

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

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

In the Matter of the Application for Disability  
Retirement of:

CLAUDELLE HALCOMB,

Respondent,

and

DEPARTMENT OF CALIFORNIA  
HIGHWAY PATROL,

Respondent.

Case No. 2015-0089

OAH No. 2015060339

**PROPOSED DECISION**

This matter was heard before Karen J. Brandt, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on January 6, 2016, in Sacramento, California.

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

Melanie J. Carr, Attorney at Law, represented Claudelle Halcomb (respondent), who was present at the hearing.

There was no appearance by or on behalf of the Department of California Highway Patrol (CHP).

Evidence was received on January 6, 2016. The record remained open to allow the parties to file closing briefs. On April 4, 2016, respondent filed her closing brief, which was marked for identification as Exhibit Y. On April 18, 2016, CalPERS filed its response, which was marked for identification as Exhibit 12. On April 27, 2016, CalPERS lodged a copy of the hearing transcript, which was marked for identification as Exhibit 13.<sup>1</sup> On May

<sup>1</sup> Email correspondence regarding respondent's application was received on May 2, 2016, and marked for identification as Exhibit 14.

2, 2016, respondent filed her reply, which was marked for identification as Exhibit Z. The record closed and the matter was submitted for decision on May 2, 2016.

## ISSUE

On the basis of orthopedic (right shoulder, neck, arm and hand) conditions, is respondent permanently incapacitated for the performance of her usual duties as a CHP Officer?

## FACTUAL FINDINGS

1. Respondent was born in 1962. She began working as a CHP Officer in 1990. On November 25, 2013, respondent submitted an application to CalPERS for service retirement. Respondent retired for service effective December 13, 2013, and has been receiving her service retirement allowance since that date.

### *Respondent's Disability Retirement Applications*

2. At hearing, there were two Disability Retirement Election Applications offered into evidence. In December 2013, CHP submitted a Disability Retirement Election Application (First Application) on behalf of respondent. The First Application identified the application type as "Service Pending Disability Retirement." In the First Application, respondent's disability was described as:

Persistent and severe pain in right shoulder, arm and hand – numbness in hand.

The First Application identified the date respondent's disability occurred as December 1, 2008. In response to the question asking how the disability occurred, the First Application stated:

Advanced Officer Safety Training Hand to Hand Combat Maneuvers.

The First Application described respondent's "limitations/preclusions" as:

Limited use of right hand. Minimal typing [and] writing. No heavy lifting due to shoulder weakness. No shotgun shooting.

In response to the question asking how respondent's injury affected her ability to perform her job, the First Application stated:

**Yes. Right hand is numb when writing and driving. Shoulder pain prevents wearing of vest [and] weapon qualification.**

The First Application indicated that respondent was not working in any capacity. In the space provided for "other information," the following information was included:

Several surgical procedures have failed to improve my condition.

3. Respondent filed a second Disability Retirement Election Application (Second Application) in January 2014. In the Second Application, respondent identified the application type as "Service Pending Industrial Disability Retirement." The descriptions in the Second Application of respondent's disability, date of occurrence, cause of disability and limitations were similar to those included in the First Application. But the Second Application indicated that respondent was working full time, and described her job duties as:

Currently 4 hour per day modified duty. Full duty status includes driving, shooting, arrest methods and report writing.

4. Carl Shin, M.D., submitted a Physician's Report on Disability dated December 12, 2013, in support of respondent's disability retirement application. In the section of the report entitled "Member History," Dr. Shin stated that the date of respondent's injury was October 11, 2011, that her injury was work related, and that it was caused by "chronic repetitive trauma." He listed his examination findings as "pain neck, shoulder, hand, finger." His diagnosis was "trigger finger, carpal/tunnel syndrome, chronic shoulder pain with impingement, chronic neck pain." He described the duties that respondent could not perform as: (1) "unable to keyboard all day"; (2) "can't shoot a gun"; and (3) "unable to carry gun belt." Dr. Shin opined that respondent was permanently incapacitated from performing her usual duties.

5. On November 14, 2014, CalPERS notified respondent in writing that her application for disability retirement had been denied, and informed her of her right to appeal. Respondent timely appealed from CalPERS' denial.

