

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

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues  
Against:

ARCHIE HINCHEN,

Respondent,

and

DEPARTMENT OF CORRECTIONS  
CALIFORNIA STATE PRISONS  
LOS ANGELES COUNTY,

Respondent.

PERS Case No. 2013-0489

OAH No. 2013090012

**PROPOSED DECISION**

This matter came on regularly for hearing on June 26, 2014, at Glendale, California, before David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California. Complainant California Public Employees' Retirement System (PERS) was represented by Elizabeth Yelland, Senior Staff Counsel. Respondent Archie Hinchén appeared and was represented by Thomas J. Wicke, Attorney at Law. Respondent Department of Corrections did not appear, despite having been properly served with notice of the hearing.

Evidence was received by way of stipulation, testimony and documents. The record remained open for receipt of briefs, received and marked for identification as follows: respondent's closing brief, July 25, 2014, exhibit R-19; PERS' closing brief, August 27, 2014, exhibit 18; and respondent's reply brief, September 8, 2014, exhibit R-20.

The record was closed and the matter was submitted for decision on September 8, 2014.

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PUBLIC EMPLOYEES RETIREMENT SYSTEM

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## FINDINGS OF FACT

The Administrative Law Judge finds the following facts:

### *Parties and Jurisdiction*

1. The Statement of Issues was signed on behalf of PERS by complainant Anthony Suine in his official capacity as Chief, Benefits Services Division of PERS.
2. Respondent Hinchon was employed by the Department of Corrections (DOC). At the time of his application for retirement, he was employed as a Correctional Officer at Lancaster State Prison. By virtue of his employment, respondent Hinchon is a state safety member of PERS subject to Government Code section 21151, under which a state member who is "incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability . . . ."
3. Due to the failure to appear at the hearing by respondent DOC after service of proper notice of the proceedings, its default is noted pursuant to Government Code section 11520. (All further references to respondent refer to respondent Hinchon.)
4. Respondent's application for disability retirement was signed June 21, 2012. He claims disability on the basis of a shoulder injury in November 2010 while extracting an inmate from a cell, resulting in rotator cuff surgery, with residual pain, numbness, loss of strength and other limitations in his right shoulder and arm.
5. Based upon receipt of reports from Drs. Fell, Hendricks and Segil, PERS notified respondent by letter dated February 20, 2013 (ex. 4), of its determination that respondent's orthopedic condition was not disabling and the conclusion that he was not substantially incapacitated from performance of his duties.<sup>1</sup>
6. Respondent filed a letter of appeal dated April 1, 2013 (ex. 5), and this hearing ensued.

### *Respondent's Work History, Injury and Medical Condition*

7. Respondent began work for the DOC as an apprentice Correctional Officer in December 2000 at Salina Valley State Prison. He transferred to Lancaster State Prison in May 2002, finished his training in November 2002, and became a Correctional Officer. Lancaster State Prison is a level 4, maximum security prison. Respondent has contact daily with inmates and is often involved in restraining them. His duties also include, as relevant to this case, cell searches, carrying a heavy mailbag, climbing ladders to roofs, pushing or

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<sup>1</sup> Dr. Fell's report is not in evidence. However, it is summarized in Dr. Segil's report (ex. 7, p. 14), which reveals that the report preceded Respondent's shoulder surgery. Therefore, it is of little relevance to the issues in this case.

pulling laden cafeteria food carts, moving heavy metal doors to the shower room, moving boxes of supplies, and cell extractions. Further job duties and physical requirements are discussed below.

8. Respondent was one of a team of officers during the extraction of a prisoner from a cell on November 19, 2010. The prisoner became combative and Respondent had to physically restrain him. Respondent felt a pop in his shoulder. He nevertheless continued, eventually handcuffing the prisoner. Respondent first underwent conservative treatment. As described in more detail below, he was later diagnosed with a right shoulder rotator cuff tear and glenoid labrum tear, and had corrective surgery on October 18, 2011. His initial recovery was good, however he experienced continuing pain and limitations after a second round of physical therapy. Respondent returned to work from March to May 2012, with no medical restrictions, but had difficulty performing his duties, could not work within the medical restrictions dated May 16, 2012, and could not have the restrictions removed. He retired and submitted his application for disability retirement.

