

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Accusation Seeking
Reinstatement from Industrial Disability
Retirement of:

SOCORRO D. LICON,

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
CALIFORNIA STATE PRISON-
CORCORAN,

Respondent.

Case No. 2014-0987

OAH No. 2015020147

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California heard this matter in Fresno, California, on September 1, 2015.

Elizabeth Yelland, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Socorro D. Licon (respondent) appeared in pro per.

Respondent California Department of Corrections and Rehabilitation (CDCR), California State Prison-Corcoran, did not appear.

Evidence was taken, the record was closed, and the matter was submitted on September 1, 2015.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED *October 20 15*
Kady Pasley

PROCEDURAL AND JURISDICTIONAL FINDINGS

1. At all times relevant to this Decision, respondent was employed by the CDCR, as a Correctional Officer (CO), assigned to the California State Prison, Corcoran (Corcoran).
2. Through her employment with CDCR respondent was a safety member of CalPERS.
3. Applicant filed her application for industrial disability retirement (Application) with CalPERS on June 4, 2009. CalPERS approved her Application for industrial disability retirement on February 22, 2010, on grounds that respondent was substantially incapacitated for performance of her duties as a CO with CDCR due to an orthopedic condition of her right knee. CalPERS' determination was based upon an Independent Medical Examination (IME).
4. In her Application, respondent wrote a detailed description regarding her specific disability claims, and how she became disabled, as follows:

Bilateral knees and left ankle, these injuries occurred on two separate dates. On 10/22/08, when I was escorting an inmate at the California State Prison-Corcoran (CSP-COR) I stepped in a pothole and injured my left knee and left ankle. Later on 12/14/08 my left knee collapsed causing me to fall strike my right knee on the ground injury to my right knee. [sic] I have since been diagnosed with a torn meniscus and an ACL tear in my right knee and possible soft tissue damage in my left knee. To date, surgery has not been conducted on either knee however, it is possible I will undergo surgery to my right knee in the future. At this point, I experience difficulties with my left ankle, such as the inability to pivot sharply and run. I also continue to experience problems with both knees, such as sharp pain in the left knee and occasional [incomplete] regarding my right knee. I experience a sharp stabbing pain, occasionally locking and instability. Also, I have pain when attempting to push, pull, sit or stand for prolonged periods. In addition, have suffered other injuries in the course of my career. On 10/10/04, I responded to a riot and injured my left biceps and shoulder while utilizing my baton to take control of the situation. As a result, I underwent surgery to repair a torn rotator cuff and biceps in my left shoulder and arm. To date, I continue to experience poor range of motion in my left shoulder. On 11/14/07, I injured my left pectoral muscle, shoulder and low back. Since his injury occurred, I continue to experience difficulty with my lower back when I am overactive. Also, this injury has caused me further complications with my left shoulder.

5. In that same 2009 application, applicant described the limitations/preclusions attributed to her injury as follows:

No twisting of the right knee and prolonged standing or walking. No inmate contact, sharp pivoting or running. Due to my physical condition and doctor's restrictions, I am unable to perform the essential functions of my job.

6. CalPERS reviewed respondent's case pursuant to Government Code section 21060. CalPERS determined that respondent was beneath the minimum age for voluntary service retirement applicable to safety members when she underwent the IME that supported the award of disability retirement.

7. Respondent was notified in writing by CalPERS on July 10, 2013, that in accordance with provisions of the Government Code, CalPERS periodically conducts re-examinations of persons on disability retirement, and that respondent's case was under review. Respondent was asked to provide information from her current and former treating physicians, a written statement regarding her current condition, and information on whether she was working and, if so, details of her employment. Respondent was also notified that it was likely that she would be scheduled for another IME at a date in the future.

8. Respondent submitted medical records, particularly those of Dr. Jahromi and Dr. Simonian, and other documentation in response to the letter and a follow-up request dated August 9, 2013. Respondent made it clear to CalPERS that she disputed any claim that she was no longer disabled.

9. The medical records and other information submitted by respondent were evaluated by CalPERS Benefits Services Division. The information was furnished to Ghol Ha'Eri, M.D., a Board certified orthopedic surgeon retained by CalPERS to perform another IME to determine whether respondent was still substantially incapacitated for performance of her usual and customary duties as a CO due to an orthopedic disability. Dr. Ha'Eri performed his IME on May 20, 2014, and submitted a written report of his findings and conclusions, dated the same day, to CalPERS Benefit Services Division for evaluation and review.

10. CalPERS' Benefit Services staff re-reviewed the medical and other reports submitted by applicant, as well as Dr. Ha'Eri's May 20, 2014 IME report.

11. CalPERS notified respondent in writing on June 26, 2014, and again on August 4, 2014, that CalPERS had concluded its reevaluation of her qualifications for disability retirement. The written notices advised respondent, in pertinent part:

A careful review of the medical reports and other information indicates that you are no longer substantially incapacitated from performing the job duties of Correctional Officer for the

Department of Corrections California State Prison-Corcoran based upon your disabling condition. In accordance with Government Code section 21192, you will be reinstated to your former position.

12. The notices also advised respondent of her right to appeal the determination and seek an evidentiary hearing to review the medical evidence in support of the CalPERS determination to return her to work and remove her from the disability retirement roll.

13. Applicant timely appealed the CalPERS determination and denial of her application. In her August 18, 2014 appeal letter, applicant stated, in pertinent part:

On May 20, 2014 when I met with the (IME) Dr. Ghol Ha'Eri it was very clear to me that after his completion of the medical evaluation and per our conversation he stated to me, "that this was just a formality part of the interview and given the obvious injuries I have particular knee injuries that I was not returned to duty given his past experience with this type of injury." We even discussed the possible third right knee surgery I have pending for the treating physician Dr. Peter Simonian M.D., due to the ongoing swelling and pain I was experiencing. I could never complete physical therapy. Simonian who performed my past two right knee surgeries requested a final MRI of my right knee. It was explained to me by Dr. Simonian that I have a small tear of the posterior horn of the lateral meniscus and the tip of the medial meniscus. Cysts were also present. This documentation can be found in my (Medical History of Treatment Review/Records) from State-Fund Compensation Insurance. I can provide a copy on request. I verbally explained my current status to Dr. Ghol [sic] in which I am still experiencing swelling and pain at times when I overexert myself my pushing my limits which is excessive walking, twisting, standing and or attempting to run. I also explained by decreasing my regular daily activities and icing along with inflammation medicine helps, but there is still locking and popping giving way of the knee causing me to fall at times which is can be very painful. This in turn causes me to feel pain in my lower right side hip area. This was all revealed and discussed during my evaluation with Dr. Ghol [sic]. I hope that this was an error or mistake. I requested a review of the medical file for which the determination was made.

14. Anthony Suine, Chief, Benefits Services Division of CalPERS, made the allegations contained in the Accusation in his official capacity and caused it to be filed on October 23, 2014. Applicant timely filed a Notice of Defense and requested a hearing on the

Accusation. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings.

15. Notice of the date, time, and place of the evidentiary hearing was duly given to CDCR. No appearance was made on behalf of CDCR. The matter proceeded as a default with respect to the CDCR, pursuant to the provisions of Government Code section 11520.

FACTUAL FINDINGS

PHYSICAL REQUIREMENTS OF THE POSITION

1. Exhibit 11 contains a CalPERS form entitled "Physical Requirements of Position/Occupational Title" for Correctional Officer, CSP-Corcoran. This physical requirements statement was completed by the Return to Work Coordinator at CSP-Corcoran on September 8, 2009, and by respondent on September 23, 2009. The physical requirements statement was relied upon by Dr. Ha'Eri in making his orthopedic determinations during the IME regarding whether respondent could substantially perform the physical requirements of her position. The physical requirements form sets forth the following physical demands for a correctional officer relevant to this inquiry as follows:

a. Sitting, standing, walking up to 1.5 miles, bending at the neck, twisting at the neck, twisting at the waist, fine manipulation, power grasping, simple grasping, repetitive use of hands, carrying weights between zero and 25 pounds up to 1.5 miles, driving up to eight hours plus per day, exposure to extreme temperature, humidity or wetness, were all required "constantly," meaning over six hours per workday;

b. Climbing up to 150 steps, bending at the waist, reaching below the shoulder, pushing and pulling, carrying 25 to 50 pounds up to 200 yards, walking on uneven ground, exposure to dust, gas, fumes or chemicals, and working at heights of up to five stories were all required "frequently," meaning between three and six hours per average workday;

c. Running, crawling up to 50 yards, kneeling, squatting, reaching above the shoulder, keyboard use, mouse use, lifting and carrying up to 100 pounds to up to 200 yards, exposure to excessive noise, operation of foot controls or repetitive movement, use of special visual or auditory protective equipment, and working with biohazards, such as blood-borne pathogens, were all required "occasionally," meaning up to but no more than three hours per workday.

2. The CalPERS physical requirements list referenced above had an additional requirement added by the Return to Work Coordinator at CSP-Corcoran who completed it. She wrote "Must be able to perform all essential functions on attached Correctional Officer-Essential Functions List."

