

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

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

In the Matter of the Application for  
Industrial Disability Retirement of:

NELLIE E. RODRIGUEZ,

Respondent,

and

DEPARTMENT OF HEALTH CARE  
SERVICES,

Respondent.

Case No. 2015-0292

OAH No. 2015110142

**PROPOSED DECISION**

Irina Tentser, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California, on July 13, 2016.

Christopher C. Phillips, Senior Staff Attorney, represented complainant Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Respondent Nellie E. Rodriguez (Respondent) was represented by Thomas J. Wicke, Esq. of Lewis, Marenstein, Wicke, Sherwin & Lee, LLP.

Respondent Department of Health Care Services (DHCS) was not represented or present at the hearing.

Evidence was received. The record was left open for parties to submit written closing briefs no later than August 10, 2016. Both parties submitted their closing briefs on August 10, 2016. Respondent's closing brief was marked as Exhibit 14. Complainant's closing brief was marked as Exhibit AA. The matter was submitted on August 10, 2016.

CalPERS denied Respondent's industrial disability retirement application after determining that she was not permanently disabled or incapacitated from performance of her duties as a DHCS Investigator at the time the application for industrial disability retirement

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED September 9, 2016

was filed. Respondent contends she was permanently disabled and substantially incapacitated for the performance of her usual duties as a DHCS Investigator at the time she filed her application for industrial disability retirement.

### FACTUAL FINDINGS

1. Complainant Anthony Suine filed the Statement of Issues solely in his official capacity as Chief of the CalPERS Benefits Services Division.
2. Respondent was employed by Respondent DHCS as an investigator. By virtue of her employment, Respondent is a state safety member of CalPERS, pursuant to Government Code section 21151.<sup>1</sup>
3. On June 26, 2014, Respondent executed and submitted an application for Service Pending Industrial Disability Retirement. Respondent claimed disability on the basis of orthopedic (neck, low back, right shoulder, and right upper extremity) conditions.
4. Respondent retired from service effective October 1, 2014. She has been receiving a service retirement allowance since that date.
5. CalPERS obtained medical reports concerning Respondent's orthopedic (neck, low back, right shoulder and right upper extremity) conditions from competent medical professionals. After review of the reports, CalPERS determined that Respondent was not permanently and substantially incapacitated for the performance of her duties as an Investigator at the time her application for industrial disability retirement was filed.
6. Respondent was notified of CalPERS's determination and was advised of her appeal rights by letter dated January 9, 2015.
7. Respondent filed a timely appeal by letter dated February 15, 2015, and requested an administrative hearing.
8. The issue that is the subject of the hearing is whether at the time of Respondent's disability application, she was permanently disabled or substantially incapacitated from the performance of her usual and customary duties as an investigator for Respondent DHCS.

#### *Usual Duties of an Investigator*

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<sup>1</sup> All further section references are to the Government Code unless otherwise indicated.

9. Two documents describing the usual duties required of an investigator, a peace officer position, were received in evidence. The first document was entitled "DUTY STATEMENT" for a Department of Health Services Investigator. (Exh. 11.) The second document was a CalPERS' document entitled "Physical Requirements of Position/Occupational Title" jointly completed and signed on May 8, 2014, by a supervising investigator and Respondent. (Exh. 12.)

10. As explained in the Legal Conclusions below, investigators must be able to perform all of the essential functions. The critical required task relevant to this matter, based on testimony and reports of medical experts, is contained in the description of duties section of the duty statement, which reads:

"Investigators, Department of Health Services (DHS), are peace officers under California Code, Section 830.3 (h) and perform investigative duties comparable to other peace officers. During the course of their employment, they are required to carry a firearm and be proficient in its use. Further, investigators must be knowledgeable in the area of non-lethal force, demonstrating appropriate use as prescribed in department policy."

(Exh. 11.)