#### *Duties of a CHP Officer*

6. As set forth in the class specification, CHP Officers: "(1) patrol State highways enforcing laws relating to the operation of motor vehicles; or (2) provide law enforcement services to State employees, officials, and the public and provide for the safekeeping of State property; or (3) provide for the protection of the Governor, other constitutional officers, and members of the Legislature; or (4) perform special staff assignments; and to do other related work."

7. The class specification describes a number of typical tasks that a CHP Officer may perform, including: (1) operate a motor vehicle over extended hours, usually alone,

while on patrol in all parts of the state under a variety of climatic, environmental, and traffic conditions, including pursuit driving under potentially hazardous circumstances; (2) remove obstacles from the roadway to ensure the smooth flow of traffic; (3) stop motorists for unsafe or illegal traffic actions or for vehicle equipment violations; (4) issue all types of enforcement documents, including citations, and conduct surveillance; (5) make a variety of in-custody arrests; (6) pursue and physically subdue combative and belligerent persons, including armed felons; (7) render general assistance to members of the motoring public; (8) administer field sobriety tests; (9) take charge at accident scenes or other emergencies; (10) investigate traffic accidents; (11) administer first aid; (12) lift and carry accident victims or prisoners in varying terrain and situations; (13) testify in court; (14) monitor and operate the departmental mobile radio and emergency equipment while performing field enforcement duty; (15) assist in miscellaneous activities such as traffic safety education programs and commercial vehicle inspections; (16) maintain firearm proficiency; (17) interview victims, witnesses, informants, and suspects for information to support criminal complaints; and (18) control crowds during disturbances and other assemblies.

8. The class specification provides further that a CHP Officer must have the ability to: (1) react calmly and maintain personal control under pressure and in high stress situations; (2) safely operate departmental vehicles, equipment, and mobile radio; (3) draw and/or discharge firearms; (4) physically perform a variety of tasks, including lifting and carrying accident victims and subduing combative prisoners; (5) administer first aid; (6) conduct investigations; and (7) engage in riot control tactics.

9. In accordance with Vehicle Code section 2268,<sup>2</sup> the CHP has developed a list of 14 critical physical activities (14 Critical Tasks) that CHP officers are required to perform. These 14 Critical Tasks include, but are not limited to: (1) lifting and carrying objects weighing up to 50 pounds; (2) pulling and dragging a 200-pound individual resisting arrest up to 20 feet; (3) separating uncooperative individuals weighing up to 200 pounds by pushing, pulling, using locks, grips, or holds, and physically restraining or subduing a resistive individual using reasonable force; (4) climbing steep embankments, hills or gullies; (5) firing 50 to 100 rounds with a handgun at a target; (6) firing a shotgun and rifle during practice, firearm qualifications or on the job; (7) drawing and holding a handgun, shotgun or rifle on a felony suspect until back-up arrives; and (8) operating a computer keyboard.

*Testimony from Respondent and Raynar Schubert*

10. Respondent's Testimony. Respondent worked as a CHP Officer from 1990 until she service retired in December 2013. For approximately the last 10 years of her career, she worked as a Mobile Road Enforcement (MRE) Officer, inspecting commercial vehicles.

11. Over the course of her employment as a CHP Officer, respondent was involved in multiple accidents and sustained multiple injuries. She was involved in seven

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<sup>2</sup> The relevant provisions of Vehicle Code section 2268 are quoted in the Legal Conclusions below.

traffic vehicle accidents while at work. Four of these accidents occurred between 1999 and 2002, when she was an instructor for the Emergency Vehicle Operations Course (EVOC). As a result of these accidents, she sustained injuries to her neck, lower back, and shoulder. When she returned to work after these accidents, she worked modified duty until she was able to perform her full duty. In 2008, she sustained a "major tear" to and dislocated her right shoulder while engaged in hand-to-hand combat training. She was off work for about one month. On November 27, 2010, she had surgery on her shoulder. In February 2012, she had carpal tunnel release surgery. In November 2012, she had trigger finger surgery on her ring finger. After this surgery, she went back to full duty on January 15, 2013. She worked full duty until August 2013. From August until she retired in December 2013, she worked modified duty. While on modified duty, she worked four-hour shifts with "many restrictions."

12. The last time respondent qualified at the range with a handgun was in 2009. The last time she qualified with the shotgun and rifle was in 2008. She testified that she "flew under" CHP's radar with regard to firearm qualifications. According to respondent, because there was no question about her daily performance on the job, CHP never audited her to determine whether she was maintaining her firearm qualifications. Respondent never drew a weapon during the time she worked as an MRE Officer.

