

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

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

In the Matter of the Involuntary Reinstatement  
from Industrial Disability Retirement of:

PATRICK L. ETHERIDGE,

Respondent,

and

R.J. DONOVAN CORRECTIONAL FACILITY,  
CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION,

Respondent.

Case No. 9452

OAH No. 2013080191

**PROPOSED DECISION**

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on March 3, 2014, in San Diego, California.

Christopher C. Phillips, Staff Attorney, represented petitioner, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System, State of California (CalPERS).

Andrew Shorb, Attorney at Law, represented respondent Patrick L. Etheridge (Mr. Etheridge) who was present throughout the hearing.

No appearance was made by or on behalf of respondent R.J. Donovan Correctional Facility, California Department of Corrections And Rehabilitation (Donovan).

The matter was submitted on March 3, 2014.

PUBLIC EMPLOYEES RETIREMENT SYSTEM  
FILED March 27 20 14  
*[Signature]*

## ISSUE

Is Mr. Etheridge, who was granted a disability retirement in 1996, now recovered from his knee injury so that he is no longer permanently disabled or incapacitated from performing the usual and customary duties of a correctional sergeant?

## FACTUAL FINDINGS

### *Preliminary Matters*

1. Mr. Etheridge was employed as a correctional sergeant at Donovan. By reason of his employment, Mr. Etheridge was a state safety member of CalPERS.
2. On May 16, 1996, Mr. Etheridge submitted an application for disability retirement on the basis of a right knee injury. CalPERS approved that application and Mr. Etheridge was retired for disability effective February 28, 1997.
3. Provisions of the Government Code authorize CalPERS to re-evaluate members who are under the minimum age for voluntary retirement to determine if they remain eligible for a disability retirement. If CalPERS determines that the member is no longer incapacitated or permanently disabled, it may cancel the disability retirement allowance and seek to have the member reinstated.
4. On March 25, 2009, CalPERS notified Mr. Etheridge that, after completing its reevaluation of him, it had determined that he was no longer substantially incapacitated from performing the usual and customary duties of a correctional sergeant at Donovan. CalPERS advised Mr. Etheridge to contact the personnel office to arrange his return to employment. Mr. Etheridge timely appealed that determination and this hearing ensued.

### *CalPERS's Evidence*

5. CalPERS received confidential information alleging that Mr. Etheridge was not disabled and had "faked" his knee injury. CalPERS's investigators conducted approximately 32 hours of surveillance in 2006, almost 4 hours in 2008, and 20 plus hours in 2009. Investigation reports documented the surveillance performed, including observations of Mr. Etheridge performing errands with his family and participating in two softball games. According to those reports, Mr. Etheridge did not appear to have any restrictions when he performed those activities. One of the CalPERS investigators, Guy Schneider, testified consistent with the reports, describing his observations of Mr. Etheridge and noting that he did not appear to favor his right leg.

A DVD of Mr. Etheridge playing softball on two occasions in August 2008 was introduced. The DVD showed Mr. Etheridge playing softball in what can only be described as an adult, male league consisting primarily of older, out of shape men. The games looked more like the backyard pick up type of games seen at family picnics. The pitching was slow

pitched, underhanded, and a “No Pepper,” meaning no fast pitches, sign was prominently hung on the backstops. The DVD clearly demonstrated this was a game for fun, not for competition, and certainly not any sort of serious exercise regimen. Furthermore, Mr. Etheridge, who was catching, did so while standing up; he was not in the traditional crouched catcher’s position. Although a few times Mr. Etheridge did run to first base after hitting a single, the majority of the video depicted him favoring his right knee when he stood, running in a teeter-totter-like manner as he tried to take the weight off his right knee, walking with his right leg turned out at a slight angle, and placing his hand over his right knee as if trying to relieve discomfort. In short, nothing on the DVD showed Mr. Etheridge engaging in the intense type of physical activity that is required of a correctional sergeant, and certainly did not demonstrate that Mr. Etheridge was no longer substantially disabled from performing the job of a correctional sergeant.

