

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 Disability Retirement
of:

BRYAN O. RANKIN,

Respondent,

and

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

Respondent.

OAH No. 2014040183

CalPERS No. 2013-0498

PROPOSED DECISION

This matter was heard before Erin R. Koch-Goodman, Administrative Law Judge, Office of Administrative Hearings, State of California, on December 15, 2015, in Fresno, California.

The California Public Employees' Retirement System (CalPERS) was represented by John Shipley, Senior Staff Counsel.

Bryan O. Rankin (respondent) was present and was represented Thomas J. Tusan, Attorney at Law.

Evidence was received and the hearing closed. The record remained open for submission of closing briefs. Simultaneous closing briefs were filed on January 18, 2016. Complainant's Closing Brief was marked Exhibit 20. Respondents' Post Trial Brief was marked Exhibit K. The record was closed and the matter was submitted for decision on January 18, 2016.

ISSUE

Is respondent currently disabled or incapacitated from the performance of his usual job duties as a CO based upon his orthopedic (torn Achilles tendon) condition?

FACTUAL FINDINGS

1. Anthony Suine, Chief, Benefit Services Division, CalPERS, made and filed the Accusation in his official capacity.

2. Respondent was employed by California Department of Corrections and Rehabilitation (CDCR), California State Prison, Corcoran (Corcoran), as a Correctional Officer (CO) at the time that he filed his application for industrial disability retirement. By virtue of his employment, respondent was a state safety member of CalPERS subject to Government Code section 21151, subdivision (a).

3. On June 15, 2009, respondent submitted his application for industrial disability retirement. Respondent was born on October 28, 1969; at the time of his application, he was 40 years old. At CalPERS request, on July 1, 2010, respondent was seen by Mohinder Nijjar, M.D., an orthopedic surgeon, for an Independent Medical Examination (IME). Dr. Nijjar wrote an IME and Supplemental Report opining respondent had a temporary disability and was substantially incapacitated from the performance of his duties following a surgically repaired Achilles tendon tear and tendonitis around the ankle joint. On or about August 10, 2010, CalPERS granted respondent industrial disability retirement on the basis of his orthopedic (torn Achilles tendon) condition, effective April 1, 2010, noting “[y]ou may be reexamined periodically to determine your qualification for reinstatement if you are under the minimum age for service retirement.”

4. On November 21 and December 10, 2012, CalPERS notified respondent his file was under review and he was subject to reexamination of his disability. On March 4, 2013, CalPERS directed respondent to Joseph Serra, M.D., an orthopedic surgeon, for an IME. Dr. Serra wrote an IME Report finding respondent was not substantially incapacitated for the performance of his duties. On March 18, 2013, CalPERS notified respondent he was no longer substantially incapacitated from performing the job duties of a CO based on his disabling condition. On or about May 11, 2013, respondent appealed the decision. On April 1, 2014, CalPERS made and filed the Accusation.

Job Duties

5. CDCR, Division of Adult Institutions, Corcoran, provided an Essential Functions list for the CO classification. The functions affecting respondent’s physical condition include:

- Walk occasionally too continuously.
- Run occasionally, 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.
- Climb occasionally too frequently, ascent/descent or climb a series of steps/stairs, several tiers of stairs or ladders as well as climb onto bunks/beds while involved in cell searches, must be able to carry items while climbing stairs.
- Crawl and crouch occasionally, crawl or crouch under inmate's bed or restroom facility while involved in cell searches, crouch while firing a weapon while involved in property searches.
- Stand occasionally too continuously, stand continuously depending on the assignment.
- Stoop and bend occasionally too frequently, stoop and bend while inspecting cells, physically searching inmates from head to toe.

6. Taken from the CalPERS Physical Requirements of Position/Occupational Title form, Corcoran provided the following information about the physical requirements of the CO position.

- a. Occasional tasks, up to three hours of the shift, include: sitting, standing, running, walking up to 1.5 miles, crawling up to 50 yards, kneeling, climbing up to 150 steps, squatting, bending (waist), reaching (above and below shoulder), pulling & pushing up to 25 miles [*sic*], keyboard use, mouse use, lifting/carrying power grasping, lifting 51 to 75 pounds for 200 yards, lifting 76 to 100 pounds for 200 yards, and lifting 100 plus pounds for 200 yards, walking on even ground up to 1.5 miles, driving up to 8 hours, exposure to excessive noises, exposure to extreme temperature and humidity wetness, exposure to dust gas, fumes or chemicals, working at heights up to 5 stories, operation of foot controls or repetitive movement, use of special visual or auditory protective equipment, and working with bio-hazards (e.g. blood borne pathogens, sewage, hospital waste.).

