

**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:

ALBERT R. PETERSON,

Respondent,

and

CALIFORNIA STATE PRISON LOS  
ANGELES COUNTY CALIFORNIA  
DEPARTMENT OF CORRECTIONS AND  
REHABILITATION,

Respondent.

Case No. 2016-0126

OAH No. 2016040021

**PROPOSED DECISION**

Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on August 25, 2016.

Terri L. Popkes, Senior Staff Attorney, represented the petitioner, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System, State of California (CalPERS).

Albert R. Peterson, respondent, represented himself.

No appearance was made by or on behalf of respondent California State Prison Los Angeles County, California Department of Corrections and Rehabilitation (Department of Corrections).

The matter was submitted on August 25, 2016.

Following the hearing, the administrative law judge requested legible copies of documents received in the hearing as Exhibit 10. On September 12, 2016, petitioner's counsel provided four pages of documents that were similar, but not identical to the pages in

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED Sep 21 2016  
Kathy P. H. C. J.

Exhibit 10. These documents were also provided to Mr. Peterson. The documents received on September 12, 2016, were marked exhibit "10A" and received in evidence.

## FACTUAL FINDINGS

### *Application for Disability Retirement*

1. Respondent was employed by Department of Corrections as a Corrections Officer for twelve years. By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151.

2. Mr. Peterson retired for service effective December 10, 2014.

3. On February 19, 2015, Mr. Peterson signed a Disability Retirement Election Application and submitted it to CalPERS. Respondent sought a disability retirement with a retirement date of December 5, 2014; he said his last day on the Department of Correction's payroll was December 4, 2014. In his application, respondent claimed a disability on the basis of "hypertension, chronic diabetic diarrhea Gastroesophageal reflux disease (GERD), degenerative disc and bulging discs, injuries to both shoulders, . . . right elbow and ankles." He asserted that various doctors had advised him his injuries were work related. He stated he could not perform duties that included heavy lifting, forceful pushing or pulling, overhead work, forceful twisting, bending, stooping, prolonged weight bearing, or walking/running on uneven surfaces and that these limitations rendered him unable to work as a corrections officer. He stated that "AME Doctors stated condition has reached max med – permanent and stationary."

4. By letter dated October 2, 2015, CalPERS informed Mr. Peterson that, after review of his medical records, it had determined that his "orthopedic (degenerative and bulging discs) condition is not disabling" and therefore, he was not "substantially incapacitated from the performance of [his] job duties as a Correctional Officer . . ." CalPERS denied his application for disability retirement. The denial of the disability retirement did not impact Mr. Peterson's service retirement, and he continued to receive service retirement benefits.

5. Mr. Peterson appealed CalPERS's denial of his disability retirement.

6. Petitioner filed Statement of Issues No. 2016-0126 on March 9, 2016. The Statement of Issues stated that the "issue on appeal is limited to whether at the time of the application, on the basis of an orthopedic . . . condition, respondent Peterson is permanently disabled or substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer for [Department of Corrections]." It further stated that if a disability were found, the issue of "whether the disability is industrial or nonindustrial will be resolved pursuant to Government Code section 21166."

### *History of Medical Complaints and Evaluations*

7. Beginning in approximately 2010, Mr. Peterson began having problems with his lower back and right elbow. He attributed his symptoms to repetitively lifting bags of mail weighing up to 75 pounds and lifting and dragging inmates who weighed from 150 to 300 pounds. He was examined by Dr. Dawit Mamo and had x-rays taken of his lower back. Dr. Mamo prescribed medication and physical therapy. Mr. Peterson did not receive any benefit from the physical therapy.

8. In 2012, Mr. Peterson began having pain in his feet.

9. On March 13, 2013, x-rays were taken of Mr. Peterson's lower back, and he was examined by Doctor Marvin Elias at Loma Linda Medical Center. Dr. Elias prescribed medication.

10. In or about January 2014, Mr. Peterson began to experience pain in his right shoulder. He attributed the pain to dragging inmates from their cells. He returned to Dr. Elias for evaluation. Dr. Elias prescribed additional medications.

11. On February 11, 2014, Mr. Peterson sought treatment of his foot pain with Dr. Nicholas Crismali. A cortisone injection administered by Dr. Crismali did not alleviate the pain.