9. Respondent's job duties and physical requirements were described in: his testimony and the testimony of his colleague, Cornetha Young; respondent's statements to doctors; a list of essential functions dated August 2008 (ex. 9); and a list of physical requirements specific to respondent dated May 30, 2012 (ex. 8). The job duties are analyzed with reference to the most recent work restriction for respondent, issued by Dr. Hendricks on May 16, 2012, which stated "no lifting, pushing or pulling greater than 90 lbs beginning 5/16/12." (Ex. 14.) Dr. Hendricks also issued a report of his examination of respondent on the same date (ex. 16) which contains the same restriction, adding it is "due to persistent weakness of the right shoulder." <sup>2</sup>

10. According to the written physical requirements (ex. 8), which were prepared to apply specifically to respondent, he must climb either occasionally up to three hours per day or frequently between three and six hours per day, up to 150 steps; reach above his shoulder occasionally up to three hours per day; push and pull occasionally up to three hours per day or frequently between three and six hours per day, up to 25 miles; lift and carry 51 to 75 pounds, 76 to 100 pounds, and 100 + pounds, occasionally up to three hours per day for 200 yards; and work at heights up to five stories occasionally up to three hours per day or frequently between three and six hours per day. Comments added to the form include the following: "Must be able to perform all of the essential functions on the attached Correctional Officer – Essential Functions. [¶] Must meet Peace Officer Standards, per

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<sup>2</sup> There was some confusion during the hearing because Dr. Hendricks issued another written work restriction, also dated May 16, 2012, with a limit of 75 pounds. (Ex. R-3.) Dr. Hendricks' report of the same date notes that respondent reported that he was able to lift only 90 pounds when he exercised, and the report refers to a 90 pound limit, which is the more accurate restriction based on the evidence.

Government Code Section 1031(f) [<sup>3</sup>]; Be found to be free from any physical emotional or mental condition that might adversely affect the exercise of the powers of [a] Peace Officer. [¶] Regardless of the frequency of the activity any inability to perform the essential functions may result in serious consequences to the safety and security of the employee, coworkers, inmates or the institution.” (*Ibid.*)

11. The essential functions (ex. 9) generally apply to all correctional officers and include 37 bullet points. The functions relevant to this case are as follows: disarm, subdue and apply restraints to an inmate; defend self against armed inmate; inspect inmates for contraband and conduct body searches; climb occasionally to frequently on steps or ladders, climb into bunks/beds for cell searches, and carry items while climbing stairs; crouch and crawl under beds or in restrooms, and for cell searches and property searches; stoop and bend to inspect cells, physically search inmates, from head to toe; lift and carry in the range of light to medium (20 to 50 pounds) frequently, and very heavy range (over 100 pounds) occasionally to lift and carry an inmate and physically restrain the inmate, including wrestling an inmate to the floor and drag/carry an inmate out of a cell; pushing and pulling to open and close locked cell doors and gates, or during an altercation with, or restraint of, an inmate; reaching overhead, occasionally to continuously, while performing cell or body searches; bracing while restraining an inmate during an altercation or while performing a body search; performing regular duties on a wide range of working surfaces; have the mental capacity to be aware and alert regarding security risks, including aggressive and violent inmates; have the mental capacity to judge an emergency situation, determine the appropriate use of force, and use that force; and have the mental capacity to recall an incident in order to accurately document it.

12. Respondent received treatment immediately after the injury, first with Dr. Balfour, who reported on December 21, 2010 (ex. R-16) that respondent was placed on modified light duty but the employer was unable to accommodate him. An MRI performed January 27, 2011, revealed rotator cuff tendon tears but no labrum tear. (Ex. 15.) Pain medication was injected on March 8, 2011 (ex. R-14), and surgery was first recommended on March 29, 2011 (ex. R-13). Respondent continued to be temporarily relieved from work and his care was taken over by Dr. Pierre Hendricks, whose examination on May 11, 2011 is reported in exhibit R-12. After confirmation of the rotator cuff tear, as well as arthritis, Dr. Hendricks recommended surgery (July 8, 2011 report, ex. R-10), which was performed on October 18, 2011. The operative report (ex. R-8) noted arthroscopic repair of the torn rotator cuff tendon and debridement of an anterior glenoid labral (cartilage) tear of the right shoulder.

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<sup>3</sup> Under Government Code section 1031, a peace officer shall meet minimum standards, including: “(f) Be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer.”