- b. Frequent tasks, for three to six hours of the shift, include: sitting, standing, walking up to 1.5 miles, climbing up to 150 steps, bending (neck and waist), twisting (neck and waist), reaching (below shoulder), pushing & pulling up to 25 [sic] miles, fine manipulation, power grasping, simple grasping, repetitive use of hands, lifting 26 to 50 pounds for 200 yards, walking on uneven ground, driving up to 8 hours, exposure to extreme temperature and humidity wetness, exposure to dust gas, fumes or chemicals, and working at heights up to 5 stories.
- c. Constant tasks, over six hours of the shift, include: sitting, standing, walking up to 1.5 miles, bending (neck), twisting (neck and waist), fine manipulation, power grasping, simple grasping, repetitive use of hands, lifting 0 to 10 pounds for up to 1.5 miles, lifting 11 to 25 pounds for up to 1.5 miles, driving up to 8 hours, exposure to extreme temperature and humidity wetness.

Respondent's Medical History

7. On September 2, 2007, while at work, respondent ran while responding to an alarm, stepped in a hole in the ground with his right foot, and felt a pulling, twisting sensation in the right foot and ankle over the Achilles tendon. Respondent reported the injury to his supervisor. On September 27, 2007, respondent was evaluated by Glenda Dalby, M.D., occupational medicine, under the guise of a worker's compensation claim. Respondent received a soft ankle brace and was prescribed physical therapy. In October 2007, respondent presented to Joseph Reynolds, M.D., a podiatrist, and accepted orthotics. On June 15, 2008, respondent returned to Dr. Dalby and received a referral to Francis Glaser, M.D., an orthopedic surgeon, for a surgical consultation.

8. On July 7, 2008, Dr. Dalby ordered an MRI of respondent's right ankle. The MRI revealed: "1) mild bone marrow edema/stress reaction of the lateral malleolus without significant corticomdullary abnormalities. 2) Slight thickening of the central Achilles tendon with small focus intrasubstance tendinosis, not the plantaris fusion. 3) small joint effusion." Surgery was recommended. On December 2, 2008, Dr. Glaser performed a debridement and repair of the right Achilles tendon. Respondent received post-operative physical therapy with little pain relief.

9. On March 24, 2009, respondent returned to Dr. Dalby. Respondent reported continued pain. On July 7, 2009, Dr. Dalby ordered another MRI of respondent's right ankle. The MRI revealed: "Findings consistent with partial tear/tendinopathy involving the distal Achilles tendon. In addition, there is a longitudinal split tear measuring approximately 2.5 cm

in craniocaudal dimension of the medial portion of the Achilles tendon. This is likely remote and/or postsurgical, given the patients prior history of trauma.” Dr. Glaser recommended a second surgery, with a fifty-percent chance of changing symptoms; respondent refused.

10. At CalPERS’s direction, on July 1, 2010, respondent was seen by Dr. Nijjar for an IME. Dr. Nijjar wrote an IME and Supplemental Report opining respondent had a temporary disability and was substantially incapacitated from the performance of his duties based upon a repaired Achilles tendon tear and tendonitis around the ankle joint.

2013-2015 Medical Reevaluations

11. On March 4, 2013, CalPERS directed respondent to see Dr. Serra for an IME. Dr. Serra found a well-healed surgical scar over the distal right Achilles tendon, with normal contour to the Achilles tendon and minimal enlargement at the site of the surgical repair. The tendon was not tender and had normal consistency when compared with the left. Peripheral pulses, as well as motor and sensory evaluation of the right lower extremity revealed strength to be normal. Ankle range of motion recorded in degrees right/left as 8/15 dorsiflexion, 50/70 plantarflexion, 15/18 inversion, and 15/25 eversion. Dr. Serra found limited flexion in the right second, third, and fourth toes, although dorsiflexion of the toes on both feet was within normal limits. Calves measured in inches right/left as 16/15.74. Ankles measured in inches right/left as 9.25/9. Respondent displayed a normal gait, but was hesitant to walk on his right toes.

Dr. Serra’s diagnostic impressions included:

- (1) Status post partial tear right Achilles tendon with surgical repair.
- (2) Chronic pain right Achilles tendon insertion, subjective complaint.

Dr. Serra opined “no specific job duties that Mr. Rankin is unable to perform because of a physical or mental condition. Mr. Rankin is not substantially incapacitated for the performance of his duties. There is an exaggeration of complaints to a significant degree.”

12. At respondent’s request, on March 30, 2015, Dr. Glaser reevaluated him. Dr. Glaser wrote a Report. Dr. Glaser reported the following exceptions to a normal evaluation: abnormal balance and weight loss, healed Achilles scar, Achilles midsubstance tenderness, thick Achilles substance, right ankle pain, 20 degrees right dorsiflexion and 50 degrees right plantarflexion. Dr. Glaser reviewed an MRI study from February 8, 2015, revealing thickening in the Achilles tendon midsubstance with mild distal tendinopathy. Dr. Glaser diagnosed respondent with Achilles tendonitis. Dr. Glaser’s diagnostic impressions included:

“right Achilles partial tear – healed by MRI, but possibly with adhesions to the tendon sheath. Tenolysis surgery would be reasonable option.”

13. On April 21, 2015, Dr. Nijjar reevaluated respondent, at respondent’s request. Dr. Nijjar drafted an Independent Medical Reevaluation (IMR) Report. Dr. Nijjar found a surgical scar well healed, nonhypertrophic, nontender, and nonadherent to the underlying structures. The Thompson test was negative for a tear in the Achilles tendon. The tendon was not tender at attachment or the retrocalcaneal area. Calves measured in centimeters right/left as 39.5/40. Ankle range of motion recorded in degrees right/left as 5/10 extension, 45/45 flexion, 30/30 inversion, and 20/20 eversion. Full range of motion found in the foot and ankle joints.

Dr. Nijjar’s diagnostic impressions included:

- (1) Contusion of the right ankle with microfracture, nondisplaced, partial outer malleolus, healed.
- (2) Achilles tendon partial tear with development of Achilles tendonitis.
- (3) Status post debridement and synovectomy [surgical removal of the membrane] of the Achilles tendon, right ankle and foot.

Dr. Nijjar opined:

The claimant is required to stand continuously for 8 hours if necessary and continuously walk for that period if necessary and he is required to run for emergencies up to 400 yards carrying his equipment if necessary, and the ground where he runs is uneven.

Considering his subjective complaints of pain in the right ankle and foot, inability to run properly and feeling insecure on the ankle. Objectively he has thickening of the paratenon of the Achilles tendon and limitation of range of motion in extension or dorsiflexion of the ankle by 5°.

With the information, there is reasonable medical probability that he is unable to run the distance required for his job. However, he can perform most of the other activities with his current injury status and treatment provided.

14. On December 11, 2015, CalPERS asked Dr. Serra to review additional medical records, including Dr. Glaser's March 30, 2015 Report and Dr. Nijjar's April 21, 2015 IMR, and then draft a Supplemental Report. In his Supplemental Report, Dr. Serra again determined respondent was not substantially incapacitated from the performance of his duties.

15. At hearing, Dr. Serra testified consistent with his IME and Supplemental reports finding respondent not disabled or substantially incapacitated. Dr. Serra discovered an enlargement of the tendon and limitation of dorsiflexion; insufficient objective findings to support respondent's subjective complaints. Dr. Serra judged respondent as exaggerating his complaints to a significant degree. Dr. Serra testified he treated marathon runners who went back to running following surgical Achilles tendon repair and there was no reason respondent could not return to work.

16. Dr. Serra concluded respondent was capable of completing the essential functions of the job, but admitted respondent would have some pain when completing certain job duties. Dr. Serra acknowledged reviewing the job duties of a CO. He testified he had performed 100s of examinations of COs and was familiar with their essential functions. However, in this case, Dr. Serra dismissed the CDCR essential function to "run in an all-out effort . . . up to 400 yards" over uneven surfaces. Dr. Serra stated: "Corrections lists the 400 yard requirement, but it is unreasonable to have that requirement of a CO;" the circumstance is "so unusual" and a "gross exaggeration." Dr. Serra did not consider the "run all-out" essential function when making his determination or when assessing respondent's ability to perform all of the duties of CO; noting respondent could respond to emergency alarms at a slower pace.

17. At hearing, Dr. Nijjar testified consistent with his 2010 IME and Supplemental Report and his 2015 IMR, finding respondent substantially incapacitated from the job duties of a CO. Dr. Nijjar discovered objective findings consistent with a disability and determined respondent was unable to complete the "run all-out" essential function of a CO.

Discussion – Usual Duties

18. At hearing, no evidence was presented as to the "usual duties" of a CO. CalPERS failed to offer the testimony of a CO and never asked respondent what his usual duties were when he was working at Corcoran as a CO. Instead, the parties offered a CDCR document entitled Correctional Officer, Essential Functions. "Essential functions means the fundamental job duties of the employment position." (*Lui v. City & Cnty. of San Francisco* (2012) 211 Cal. App. 4th 962, 971; see *Cripe v. City of San Jose*, 261 F.3d 877, 887 (9th Cir.2001).) Akin to disability discrimination, the question here is whether respondent can perform the essential functions of the position. (*Green v. State* (2007) 42 Cal.4th 254; *Lui, supra*, at p. 970-971.)

19. Among other things, a CO is required to “run in an all-out effort while responding to alarms . . . up to 400 yards” over uneven surfaces. Dr. Serra testified the “run all-out” essential function was “unreasonable” and “so unusual.” Yet respondent’s injury occurred as a result of running all-out while responding to an alarm. Clearly, the requirement is a necessary part of a CO’s job duties.

20. In making his finding, Dr. Serra failed and refused to consider the “run all-out” essential function. However, Dr. Serra cannot simply dismiss an essential function on his own accord. When questioned, Dr. Serra said respondent could respond to alarms, but simply at a slower pace. However, a slower pace does not meet the job requirement to “run all-out.” Ultimately, Dr. Serra concluded respondent was not substantially disabled for the performance of his usual job duties.

21. In comparison, Dr. Nijjar considered all essential functions in making his findings. Specifically, Dr. Nijjar determined respondent cannot “run in an all-out effort while responding to alarms . . . up to 400 yards” over uneven surfaces. As a result, Dr. Nijjar opined respondent cannot complete the usual job duties of a CO.

22. At hearing, Dr. Serra presented his findings in a straightforward manner. Dr. Nijjar did the same. Yet their conclusions were in absolute opposition. Dr. Serra dismissed respondent’s subjective complaints because they were not supported by objective findings. Dr. Nijjar weighed respondent’s subjective complaints in making his determination. Dr. Serra failed to consider the “run all-out” essential function; Dr. Nijjar considered it. In sum, Dr. Serra findings are incomplete because he failed to consider the essential functions of the CO position. Dr. Nijjar’s opinion is the only complete evaluation offered in this case. For all the above reasons, respondent has established through competent medical evidence that his orthopedic condition substantially disables him from performing his usual job duties as a CO at Corcoran.

LEGAL CONCLUSIONS

Applicable Laws and Statutes

1. Disability as a basis of retirement, means disability of permanent or extended and uncertain duration. (Gov. Code, § 20026.) According to Government Code section 21156, subdivision (a)(1), “[i]f 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.”

2. Any state safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability. (Gov. Code, § 21151, subd. (a).) An

applicant must demonstrate their substantial inability to perform their usual duties on the basis of competent medical evidence. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.)

3. Pursuant to Government Code section 21192,

The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. . . . Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

4. According to Government Code section 21193, “[i]f the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability . . . and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.”

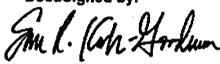
Determination

5. No cause exists to grant CalPERS' request to reinstate respondent to his former position as a CO with CDCR, Corcoran. Complainant did not establish that respondent is capable of performing usual job duties as a CO at this time, based upon competent medical evidence. In this case, Dr. Nijjar's testimony is most persuasive. He testified competently and clearly. He applied the CalPERS standard of substantial incapacity and determined that respondent is disabled; and he cannot perform all of the usual duties of his job.

ORDER

Respondent's appeal is GRANTED. The request of California Public Employees' Retirement System to involuntarily reinstate respondent Bryan Rankin from disability retirement is DENIED.

DATED: February 12, 2016

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ERIN R. KOCH-GOODMAN
Administrative Law Judge
Office of Administrative Hearings