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: LORI GIBSON, Respondent, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, CALIFORNIA CORRECTIONAL CENTER, Respondent.	Case No. 2015-0081 OAH No. 2015040240

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on February 11, 2016, in Sacramento, California.

Preet Kaur, Staff Attorney, represented California Public Employees' Retirement System (CalPERS).

Richard E. Elder, Jr., Attorney at Law, represented Lori Gibson (respondent), who was present.

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

Evidence was received on February 11, 2016. The record remained open to allow CalPERS to submit a letter and the parties to submit briefs. On February 24, 2016, CalPERS submitted a letter regarding its position on the scope of respondent's disability, which was marked for identification as Exhibit 14. On March 23, 2016, respondent submitted her closing brief, which was marked for identification as Exhibit L. On March 24, 2016, CalPERS submitted its closing brief, which was marked for identification as Exhibit 15. On April 5, 2016, respondent submitted her reply, which was marked for identification as Exhibit M. On April 6, 2016, CalPERS submitted its reply, which was marked for identification as Exhibit 16. On April 15, 2016, CalPERS submitted the transcript of the

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED April 22 20 16
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hearing, which was marked for identification as Exhibit 17. The record was closed, and the matter was submitted for decision on April 15, 2016.

ISSUES

The issues for Board determination are:

1. Should the determination of whether respondent should be reinstated from disability retirement be based solely on her right thumb condition?

2. Did CalPERS establish that respondent is no longer substantially incapacitated from performing the usual duties of a Correctional Officer and should therefore be reinstated from disability retirement?

FACTUAL FINDINGS

1. Respondent was born in 1972. She was employed by CDCR as a Correctional Officer. On or about March 12, 2003, respondent applied for disability retirement. Respondent's application was granted, and she disability retired effective December 2, 2003, when she was 31 years old.

Duties of a Correctional Officer

2. As set forth in a Correctional Officer Job Analysis (Job Analysis), Correctional Officers "are sworn Public Safety Officers and must be qualified under the California Penal Code in the use of firearms and other areas relating to a sworn position." They "provide security to inmates in correctional institutions in accordance with established polices, regulations and procedures, and observe conduct and behavior of inmates to prevent disturbances and escapes." There are many different posts to which Correctional Officers may be assigned to work in a correctional institution. Correctional Officers "must be able to perform the duties of all the various posts."

3. The Job Analysis stated that Correctional Officers must be able to: (a) lift and carry 20 to 50 pounds frequently (from one-third to two-thirds of the work day); (b) lift and carry over 100 pounds occasionally (one-third or less of the work day); (c) physically restrain, lift and carry an inmate; (d) push and pull while opening and closing locked gates and cell doors throughout the work day; (e) reach while performing regular duties, including operating automatic doors, searching inmates and their property, issuing keys and equipment, and locking and unlocking doors; (f) reach overhead while performing cell or body searches, seeking out contraband, obtaining necessary supplies, and operating tower spotlights; (g) move and use their arms freely while performing their regular duties; and (h) move, use and grasp with their hands and wrists while performing their regular duties, including when opening and closing locked gates and cell doors, applying restraint devices, operating

computers, loading and unloading weapons, operating radios, operating spotlights, and using weapons.

Respondent's March 2003 Disability Retirement Application

4. Respondent submitted a disability retirement application dated March 12, 2003. In her application, respondent described her disabilities and their causes as follows:

> On July 10, 2002, I broke my right [*sic*] while shutting a gate @ C.C.C. I shut the gate on my right thumb.

She described her limitations and preclusions as:

> I have limited use of both of my arms especially my right hand.

In response to the question asking how her injury or illness affected her ability to perform her job, she stated:

> I can not perform my duties because of my arms [and] hand. I need full use of them both. I could not use a baton, firearm, or help in a dispute.

Respondent was not then working in any capacity.

2003 Independent Medical Evaluation (IME) by James G. Fischer, M.D.

5. After receiving respondent's disability retirement application, CalPERS sent respondent for an IME to James G. Fischer, M.D., a board-certified orthopedic surgeon. On November 4, 2003, Dr. Fischer physically examined respondent, reviewed her history, medical records and job duties, and issued an IME report. At the time, respondent was 31 years old. Respondent told Dr. Fischer that on July 10, 2002, she smashed her right thumb while sliding a gate at work. She was found to have a tuft fracture in the right thumb. Respondent told Dr. Fischer that she had "some slight tenderness in the right thumb tip, with heavy tip grasping type activities only." Her main complaints were "increased wrist pain on the radial side of her right wrist and lateral elbow pain in the left elbow with any attempts at grasping, twisting, lifting, pushing, or pulling." She also complained of "some stiffness in the wrist and elbow in the morning." She described her discomfort as a "deep dull ache in these areas, preventing the activities" she described.

6. After examining respondent and reviewing her medical records and job duties, Dr. Fischer diagnosed respondent as follows:

1) Status post right thumb distal tuft fracture (healed).

2) Chronic right radial wrist stenosing tenosynovitis (de Quervain's tenosynovitis).[1]

3) Chronic left lateral epicondylitis.[2]

7. Dr. Fischer opined that respondent was "substantially incapacitated from the performance of the essential functions of her actual and present job duties" based upon her "inability to lift, carry, push or pull greater than 20 pounds on a frequent basis including lifting or carrying an inmate, or restraining an inmate." Dr. Fischer believed that "this inability, as well as the inability to use her baton or hand gun effectively would place her and her fellow officers at risk." Dr. Fischer identified the date of respondent's incapacity as July 10, 2002, the date of her original work injury. Dr. Fischer opined further that respondent's incapacity was "temporary, as most tendinitis conditions should improve with time." He expected that the duration of her incapacity would be "one to two years" and that respondent should be "reevaluated at that time to see if she still has substantial inability to perform her usual and customary duties."

CalPERS' Approval of Respondent's Disability Retirement Application

8. On December 10, 2003, CalPERS sent a letter to respondent approving her application for disability retirement "based upon [her] orthopedic (right thumb) condition(s)."

January 2011 IME by Edward M. Katz, M.D.

9. In 2011, CalPERS sent respondent to Edward M. Katz, M.D., FACS, for another IME. Dr. Katz was an orthopedic surgeon. On January 20, 2011, he physically examined respondent, reviewed her history, medical records and job duties, and issued an IME report. Respondent complained of pain "in both arms, about the elbow area, and hand, fingers and the thumb area." Respondent told Dr. Katz that she fractured her right thumb on July 10, 2002, when it was "slammed" in a metal gate at work. She "developed de Quervain's disease in the right forearm associated with prolonged splinting and inactivity." Due to the injury to the right upper extremity, "she developed overuse in the left hand and elbow which was considered a compensatory consequence to her industrial injury." Respondent was not working at the time of the IME.

10. After examining respondent and reviewing her medical records and job duties, Dr. Katz diagnosed her as follows:

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[1] De Quervain's is the "inflammation of tendons and their sheaths at the styloid process of the radius that often causes pain in the thumb side of the wrist." (http://c.merriam-webster.com/medlineplus/deQuervain's).

[2] "Epicondylitis" is sometimes colloquially referred to as "tennis elbow."

1. Status post right distal tuft fracture, healed.

2. Chronic de Quervain's tenosynovitis right wrist.

3. Chronic left lateral epicondylitis.

11. Dr. Katz opined that respondent was substantially incapacitated from the performance of her duties as a Correctional Officer, and that her incapacity was permanent. Dr. Katz found that:

> There are specific job duties that she cannot do or would be unable to perform. These are repetitive use with both extremities, gripping and grasping as described for a correctional officer. She would have trouble with repetitive gripping, grasping, pushing, pulling, and lifting with the upper extremities. This is because of her physical condition.

12. After Dr. Katz's IME, respondent remained on disability retirement.

August 2014 IME by Joseph Serra, M.D.

13. In 2014, CalPERS sent respondent for an IME with Joseph Serra, M.D., a board-certified orthopedic surgeon. From 1961 to 1965, Dr. Serra did a residency in orthopedic surgery. In 1965 and 1966, he did a fellowship in hand surgery. He performed surgery on hands and upper extremities until 2000 when he retired from performing surgery.

14. On August 28, 2014, Dr. Serra physically examined respondent, reviewed her history, medical records and job duties, and issued an IME report. At the time of this IME, respondent was 42 years old. Respondent complained of "tingling in her right forearm and upper arm for the past month or two." She also had "pain in the dorsum of her right thumb extending to her right wrist." Her right thumb was still tender to touch. She had pain with driving and doing laundry. For the previous year, she had stiffness in her right thumb when typing more than 10 to 15 minutes. She had "generalized aching" in her left elbow, as the "result of compensating for lack of use of the right hand for four to six months after injury." Her symptoms were aggravated by usage. She had "partial relief" with rest and medications. She also used heat on her right hand two to three times per week. Respondent told Dr. Serra that since she disability retired, she had worked as a preschool home visitor and a preschool teacher.

15. Dr. Serra's examination of respondent's right upper extremity revealed "no evidence of atrophy." She had "full range of motion in her right shoulder, elbow and forearm." Her range of motion in her right wrist revealed a "10 degree limitation of dorsiflexion at 70 degrees compared with 80 degrees" on the left.[3] Palmar flexion was 80

[3] Dr. Serra's IME report stated that respondent's dorsiflexion was 80 degrees on the "right." At hearing, he clarified that it was 80 degrees on the left.

degrees bilaterally. She had no tenderness and "excellent range of motion" in her right thumb, "tip touching the fifth metatarsal with ease." She had "normal" range of motion in all her digits bilaterally. Her fingertips could touch the middle palmar crease "with ease." There was no evidence of swelling or erythema in her left elbow. There was "minimal tenderness" over the lateral epicondyle of the left elbow. The range of motion in her left elbow was "0 degrees extension to 125 degrees of flexion," which was "comparable to the uninvolved right" elbow.

16. After examining respondent and reviewing her medical records and job duties, Dr. Serra diagnosed her as follows:

1. Status post tuft fracture right thumb 2002, healed.

2. Status post de Quervain's syndrome right first dorsal compartment, resolved.

3. Lateral epicondylitis left elbow, mild, chronic.

17. Dr. Serra opined that respondent was not substantially incapacitated from performing her usual duties as a Correctional Officer. Dr. Serra stated:

> It is my orthopedic opinion that there is a significant exaggeration of complaints. Her subjective complaints far outweigh any objective findings. This began in 2002 simply as a crush injury to the distal phalanx of her right thumb. To consider this as the cause of a substantial incapacity even in a correctional officer is not reasonable.

18. At hearing, Dr. Serra testified that, when he examined respondent, he found no atrophy in respondent's extremities, which showed that she was using them. She had "excellent" range of motion in both her right and left extremities. The injury to her right thumb had fully resolved. Her left elbow showed no signs of infection, redness or swelling. Her grip strength with her right dominant hand was greater than her left, even though her right hand was the one that was injured. The circumference of her right arm was greater than her left. According to Dr. Serra, everything "looked great" except for a little tenderness in her left elbow. Respondent's complaints of pain did not match with Dr. Serra's objective findings. Dr. Serra reviewed the usual duties of a Correctional Officer and found that respondent was physically able to perform all of them.

February 2016 Evaluation by Andrew K. Burt, M.D.,

19. Respondent retained Andrew K. Burt, M.D. as an expert witness. Dr. Burt described himself as a "board-eligible," but not board-certified, orthopedic surgeon. From 1974 to 1977, he was a resident in orthopedics. Since 1983, the "majority" of his work has consisted of forensic medical evaluations.

20. Dr. Burt saw respondent for an orthopedic consultation evaluation on January 25, 2016, reviewed her history, medical records and job duties, and issued a report dated February 5, 2016. Respondent was 43 years old at the time of Dr. Burt's evaluation. She complained about pain in her right hand. She reported that pinching, gripping, grasping, and torque activities increased the pain "to the point that action is precluded." The pain "radiates up [her] arm to the lateral elbow on the right side." Respondent further complained of pain in her left elbow, with similar symptoms, and an inability to lift more than eight pounds. Several years ago, she tried firing one shot with her husband's 38 caliber revolver, which caused a flare-up of her wrist and elbow pain on the right side. She was not able to tolerate the recoil.

21. On examination, Dr. Burt found that the right upper extremity revealed "no abnormality with the exception of the increased carrying angle." Finklestein's test was "slightly positive indicating some ongoing symptoms from de Quervain's on the right." Range of motion was normal for both the right and left elbow. Respondent's right and left arms both measured the same. Dr. Burt stated these measurements revealed "some atrophy of the musculature of the right-dominant upper extremity." Respondent complained of tenderness to palpation in the right wrist, right thumb, and both elbows. Respondent's grip strength on both sides was measured at 40 pounds. Dr. Burt found "an estimated loss of grip strength of 30% left and right."

22. Dr. Burt diagnosed respondent as follows:

1. Chronic lateral epicondylitis, right-dominant elbow.

2. Chronic de Quervain's tenosynovitis, right wrist (quiescent at this time).[4]

3. Chronic flexor carpi radialis tendinitis, right wrist.

4. Chronic medial epicondylitis, left non-dominant elbow.

5. Chronic lateral epicondylitis, left non-dominant elbow.

23. Dr. Burt summarized respondent's subjective complaints as "frequent pain of minimal to slight intensity at the right-dominant wrist and elbow and at the left elbow." He found further that "[g]ripping, grasping, impact and torque activities rapidly increase the pain to the point that action is precluded." Respondent estimated that she had lost "about 50% lifting capacity." Dr. Burt summarized his objective findings as follows:

> ... an increased carrying angle on both sides with some atrophy of the musculature of the right upper extremity. Measurements

[4] In his February 5, 2016 report, Dr. Burt stated "elbow." He corrected it at the hearing to be "wrist."

> are equal left and right where the dominant upper extremity would be expected to measure ½ to 1 or 2 cm over the other side. There is loss of grip strength and pinch strength with testing with the Jamar dynamometer.

24. Dr. Burt opined that respondent's "ongoing symptoms" rendered her "substantially incapacitated from performing her job as a correctional officer."

25. At hearing, Dr. Burt pointed to his findings that respondent had some atrophy in her right upper extremity and diminished grip strength in both hands as the objective evidence that supported respondent's subjective claims of pain. Dr. Burt asserted that he reached these objective findings because he would have expected respondent's dominant upper extremity to be larger and stronger than her non-dominant extremity, but he found them to be equal in size and strength. Dr. Burt did not disagree with Dr. Serra's findings that respondent's grip strength with her right dominant hand was greater than her left, and that the grip strength that Dr. Serra found was actually less than that measured by Dr. Burt. He suggested that the differences in grip strength found by him and Dr. Serra could have been caused by differences in the Jamar dynamometers they used or the amount of symptoms respondent was experiencing on the different evaluation days. He also conceded that he could not tell the amount of atrophy respondent may have had in her arms since her atrophy was bilateral. He admitted that the only way he could tell if respondent was experiencing pain was based on what she told him. He testified that respondent was able to shoot a firearm, but that it would hurt her to do so. He also testified that it would be "difficult" for respondent to restrain an inmate, by which he meant that she would have pain if she tried to do so and would cause risk to herself and others.

Respondent's Testimony

26. Respondent testified that before she began working as a Correctional Officer, she successfully completed the training academy and could perform all the essential functions of the job. She worked as a Correctional Officer for about eight to nine months before she was injured. She explained how she smashed her right thumb in the gate while at work on July 10, 2002. She never returned to work as a Correctional Officer after her injury. She filed a workers' compensation claim, which was accepted. She participated in all the treatment that was offered for her injury. She explained that her wrist began hurting about three to four months after, her right elbow began hurting about six months after, and her left elbow began hurting about nine months after her July 2002 thumb injury.

27. A few months ago, she tried to shoot a weapon, but was unable to do so. That was the only time she tried to shoot a weapon since she left CDCR. She stated that her whole arm and elbow hurt after she tried to shoot. She did not have the strength to hold up her arm adequately to fire a weapon. She experienced significant pain in her arm from the recoil. She did not have the strength to pull back the trigger fully. She does not believe she could qualify shooting a gun, which is required for Correctional Officers.

28. Respondent testified that she does not have the upper body strength to disarm or subdue an inmate, to lift and carry an inmate, or to do the pushing and pulling required of a Correctional Officer. She asserted that it would cause her too much pain to use her hands and wrists to the extent required of a Correctional Officer. She admitted, however, that she has not attempted to perform the essential functions of a Correctional Officer since she disability retired in 2003.

29. In about 2004, respondent began working full time as a preschool home visitor. In this capacity, she would visit children at their homes to assess their ability to participate in preschool. She worked five days a week, eight hours a day in this positon for about one year. She left this position for reasons unrelated to her physical condition. For one and one-half years, respondent worked as a preschool teacher. In about 2011, she left this position after she fractured her left shoulder when she fell on the snow and ice.

Other Medical Evidence

30. Respondent offered various medical records and workers' compensation reports, which were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).[5] All these records and reports were dated in 2002 or 2003. Since the question for determination is whether respondent is now substantially incapacitated, these records and reports were given little weight.

Discussion

31. Scope of Respondent's Medical Condition. At hearing, CalPERS argued that the determination of whether respondent should be reinstated from disability retirement should be based solely on respondent's right thumb condition. In support of its argument for limiting the scope of respondent's claimed disabilities, CalPERS pointed to its December 10, 2003 approval letter, which stated that respondent's disability retirement application was approved "based upon [her] orthopedic (right thumb) condition(s)." But that letter did not include any findings, conclusions or other statements to indicate that CalPERS was denying her application to the extent it requested disability retirement based upon her other claimed medical conditions. There was no evidence that CalPERS ever notified respondent that it had denied her disability retirement application to the extent it was based upon medical conditions other than her right thumb condition. There was also no evidence that CalPERS ever informed respondent that she had a right to appeal CalPERS' determination to the extent it denied her application for disability retirement based upon such other medical conditions.

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[5] Government Code section 11513, subdivision (d), in relevant part, provides:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

32. In her disability retirement application, respondent identified her disabling conditions as the "limited use of both of my arms especially my right hand." Dr. Fischer, in his November 4, 2003 IME report, identified de Quervain's tenosynovitis in her right wrist and epicondylitis in her left elbow as the reasons he believed that respondent was substantially disabled from performing the duties of a Correctional Officer. CalPERS relied upon Dr. Fischer's IME report when it approved respondent's disability retirement application. Dr. Katz reached similar conclusions in his January 20, 2011 IME report. Both Drs. Serra and Burt examined respondent's wrists and elbows when reaching their opinions in this matter.

33. Because: (a) respondent included in her application for disability retirement medical conditions other than her right thumb; (b) the independent medical evaluator who examined respondent in 2003 found respondent was disabled based upon medical conditions other than her right thumb; and (c) CalPERS failed to adequately inform respondent that her disability retirement application was denied to the extent that she applied for disability retirement on the basis of medical conditions other than her right thumb, CalPERS' request that the scope of respondent's disability be limited to only her right thumb was without merit. Accordingly, its request to limit respondent's medical condition to only her right thumb must be denied.

34. Respondent's Current Medical Condition. When all the evidence is considered regarding respondent's hands, wrists, elbows, and arms, the opinion of Dr. Serra that respondent was not substantially incapacitated from performing the usual duties of a Correctional Officer was persuasive. As Dr. Serra explained, although respondent complained of pain, there were few objective findings upon examination to support or explain her pain complaints. His determinations that any physical impairments that respondent may have suffered to her thumb and upper extremities had substantially resolved and she was not substantially incapacitated from performing the usual duties of a Correctional Officer were supported by his physical examination of her.

35. At the hearing, Dr. Burt did not provide sufficient medical evidence to support his objective findings. In addition, he did not adequately explain how his objective findings substantiated respondent's subjective complaints about the extent of her pain. He admitted that his opinion that respondent was substantially incapacitated was based primarily on her reports of pain. In sum, Dr. Burt's opinion that respondent was substantially incapacitated was not adequately supported by competent medical evidence to be credited. In the absence of sufficient competent medical findings to support respondent's pain complaints, it cannot be found that respondent is substantially incapacitated from performing the usual duties of a Correctional Officer.

36. Because respondent is already receiving disability retirement, the burden was on CalPERS to establish that respondent is no longer substantially and permanently disabled from performing the usual duties of a Correctional Officer. CalPERS presented sufficient competent medical evidence to meet its burden of proof. Consequently, its request that respondent be involuntarily reinstated from disability retirement should be granted.

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. As set forth in Findings 31, 32, and 33, CalPERS failed to establish that the determination of whether respondent should be reinstated from disability retirement should be based solely on her right thumb condition. (See *California Department of Justice v. Board of Administration of California Public Employees' Retirement* (2015) 242 Cal.App.4th 133, 141-142.)

5. 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.

6. To involuntarily reinstate respondent from industrial disability retirement, CalPERS had to establish that respondent is no longer substantially incapacitated from performing the usual duties of a Correctional Officer. As set forth in Findings 34, 35, and 36, CalPERS offered sufficient competent medical evidence at the hearing to meet its burden of proof. Consequently, CalPERS' request that respondent be involuntarily reinstated from disability retirement should be granted.

ORDER

The request of California Public Employees' Retirement System to involuntarily reinstate respondent Lori Gibson from disability retirement is GRANTED.

DATED: April 20, 2016

DocuSigned by:
Karen Brandt
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KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings