

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:

CalPERS No. 2014-1174

MATTHEW KIME,

OAH No. 2015050413

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION, PELICAN BAY
STATE PRISON,

Respondent.

PROPOSED DECISION

This matter was heard before Erin R. Koch-Goodman, Administrative Law Judge, Office of Administrative Hearings, State of California, on July 12, 2016, in Sacramento, California.

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

Matthew D. Kime (respondent) was present and was represented James Fallman, Attorney at Law.

Evidence was received, the record closed, and the matter submitted on June 22, 2016.

ISSUE

Is respondent currently disabled or incapacitated from the performance of his usual job duties as a Correctional Officer (CO) based upon his orthopedic (chronic thoracic strain) condition?

FACTUAL FINDINGS

1. On April 4, 2003, respondent submitted his application for disability retirement (Application). Respondent was born on March 14, 1976. At the time of his application, he was 27 years old. When he applied for disability retirement, respondent was employed by California Department of Corrections and Rehabilitation (CDCR), Pelican Bay State Prison (PBSP), as a CO. By virtue of his employment, respondent was a state safety member of CalPERS subject to Government Code section 21151, subdivision (a). On or about August 28, 2003, CalPERS granted respondent's Application on the basis of his orthopedic (chronic thoracic strain) condition, noting "[y]ou may be reexamined periodically to determine your qualification for reinstatement if you are under the minimum age for service retirement."

2. In or around 2010, CalPERS sent respondent to Mohinder Nijjar, M.D., an orthopedic surgeon, for an Independent Medical Examination (IME), to reevaluate him. Dr. Nijjar wrote an IME Report, opining that respondent had a permanent disability and was substantially incapacitated from the performance of his duties. On July 15, 2010, CalPERS informed respondent that he continued to be substantially incapacitated for the CO position.

3. On April 22, 2014, CalPERS sent respondent to Robert Henrichsen, M.D., an orthopedic surgeon, for an IME, to reevaluate him. Dr. Henrichsen wrote an IME and Supplemental reports, finding respondent not substantially incapacitated for the CO position. On May 29, 2014, CalPERS notified respondent that he was no longer substantially incapacitated for the CO position. On or about June 24, 2014, respondent appealed the decision. On May 13, 2015, Diane Alsup, Interim Chief, Benefit Services Division, CalPERS, made and filed the Accusation in her official capacity.

Job Duties

4. CDCR, Division of Adult Institutions, Essential Functions list for the CO classification includes the following functions affecting respondent's physical condition:

- Disarm, subdue, and apply restraints to an inmate.
- Defend self against an inmate armed with a weapon.
- Walk occasionally too continuously.
- Crawl and crouch occasionally, crawl or crouch under inmate's bed or [in] restroom facility while involved in cell searches, crouch while firing a weapon [or] 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 search[ing] inmates from head to toe.
- Lift and carry continuously to frequently, lift and carry in the

light (20 pounds maximum) to medium (50 pounds maximum) range frequently throughout the workday and in the very heavy lifting range (over 100 pounds) occasionally, lift and carry an inmate and physically restrain the inmate, including wrestling an inmate to the floor drag/carry an inmate out of a cell, perform lifting and carrying activities while working in a very cramped space.

- Pushing and pulling occasionally to frequently, push and pull while opening and closing locked gates and cell doors throughout the workday, pushing and pulling may also occur during an altercation or the restraint of an inmate.
- Bracing occasionally, brace while restraining an inmate during an altercation or while performing a body search.
- Twisting of the body frequently to continuously, twist his body in all directions while performing his regular duties, twisting may take place with the body in an upright position while either standing or walking.

5. PBSP provided the following information about the physical requirements of the CO position, in the CalPERS Physical Requirements of Position/Occupational Title form.

- a. Occasional tasks, up to three hours per shift, include: sitting, standing, running, walking up to 1.5 miles, at one time, or 12 miles per day, crawling up to 50 yards, kneeling, climbing up to 150 steps, squatting, bending (waist), reaching (above and below shoulder), pulling & pushing, keyboard use, mouse use, lifting/carrying 51 to 100 plus pounds, walking on uneven ground, 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, 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 per shift, include: sitting, standing, walking up to 1.5 miles, at one time, or 12 miles per day, climbing up to 150 steps, bending (neck and waist), twisting (neck and waist), reaching (below shoulder), pushing & pulling up to 25 times, fine manipulation, power grasping, simple grasping, repetitive use of hands, lifting/carrying 26 to 50 pounds, 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.

- c. Constant tasks, over six hours per shift, include: sitting, standing, walking up to 1.5 miles, at one time, or 12 miles per day, bending (neck), twisting (neck and waist), fine manipulation, power grasping, simple grasping, repetitive use of hands, lifting/carrying 0 to 25 pounds, walking on uneven ground, driving up to 8 hours, and exposure to extreme temperature and humidity wetness.