12. In the spring of 2014, Mr. Peterson felt pain in his hips. Dr. Elias ordered an MRI of Mr. Peterson's lumbar spine. The MRI showed "Degenerative disc disease with broad-based bulging disc at L2-3, L3-4, and L4-5. At L4-5 there is resultant moderate bilateral neural foraminal narrowing." By note dated November 20, 2014, Dr. Elias stated it was his "medical opinion that Albert Peterson is unable to perform the duties at his job due to his chronic lower back pain."

13. In or around September 2014, Mr. Peterson was evaluated for pain management. An epidural injection and nerve block administered to the right side of Mr. Peterson's lower back did not relieve the pain.

#### **DR. SIMPKINS'S AME EXAM<sup>1</sup>**

14. Mr. Peterson filed a workers' compensation claim concerning problems with his "shoulders, back, lumbar spine, feet and heart." On November 10, 2014, Dr. Albert Simpkins, Jr., Diplomate, American Board of Orthopaedic Surgery, performed an Agreed Medical Evaluation (AME). Dr. Simpkins interviewed Mr. Peterson for his medical and

---

<sup>1</sup> Drs. Simpkins and Bergey's reports were admitted without objection as administrative hearsay. No evidence was offered regarding the expertise of these physicians, other than that which appears on the letterhead of their reports.

work history and current complaints, reviewed medical records, and conducted an examination.

Dr. Simpkins learned that Mr. Peterson's usual job duties included "monitoring inmates, controlling access to the building and cells, searching and escorting individuals, intervening in altercations, responding to various alarms, performing CPR if necessary, pulling and dragging inmates in and out of cells, collecting mail bags, reading mail and writing reports." In evaluating Mr. Peterson, Dr. Simpkins considered that

[d]uring a typical shift, [Mr. Peterson] will sit approximately two hours and constantly alternate between standing and walking approximately six hours. He will frequently lift and carry up to 10 pounds and occasionally lift and carry 11 to 100 – plus pounds. He will occasionally push or pull up to 100-plus pounds. [Mr. Peterson] states the heaviest object he lifts on a regular basis is a mail bag, estimated to weigh up to 75 pounds.

Throughout the day, [Mr. Peterson] will constantly perform prolonged/repetitive neck motion. He will frequently bend, climb and write or keyboard. He will frequently squat, kneel, walk on uneven ground and work above ground. He will occasionally reach above shoulder level, reach at shoulder level, reach below shoulder level, perform fine hand manipulation and perform simple grasping.

Mr. Peterson told Dr. Simpkins that he "experiences increased low back and hip pain with prolonged standing and walking." Mr. Peterson complained of "intermittent, moderate to severe, aching pain in his right shoulder" with pain that radiated "down his arm into his forearm." He also complained of "numbness and tingling down his arm into his hand and fingers" and "weakness in his arm and hand."

Mr. Peterson reported "frequent, mild to severe, stabbing pain with stiffness in his low back" and "radiating pain down his legs into his thighs." He stated that "[s]itting, standing, driving and walking aggravates his symptoms." He also reported frequent, moderate to severe, aching pain with stiffness in his hips, "giving out of his legs," "stabbing pain in his feet" and "radiating pain with stiffness in his ankles."

Dr. Simpkins found objective evidence of mild degenerative changes in Mr. Peterson's right and left shoulders; mild to moderate tendinosis in his right elbow, degenerative disc disease with "broad-based bulging disc at L2-3" in the lumbar spine, and mild degenerative changes in his feet. Dr. Simpkins recommended treatments included acupuncture for his shoulder, non-surgical intervention for his lumbar spine unless that proved ineffective, compressive bandages on his elbows, and anti-inflammatories and physical therapy on his elbows and feet.

Dr. Simpkins found Mr. Peterson's medical condition to be permanent and stationery. He opined that Mr. Peterson's subjective factors of disability were "intermittent slight to occasional slight to moderate." Although Dr. Simpkins determined Mr. Peterson was "able to perform the duties of his usual and customary occupation . . . , he concluded that Mr. Peterson was subject to the following work restrictions: preclusion from heavy lifting, forceful pushing, pulling, twisting and torquing, overhead work, repetitive bending and stooping, prolonged weight-bearing, walking on uneven terrain, running, jumping and climbing."