13. While she was working, respondent believed she could do her job as a CHP Officer, and would be able to do whatever needed to be done if faced with an event or problem.

14. In approximately 2009, respondent began seeing Michael Cohen, M.D., as her occupational health doctor, and Doug Cobb, Dr. Cohen's physician assistant. She also saw Dr. Shin for acupuncture, specifically for her neck. She asserted that from 2010 through 2013, she was in constant pain from her right shoulder to her hand. She also asserted that even though she was working full duty, she was not performing 100 percent of her job duties.

15. Respondent testified that in August 2013, when she was working full duty as an MRE Officer, she has an "epiphany" and "overwhelming" anxiety while she was inspecting a truck. She realized that she would not be able to defend herself if she needed to. She "fell apart," feeling "emotionally distraught" and "vulnerable." She went to the Employee Assistance Program (EAP) for her anxiety. She testified that, although her physical condition had not changed, she "stopped lying" to herself that she could do her job. Prior to that time, she had been able to fire her handgun. Although she did not qualify at the range, every month until then, she was shooting 50 rounds with her handgun as required by the CHP, even though she experienced numbness in her hand and pain in her arm. The EAP nurse she saw noted that her "depression and anxiety have increased, and she now is unable to even pull a trigger."<sup>3</sup>

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<sup>3</sup> At hearing, respondent stipulated that she was not seeking disability retirement based upon her psychological issues.

16. In August 2013, respondent was placed on modified duty even though she was not involved in a traumatic incident. She described her incapacity as “building up” over the years. She asserted that her pain was constant, she could not lift her arm, and she could not grip, which made her unable to perform her job duties.

17. Since respondent retired from the CHP in December 2013, she has not worked. She now fishes for trout, but not bass, because it does not require her to throw her lure. Once since her retirement, she helped her grandchildren reel up a fish. In 2008, she gave up hunting with a rifle. Since her retirement, she has gone on two hunting trips. She uses a handgun supported by a bipod. In 2015, respondent had surgery on her shoulder. As a result of that surgery, her hand is no longer numb.

18. Raynar Schubert’s Testimony. Mr. Schubert testified on behalf of respondent. He is a CHP Officer in the Valley Division Commercial Enforcement Unit. He worked with respondent for eight years. From 2010 to 2013, they both had the same assignment. Mr. Schubert is also a range instructor. Sometime in early 2011, after respondent returned to work following her shoulder surgery, she asked Mr. Schubert to take her to the range to see if she could qualify shooting a departmentally issued shotgun, rifle and pistol. At the range, Mr. Schubert gave respondent a shotgun, which she shouldered to her right side. She shot one round and went down to her knees. She had tears coming out of her eyes and was in visible pain. Mr. Schubert told respondent that they were done at the range. Mr. Schubert did not know how long it was after respondent’s shoulder surgery that she tried to shoot the shotgun.

#### *Expert Opinions*

19. Respondent called Michael Cohen, M.D., as her expert witness. CalPERS called Frank Minor, M.D., as its expert witness.

20. Michael Cohen, M.D. Dr. Cohen is board-certified in aerospace and occupational medicine. He is the Department Chief of Occupational Medicine at Sutter Health in the valley region. He treats patients who are injured or made ill at work. He is aware of the duties of a CHP Officer and the 14 Critical Tasks. He has treated respondent since 2009, although not continuously. He has seen respondent approximately 12 times. The primary focus of his treatment has involved respondent’s right knee, which is not at issue in this matter. He has also facilitated treatment for her right shoulder.

21. At hearing, Dr. Cohen described respondent’s various injuries and surgeries. With regard to respondent’s right shoulder, Dr. Cohen was aware of respondent’s multiple motor vehicle accidents, her initial shoulder dislocation, and her shoulder surgery in 2010. Dr. Cohen also described respondent’s 2015 MRI with arthrogram on her right shoulder for rotator cuff and labral tears. With regard to respondent’s right hand, Dr. Cohen described

respondent's carpal tunnel surgery, the trigger finger surgery on her ring finger, and her Dupuytren's palmar contracture, which restricted full range of motion in her hand.<sup>4</sup>

22. Dr. Cohen saw respondent on August 30, 2013. She complained of pain in her right arm and hand. He noted that a January 23, 2013 MRI of respondent's cervical spine found no disc herniation, and no central or neural canal stenosis, but there was a "mild disc osteophyte complex effacing the ventral thecal sac" at C6-C7. Upon examination, he found that she had full range of motion in her shoulder. He diagnosed respondent with: (1) "Neuropathy, right upper extremity"; (2) "Right shoulder impingement, surgery 2010"; (3) "R ring finger trigger release 2012"; and (4) "Situational anxiety." He restricted respondent to modified duty. At hearing, he estimated that he restricted respondent to modified duty based 50 percent on her subjective complaints of pain and 50 percent on objective findings, including her abnormal neck MRI, multiple surgeries, de Quervain's tendinitis of her right thumb,<sup>5</sup> and contracture of her right hand. Dr. Cohen testified that he restricted respondent to modified duty because lifting, pushing, pulling and carrying would "aggravate" her condition. When asked about whether respondent could perform these tasks, he stated that it depended on the "urgency of the need" to do so.

23. Dr. Cohen opined that respondent's lifting, carrying, pushing and pulling heavy objects with her affected hand and shoulder was not "safe." He opined further that she would have "difficulty" handcuffing someone, and it would be "hazardous" to the public and herself to drive a patrol vehicle at high speeds. When asked what he meant when he stated that respondent's performing a task would not be "safe," Dr. Cohen explained that it was because there was a threat of future injury. Dr. Cohen opined that, because respondent is right-hand dominant, her right-hand conditions would: (1) "probably" prevent her from qualifying with a handgun or repetitively pulling a trigger; (2) "possibly" prevent her from firing a shotgun; (3) "potentially impair" her from successfully concluding an altercation and defending herself or the public; and (4) "potentially" limit her from removing large road debris from the highway and performing other physical activities requiring the use of her right hand. Dr. Cohen opined that respondent's right shoulder condition would prevent her from pulling, pushing, lifting or carrying heavy objects that were more than 10 pounds. According to Dr. Cohen, respondent's right shoulder and hand conditions prevent her from performing tasks identified in the 14 Critical Tasks that involved lifting, carrying, pushing, pulling, and manual dexterity.

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<sup>4</sup> The MedlinePlus Medical Dictionary defines "Dupuytren's contracture" as "a condition marked by fibrosis with shortening and thickening of the palmar aponeurosis resulting in flexion contracture of the fingers into the palm of the hand." (<http://c.merriam-webster.com/medlineplus/Dupuytren's>.)

<sup>5</sup> The MedlinePlus Medical Dictionary defines "de Quervain's disease" as "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/de%20quervain's>.)

24. At hearing, Dr. Cohen admitted that he was not aware of the legal definition of “substantially incapacitated.” After reviewing that definition, Dr. Cohen opined that respondent was substantially incapacitated due to her medical conditions, which were of a permanent or extended duration and were unlikely to respond to medical treatment.

25. Frank Minor, M.D. Dr. Minor is a board-certified orthopedic surgeon. Dr. Minor examined respondent on August 11, 2014, took a history, reviewed her medical records and job duties, and issued an Independent Medical Examination (IME) report. In his IME report, Dr. Minor reviewed the history of respondent’s work-related injuries. Respondent reported that she had constant burning pain in the anterior aspect of her right shoulder. She had aching in her posterior right neck and shoulder. She had “pins and needles” that extended into her right thumb. She also noted numbness in her right hand and fingers. In his IME report, Dr. Minor extensively reviewed the requirements of the 14 Critical Tasks.

26. Upon physical examination, Dr. Minor found that respondent’s right shoulder could rotate internally 60 degrees and externally 75 degrees, when normal rotation for both is 90 degrees. He found positive signs of impingement in her right shoulder. She had a positive Finkelstein’s test. After examining respondent, Dr. Minor diagnosed her as follows:

1. Multiple cervical strains with non-verifiable radicular complaints.
2. Right shoulder labral tear, status post repair.<sup>6</sup>
3. Status post right carpal release.
4. Status post right ring finger trigger finger release with residual palmar fibrosis suggestive of a Dupuytren’s diaphysis.
5. Untreated right de Quervain’s.
6. Left knee, chondromalacia of the patellofemoral joint.<sup>7</sup>

27. In his IME report, Dr. Minor found that respondent was “unable to frequently crawl, kneel, squat, reach above the shoulder, perform keyboard or mouse use.” But she was “capable of doing those activities occasionally for up to three hours.” Dr. Minor noted that respondent was “concerned she would have difficulties pulling or dragging a non-resistive, incapacitated person weighing 160 to 200 pounds five to 20 feet in an emergency situation or

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<sup>6</sup> Dr. Minor’s IME report referred to a “rotator cuff” tear. At hearing, he amended that to a “labral” tear.