13. Recovery was average and physical therapy was recommended, which had not started as of an examination and report of December 14, 2011 (ex. R-6). Work restrictions were issued including no pushing, pulling or lifting greater than 10 pounds and no work above shoulder level. As respondent could not work with these restrictions, he did not return to work. This is true of all work restrictions noted below until respondent returned to work in March 2012. The restrictions are noted to show that Respondent improved over time and the restrictions were modified to permit lifting heavier weights.

14. After some physical therapy, respondent reported improvement at an examination on January 11, 2012. The work restriction was modified to 30 pounds (ex. R-5). A report dated February 8, 2012 (ex. R-4), includes that respondent had little pain but did have residual weakness. Twelve more physical therapy sessions were ordered and the work restriction was increased to 50 pounds.

15. Respondent saw Dr. Hendricks again on March 7, 2012. No report is in evidence, but the report is summarized by Dr. Sanders (ex. R-1, p. 24) and Dr. Selig (ex. 7, p. 12.). Based on respondent's improvement, Dr. Hendricks determined that he could return to work.

16. Respondent returned to work on March 7, 2012, for one week on light duty while he was still having physical therapy, and then returned to full duty. After an examination on April 4, 2012 (ex. 15), Dr. Hendricks reported that respondent had completed physical therapy, was working out in a gym, and reported soreness in his right shoulder with weightlifting. Dr. Hendricks determined that respondent could continue to work with no restrictions.

17. Upon returning to work, respondent experienced pain in his right shoulder and arm. He described various physical activities that resulted in pain, including carrying a heavy mailbag, placing inmates in restraints, moving the iron shower gate, moving boxes of supplies, cleaning, moving heavy metal food carts, and doing cell searches that required him to reach overhead or support himself with his arms. While doing a prisoner pat down, respondent would often support his weight on one arm, above his head, while using the other to pat down one side of the lower body of the prisoner, and then switch arms to pat down the other side of the prisoner's body. This was the accepted method of maintaining control over a prisoner during a pat down. Respondent experienced a slight increase in pain when he first returned to work, and the pain increased over time. He would take aspirin before and after his shift. He was aware of prison policy that did not permit the use of prescription pain medications during a work shift. After Dr. Hendricks issued a work restriction to not lift more than 90 pounds (see Factual Finding 18, below), respondent was informed by the prison's return-to-work coordinator that this restriction could not be accommodated.

18. Respondent was examined by Dr. Hendricks on May 16, 2012 (report, ex. 16). Then seven months post-surgery, respondent reported residual weakness and right shoulder soreness with pushing, pulling and lifting, and that pain caused him to leave work on May 9 after working four hours that day. Despite strengthening exercises he could lift only 90

pounds. On examination comparing right to left, right shoulder strength had a slight reduction of abduction and the right deltoid was also slightly reduced. Respondent was advised to continue his strengthening program. No improvement was expected either with or without further treatment. Dr. Hendricks issued work restrictions of no lifting, pushing or pulling greater than 90 pounds. (See Factual Finding 9 and footnote 1.) On June 29, 2012, Dr. Hendricks signed the physician's report supporting respondent's disability application (ex. R-2), checking "yes" next to the questions of whether respondent was substantially disabled from performance of his usual employment duties, that the incapacity was permanent, and that Dr. Hendricks had reviewed the job duty statement and physical requirements of the position to make his opinion. Dr. Hendricks did not fill in the portion asking which of respondent's duties he could not perform. However, on the prior page Dr. Hendricks referred to his full report of May 16, 2012.

19. Except for this June 29, 2012 report, Dr. Hendricks' reports were generated in respondent's workers' compensation claim relating to his injury. In that matter, an Agreed Medical Examination was performed on August 16, 2012 by Alan Saunders, M.D., who reviewed the relevant medical records and spent 30 minutes to interview and examine respondent. The report (ex. R-1) includes respondent's complaints of then-present weakness with lifting, carrying, pushing and pulling, decreased range of motion behind his back, discomfort and swelling, and difficulty lifting or carrying things away from his body. Although Dr. Sanders indicates the job "has been described above," there is no job description in the report. On neurological evaluation, by manual muscle testing, there was Grade IV weakness in the six positions tested. Grip strength was lower in the right (18, 18, 16) than the left (22, 20, 20) on testing with the Jamar Dynamometer. On testing with an Arcon Strength Testing Machine, Respondent lifted 30 to 40 pounds but had difficulty maintaining it. Respondent reported that it was difficult for him to do his job with the necessary lifting and involvement in altercations. Dr. Sanders indicated he agreed, did not think that respondent should return to work, and agreed with respondent's decision to retire on an orthopedic basis.