3. The Essential Functions List is contained in Exhibit 17, and was carefully reviewed by Dr. Ha'Eri as part of his IME examination. Not all of the essential functions required of respondent for the performance of her job as a CO are physical, or impacted by claims of orthopedic disability. Specific essential functional requirements listed that are physical or are impacted by applicant's claims of orthopedic disability are summarized as follows:

- a. Must be able to swing batons with force to strike an inmate;
- b. Disarm, subdue and apply restraints to an inmate;
- c. Defend self against an inmate armed with a weapon;
- d. Inspect inmates for contraband, conduct body searches;
- e. Walk occasionally to continuously, run occasionally, and run in an all-out effort while responding to alarms or serious incidents, distances vary from a few yards up to 400 yards, running may take place over varying surfaces including uneven grass, dirt areas, pavement, cement, etc. running can include stairs or several flights of stairs maneuvering up or down;
- f. Climb occasionally to frequently ascend/descend or climb a series of steps/stairs, several tiers of stairs or ladders as well as climb onto bunks/beds all involved in cell searches, must be able to carry items while climbing stairs;
- g. Crawl and crouch occasionally, crawl or crouch under an inmate's bed, or restroom facility while involved in cell searches, crouch while firing a weapon or while involved in property searches;
- h. Stand occasionally to continuously, stand continuously depending on the assignment;
- i. Sit occasionally to continuously, sit while performing recordkeeping or record writing activities, observing designated areas and driving activities;
- j. Stoop or bend occasionally to frequently, stoop and bend while inspecting cells, physically searching inmates from head to toe, and while performing janitorial work including mopping and cleaning;
- k. Lift and carry continuously to frequently, lift and carry in the light (20 pound maximum) to medium (50 pound maximum) range frequently throughout the workday and in the very heavy lifting range (over 100 pounds) occasionally, lift and carry an inmate and physically restrain the inmate including wrestling an inmate to the floor, drag/carry an inmate out of the cell, performed lifting/carrying activities while working in a very cramped space;

l. Pushing and pulling occasionally to frequently, push and pull while opening and closing locked gates and cell doors throughout the workday, pushing and pulling may also occur during an altercation where restraint of an inmate is taking place;

m. Reaching occasionally to continuously, reach overhead while performing cell or body searches, etc.;

n. Head and neck movement, frequently to continuously throughout the workday, move or use head/neck while performing his regular duties including observing and the surveillance of inmates, neck movements including both side to side as well as flexing downward and backward; arms movement occasionally to continuously;

o. Bracing occasionally, brace while restraining inmate, during an altercation, or while performing a body search, press occasionally, press with legs/feet while driving a vehicle;

p. Twisting of the body frequently to continuously, twist the body in all directions while performing regular duties, twisting may take place with the body in an upright position while either standing or walking;

q. Perform regular duties on a wide range of working surfaces, which may become slippery due to weather or spillage of liquids or grease; and

r. Remain functional with exposure to fumes, gases and various chemicals, such as, but not limited to, pepper spray and tear gases, must be able to defend self, staff, and inmates during incidents when chemical agents are being applied.

4. Dr. Ha'Eri read and considered applicant's official CDCR CSP-COR job description and duty statement in performing his IME and writing his report. Dr. Ha'Eri testified that he is very familiar with the physical, mental and emotional essential functions and job requirements for a CO, as he has performed more than 50 previous evaluations of COs and has many previous times read the job description, physical requirements and essential functions documents, and other physical and mental job requirements statements produced by CDCR for this job classification.

DR. HA'ERI'S IME FINDINGS AND CONCLUSIONS

5. As noted above, Dr. Ha'Eri performed an IME of respondent on May 20, 2014. He reviewed her past medical history, prior surgeries, current medications, social history, personal habits, prior injuries and surgeries, her work status, her history of injury and medical care, all as disclosed and related by respondent. He also noted respondent's present complaints and concerns. He then performed a physical and orthopedic clinical examination.

6. Respondent told Dr. Ha'Eri that her present complaints were that her "Right knee at times gives way and she feels catching in her joints." She indicated that she

experiences pain in her right knee with increased physical activity, such as prolonged standing/walking, stair-climbing and deeply bending. She reported no complaints regarding her left knee or her left ankle.

7. On physical examination, Dr. Ha'Eri noted a well-healed scar from a prior arthroscopic surgery and no evident swelling or effusion. His palpation of her knees revealed no tenderness or additional swelling. He observed that both of her knees moved through a full range of motion, up to 130 degrees of flexion each. He observed minimal crepitus with motion in her right knee, but patellar tracking was normal in both knees. No laxity was observed in her knees, indicating that both her knees were stable. No abnormality was observed when medial or lateral stress of the knees was applied. Dr. Ha'Eri's neurological examination of respondent's lower extremities was grossly normal.