Respondent's Medical History

6. On March 21, 2002, while at work, respondent assisted with the escort of an inmate to the medical clinic for evaluation. The inmate became violent and respondent and his partner subdued and restrained the inmate on a gurney, and then transported him to the hospital. When respondent was lifting the inmate from the gurney, he felt a "snap" in the middle of his upper back, as well as pain in the front of his chest on the left. Respondent reported the injury to his supervisor and filed a worker's compensation claim.

7. In April 2002, respondent was medically evaluated by Dr. Wayne Hawthorne, M.D. (now deceased), who found neck and upper back soreness, tenseness in the back, and tenderness at T5-T7. Respondent was taken off work. An x-ray and MRI were ordered, along with a surgical consultation by Daniel Farnum, M.D. On or about July 10, 2002, respondent was released to return to work on modified duty.

8. On September 27, 2002, a day off, respondent helped to push a stalled truck at the dump and injured his upper back again. On October 11, 2002, respondent was evaluated by James Morrow, D.O., family practitioner, and at respondent's request, was released to return to work with no restrictions, but his pain persisted.

9. On February 11, 2003, respondent was evaluated by Larry Maukonen, M.D., a neurologist, who found mild spasm and tenderness at T-9 and T-10 and tenderness about the left scapular muscle. In March, respondent was determined to be at Maximum Medical Improvement (MMI), for his worker's compensation claim, and taken off work. In April, respondent filed his Application, with a medical report by Dr. Morrow in support. Dr. Morrow diagnosed respondent with chronic thoracic strain, with the following work restrictions: no squatting, kneeling, sitting, lifting over 25 pounds, standing for long periods, pushing, or restraining inmates.

10. In May, respondent was evaluated by Alan Brown, M.D., who conducted an orthopedic examination and found normal range of motion, reflexes, and motor strength, but tenderness at T-10. Dr. Brown deemed respondent a "qualified injured worker," allowing respondent to participate in vocational rehabilitation.

11. In October 2003, respondent was evaluated by Donald Iverson, M.D., neurologist, who diagnosed him with slipped rib syndrome. In December 2003, respondent was evaluated by James Jaworski, M.D., who found tenderness at T-9 and T-10, and diagnosed respondent with thoracic radiculitis. A November 2003 MRI scan revealed Schmorl's nodes (an upward and downward protrusion of a spinal disk's soft tissue pushing into the bony tissue of the adjacent vertebrae). In August 2004, respondent was seen by Dr. Morrow, who found respondent's anterior ribs were detached from the sternum. In November 2004, Dr. Morrow diagnosed respondent with somatic dysfunction of the spine, associated with muscle spasm. In October 2006, Dr. Morrow found respondent to have chronic back pain, secondary to a worker's compensation injury. In July 2007, Dr. Morrow described respondent's condition as failed back syndrome, secondary to a worker's compensation injury.

2010 & 2014 Medical Reevaluations

12. At CalPERS's direction, on or about March 25, 2010, respondent was seen by Dr. Nijjar, for an IME, to reevaluate his physical condition. Dr. Nijjar interviewed respondent, reviewed his medical file and duty statement, conducted an orthopedic examination, and wrote a Report.¹ Dr. Nijjar did not testify at hearing. A review of Dr. Nijjar's report reveals the following information. All radiological images of respondent's spine were normal. Upon physical examination, respondent's cervical spine was within normal limits with no localized tenderness, no deformity, no paraspinal muscle spasm, and full range of motion. The dorsal spine showed no deformity, but slight tenderness over T8-T9. Range of motion was limited by 10-percent for flexion, lateral rotations, and lateral bending. Extension was normal. Examination of the chest wall revealed slight tenderness at the costochondral junction at the fourth rib in the left anterior costochondral area. Deep breathing did not increase pain. Examination of the lumbosacral spine shows no deformity, no tenderness, and no restriction of range of motion. An upper extremity neurological examination found deep tendon reflexes, biceps, triceps, and brachioradialis reflexes to be 2+ positive and equal on both sides. Sensation in the upper extremities, with touch and pinwheel, did not show any dermatomal or patchy area of anesthesia or hypoesthesia. Based upon the above, Dr. Nijjar opined that respondent had a permanent disability and was substantially incapacitated from the performance of his duties, based upon a diagnosis of: "(1) dorsal spine sprain/strain, possible protruded dorsal disc, [and] (2) costochondral injury fourth rib, left chest wall."

13. At CalPERS's direction, on April 22, 2014, respondent was seen by Dr. Henrichsen, a retired orthopedic surgeon of 38 years, licensed and Board Certified in

¹ Dr. Nijjar's IME Report was admitted as administrative hearsay pursuant to Government Code section 11513, subdivision (d), which provides in pertinent part, that "[h]earsay 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."

Orthopedic Surgery in California. Dr. Henrichsen conducted an IME. Dr. Henrichsen interviewed respondent, took a medical history and an accounting of respondent's current complaints; reviewed respondent's medical files and job duty statement; and completed an orthopedic examination of respondent's spine and upper extremities. Dr. Henrichsen did not review any imaging, but read the corresponding reports (April 2002 x-ray, May 2002 MRI, September 2003 MRI, November 2003 MRI). Thereafter, Dr. Henrichsen wrote a Report. In September 2014, Dr. Henrichsen wrote a Supplemental Report. He testified at hearing consistent with his reports.

14. Respondent reported the use of the following medications for treatment of his back and chest pain: Vicodin, Soma, Zanaflex, Tylenol with codeine, Ibuprofen, Marcaine and steroid injections, Darvocet, Hydrocodone, Morphine (Kadian and Avinza), Ambien, Percocet, and Lidoderm patches. Respondent complained of pain in his mid-thoracic spine posteriorly with motion and lifting, with some left side anterior rib pain.

15. Dr. Henrichsen physical examination revealed the following findings. Range of motion for the thoracic spine was: flexion 10/15/10 degrees, extension 10/10/10 degrees, and rotation 35/35 degrees. The range of motion for the lumbar spine was normal. The range of motion for the cervical spine was: flexion 50 degrees, extension 60 degrees, rotation 90 degrees to right and left. The shoulder and elbow range of motion was normal.

Respondent's strength was normal on his heels and toes. His Trendelenburg test was negative. His femoral nerve traction test did not produce symptoms in his thoracic or lumbar spine. He could squat and rise. Prone examination revealed tenderness at T9, but no thoracic radicular findings. An examination of the anterior chest revealed no rib hump or abnormal rib prominence, however there was tenderness at the fourth rib at the costochondral junction on the left. No rib instability, but coronal pressure produced pain on the left side.

16. Dr. Henrichsen diagnosed respondent with: (1) history of thoracic strain, (2) costochondral rib pain, and (3) no examination evidence of "slipped rib syndrome." Dr. Henrichsen opined: "[e]ssentially what has occurred, because of pain and persistent symptoms in the face of three normal thoracic spine MRI scans, a normal cervical spine scan and a normal thoracic spine x-ray, it has been determined he was unable to work because of his pain symptoms. While I believe I understand the situation, the actual pathology identified in the medical records and examinations is small." Dr. Henrichsen concluded that "there are no specific job duties that member is unable to perform. There is no incapacity [and] the member is not substantially incapacitated."

17. In September 2014, at CalPERS's request, Dr. Henrichsen reviewed additional records and wrote a Supplemental Report. Specifically, Dr. Henrichsen read a chart note from Kevin Caldwell, M.D., dated June 24, 2014, indicating that respondent's pain is unchanged since his injury in 2002, and his pain is worsened by standing, sitting, or walking for too long. In addition, Dr. Henrichsen reviewed a Physician's Report on Disability, completed by Dr. Caldwell, on June 26, 2014, finding respondent substantially incapacitated. Thereafter, Dr. Henrichsen wrote a Supplemental Report. His opinion was unchanged by Dr.

Caldwell's findings.

Respondent's Medical Evidence

18. Respondent is currently under the care of Joseph R. Meyers, M.D., orthopedic surgeon. On December 4, 2015, Dr. Meyers ordered an MRI of respondent's cervical spine. The MRI revealed two posterior central disc protrusions at T3-4 and T7-8, each measured 3 mm and both abutting the spinal cord. On February 4, 2016, Dr. Meyers sent a letter to CalPERS documenting the following:

On reviewing the patient's ability to return to his previous occupation as a correctional officer, the physical requirements of that position include things that Officer Kime cannot perform.

He cannot run occasionally, up to three hours; he cannot stand frequently 3-6 hours. He cannot bend at the waist occasionally up to three hours, frequently three to six hours or constantly over six hours. He cannot twist at the waist frequently three to six hours or constantly four to six hours.

Mr. Kime is not able to disarm or subdue or apply restraints to an inmate. He is not able to walk occasionally to continuously. He is not able to crouch while firing a weapon or while involved in property searches. He is not able to lift and carry continuously 50 lbs frequently throughout the workday or do heavy lifting over 100 lbs. He is not able to do pushing or pulling which may occur during altercations or the restraint of an inmate.

[¶] . . . [¶]

He is substantially incapacitated from the performance of his normal job duties, and the incapacity began at the patient's retirement.²

Dr. Meyers did not testify at hearing.

19. At hearing, respondent offered the testimony and opinions of Everett D. Allen, M.D., Ph.D. Most recently, Dr. Allen was employed by PBSP; first employed as a physician in 1999, through a registry, then hired as a Physician and Surgeon in 2000, made Chief

² Dr. Meyers's letter was admitted as administrative hearsay pursuant to Government Code section 11513, subdivision (d), which provides in pertinent part, that "[h]earsay 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."

Physician and Surgeon in 2001, and finally, promoted to Chief Medical Officer. During his employment, Dr. Allen treated staff as well as inmates. From personal experience, Dr. Allen is familiar with the responsibilities of a CO at PBSP. He provided specific examples of the extensive physical requirements of the CO position at PBSP.

20. Prior to his testimony, Dr. Allen reviewed respondent's medical file and his job duty statement, as well as Dr. Nijjar's IME Report, Dr. Henrichsen's IME and Supplemental reports, and Dr. Meyer's letter. In addition, Dr. Allen spoke with and examined respondent. In sum, Dr. Allen opined "that Mr. Kime is incapacitated from his thoracic strain from the performance of his duties as a correctional officer, and that this disability is permanent." To form his opinion, Dr. Allen relied on Dr. Nijjar's report, the 2015 MRI results, respondent's 13 year opioid use for chronic back and chest pain, and the physical requirements of the CO position.

Discussion

21. Respondent is subject to reevaluation of his disabling condition because he is not yet of retirement age. (Gov. Code, § 21192.) In 2003, at the age of 27, respondent was deemed substantially incapacitated by Dr. Morrow, and respondent was placed on industrial disability retirement. In 2010, at the age of 34, respondent was deemed substantially incapacitated by Dr. Nijjar, and respondent continued on industrial disability retirement. In 2014, at the age of 38, respondent was evaluated by Dr. Henrichsen, and deemed not to be substantially incapacitated. In a review of respondent's medical records and a physical examination, Dr. Henrichsen found no objective findings for respondent's disabling condition, opining that all findings of substantial incapacity were based on respondent's subjective complaints of pain. Using the CalPERS standard, Dr. Henrichsen concluded that subjective complaints of pain are insufficient to make a finding of substantial incapacity and findings based on prophylactic measures to prevent future injury cannot be considered.

22. Dr. Henrichsen based his opinions on the following: all imaging was normal; upon physical examination, respondent did not have slipped rib syndrome; and all other diagnoses substantiate respondent's subjective complaints of pain only. At hearing, Dr. Henrichsen was asked to review Dr. Meyers's letter and the 2015 MRI findings. Neither caused Dr. Henrichsen to change his opinion. Dr. Henrichsen remarked that two protruding discs did not make respondent substantially incapacitated from the job duties of a CO.

23. In contrast, Dr. Allen concluded that the 2015 MRI revealed objective findings sufficient to determine respondent is substantially incapacitated from the job duties of a CO at PBSP. However, Dr. Allen is not an orthopedist, he has never completed an IME, he was unfamiliar with the CalPERS standard of substantial incapacity (incorrectly comparing it to a pre-employment examination), and he failed to provide any objective findings, based upon a physical examination of respondent or otherwise, to support his conclusion. While Dr. Allen provided a unique perspective on the physical requirements of the job duties of a CO at PBSP, his familiarity with the job duties does not overwhelm the requirement to provide objective findings to support a determination of substantial incapacity. In sum, Dr. Allen agreed with

Dr. Nijjar's findings and relied on the most recent MRI findings to make his determination. However, Dr. Nijjar's report fails to identify objective findings to support a determination of substantial incapacity, and both Dr. Meyers and Dr. Allen failed to articulate why the objective finding of two protruding discs would make respondent substantially incapacitated under the CalPERS standard. For all the above reasons, respondent has not established, through competent medical evidence, that his orthopedic condition substantially disables him from performing his usual job duties as a CO at PBSP.

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.”

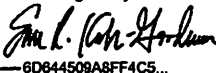
Determination

5. Cause exists to grant CalPERS’s request to reinstate respondent to his former position as a CO with CDCR, PBSP. Complainant established that respondent is capable of performing the usual job duties of a CO at this time, based upon competent medical evidence. In this case, Dr. Henrichsen’s testimony was on-point and persuasive. He testified competently and clearly. He applied the CalPERS standard of substantial incapacity and determined that respondent can perform all of the usual duties of his job as CO.

ORDER

The request of California Public Employees’ Retirement System to reinstate respondent Matthew Kime from industrial disability retirement is GRANTED.

DATED: August 11, 2016

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