20. Respondent testified credibly about his usual duties, some of which are described in Factual Finding 16. Respondent was a housing officer in a prison unit with about 200 prisoners. The unit had one control officer stationed in a control booth and two floor officers; respondent was a floor officer. This particular unit had new prisoners going through the intake process. Respondent had consistent contact with prisoners during various activities, in moving from activity to activity and area to area, including the responsibility to pat down prisoners at various times. All prisoners would be patted down during their intake processing. Respondent would also use his arm above his head while climbing a ladder, which he did about once each month, and while climbing on bunk beds in cells and searching shelves and other areas above his shoulders during required cell searches. Respondent performed at least six cell searches each day. Placing prisoners in handcuffs was routine and occurred daily. Respondent moved heavy food carts every day. Respondent was called upon to lift prisoners to restrain or move them. If a prisoner had a seizure, respondent would have to lift and carry him. Respondent estimated he had to carry an inmate about once each month. When asked about the average size of prisoners, respondent, at 6 feet, one inch tall

and 260 pounds about the time of the injury stated that he did not know many small inmates. There were times when respondent could be assisted by the other floor officer. However, at other times the other floor officer would not be available, sometimes because the other officer was elsewhere in the unit or because the other officer had other assigned duties to complete.

21. Respondent is POST certified (Peace Officer Standards and Training), which he described as a portion of the training he received at the academy and which requires periodic classwork and training for re-certification, including physical training in use of force, hand-to-hand encounters, use of a baton and pepper spray, and cardio-pulmonary resuscitation (CPR). However, it was not established that respondent was required to have a POST certification for his position with DOC.

22. Since retirement, respondent suffers pain daily in his right arm and shoulder. The intensity varies. His right arm and shoulder have been weaker since the injury. Respondent volunteers at a church-run neighborhood after-school program for children from age three to teenagers. He has the keys and opens the doors, and provides general supervision of activities. He has not had to intervene to stop any physical fights. Due to his physical condition he has given up his major hobby, bowling, which he had done twice per week.

23. Cornetha Young has been a correctional officer at Lancaster prison for seven years, has the same duties as respondent and has worked with respondent. She was aware of respondent's injury and his return to work. When respondent returned from March to May 2012, Young saw him two to three times each week and noticed respondent's physical limitations. She observed he was not using both arms normally, and favored his left arm over his right. She noticed this while respondent was placing inmates in restraints and while he was performing cell searches. Respondent could not lift heavy supply boxes with one arm, and he needed assistance with some boxes. Prior to his injury, respondent was able to lift and move the boxes without assistance. Young estimated the boxes weighed 30 to 40 pounds. Respondent complained to Young that his pain increased depending on his duties. She stated he "pretty much used his left arm only."

24. At the request of PERS, on November 9, 2012, respondent was examined by Clive M. Segil, M.D., orthopedic surgeon. Dr. Segil prepared a report dated November 26, 2012 (ex. 7),<sup>4</sup> and testified at the hearing. At the conclusion of his report, Dr. Segil answered specific questions from PERS including that respondent is unable to lift more than 90 pounds above his shoulder level "because of his physical condition," the condition was caused by his employment, and respondent is not substantially incapacitated for the performance of his

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<sup>4</sup> Dr. Segil apparently had questions for PERS after he examined respondent and he received a letter from PERS dated November 19, 2012, as referenced in his report. (Ex. 7, pp. 16-17.) The PERS letter dated November 19, 2012 is not in evidence.

usual duties. Dr. Segil testified he relied on written information provided to him from PERS to determine whether respondent was qualified for a disability retirement. This written information is found in exhibit 17, a letter to Dr. Segil from PERS dated October 26, 2012.