6. CalPERS obtained Mr. Etheridge’s medical records and sent those plus the surveillance video of Mr. Etheridge playing softball to its medical expert, orthopedic surgeon Mark Mikulics, M.D. Dr. Mikulics reviewed the video, the medical records, and conducted an independent medical evaluation of Mr. Etheridge in February 2009. Dr. Mikulics prepared a report, and his opinions led to CalPERS’s decision to terminate Mr. Etheridge’s disability retirement. However, one month before this hearing, Dr. Mikulics notified CalPERS that he would be unable to testify. At hearing, CalPERS offered Dr. Mikulics’s report as administrative hearsay, but Mr. Etheridge’s objection to its introduction was sustained because the report did not supplement or explain any non-hearsay evidence introduced.<sup>1</sup> CalPERS then moved to continue the hearing to a date when Dr. Mikulics would be available to testify. That motion was denied as untimely because CalPERS had known since at least February 13, 2014, when Dr. Mikulics sent CalPERS his letter, that he would be unavailable to testify at hearing.<sup>2</sup>

However, respondent’s expert was asked about findings in Dr. Mikulics’s report and that expert’s testimony and conclusions, coupled with the fact that he has been treating respondent for a lengthy period of time and performed surgery on his right knee, suggested that even if Dr. Mikulics’s report had been introduced, or if Dr. Mikulics had been available to testify, the overwhelming evidence demonstrated that Mr. Etheridge still has a permanent disability. As noted more fully below, CalPERS failed to meet its burden of proof that Mr. Etheridge was no longer substantially incapacitated from performing his job duties, in light of the voluminous evidence to the contrary.

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<sup>1</sup> Government Code section 11513 permits the introduction of hearsay evidence to supplement or explain other evidence. However, because Dr. Mikulics did not testify, nor did any witness who testified offer any non-hearsay evidence that the report would supplement or explain, Dr. Mikulics’s report was not admitted into evidence.

<sup>2</sup> Government Code section 11524 requires a party to seek a continuance within 10 days of discovering the event which establishes good cause for a continuance. The first time CalPERS notified this court that Dr. Mikulics was unavailable to testify at hearing was during the hearing which was more than 10 days after learning of his unavailability.

*Mr. Etheridge's Evidence*

7. Mr. Etheridge is currently 49 years old. He began working at Donovan as a correctional officer in 1989. He did extremely well in his career and was promoted to correctional sergeant in 1991. As Mr. Etheridge explained, he was on a career fast track and was looking forward to a long career with the Correctional Department. However, in 1991, while responding to a prisoner altercation, he slipped and fell on a newly washed floor, injuring his right knee. As a result of his fall, Mr. Etheridge injured his trochlear cartilage, developed a symptomatic plica gap between his kneecap and femur, and suffered a partial tear of the patellar tendon. Mr. Etheridge's medical records documented a lengthy rehabilitation period, physical therapy, medical consultation and medication regimen. He has undergone three surgeries involving extensive debridement and repair. Despite all of this treatment, Mr. Etheridge still suffers right knee pain which is aggravated with activity. Medical reports documented that in 1997 doctors determined that Mr. Etheridge had lost at least half of his ability to bend, stoop, squat, carry or lift; 90 percent of his ability to kneel and 100 percent of his ability to crawl. Competent medical opinions determined that Mr. Etheridge was unable to carry out his job duties, which resulted in his receiving a disability retirement in 1997.

8. Mr. Etheridge's orthopedic surgeon, Richard Greenfield, M.D., performed the July 1996 surgery (the third surgery), authored several reports and reviewed multiple medical records. Dr. Greenfield testified in this proceeding. He was an extremely knowledgeable, credible, and persuasive witness. Dr. Greenfield did not overstate Mr. Etheridge's condition, he has discussed conservative medical treatment with Mr. Etheridge and he convincingly explained why Mr. Etheridge continues to be permanently incapacitated and disabled from performing his job duties as a correctional sergeant. Further, as noted in Dr. Greenfield's reports, and as he credibly explained, Mr. Etheridge suffers pain when he attempts various activities but has been encouraged to try things as tolerated. Not only did this testimony make sense, but it is axiomatic that no competent physician would instruct a patient not to exercise. Rather, good physicians tell patients to perform activities as they are able. As Mr. Etheridge testified, this is how he has lived his life since suffering his knee injury in 1991.

9. Mr. Etheridge and his brother-in-law testified about the softball league and Mr. Etheridge's activity level since his injury. The softball league was a noncompetitive, recreational league, which neighbors had tried to get Mr. Etheridge to join for some time. Finally, in the summer of 2008 Mr. Etheridge agreed to play. Mr. Etheridge explained that his teammates were aware of his right knee limitations and accommodated him by letting him play catcher so he did not have to move in the field. They also allowed him to have a pinch runner after a few games when his knee pain prevented him from running.<sup>3</sup> Eventually, because of his right knee pain, Mr. Etheridge quit playing softball and he did not finish the season. Mr. Etheridge's brother-in-law corroborated Mr. Etheridge's testimony and he made a very credible witness. He even at one point during his testimony apologized to Mr. Etheridge for describing him as not very active. That spontaneously uttered apology

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<sup>3</sup> Mr. Etheridge did not have a pinch runner when he was videotaped by the CalPERS investigators; he ran the bases during both games.

while testifying made Mr. Etheridge's brother-in-law appear to be an extremely credible and sincere witness.

Mr. Etheridge also testified about the very physical nature of his former job and explained that, as a correctional sergeant, his work involved covering all of the prison campus if an alarm sounded - not just the area he was assigned to patrol. Thus, contrary to CalPERS's contention, Mr. Etheridge's promotion increased his physical activity at Donovan. No evidence refuted Mr. Etheridge's testimony about his job duties.

## LEGAL CONCLUSIONS

### *Burden and Standard of Proof*

1. Evidence Code section 500 provides that, except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that the party is asserting.

2. Evidence Code section 115 defines "burden of proof" as a party's obligation "to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." Unless specified, the burden of proof requires proof by a preponderance of the evidence.

3. In this proceeding, CalPERS had the burden of proving by a preponderance of the evidence that circumstances had changed, that Mr. Etheridge was no longer substantially incapacitated from performing the duties of a correctional sergeant, that Mr. Etheridge was capable of returning to work, and that Mr. Etheridge should be reinstated to his former employment as a correctional sergeant.

### *Applicable Statutes*

4. Government Code section 20026 defines the terms "disability" and "incapacity for performance of duty," when used as a basis for retirement, to mean a "disability of permanent or extended and uncertain duration" that is based on "competent medical opinion."

5. Government Code section 21151, subdivision (a), provides that a state safety or state peace officer who is "incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability. . . regardless of age or amount of service."

6. Government Code section 21156 provides that if the evidence demonstrates that the member 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. The determination of incapacitation shall be based on competent medical opinion.

7. Government Code section 21192 provides that recipients of a disability retirement allowance under the minimum age for voluntary retirement for service may be required to undergo a medical examination. Based on the results of that examination, CalPERS shall determine whether or not the member is still incapacitated from performing his or her job duties.

8. Government Code section 21193 provides that if the member is determined to no longer be eligible for a disability retirement, it shall be canceled and the member shall be reinstated.

#### *Eligibility for a Disability Retirement*

9. "Incapacitated for the performance of duty" means the substantial inability of the applicant to perform his or her usual duties. An employee who is incapacitated only to a limited extent is not entitled to disability retirement. (*Mansperger v. Public Employees' Retirement System* (1979) 6 Cal.App.3d 873, 875-877.)

#### *Conclusion*

10. The competent medical evidence and other available information established by a preponderance of the evidence that Mr. Etheridge remains substantially incapacitated from performing the customary and usual duties required of a correctional sergeant. The overwhelming medical evidence demonstrated that Mr. Etheridge suffered a substantially incapacitating injury to his right knee, from which he has not recovered. Participating for a few games in a nonathletic, neighborhood softball league, which he eventually quit because of the pain it caused him, does not tend to prove that he is no longer substantially incapacitated. Nothing about Mr. Etheridge trying to play softball demonstrated that he was no longer disabled. Instead, it was an activity he attempted, it caused him pain, and he quit. This was consistent with Mr. Etheridge's conduct since injuring his knee in 1991, and nothing about that conduct demonstrated that he was "faking" his disability. Moreover, Dr. Greenfield's restrictions were not absolute prohibitions from attempting activities; they were simply medical recommendations of activities to avoid so as to prevent pain and/or further injury. Playing a few games of softball in a non-competitive adult league did not rise to the level of disregarding medical advice.

In light of the voluminous medical records documenting Mr. Etheridge's extensive injury, multiple medical procedures, physical therapy, conservative care, and medication Mr. Etheridge has received during the past 13 years, the evidence conclusively demonstrated that Mr. Etheridge remains permanently disabled and incapacitated from performing the usual and customary duties of a correctional sergeant.

ORDER

Patrick Etheridge's appeal from CalPERS's determination that he is no longer eligible for a disability retirement is granted. Patrick Etheridge remains substantially incapacitated from performing the usual and customary duties of a correctional sergeant and shall remain on disability retirement. CalPERS's determination to the contrary is reversed.

DATED: March 24, 2014



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MARY AGNES MATYSZEWSKI  
Administrative Law Judge  
Office of Administrative Hearings