Dr. Simpkins opined that Mr. Peterson's injuries "appear to have occurred in the course and scope of his employment on a continuous trauma basis," although he noted his opinion could change if given additional information. He apportioned 100 percent of Mr. Peterson's lumbar spine injuries and 85 percent of his shoulders injuries to his employment. He found no permanent impairment of his elbows or feet.

#### DR. BERGEY'S EXAM – FEBRUARY 2015

15. On February 11, 2105, Dr. Darren L. Bergey, M.D., QME, performed a "Complex Orthopedic Spine Surgeon Initial Primary Treating Evaluation" pursuant to Worker's Compensation Insurance Adjuster, Jose Hernandez's request.

Mr. Peterson reported to Dr. Bergey that he continued to have "low back pain radiating into the buttocks and down the posterior thighs, and occasionally to the calves."

Dr. Bergey obtained Mr. Peterson's history, examined him, and administered tests, including range of motion tests. Dr. Bergey agreed with Dr. Simpkins's diagnoses of Mr. Peterson and his recommended treatment. He also agreed that Mr. Peterson's symptoms were caused by industrial injury suffered when Mr. Peterson worked for the Department of Corrections. However, Dr. Bergey disagreed with Dr. Simpkins's opinion that Mr. Peterson could perform his usual and customary job duties. Dr. Bergey requested authorization for acupuncture and chiropractic therapy.

#### FUNCTIONAL CAPACITY EVALUATION - FEBRUARY & APRIL 2016

16. Dr. Bergey referred Mr. Peterson to participate in a functional capacity evaluation which was performed on February 11, 2016.<sup>2</sup> The evaluation took five hours. The examiner noted that Mr. Peterson "gave full effort" and summarized that "[s]ubjective exam indicates that there is severe interference due to pain." The evaluation demonstrated that Mr. Peterson had good strength and mobility in his lower extremities and fair to good strength in his trunk area. The evaluator determined that Mr. Peterson was able to sit, stand and walk, squat and bend, and push, pull, lift and carry on an occasional basis. Mr. Peterson was able to lift up to 56 pounds and carry up to 46 pounds on an occasional basis. He could

---

<sup>2</sup> Neither the evaluation report, Dr. Bergey's progress report nor other evidence offered at the hearing identified who performed the functional capacity evaluation.

push up to 130 pounds of force and pull up to 180 pounds of force on an occasional basis. Nonetheless, the evaluation disclosed that Mr. Peterson could not lift or carry over 56 pounds on more than an occasional basis. It concluded that Mr. Peterson had “movement deficits during dynamic tasks and may be limited with combined twisting, lifting, push and pull activities. Concern would be aggressive interaction with inmates.”

17. On April 11, 2016, Dr. Bergey met with Mr. Peterson to review the results of the functional capacity evaluation; he wrote a report summarizing that visit. In the report, Dr. Bergey stated that, since his evaluation in February, Mr. Peterson continued to have “low back pain, as well as radiating leg pain and bilateral shoulder pain.” Dr. Bergey reviewed the report written by Robert Kolesnik, M.D., an independent medical examiner whom CalPERS asked to review Mr. Peterson’s medical records and render an opinion, and wrote that the results of his functional capacity evaluation provided “objective evidence that Dr. Kolesnik’s report does not meet the standard of substantial medical evidence.” Dr. Bergey confirmed his opinion that Mr. Peterson was “a candidate for medical retirement, based upon AME report, my report, and the results of the functional capacity evaluation.”

#### *Independent Medical Evaluation*

18. Robert J. Kolesnik, M.D., is a board certified diplomate of the American Board of Orthopaedic Surgery. He obtained his undergraduate and medical degrees from University of Southern California in 1975 and 1979 respectively. He has been board certified since 1985.

19. Dr. Kolesnik testified that he was familiar with the job duties and responsibilities of correctional officers because, during his medical training (pre-1984), he saw patients in a county jail. He has performed examinations of approximately 50 law enforcement personnel, a few of which were correctional officers. He understood correctional officers had general supervisory duties and were required to restrain inmates on occasion. Dr. Kolesnik reviewed Department of Correction’s documents listing the essential job functions and physical requirements of a correctional officer. There was no evidence in Dr. Kolesnik’s report, or in his testimony at the hearing, that Dr. Kolesnik interviewed Mr. Peterson about his daily, usual or customary job duties.