25. In his report (ex. 7),<sup>5</sup> Dr. Segil included information gathered from respondent, the results of his examination of respondent, his diagnoses of respondent and a summary of the records he reviewed. To the extent Dr. Segil addressed pain in respondent's left knee and left ankle, the material is not relevant to this case. Dr. Segil's summary of medical records included all of the medical reports submitted in evidence at the hearing, and other records, such as for physical therapy sessions. The report lists the date of injury as December 19, 2010 (p. 2), however the actual date of injury was November 19, 2010. Dr. Segil testified that the December date was given by respondent. The report notes the following about respondent's job duties: that respondent "provides safety and security[.] He is allowed to carry 100 pounds and provide rescue[.]" (P. 3.) The report makes no mention of any written job duty statement. At the hearing Dr. Segil stated he reviewed the written job duties found in exhibits 8 and 9. The report correctly lists the injured shoulder as the right (pp. 2, 5, 7), and incorrectly as the left (p. 4), which Dr. Segil attributes to a typographical error.

26. Based on his examination of respondent's right shoulder, Dr. Segil reported four healed arthroscopy scars; there was no evidence of weakness of the shoulder muscles, and there is tenderness over the anterior aspect of the shoulder muscle. In his testimony, Dr. Selig explained that weakness is based on his objective examination, and that tenderness is a pain response reported by respondent upon the doctor's efforts to move or palpate an area of the shoulder to see if the pain is induced. He distinguished this from the pain that might be reported by a patient upon questioning only. Dr. Segil's examination of various aspects of the shoulder and bicep areas, including specific reference to the rotator cuff, did not reveal any other tenderness or positive reaction to the various tests he administered. Dr. Segil's relevant diagnosis was right shoulder status post rotator cuff repair and arthroscopy surgery. In addition to the answers to PERS' questions noted in Factual Finding 24, Dr. Segil also answered that respondent was not incapacitated, had put forth his best effort, had cooperated with the examination and did not exaggerate any complaints.

27. Dr. Segil's testimony included references to his report and to the other medical records. Respondent's slightly diminished internal rotation and shoulder muscle tenderness would not cause respondent to be disabled. On review of Dr. Hendricks' reports on May 16, 2012, and the question of whether respondent needed further treatment, Dr. Segil agreed with Dr. Hendricks that a re-evaluation would take place if respondent experienced any additional symptoms. Regarding the report of Dr. Sanders on August 16, 2012 (ex. R-1), soon after respondent stopped working, Dr. Segil explained Dr. Sanders' reference to Grade IV weakness of respondent's right shoulder. Grade IV means minimal weakness, almost normal (normal is Grade V). Dr. Segil noted that Dr. Sanders wrote he tested six shoulder positions

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<sup>5</sup> All page references in paragraphs 25 and 26 are to Dr. Segil's report, exhibit 7.

without indicating the particular positions. Dr. Segil noted that Dr. Sanders had three lines in his report about the shoulder examination while Dr. Segil had performed nine different tests on respondent's shoulder. In Dr. Segil's opinion, the differences were "night and day," and Dr. Sanders' shoulder examination was superficial.

28. Dr. Segil has performed numerous rotator cuff surgeries. The normal expectation for complete recovery is three months, including six weeks of physical therapy. Once healed, the patient should be pain free and with no restrictions, which Dr. Segil considers to be a successful surgery. Strength training, such as weight lifting, is important to recovery, and he was aware that respondent had done weight lifting during his rehabilitation. He believed that further exercise would improve respondent's condition, as it would strengthen the shoulder muscles.

29. When asked, Dr. Segil acknowledged that Dr. Hendricks' report of May 16, 2012 (ex. 7), found that respondent was disabled. Dr. Segil added this was the most accurate post-surgical report prior to his own. Dr. Segil was aware of Dr. Hendricks' increasing weight limits for respondent as he recovered from the surgery, and the report of no restrictions leading to respondent's return to work. Dr. Segil included a 90 pound weight restriction in his report because Dr. Hendricks had a 90 pound weight limit after respondent stopped working, and Dr. Segil agreed with Dr. Hendricks. When a difference was pointed out; i.e., that Dr. Hendricks' limitation on May 16, 2012 was no lifting, pushing or pulling greater than 90 pounds (exs. 14 and 16), but Dr. Segil's limit was to not lift more than 90 pounds above shoulder level, Dr. Segil commented that the shoulder level aspect was a restriction he had determined. Dr. Segil also testified that he would now (meaning at the time of the hearing in June 2014) say respondent had no restrictions, based on "these three hours today and review of the records."<sup>6</sup>

30. In Dr. Segil's opinion respondent would be able to lift 100 pounds over his head, although he might experience pain or ache that could be addressed with ice or heat, or a hot shower. If there was a preclusion for respondent to not lift 90 pounds, Dr. Segil opined this would not preclude respondent from performing the essential functions of his job. Dr. Segil did not believe that respondent was disabled, either as of the time of the examination or as of the time of the hearing.