8. In his testimony, Dr. Ha'Eri elaborated that during the orthopedic physical examination, he observed that respondent had a "completely normal independent gait." In his check for crepitus on palpation, and when respondent moved her right knee in his examination, he observed that she suffers from mild chondromalacia, which is a roughness on the backside of the kneecap that can cause clicking and popping on motion. He noted a particularly meaningful clinical finding was that respondent was able to attain a completely normal full range of motion on both knees. He observed that the results and findings of his clinical orthopedic examination were "fully normal."

9. Dr. Ha'Eri reviewed the medical records of respondent's previous treating physicians and surgeons for her various conditions, and particularly those of her knees, including the records provided from her primary treaters and surgeons, Dr. Jahromi and especially Dr. Simonian, who is respondent's primary orthopedic surgeon. Dr. Simonian performed both arthroscopic surgeries on respondent's right knee. He also reviewed MRI studies of respondent's right knee dated February 19, 2009, and December 13, 2010.

10. Dr. Ha'Eri's diagnosis was that applicant had suffered previous left knee and left ankle sprains that were resolved; and that she has mild right knee instability, with a medial meniscus tear and chondromalacia, for which she has undergone arthroscopic surgery twice. In the first surgery, chondroplasty¹ of the joint was carried out, and the second surgery, posterior cruciate ligament reconstruction, a partial meniscal repair, and another chondroplasty, all with very good results. Dr. Ha'Eri described Dr. Simonian's repair of respondent's meniscal tear and post cruciate ligament reconstruction as "perfect, without even a scar."

11. In his testimony, Dr. Ha'Eri opined that respondent's left knee and left ankle problems are "fully resolved," following her surgeries and recovery. With respect to respondent's concerns about her right knee, Dr. Ha'Eri testified that "there are no job duties

¹ Chondroplasty is a shaving of the inner surface of the patella to smooth is so it does not click and pop so much on movement, a process he described as somewhat akin to "mowing a lawn."

of a CO that she is unable to do due to any orthopedic condition of her right knee.” Dr. Ha’Eri testified that respondent is not substantially incapacitated from the performance of her duties as a CO due to any orthopedic condition of her right knee.

12. Dr. Ha’Eri explained when questioned that respondent’s chondromalacia, which causes her the annoying clicking and popping occasionally, and makes her feel like her knee is unstable and unreliable, is not disabling or incapacitating, is mild and has been treated effectively twice. He explained that chondromalacia is like “a gray hair in the knee,” a product of the process of normal aging and the wear and tear that comes from ordinary physical activity. He explained that the condition can be disconcerting in that when the patella clicks and pops, it can make the knee feel unstable to someone unfamiliar with the condition, and that actually the condition does not make the joint unstable or prone to failure upon physical activity. He testified that he is, “very familiar with the need of COs to respond to alarms, subdue inmates, and perform other occasionally physically demanding tasks.” He testified that if applicant’s standard of fitness for her right knee were applied to all COs, “99 per cent of your colleagues would be unable to function.” He mentioned that “all of your colleagues your age have chondromalacia, and your older colleagues are very much likely worse.” He acknowledged, “Yes, you may have to run or struggle to subdue an inmate occasionally, but there is no objective orthopedic reason in your right knee to preclude you from doing your job.”

13. Respondent produced considerable medical records from Dr. Simonian, a more recent MRI of respondent’s right knee, and records from Dr. Jahromi during the hearing. These records were reviewed by Dr. Ha’Eri during the course of the evidentiary hearing. Dr. Ha’Eri noted that he had already seen and reviewed most of these records, considered and mentioned them in making his diagnosis and opinions, and that there was nothing new revealed in the records that would change or affect his opinions. He had not seen the new MRI, but observed that the MRI revealed nothing new, and considering the excellent repair that Dr. Simonian had performed on respondent’s right knee, it appeared to him that the MRI should not have been ordered because there is no evidence in the record that it was medically necessary.