11. Investigator "Essential Functions" include conducting a full scope of criminal and civil investigations of fraud or abuse against Medi-Cal, moderate to heavy travel, interviewing and interrogating suspects and witnesses, executing search warrants and subpoenas, conducting surveillance and covert activities, preparing detailed reports, and effecting arrests. (Exh. 11.) Respondent's work hours were long and irregular, requiring her to frequently work 60 hours per week.

12. Respondent testified at hearing that she spent approximately 70 to 80 percent of her time in the investigative field interviewing suspects and witnesses, conducting surveillance, collaborating with other law enforcement agencies, driving extensively, getting in and out of her vehicle more than 10 to 15 times per day, executing search and arrest warrants once or twice a month, effecting arrests once a month, and using handcuffs once or twice a month. Most critically to the issue of Respondent's incapacity to perform her usual job duties, Respondent was required to carry her firearm at all times in the field. In addition, she carried pepper spray, handcuffs, a flashlight, and additional ammunition.

13. As part of complying with mandatory continuing training under Peace Officer Standards and Training (POST), Respondent was required to qualify for her weapon four times a year, which required shooting 42 rounds, and before attempting to qualify. Prior to qualifying, Respondent would train 80 to 100 rounds. Qualifying consisted of use of a handgun, shotgun, and shooting with one hand. Respondent was also required to complete a training class in arrest and control, pepper spray, and CPR.

14. Andres Romo (Romo), a supervising investigator since November 2010, and former investigator testified that investigators were required to carry a weapon daily.

According to Romo, there was an increased emphasis in tactical training and use of weapons in recent years and investigators were required to engage in simulations where paint bullet rounds were fired.

### *Respondent's Injuries Leading to Her Claimed Industrial Disability*

#### **A. Employment History**

15. In 1976, Respondent began State employment as a clerk for the Medical Board of California. In 1999, she promoted to investigator. Respondent attended POST Certified Academy, where she underwent classroom and field instruction training in firearms (pistol and shotgun), arrest and control, evidence handling, and interviewing witnesses. She completed the Academy and passed the physical exam.

16. In 2003, Respondent transferred to DHCS, where she continued to work as an investigator in matters regarding allegations of Medi-Cal fraud.

17. On May 2, 2013, Respondent was restricted from field work and placed on temporary modified duty due to industrial injuries. By November, 2013, Respondent was taken off work because DHCS could not accommodate her restrictions.

18. On March 12, 2014, DHCS notified Respondent by letter “. . . that an Investigator are Peace Officers under California Penal Code 830.3(h) and required to perform Post Officer Standards and Training requirements . . . mandated to participate and successfully complete mandated training courses, including weapons qualifications . . . Based on your permanent work restrictions, DHCS has determined that the department can no longer allow you to work in the capacity of an Investigator.” (Exh. X.) The letter served to inform Respondent that her physical restrictions were incompatible with peace officer duties as an investigator. As a result, Respondent was removed from her investigator position. She then filed for disability retirement and retired, as described in factual findings 3 and 4.

#### **B. Injuries and Medical Treatment Based On Competent Medical Opinion**

19. In January 2012, Respondent was injured during a training drill when she was flipped over her partner's shoulder and landed on her right shoulder. Respondent was treated at Kaiser Permanente (Kaiser) and was diagnosed with right lateral epicondylitis and repetitive use strain. Respondent was prescribed physical therapy, ibuprofen, and Flexiril. Respondent was off duty for one or two days and then worked modified duty for the next four months, writing reports and having restrictions of no field work and no firearm training.

20. In December 2012, Respondent completed a mandated POST all-day handgun and shotgun training during which she discharged 200 rounds. At the end of the day, Respondent was unable to holster her weapon due to pain in her right forearms and elbow. As a result, Respondent visited Kaiser for pain in her right shoulder and forearm. (Exhs. A

and B.) Respondent was placed on light duty answering phones and restricted from field work. In April 2013, she returned to full duty.

21. On May 2, 2013, Respondent was completing mandatory firearm training, consisting of shooting one-handed. After 80 rounds, Respondent began to feel pain in her right arm and had difficulty gripping. Because Respondent was not able to hold her weapon in front of her and load her ammunition, she was unable to qualify.

22. Subsequently, Respondent was treated at Kaiser's occupational health unit with complaints of pain in her neck, right shoulder, right arm, wrist and hand, a pinching sensation in her neck and right shoulder, down to the right elbow, and numbness and tingling in her fingers. Based on an examination by a Kaiser physician, Respondent had decreased motion in her neck, decreased range of motion, tenderness and pain in her right shoulder, swelling and tenderness in the right elbow, and tenderness and deformity in her forearm, wrist and hand. Additionally, the physician's examination revealed that positive results on Hawkins impingement<sup>2</sup>, Cozen's<sup>3</sup> and Finkelstein's<sup>4</sup> tests.

23. Respondent was diagnosed with right lateral epicondylitis, bicipital tendonitis, DeQuervain's tenosynovitis, and cervical radiculopathy. She was prescribed ibuprofen, Mobic, Flexeril, and physical therapy. Work restrictions included no reaching above the right shoulder, no gripping or grasping with right hand, and no lifting, carrying, pushing, pulling of more than five pounds. (Exhs. A, B, C, and D.) Respondent returned to temporary modified duty answering phone calls with no field work.

24. Respondent continued to treat at Kaiser in subsequent months and completed physical therapy and acupuncture treatment. Respondent's complaints worsened despite treatment and she developed additional complaints of pain in her left shoulder, elbow, wrist, and thumb. (Exhs. D, E, G, and M.)

25. Beginning on December 4, 2013, Respondent also began experiencing low back pain. (Exh. O.) As a result, Respondent was given added restrictions to avoid repetitive right wrist extension, scooping, and no keyboard or mouse use more than 15 minutes per hour. (Exh. E.) On August 19, 2013, an MRI was completed which indicated mild posterior disc osteophyte complex with mild central stenosis at C3/4 and C4/5 and mild disc bulge at C5/6. (Exhs. J and P.)

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<sup>2</sup> Hawkins impingement test is a physical examination performed to evaluate pain produced by forced internal rotation of the humerus in 90° of abduction.

<sup>3</sup> Cozen's test is a physical examination performed to evaluate for lateral epicondylitis or, tennis elbow.

<sup>4</sup> Finkelstein's test is used to diagnose De Quervain's tenosynovitis in people who have wrist pain. De Quervain's tendinosis occurs when the tendons around the base of the thumb are irritated or constricted.

26. On February 18, 2014, Respondent was judged by her doctors to have reached "Maximum Medical Improvement." (Exh. S.) Respondent exhibited a significant deficit of grip strength in her dominant right hand. (*Id.*) Permanent work restrictions included: no lifting, pushing, pulling greater than five pounds, and no repetitive right elbow movement or keyboard use for more than 15 minutes per hour.

27. On October 9, 2014, Kaiser's industrial work status report prescribed restrictions for Respondent of reaching above the right shoulder only occasionally, no more than 15 minutes of keyboard/mouse use per hour, only occasionally gripping/grasping with right hand, no pushing, pulling, lifting more than five pounds, and avoiding repetitive right wrist extension and scooping. (Exh. W.)

28. Respondent's treatment is ongoing. Recent medical records submitted into evidence indicate a narrative of worsening complaints and clinical abnormalities. Respondent reported that she takes Mobic, Flexeril, and Tylenol with Codeine. She has received two cortisone injections in her right elbow, and an injection into her neck. Respondent is undergoing acupuncture, physical therapy and traction. Respondent is limited in her driving and has given up many of her activities, including cooking, gardening, and dancing. Respondent felt she could no longer perform investigator functions due to her physical limitations.

*Medical Opinion of Robert B. Fenton, M.D.*

29. On October 24, 2014, Respondent underwent an Independent Medical Evaluation (IME) at the request of CalPERS performed by Dr. Robert B. Fenton, a board-certified orthopedic surgeon. After Dr. Fenton's examination, he prepared a report that was received in evidence. Dr. Hendricks also testified at the hearing.

30. Dr. Fenton reviewed medical records and conducted a physical examination of Respondent. Respondent was 59 years old at the time and described her last job with Respondent DHCS as an investigator.

31. After his examination of Respondent, Dr. Fenton's impression was that Respondent suffered from Cervical Strain with Degenerative Disc Disease at C3-4 and per MRI of the cervical spine August 19, 2013, mild posterior disc osteophyte complex with mild central stenosis at C3-4 and C4-5; Right Shoulder Impingement with bicipital Tendinitis and mild acromioclavicular joint Arthrosis; Bilateral proximal extensor Tendinitis; Mild thumb extensor Tendinitis on the right consistent with De-Quervain's tenosynovitis; and Lumbosacral Strain with degenerative changes L4-5. (Exh. 8 at p. 28.) Dr. Fenton's findings and diagnoses were consistent with those made at Kaiser from 2012 through 2016, as described in factual findings 19

32. Dr. Fenton was not provided with Respondent's "specific job description and the physical requirements of her position" at the time he rendered his initial report and formed his opinion regarding her incapacity. (Exh. 8 at p. 28.) Instead, he relied solely on a

cursory overview of her job duties obtained by his office historian, with no further inquiry. (Exh. 8 at pgs. 2 and 28.) Notwithstanding the lack of detailed information regarding Respondent's job duties and physical requirements, Dr. Fenton concluded that Respondent was "capable of performing the majority of her work activities." (Exh. 8 at p. 29.) In rendering his summary opinion, Dr. Fenton did not follow CalPERS' instruction to discuss "specific job duties" he opined Respondent could not perform. (Exh. 7.)

33. In a November 24, 2014 supplemental report, Dr. Fenton maintained his prior opinion that Respondent was not permanently incapacitated for duty. Dr. Fenton reached the foregoing opinion without considering the physical requirements document related to Respondent's position, which he described as "not readable." (Exh. 9, pg. 1.) Dr. Fenton wrote that he had reviewed a duty statement for a summary as a Medi-Cal Fraud Investigator which he described as indicating "that she was required to carry a firearm and remain proficient and be knowledgeable in non-lethal force demonstrating appropriate use." (*Id.*)

34. After the summary description of Respondent's duties described in factual finding 33, Dr. Fenton opined in his two page November 24, 2014 report as follows:

"Based on the information provided and with the understanding that the physical requirements unfortunately is not readable, my thoughts continue to remain unchanged and find the member not incapacitated for reasons described previously."

(Exh. 9 at p. 2.)

35. On December 23, 2014, Dr. Fenton issued a final supplemental report. Dr. Fenton wrote that the final supplemental report was prepared after being provided with the physical requirements of "a travel investigator" which had previously been unavailable when he formed his opinion regarding Respondent's incapacity. (Exh. 10 at p. 1.)

36. In the December 23rd three-page supplemental report, Dr. Fenton listed the physical requirements of Respondent's job and indicated that he found the physical requirements consistent with Respondent's description of her employment as contained in his October 24th report. He then concluded without any specific discussion that Respondent could perform a majority of her duties and was not permanently incapacitated. No mention was made regarding Respondent's mandatory requirement and duty that she qualify to use a firearm as part of her Investigator position and carry a firearm as part of her duties.

37. At hearing, Dr. Fenton testified that he would prescribe the following work restrictions on Respondent: no repetitive gripping on the right, use of her right arm at or above shoulder level, no prolonged fixed position of her head, no repetitive motions at the extremes of her upper extremities. Again, Dr. Fenton did not specifically address how Respondent's physical restrictions affected her ability to fulfill her duty to qualify to use a firearm and the requirement that she carry a firearm at all times in the performance of her duties. He did not address the evidence that Respondent's pain precluded her from being able to hold a weapon or load ammunition in May 2013. Dr. Fenton indicated that he



believed Respondent was credible, cooperative, and put forth her best effort during his examination. (Exh. 8 at p. 30.)

### *Resolution of Conflicts Between Medical Evidence*

38. Dr. Fenton was the only expert witness who testified at hearing on the question of Respondent's substantial capacity to perform her usual duties. As noted in factual findings 15 through 28, Respondent's hearing testimony that she was disabled was corroborated by direct and/or relevant medical evidence. Most notably, she was unable to comply with POST requirements that she qualify with her weapon four times a year, which caused her termination from her Investigator position by Respondent DHCS. Dr. Fenton's opinions regarding Respondent's ability to perform her job duties were demonstrably based on a lack of factual consideration of Respondent's duties as an investigator, as described in factual findings 29 through 37. In addition, Dr. Fenton did not adequately address and/or explain the logical inconsistency of how Respondent could be removed from her investigator position by Respondent DHCS because her employer determined that her physical incapacity precluded her from being able to fulfill the essential duty requirement of carrying a firearm and still be found substantially capable to perform her usual duties by CalPERS. Accordingly, Dr. Fenton's opinion regarding Respondent's ability to perform her usual job duties is unpersuasive.

## LEGAL CONCLUSIONS

1. An applicant for retirement benefits has the burden of proof to establish a right to the entitlement absent a statutory provision to the contrary. (*Greator v. Board of Administration* (1979) 91 Cal. App.3d 57.)

2. Section 20026 states:

“‘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, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.”

3. Incapacity for performance of duty means the substantial inability to perform usual job duties. (*Mansperger v Public Employees' Retirement System* (1970) 6 Cal. App.3d 873, 876.) The ability to substantially perform the usual job duties, though painful or difficult, does not constitute permanent incapacity. (*Hosford v. Board of Administration* (1978) 77 Cal. App.3d 854, 862.) Usual job duties are to be determined on a case by case basis and do not include infrequently performed tasks. (*Id.*) In sum, mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689; *Cansdale v. Board of Administration* (1976) 59 Cal.App.3d 656; *Bowman v. Board of Administration* (1984) 155 Cal.App.3d 937.)

4. Section 21151, subdivision (a) states:

**“Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.”**

5. Section 21152 states, in part:

**“Application to the board for retirement of a member for disability may be made by:**

**(a) The head of the department in which the member is or was last employed, if the member is a state member other than a university member.**

**[¶] . . . [¶]**

**(d) the member of any person in his or her behalf.”**

6. Section 21154 states:

**“The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.”**

7. Section 21156, subdivision (a)(1) states:

**“If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, 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, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.”**

8. Section 21166 states, in part:

“If a member is entitled to a different disability retirement allowance according to whether the disability is industrial or nonindustrial and the member claims that the disability as found by the board, or in the case of a local safety member by the governing body of his or her employer, is industrial and the claim is disputed by the board, or in case of a local safety member by the governing body, the Workers’ Compensation Appeals Board, using the same procedure as in workers’ compensation hearings, shall determine whether the disability is industrial.”

9. Here, the evidence showed Respondent was physically incapable of performing all of the usual duties associated with her position as an investigator, as established through her credible testimony and her medical records, based on factual findings 9 through 38. Respondent was terminated from her position as an investigator because she was physically incapable of qualifying to use a weapon, an essential job requirement for her position. Respondent therefore established on the basis of competent medical opinion and relevant evidence that she has a physical disability of permanent or extended and uncertain duration that incapacitates her for the performance of her required duties as a DCHS Investigator, as described in factual findings 9 through 38 and legal conclusions 1 through 8 .

**ORDER**

**Respondent Nellie E. Rodriguez’s appeal is granted.**

Dated: September 2, 2016

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*Irina Tentser*  
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**IRINA TENTSER**  
**Administrative Law Judge**  
**Office of Administrative Hearings**