31. The totality of the evidence establishes that Respondent is substantially incapacitated from performing his usual duties as a Correctional Officer for the DOC.

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<sup>6</sup> The ALJ is not aware whether a transcript of the hearing was prepared. The quoted material is based on the ALJ's notes and recollection of the testimony.

## CONCLUSIONS OF LAW AND DISCUSSION

Based upon the foregoing findings of fact, the Administrative Law Judge makes the following conclusions of law.

1. Decisions on disability are governed by the following sections of the Government Code:

Section 20026 defines “disability” and “incapacity for performance of duty” as meaning disability of permanent or extended and uncertain duration, as determined by the PERS’ board “on the basis of competent medical opinion. . . .”

Section 21154 provides that, if a member has applied for disability retirement, the PERS board may “order a medical examination of a member who is otherwise eligible to retire to determine whether the member is incapacitated for the performance of duty. . . .”

Section 21156 states that a member may be retired for disability if the medical examination and other available information show that the “member in the state service is incapacitated physically or mentally for the performance of his or her duties . . . .”

2. Respondent is seeking a benefit and therefore bears the burden of proof. When reviewing the denial of an application for disability benefits, the burden of proof is on the applicant. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) The standard of proof is by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

3. “Incapacitated for the performance of duty” has been interpreted as the “substantial inability of the applicant to perform his usual duties,” as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877 (*Mansperger*); *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854 (*Hosford*)). An increased risk of further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future injury are insufficient to support a finding of present disability. (*Hosford, supra*, 77 Cal.App.3d at 862-863.)

4. Some of the facts and legal reasoning in *Mansperger* and *Hosford* are illuminating. The applicant in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations by the public and to apprehend violators; issuing warnings and serving citations; and serving warrants and making arrests. He suffered an injury to his right arm while arresting a suspect and medical evidence established reduced strength in his right arm. However, relative to his job duties, he could shoot a gun, drive a car, swim, row a boat (but with some difficulty), pilot a boat, pick up a bucket of clams, and apprehend a prisoner (with some difficulty). He could not lift heavy weights or carry the prisoner away. The court noted that “although the need for physical arrests do occur in petitioner’s job, they are not a common occurrence for a fish and

game warden.” (*Id.* at p. 877.) Similarly the need to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding that the applicant was not incapacitated for the performance of his duties the *Mansperger* court noted that the activities he was unable to perform were not common occurrences and that he could otherwise “substantially carry out the normal duties of a fish and game warden.” (*Id.* at p. 876.)

5. The analysis from *Mansperger* was applied in *Hosford* to a state traffic officer, a sergeant for the California Highway Patrol. Hosford suffered a back injury lifting an unconscious victim, aggravating prior injuries. In determining whether an individual was substantially incapacitated from his usual duties, the court held it must look to the duties actually performed by the individual, and not exclusively at the job description. The actual and usual duties of the applicant must be the criteria upon which any impairment is judged. Generalized job descriptions and physical standards are not controlling. Neither are actual but infrequently performed duties.

6. The *Hosford* court rejected a contention frequently raised by disability applicants, i.e., many injuries or medical conditions create an increased risk that the person will suffer a further injury or aggravation at a later time. The court interpreted the medical opinion on a worker’s limitations as indicating that the worker is presently capable of performing a certain task, but the task should be avoided as a prophylactic restriction. In rejecting Hosford’s contention that his increased risk of future injury rendered him presently disabled, the court stated: “As the Board correctly points out, however, this assertion does little more than demonstrate his claimed disability is only prospective (and speculative), not presently in existence.” (*Id.* at p. 863.) Thus, the disability must be presently existing and not prospective in nature. The person must be presently incapable of performing the usual duties of a position. Prophylactic restrictions that are imposed only because of risk of future injury are insufficient to warrant a grant of disability retirement. As to Hosford’s present condition the court noted that officers in top physical condition may suffer injuries performing their customary tasks, and each officer must be aware of his own limitations. (*Id.* at p. 864.) Referring to *Mansperger*, the *Hosford* court concluded that Hosford was not disabled unless he was substantially unable to perform the usual duties of the job. He could sit in a patrol car, although it would bother his back; he could stop and exercise as needed; and he would spend less than half of his time in the field. He could run, probably with pain, and could apprehend persons escaping over rough terrain, again with pain. These strenuous activities were rare, supporting the medical opinion that he was not disabled. (*Id.* at p. 862.) Further, Hosford’s fear of injury was not considered mentally disabling. (*Id.* at p. 865.)