<sup>7</sup> At hearing, respondent stipulated that her knee was not at issue in this matter.

protest.” According to Dr. Minor, respondent’s duty statement stated that she was “expected to do this one to two times per year for a minute.” Dr. Minor noted further that respondent was “concerned about dealing with altercations and separating uncooperative persons.” According to Dr. Minor, respondent’s duty statement indicated that she “would need to do this one to three times per month for five to 60 seconds.” He opined that she “should be able to do those activities.” Respondent also told Dr. Minor that she had “difficulty operating a computer keyboard in an office or patrol car.” According to Dr. Minor, her duty statement indicated that she “should do this one to three times a day for eight to 20 minutes.”

28. Dr. Minor opined that respondent was not substantially incapacitated from performing the usual duties of a CHP Officer. As Dr. Minor stated:

It is not clear why she is so limited, other than she is having subjective pain. She has had multiple electrodiagnostic studies and MRI’s that do not explain the symptoms in her right arm and hand to me or multiple other physicians. She has noted some cramping in her thumb when writing. She has de Quervain’s causing right wrist pain that would likely respond to a cortisone shot or a release of the third dorsal compartment. This, indeed, may be causing the cramping pain associated with mouse use and writing.”

29. At hearing, Dr. Minor testified that, upon examination, respondent had “excellent” range of motion. There was no evidence of a rotator cuff tear in her shoulder. Her cervical MRI was normal, showing no pinched nerves. Several electrodiagnostic studies of her cervical nerves showed no pinching or problems. Her strength was “excellent.” Dr. Minor found no atrophy or loss of reflexes. Dr. Minor opined that what little range of motion loss he found would not inhibit respondent from doing her job. Dr. Minor also opined that respondent could perform all 14 Critical Tasks, although she might have some trouble doing so. He explained that the positive Finkelstein’s test indicated that she had cramping and symptomatology in her hands and wrists. Dr. Minor opined that this could be repaired with a simple procedure, with the patient generally able to go back to full activity in about six weeks. In sum, Dr. Minor found that respondent was not substantially and permanently incapacitated from performing the usual duties of a CHP Officer.

#### *Other Medical Reports*

30. At the hearing, respondent submitted additional medical records, which were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).<sup>8</sup>

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<sup>8</sup> 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

31. On February 17, 2015, Stephen E. Conrad, M.D., conducted an Agreed Medical Examination (AME) in respondent's workers' compensation case. In his AME report, Dr. Conrad noted that respondent lived in the mountains and had to split and stack wood, which she was able to do with difficulty. She also had difficulty lifting her 23-pound grandchild. After examining respondent, Dr. Conrad diagnosed her as follows:

1. Repetitive strain injury, right upper extremity, with manifestations of carpal tunnel syndrome and stenosing tenosynovitis with myofascitis.
2. Status post right carpal tunnel release, 3 February 2012.
3. Status post right trigger finger release (ring finger), 6 November 2012.
4. History of rotator cuff and glenoid labral tear, right shoulder.
5. Status post repair, right rotator cuff and glenoid labrum, right shoulder, 18 November 2010.
6. Multilevel cervical disc disease with cervical radiculitis.

32. In his February 17, 2015 AME report, Dr. Conrad noted respondent's subjective complaints of pain. He described his objective findings as:

There are limitations in cervical spine motion. Anatomic tenderness is present over the cervical spine and right trapezial musculature. Arthroscopic scars are present over the right shoulder. The right shoulder is tender and there are limitations in right shoulder motion. The right hand is tender. A well-healed surgical scar is present over the volar aspect of the right hand. Preoperative electrical studies indicate a slowing of median nerve conduction of the right hand. Sensory loss is present over the right thumb and index finger. Palmar thickening is present over the right ring finger.

Dr. Conrad opined that respondent was "unable to perform regular duty as a highway patrol officer."

### *Discussion*

33. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a CHP Officer. Until August 2013, she worked full time as a CHP Officer. She ceased working full time based upon her own personal determination that she was not able to perform her job duties, not due to a traumatic or disabling injury. Dr. Cohen saw respondent

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be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

on August 30, 2013. His notes of that visit do not include sufficient information to establish that respondent was placed on modified duty because Dr. Cohen believed that she was substantially and permanently unable to perform the usual duties of a CHP Officer.

34. Dr. Cohen's opinion that respondent could not perform some of the 14 Critical Tasks was not consistent with the standards applicable in these types of disability retirement proceedings. He opined that it would be "difficult," that it might not be "safe," or that it might be "hazardous to the public" for respondent to perform certain of the tasks. He stated that he was concerned that doing some of these tasks might cause her future injury. Thus, Dr. Cohen's restrictions appeared to be imposed primarily for prophylactic purposes, and were not based on whether respondent was actually capable of performing such tasks when called upon to do so. There was also insufficient evidence to establish that the pain respondent experienced when she fired a shotgun at the range in early 2011 with Officer Schubert caused her to be unable to perform the firearms tasks set forth in the 14 Critical Tasks. Respondent admitted that, although she did not seek to qualify at the range after 2009, she continued to regularly fire 50 rounds of ammunition as required by the CHP.

35. The medical reports that were admitted as administrative hearsay did not support that respondent is substantially and permanently incapacitated from performing the usual duties of a CHP Officer. To the extent the doctors who authored those reports applied evaluation standards applicable in workers' compensation cases, their opinions can be given little weight in this proceeding. The standards in disability retirement cases are different from those in workers' compensation. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Kimbrough v. Police & Fire Retirement System* (1984) 161 Cal.App.3d 1143, 1152-1153; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132 [a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different].) For example, the objective findings in Dr. Conrad's February 17, 2015 AME report summarized above were insufficient to support that respondent is substantially and permanently incapacitated from performing the usual duties of a CHP Officer.

36. In contrast, Dr. Minor, in reaching his opinion that respondent was not substantially and permanently incapacitated from performing the usual duties of a CHP Officer, applied the standards applicable in these types of disability retirement proceedings. His opinion that respondent's subjective complaints of pain were not adequately supported by objective medical evidence was persuasive and consistent with the medical records offered at hearing.

37. In her reply brief, respondent criticized Dr. Minor for failing to recognize that her positive impingement sign indicated a rotator cuff tear in her right shoulder. Respondent's criticism was not persuasive. Dr. Minor's IME was performed on August 11, 2014, before respondent's 2015 shoulder surgery. It was not clear from the evidence presented at hearing whether that surgery found and repaired a rotator cuff tear or just a labral tear. If respondent had a rotator cuff tear, Dr. Cohen could not determine whether that tear occurred before or after her service retirement in December 2013. Respondent testified

that, as a result of her 2015 shoulder surgery, her hand was no longer numb. Thus, respondent did not establish that she had a substantially and permanently disabling rotator cuff tear at the time she applied for disability retirement.

38. In sum, when all the evidence is considered, respondent failed to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a CHP Officer. Consequently, her disability retirement application must be denied.

### LEGAL CONCLUSIONS

1. By virtue of her employment, respondent is a state safety (patrol) member of CalPERS, pursuant to Government Code section 20390.<sup>9</sup>

2. To qualify for disability retirement, respondent had to prove that, at the time she applied, she was “incapacitated physically or mentally for the performance of [her] duties in the state service.” (Gov. Code, § 21156.) As defined in Government Code section 20026,

“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. In accordance with Vehicle Code section 2268, the CHP has developed the 14 Critical Tasks of a CHP Officer. Vehicle Code section 2268, in relevant part, provides:

(a) Any member of the Department of the California Highway Patrol, as specified in Sections 2250 and 2250.1, shall be capable of fulfilling the complete range of official duties administered by the commissioner pursuant to Section 2400 and other critical duties that may be necessary for the preservation

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<sup>9</sup> Government Code section 20390, in relevant part, provides:

(a) “Patrol member” includes all members employed in the Department of the California Highway Patrol or by a county in connection with its highway patrol function, respectively, whose principal duties consist of active law enforcement service, except those whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise clearly do not fall within the scope of active law enforcement service, even though the person is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active law enforcement service.

of life and property. Members of the California Highway Patrol shall not be assigned to permanent limited duty positions which do not require the ability to perform these duties.

[¶] ... [¶]

(c) Nothing in subdivision (a) entitles a member of the California Highway Patrol to, or precludes a member from receiving, an industrial disability retirement.

4. In *Beckley v. Board of Administration of California Public Employees Retirement System* (2013) 222 Cal.App.4th 691, 701, the court reconciled Vehicle Code section 2268 with CalPERS' authority to review disability retirement applications from CHP Officers as follows:

When read as a whole, it is clear that the statute establishes that the "usual duties" of every CHP officer include, by legislative mandate, the ability to carry out all tasks necessary for the preservation of life and property, but that an officer's *inability* to accomplish those tasks does not require a finding that the officer sustained an *industrial* disability (compare §§ 21150 & 21151), or that his incapacity is "of permanent or extended and uncertain duration" (see § 20026), or that the officer meets any other proper requirements for entitlement to industrial disability retirement. These matters are for CalPERS to decide.

(Italics in original.)

5. The determination of whether respondent is substantially incapacitated must be based on an evaluation of whether, at the time she applied for disability retirement, she was able to perform the usual duties of a CHP Officer, including the 14 Critical Tasks, and not just the usual duties of her most recent position as an MRE Officer. (*California Department of Justice v. Board of Administration of California Public Employees' Retirement System (Resendez)* (2015) 242 Cal.App.4th 133, 139.)

6. 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.)

The employee in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations and apprehend violators, issuing warnings and serving citations, and serving warrants and making arrests. He suffered an injury to his right arm while arresting a suspect. He could shoot a gun, drive a car, swim, row a boat (with some difficulty), pick up a bucket of clams, pilot a boat, and apprehend a

prisoner (with some difficulty). He could not lift heavy weights or carry a prisoner away. The court noted that “although the need for physical arrests do occur in petitioner’s job, they are not a common occurrence for a fish and game warden.” (*Mansperger, supra*, 6 Cal.App.3d at p. 877.) Similarly, the need for him to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding that the game warden was not incapacitated for the performance of his duties, the *Mansperger* court noted that the activities he was unable to perform were not common occurrences and that he could otherwise “substantially carry out the normal duties of a fish and game warden.” (*Id.* at p. 876.)

7. The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, reached a similar conclusion with respect to a state traffic sergeant employed by the CHP. The applicant in *Hosford* had suffered injuries to his left ankle and knee, and had strained his back. The court noted that the sergeant “could sit for long periods of time but it would ‘probably bother his back;’ that he could run but not very adequately and that he would probably limp if he had to run because he had a bad ankle; that he could apprehend persons escaping on foot over rough terrain or around and over obstacles but he would have difficulty and he might hurt his back; and that he could make physical effort from the sedentary state but he would have to limber up a bit.” (*Id.* at p. 862.) Following *Mansperger*, the court in *Hosford* found that the sergeant:

is not disabled unless he is substantially unable to perform the usual duties of the job. The fact that sitting for long periods of time in a patrol car would “probably hurt his back,” does not mean that in fact he cannot so sit; ...[¶] As for the more strenuous activities, [a doctor] testified that Hosford could run, and could apprehend a person escaping over rough terrain. Physical abilities differ, even for officers without previous injuries. The rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the function, renders [the doctor’s conclusion that Hosford was not disabled] well within reason. (*Ibid.*)

In *Hosford*, the sergeant argued that his condition increased his chances for further injury. The court rejected this argument, explaining that “this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently existing.” (*Hosford, supra*, 77 Cal.App.3d at p. 863.) As the court explained, prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (*Ibid.*)

8. In *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff was not permanently incapacitated for the performance of his duties, finding, “A review of the physician’s reports reflects that aside for a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the appellant’s condition are dependent on his subjective symptoms.”

9. When all the evidence in this matter is considered in light of Vehicle Code section 2268, the courts' holdings in *Beckley*, *Resendez*, *Mansperger*, *Hosford*, and *Harmon*, and CHP's 14 Critical Tasks, respondent did not establish that her disability retirement application should be granted. There was not sufficient evidence based upon competent medical opinion that she is permanently and substantially incapacitated from performing the usual duties of a CHP Officer. Consequently, her disability retirement application must be denied.

**ORDER**

The application of respondent Claudelle Halcomb for disability retirement is **DENIED**.

**DATED: May 10, 2016**

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