back, and her left and right lumbar were tender to palpation. He diagnosed her with chronic low back pain.

29. Included with Dr. Whitmore's progress note was a report of a MRI of applicant's lumbar spine, which was performed on November 23, 2010. Dr. Peter Chiu, the author of the report, noted that there was a small disc bulge, bilateral facet hypertrophy, and ligamentum flavum thickening at L3-L4. There was a small disc bulge, bilateral facet degenerative change, and ligamentum flavum thickening at L4-L5. He also noted that there was a disc bulge and bilateral facet degenerative changes at L5-S1. His diagnosis was mild lower lumbar spine degenerative changes with mild neural foraminal narrowing.

30. In respect to applicant's claim that she is substantially incapacitated due to carpal tunnel syndrome, Dr. Katz opined that she was not substantially incapacitated due to carpal tunnel syndrome. Applicant did not submit direct and persuasive medical evidence establishing otherwise.

31. In respect to applicant's claim of substantial incapacity due to high blood pressure, she did not submit direct and persuasive medical evidence in support of her claim.

### *Discussion*

32. Dr. Katz's original opinion that applicant is substantially incapacitated for the performance of her usual job duties as a Correctional Officer due to chronic lower back pain is more persuasive than his subsequent opinion to the contrary. His original opinion was formed after reviewing applicant's medical records from July 23, 2004, through August 24,

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<sup>3</sup> Government Code section 11513, subdivision (d), provides: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection and civil actions."

2011, and conducting a physical examination of her. In his July 5, 2012 supplemental report, Dr. Katz wrote: "I did review all of the records in this case and the medical records of the back condition. They could not change my opinion. [¶] Again, I reviewed all of the medical records in this case and he did not change my opinions in this case." But without reviewing any additional medical records, conducting another physical examination of applicant, or providing any factual basis for changing his opinion, Dr. Katz then opined that applicant is not substantially incapacitated due to chronic lower back pain in his July 23, 2012 supplemental report. As discussed above, Dr. Katz did not testify at hearing and, therefore, was not questioned about the change in his opinion. (Evid. Code, § 412 [a party's evidence should be viewed with distrust when it had the ability to produce stronger evidence but did not].)

Additionally, Dr. Katz's original opinion is consistent with Dr. Chiu's diagnosis of mild lower lumbar spine degenerative changes with mild neural foraminal narrowing, as well as Dr. Whitmore's diagnosis of chronic low back pain. Dr. Chu's diagnosis was made based on his findings after reviewing a November 23, 2010 MRI of applicant's lumbar spine. His findings were consistent with those made by Dr. Anderson after reviewing a September 2011 MRI of applicant's lumbar spine. Dr. Katz wrote in his report that Dr. Anderson had recommended back surgery based on her findings, applicant was agreeable to surgery, surgery was never performed, and applicant was discharged from Dr. Anderson's care. There was no evidence of why surgery was not performed.

## LEGAL CONCLUSIONS

### *Applicable Statutes*

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

"Disability" and "incapacity for performance of duty" as the basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion.
2. 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."
3. Government Code section 21156, subdivision (a)(1), provides, in pertinent part:  

If the medical examination and other available information show to the satisfaction of the board ... that the member in the state service is incapacitated physically or mentally for the

performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability.

4. The issue of whether applicant is substantially incapacitated for the performance of her usual job duties as a result of a disability is the sole issue for determination on appeal. The issue of causation shall be determined as provided in Government Code section 21166, which states:

If a member is entitled to a different disability retirement allowance according to whether the disability is industrial or nonindustrial and the member claims that the disability as found by the board, or in the case of a local safety member by the governing body of his or her employer, is industrial and the claim is disputed by the board, or in case of a local safety member by the governing body, the Workers' Compensation Appeals Board, using the same procedure as in workers' compensation hearings, shall determine whether the disability is industrial.

The jurisdiction of the Workers' Compensation Appeals Board shall be limited solely to the issue of industrial causation, and this section shall not be construed to authorize the Workers' Compensation Appeals Board to award costs against this system pursuant to Section 4600, 5811, or any other provision of the Labor Code.

#### *Burden of Proof and Legal Standards for Determining Disability*

5. Applicant has the burden of proof to establish by a preponderance of evidence that she is "incapacitated for the performance of duty," which courts have interpreted to mean "the substantial inability of the applicant to perform [her] usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) Discomfort, which may make it difficult to perform one's duties, is insufficient to establish permanent incapacity for the performance of her position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; citing, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties *supra* cannot form the basis of a disability determined. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

#### *Conclusion*

6. As set forth in Factual Finding 32, the persuasive medical evidence established that applicant is substantially incapacitated for the performance of her usual duties as a Correctional Officer with the California Department of Corrections and Rehabilitation, State

Prison – Solano due to lower back pain. This evidence is bolstered by evidence that applicant was able to continue performing her usual duties for seven years while her employer accommodated her medical restrictions, and she did not apply for industrial disability retirement until after those restrictions were no longer being accommodated.

**ORDER**

The Application of Lydia K. Francis for disability retirement benefits is **GRANTED**.

**DATED: December 2, 2013**

  
**COREN D. WONG**  
Administrative Law Judge  
Office of Administrative Hearings