7. PERS also refers to its precedential decisions in three cases (exs. 11, 12 and 13) to establish that competent medical evidence is needed to support a finding on the question of whether an applicant qualifies for a disability retirement. PERS contends that Dr. Segil’s report and opinions are the only competent medical evidence in this matter, as he relied upon the standard of whether the worker has a substantial inability to perform the usual duties of the position, and that the other medical evidence, gathered from respondent’s workers’ compensation proceedings, is not competent medical evidence.

8. Admittedly the precedential decisions refer to the concept of competent medical evidence, a concept included in Government Code section 20026. However, the statutory direction in Government Code section 21156 requires the PERS board to consider the medical examination it can order (under section 21154) “and other available information.” The medical reports prepared for the workers’ compensation proceedings constitute “other available information.” Therefore the question is raised as to the weight, if any, to be given to the medical reports generated in respondent’s workers’ compensation matter, where the legal and medical issues are different than in a disability retirement matter such as this.

9. A workers’ compensation ruling or settlement is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132.) In *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, the court addressed the distinction between workers’ compensation laws and PERS: “A finding by the WCAB of permanent disability, which may be partial for the purposes of workers’ compensation, does not bind the retirement board on the issue of the employee’s incapacity to perform his duties. . . . (Citations.)” (*Id.* at 215.)

The *Reynolds* court cited *Pathe v. City of Bakersfield* (1967) 255 Cal.App.2d 409 in distinguishing between the workers’ compensation laws and PERS. The two systems were distinguished as existing for entirely different reasons and they were established to attain wholly independent objectives. (*Reynolds, supra*, 126 Cal.App.3d at p. 212.) The *Reynolds* court further held that, although they supplement each other, “The jurisdiction of the WCAB is exclusive only in relation to its own objectives and purposes and at the very most overlaps the subject matter jurisdiction of the pension board on a single issue of fact only, the issue as to whether an injury or disability is service-connected . . . .” (*Id.* at 213.) Accordingly, a finding of industrial injury under the workers’ compensation system does not entitle an applicant to a disability retirement.

10. The workers’ compensation medical reports are not binding here. Nevertheless, those medical reports are not devoid of relevant information. The findings upon the various doctors’ examinations are objective evidence. The doctors’ diagnoses and opinions are as good as the information upon which they rely. (*White v. State of California* (1971) 21 Cal.App.3d 738; *Kennemur v. State of California* (1982) 133 Cal.App.3d 907.) “Similarly, when an expert’s opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an “expert opinion is worth no more than the reasons upon which it rests.” (Citation.) (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1116.)

11. That the medical reports generated in respondent’s workers’ compensation matter do not use the language of the PERS’ disability statutes or case law interpreting them does not make them meaningless. Further, after Dr. Hendricks generated his reports, he

signed the medical report supporting respondent's application, which stated that respondent was substantially incapacitated from the performance of his usual duties. This is "other available information," as that phrase is used in Government Code section 21156, and "competent medical opinion," as that phrase is used in Government Code section 20026, that references the correct standard in these proceedings and lends credence to Dr. Hendricks' other reports.

12. Substantial weight and credibility are afforded to the reports of Dr. Hendricks for other reasons. He performed the shoulder surgery and treated respondent for more than one year. Further, Dr. Selig initially agreed with and relied upon Dr. Hendricks' limitation of 90 pounds and incorporated it into his own opinion and report, adding relevance to that limitation for purposes of a determination of respondent's disability status. The number of times that Dr. Hendricks examined and treated respondent also gives him more data on which to rely. Also, Dr. Hendricks was aware that respondent was lifting weights for rehabilitation and reached a 90 pound practical limit. This adds credibility his reports and opinions. Dr. Selig opined that his own examination was more comprehensive than Dr. Sanders', which may lessen, but not eliminate, the weight given to Dr. Sanders' report.

13. If Dr. Selig's is the only opinion that constitutes competent medical evidence, as PERS contends, then Dr. Selig's report establishes that respondent is substantially incapacitated from the performance of his usual duties. Dr. Selig stated that respondent could not lift 90 pounds above his shoulder. As discussed in Legal Conclusion 16 below, such a limitation prevents respondent from performing his usual duties. However, as noted above, there are other competent medical opinions and available information on which to rely.

14. Dr. Selig's report and opinions suffered from certain factors which negatively affect their weight and credibility. His report contained errors, as noted in Factual Finding 25. It is significant to note that Dr. Selig acknowledged that the incorrect reference to the left shoulder was a typographical error, but stated that the wrong date of injury was a date given by respondent. It is highly unlikely that respondent gave Dr. Selig the wrong date of injury, and more likely that it as a typographical or other error, yet Dr. Selig did not seem willing to acknowledge another error, albeit minor, in his report.

15. More significant is the nature of Dr. Selig's changing opinions concerning weight limitations for respondent. He initially stated that he agreed with Dr. Hendricks' restriction of no lifting, pulling, or pushing of greater than 90 pounds, and referenced the full report of Dr. Hendricks of May 16, 2012 as supporting that limit. When Dr. Selig was asked why his restriction, that respondent not lift more than 90 pounds above shoulder level because of his physical condition, was different from Dr. Hendricks' restriction, Dr. Selig responded that this was his own restriction, in essence now differing somewhat from Dr. Hendricks. At the time he wrote this restriction, and testified about it, Dr. Selig was fully aware of the standards used by PERS for disability determinations. Later in the hearing, based on merely the hearing itself (where Dr. Selig was the first witness and respondent had not yet testified), Dr. Selig stated under oath that now there were no restrictions on

respondent. These changing opinions, the last one during the hearing and without convincing explanation or substantiation, do not justify significant weight, which can affect his other opinions. In such matters, the trier of fact has flexibility and discretion, and may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted.” (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.)

16. Respondent not only has the continuing duty to be responsible to lift inmates when necessary, he actually carries out that responsibility, on average, once per month. More often he has physical contact to pat down, restrain and control inmates. Unlike the situations where a co-worker can be available for assistance, such as in *Hosford* and in some of the precedential decisions, respondent cannot rely on the assistance of a co-worker when he might be called upon to lift a prisoner completely or lift more than 90 pounds. Respondent is one of two officers directly supervising 200 inmates in a maximum security state prison, and the situations wherein he might lift or carry weight above 90 pounds are neither scheduled nor predictable, but are commonplace. Admittedly, cell extractions are known beforehand and accomplished by multiple guards. But these other situations are random, and respondent’s inability to carry the weight is a danger to himself, his co-workers, and inmates. Further, the physical requirements (ex. 8) state that respondent must lift and carry 51 to 75 pounds, 76 to 100 pounds, and 100 + pounds, occasionally up to three hours per day for 200 yards. The DOC could not accommodate Dr. Hendricks’ 90 pound weight restriction. Dr. Selig did not demonstrate sufficient knowledge of these job requirements, and his opinion that respondent was not substantially incapacitated from performing his usual duties is entitled to little weight.

17. The medical evidence of respondent’s limitations is supported by respondent’s testimony of his limitations on returning to work, as well as Cornetha Young’s observations of respondent at that time. Although the surgery may have repaired the torn rotator cuff and labrum tear in respondent’s right shoulder, the surgery was not successful in that respondent was not completely rehabilitated after the surgery, continued to experience pain, and was unable to lift the weight necessary to do his job.

18. To be clear, the evidence of respondent’s difficulty, due to pain, in performing cell searches and body searches, moving food carts, opening metal shower gates, moving boxes of supplies or a mail bag does not rise to the level of establishing a disability. The weight carrying limits do. It is a usual duty, and respondent is substantially incapacitated from performing it.

19. Respondent has sustained his burden of establishing that he is incapacitated physically for the performance of duty, as required under Government Code sections 21154 and 21156, and is therefore entitled to disability retirement. See Findings 4, and 7 through 31, and Legal Conclusions 1 through 18.

ORDER

The application for disability retirement of Respondent Archie Hinchey is granted.

DATED: September 12, 2014.

A handwritten signature in black ink, reading "David B. Rosenman". The signature is written in a cursive style with a horizontal line underneath it.

DAVID B. ROSENMAN  
Administrative Law Judge  
Office of Administrative Hearings