14. Respondent testified she is very fearful to return to work because she is certain she will hurt herself again. She cannot trust or rely on her right knee to satisfactorily and safely perform the physical requirements of her job. She expressed particular concern about her inability to run up and down stairs, to pursue and subdue an inmate, to struggle with an inmate, or to perform any of the twisting motions that are required to successfully handle a baton or a weapon. She repeatedly pointed to her performance in her earlier career as a CO in her 30s, when she took great pride in her ability to excel in the physical aspects of performing her duties in a competent fashion. She was once a side handle baton instructor in a range master, and hoped to make a career and eventually promote to become a Lieutenant. She noted that the injuries to her right knee have destroyed her confidence to perform the physical part of her duties, because her right knee “is just not there for me, it’s just not what it needs to be.” She noted that she respects the doctor’s report, but observed that the doctor

does not live with me and know my injuries or know what it's like to have to try to work with and unreliable knee in a correctional facility environment.

ANALYSIS OF THE MEDICAL EVIDENCE OF INCPACITY

15. The medical evidence submitted in support of claimed continuing disability on the basis of respondent's orthopedic condition supports only a conclusion of a period of temporary total disability that was recognized by the previous grant of disability retirement, but no longer exists. The period of temporary total disability does not equate to substantial incapacity, which requires evidence of a permanent and sustained substantially incapacitating disability that does not exist in this record. The records of Dr. Jahromi and Dr. Simonian support Dr. Ha'Eri's opinions and conclusions that, following Dr. Simonian's surgical repairs, and a period of recovery and rehabilitation, respondent has recovered, and there is no current persuasive medical evidence of continuing disability. Respondent has made a full recovery, and although she struggles with the effects of the onset of degenerative arthritis, the medical evidence supports only a conclusion that this is a process of normal aging. There is no contrary medical evidence. The medical evidence supports only a conclusion that respondent is no longer substantially incapacitated, and should be returned to work.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. "As in ordinary civil actions, the party asserting the affirmative in an administrative hearing has the burden of proof going forward and the burden of persuasion by a preponderance of the evidence."² In this instance, CalPERS has the burden of proving that applicant is no longer substantially incapacitated from the performance of her usual and customary duties in order to remove her from the roles of disability retirement.

2. "'Disability' and 'incapacity for performance of duty' as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion."³

3. "If the medical examination and other available information show to the satisfaction of the board ... that the member is incapacitated physically or mentally for the performance of his or her duties in the state service and is eligible to retire for disability, the board shall immediately retire him or her for disability...."⁴

² *McCoy v. Board of Retirement* (1986) 183 Cal.App. 3d 1044, 1051.

³ Government Code section 20026, in pertinent part.

⁴ Government Code section 21156, in pertinent part.

4. “We hold that to be ‘incapacitated for the performance of duty’ within section 21022 means the substantial inability of the applicant to perform his usual duties.”⁵ *Mansperger* continues to be the definitive statement of California courts to date regarding the meaning of the language of section 21156 “incapacitated for the performance of duty,” in the context of an application for a disability retirement.

5. In applying the *Mansperger* standard, it has been held that the fact that a person has a limiting and painful physical condition, or an emotionally troubling psychological condition that limits, but does not preclude, the person’s ability to perform his or her usual duties; or makes performing the usual and customary duties of one’s occupation more difficult or unpleasant physically or mentally does not necessarily constitute a substantial incapacity for the purposes of a disability retirement.⁶ The fact that the physical or psychological condition may preclude the applicant from performing some but not all usual and customary job duties does not necessarily mean the applicant is substantially incapacitated within the meaning of *Mansperger* and section 21156.⁷

6. As set forth in the Factual Findings, CalPERS carried its burden of proof by a preponderance of the evidence that respondent is no longer substantially incapacitated for the performance of her usual and customary duties as a CO with the CDCR. The medical evidence does not support a claim of continuing substantial incapacity on the basis of orthopedic conditions, particularly that of respondent’s right knee. There is no current persuasive medical evidence of continuing substantial orthopedic incapacity. Respondent sustained a period of total temporary disability that was acknowledged and covered during her period of disability retirement, but she received excellent surgical treatment, and has recovered. The great weight of the medical evidence in this record supports only a conclusion that there is no orthopedic reason why applicant cannot perform the usual and customary duties of her position as a CO with the CDCR.

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⁵ *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App. 3d 873, 876.

⁶ *Hosford v. Board of Administration* (1978) 77 Cal.App. 3d 854, 861-863.

⁷ *Id.*

ORDER

The accusation is SUSTAINED. The appeal of Socorro Licon of the CalPERS determination that she is no longer medically eligible for a disability retirement is DENIED. The determination of the CalPERS Benefits Division that applicant is not substantially incapacitated from the performance of her duties is AFFIRMED. Respondent shall forthwith be returned to work as a Correctional Officer with the California Department of Corrections and Rehabilitation-Corcoran State Prison.

DATED: October 1, 2015



STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings