

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

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

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

MARK HITT,

Respondent,

and

DEPARTMENT OF CORRECTIONS AND  
REHABILITATION, CALIFORNIA  
CORRECTIONAL INSTITUTION,

Respondent.

Case No. 2015-0525

OAH No. 2015090282

**PROPOSED DECISION**

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on March 29, 2016, in Fresno, California.

The California Public Employees' Retirement System (CalPERS) was represented by Terri Popkes, Senior Staff Attorney.

Mark Hitt (respondent) appeared on his own behalf.

There was no appearance by or on behalf of the Department of Corrections and Rehabilitation, California Correctional Institution (CDCR).

Evidence was received, the record was closed, and the matter submitted for decision on March 29, 2016.

## SUMMARY

Respondent retired for disability from his position as a CDCR correctional officer, effective March 2, 2013, based on an orthopedic (right knee) condition. CalPERS conducted a post-retirement evaluation of respondent's qualifications for disability retirement, and on March 10, 2015, notified respondent of its determination that he was no longer substantially incapacitated from performing his job duties. Respondent filed a timely appeal, CalPERS filed an accusation, and this hearing followed.

As part of its post-retirement evaluation, Ghol B. Ha'Eri, M.D., a board certified orthopedic surgeon, conducted an independent medical evaluation of respondent. Dr. Ha'Eri examined respondent on January 27, 2015, and prepared a report of the same date in which he concluded that respondent is not substantially incapacitated for the performance of his duties as a correctional officer.

Dr. Ha'Eri prepared a supplemental report dated March 17, 2016, in which he took into account new information provided in an orthopedic examination report prepared by a board certified orthopedic surgeon, Philip Conwisar, M.D., on February 3, 2016. Dr. Conwisar concluded that respondent has moderately severe degenerative joint disease in his right knee, and that he is permanently and substantially incapacitated from the performance of his job duties. Based on the new information in Dr. Conwisar's report, including an x-ray taken on February 3, 2016, Dr. Ha'Eri agrees with Dr. Conwisar's conclusion that respondent is permanently incapacitated from performing his usual duties as a CDCR correctional officer.

## FACTUAL FINDINGS

1. Respondent was employed as a correctional officer with CDCR. By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151.<sup>1</sup> On September 27, 2012, respondent submitted a Disability Retirement Election Application with the Benefit Services Division of CalPERS. He claimed disability on the basis an orthopedic (right knee) condition.

2. CalPERS approved respondent for industrial disability retirement effective March 2, 2013, based upon an orthopedic (right knee) condition. Respondent was born on

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<sup>1</sup> Government Code section 21151, subdivision (a), provides: "Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service."

May 10, 1977, and is therefore under the minimum age for voluntary retirement for service applicable for members of his classification.<sup>2</sup>

3. By letter dated September 24, 2014, CalPERS informed respondent and CDCR that it would be reevaluating respondent's qualifications to determine his continuing eligibility to receive disability retirement. CalPERS obtained medical reports concerning respondent's orthopedic condition. After review of these reports and other information, CalPERS determined that respondent was no longer disabled or incapacitated from performing his duties as a correctional officer, and should be reinstated to his former position.

4. By letter dated March 10, 2015, CalPERS notified respondent and CDCR of its determination that respondent is no longer substantially incapacitated from performing his job duties, and advised respondent of his appeal rights. Respondent filed a timely notice of appeal.

5. CalPERS filed an Accusation dated July 24, 2015. Per the Accusation, the appeal is limited to the issue of "whether respondent Hitt is disabled or incapacitated from performance of his usual job duties."

6. Respondent began working with CDCR in March 2003. As a correctional officer respondent was required to perform a variety of physical tasks. CDCR prepared a list of essential functions which a correctional officer must be able to perform. A sample of the essential functions includes the ability do the following: disarm, subdue and apply restraints to an inmate; defend self from an inmate armed with a weapon; run occasionally in an all-out effort while responding to alarms or serious incidents; climb occasionally to frequently ascend/descend a series of steps/stairs or ladders as well as climb onto bunk-beds; crawl and crouch occasionally when involved in searches; lift and carry continuously to frequently 20 to 50 pounds; and frequently push and pull while opening and closing locked gates and cell doors.

#### *Medical Evaluations Post-Retirement*

##### Ghol B. Ha'Eri, M.D. – January 27, 2015

7. Respondent was seen for an independent medical examination by Dr. Ha'Eri on January 27, 2015, at CalPERS's request. Dr. Ha'Eri is board certified in orthopedic surgery. He saw respondent for approximately one half hour. He also reviewed respondent's available medical records and the job description for a correctional officer at CDCR.

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<sup>2</sup> Government Code section 21060 provides in pertinent part: "A member shall be retired for service upon his or her written application to the board if he or she attained age 50... ."

8. The history of respondent's condition is that on October 23, 2011, while at work respondent was walking down some stairs when he missed a step and twisted his right knee. His right knee subsequently became painful and swollen. He was seen the same day by a primary care physician, who transferred respondent to an orthopedic surgeon. After a course of physical therapy, on April 4, 2012, respondent underwent arthroscopic surgery during which the surgeon performed a partial medial meniscectomy and chondroplasty. Postoperatively, respondent was referred for physical therapy.

9. At the time of Dr. Ha'Eri's examination, respondent complained of right knee pain increasing with physical activities, and occasional clicking. The examination showed no joint swelling or effusion, and no crepitus. The range of motion was within normal limits, and manipulation of the right knee showed no ligamentous laxity. The knee joint was stable medially and laterally.

10. After performing the above-described physical examination, and having reviewed medical records relating to respondent's complaints and list of tasks required of correctional officers, Dr. Ha'Eri opined that respondent was not substantially incapacitated from the performance of his usual and customary duties as a correctional officer. He opined that there are no job duties respondent is unable to perform because of the physical condition of his right knee.

Philip H. Conwisar, M.D. – February 3, 2016

11. Respondent was seen by Dr. Conwisar for an orthopedic examination on February 3, 2016. Dr. Conwisar is board certified in orthopedic surgery. He examined respondent, and reviewed available medical records and a list of essential functions of a correctional officer. He also viewed an x-ray taken on February 3, 2016.

12. Based on his examination of respondent and review of the available medical records, including the x-ray taken on February 3, 2016, Dr. Conwisar opined that respondent has moderately severe degenerative joint disease in his right knee, which is unlikely to improve with additional medical treatment. Dr. Conwisar also opined based on the subjective and objective findings that respondent is unable to perform numerous essential duties of a correctional officer, including all of the duties listed in Factual Finding 6, above. He found that respondent's incapacity is permanent and unlikely to change with or without further medical treatment.

Ghol B. Ha'Eri, M.D. – March 17, 2016

13. Dr. Ha'Eri prepared a supplemental report dated March 17, 2016, in which he took into account the new information provided in the report prepared by Dr. Conwisar, specifically the x-ray of respondent's right knee taken on February 3, 2016. Based on the new information, Dr. Ha'Eri changed his opinion previously expressed in his examination report dated January 27, 2015, and now agrees with Dr. Conwisar's opinion that respondent is permanently incapacitated from performing the duties of a correctional officer. Dr. Ha'Eri

believes respondent's orthopedic condition in his right knee worsened during the intervening time between his own independent medical evaluation on January 27, 2015, and Dr. Conwisar's evaluation in February 2016.

*Discussion*

14. CalPERS filed the accusation seeking to reinstate respondent from disability retirement to his former position as a CDCR correctional officer, based largely in reliance upon the medical evaluation and opinion of Dr. Ha'Eri, dated January 27, 2015. Dr. Ha'Eri's opinion has since changed based on new information, as articulated in his supplemental report dated March 17, 2016.

15. The above matters having been considered, CalPERS did not present competent medical evidence to establish that respondent is no longer incapacitated from performing his usual duties as a CDCR correctional officer. Accordingly, CalPERS's request that respondent be reinstated as a CDCR correctional officer must be denied.

**LEGAL CONCLUSIONS**

1. In accordance with Government Code section 21192, CalPERS re-evaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

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 .... The examination shall be made by a physician or surgeon, appointed by the board .... 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 ... 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.

2. Government Code section 21193 governs the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty and, in relevant part, provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she

has applied for reinstatement 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.

3. Government Code section 20026 defines “disability” and “incapacity for performance of duty,” and, in relevant part, provides:

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.

4. In *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term “incapacity for performance of duty” as used in Government Code section 20026 (formerly section 21022) to mean “the *substantial* inability of the applicant to perform his usual duties.” (Italics in original.) In *Hosford v. Board of Administration of the Public Employees’ Retirement System* (1978) 77 Cal.App.3d 854, 862 the court held that a disability or incapacity must currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient.

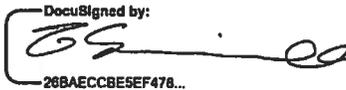
5. As the proponent for a determination that respondent is no longer disabled, CalPERS has the burden of proving that respondent is no longer entitled to disability retirement. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691; *Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.3d 234, 238.)

6. CalPERS has not met its burden of demonstrating through competent medical evidence that respondent is no longer incapacitated from performing his usual duties as a CDCR correctional officer. Consequently, its request that respondent be reinstated as a CDCR correctional officer must be denied.

#### ORDER

Respondent’s appeal is GRANTED. The request of California Public Employees’ Retirement System to involuntarily reinstate respondent Mark Hitt from disability retirement is DENIED.

DATED: April 21, 2016

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TIMOTHY J. ASPINWALL  
Administrative Law Judge  
Office of Administrative Hearings