20. On September 1, 2015, Dr. Kolesnik performed an independent medical evaluation of Mr. Peterson for CalPERS, and he wrote a report. Dr. Kolesnik evaluated Mr. Peterson to determine his then-current status and whether he was able to perform the essential functions of his job. He spent 45 minutes interviewing Mr. Peterson and conducting a physical examination; 1.5 hours reviewing medical records; and 2.0 hours preparing his report. Dr. Kolesnik reviewed the medical records Drs. Simpkins and Bergey reviewed. Although Dr. Kolesnik testified at the hearing, he had no independent recollection of his examination of Mr. Peterson other than by reference to his written report.

21. Mr. Peterson reported to Dr. Kolesnik that he experienced intermittent pain in both shoulders, particularly with motion and lifting activities. He reported intermittent

stabbing and aching pain in his elbows with motion and lifting. He experienced intermittent stabbing pain in the lumbar spine with “standing, walking, sitting, bending, and lifting.” He said the pain radiated to the buttocks and over both hips. Mr. Peterson also reported intermittent severe pain in both ankles and feet. He stated the pain in his ankles resolves after several minutes, but he experiences a lingering aching through the day.

Dr. Kolesnik diagnosed Mr. Peterson with “bilateral rotator cuff tendinitis with acromioclavicular arthritis;” “bilateral elbow pain with MRI evidence of lateral and medial epicondylitis and distal biceps tendinitis;” and “lumbosacral strain with degenerative disc disease.” Dr. Kolesnik opined, however, that “there are no specific job duties that [Mr. Peterson] is unable to perform due to [his] physical and mental conditions.” He determined that Mr. Peterson was “not presently substantially incapacitated for the performance of his duties as a correctional peace officer.” Although Dr. Kolesnik stated that Mr. Peterson cooperated with his examination and put forth his best efforts, Dr. Kolesnik believed that Mr. Peterson exaggerated his complaints. Dr. Kolesnik based this opinion on the fact that Mr. Peterson’s physical examination was normal, he had full range of motion, and any medical condition shown through the examination and/or imaging was insignificant.

Dr. Kolesnik, however, also opined that Mr. Peterson’s “diagnoses/conditions were aggravated by his employment.” He stated:

[Mr Peterson’s] work as a correctional peace officer involved frequent use of the upper extremities as well as frequent bending, stooping, standing and walking. [Mr. Peterson] does demonstrate osteoarthritic changes in both shoulder acromioclavicular joints, and plain x-rays and magnetic resonance imaging of the lumbar spine have revealed degenerative disc disease and osteoarthritis. Although [Mr. Peterson] would have been symptomatic in regard to his shoulders and lumbar spine, even if he was not working, his work as a correctional police officer [r] aggravated and accelerated the arthritic and degenerative processes in the shoulders and lumbar spine as well as caused bilateral shoulder and right elbow tendinitis, in addition to bilateral ankle and foot tendinitis.

Dr. Kolesnik further agreed that because Mr. Peterson’s symptoms were subjective, proof of his injuries might not appear in a physical examination. Dr. Kolesnik observed Mr. Peterson for only 30 to 40 minutes. He found no physical evidence in his examination to substantiate Mr. Peterson’s subjective symptoms. He testified, for example, that he could not determine if Mr. Peterson could, or could not, lift. He could only state that he found no medical evidence that supported Mr. Peterson’s claim he had pain upon lifting.

22. Dr. Kolesnik issued a supplemental evaluation report on June 8, 2016, in which he specifically addressed the functional capacity evaluation of Mr. Peterson. He



noted, as he did in his prior report, that Dr. Simpkins's report "is confusing and contradictory. He states the patient is 'able to perform the duties of his usual and customary occupation,' but also places him on multiple work restrictions including preclusion from heavy lifting." Nothing in the functional capacity report or Dr. Simpkins's evaluation caused Dr. Kolesnik to change his prior opinion.

*Essential Job Duties of a Correctional Officer*

23. The Department of Corrections prepared a list of the essential job functions of a correctional officer. Two versions of the documents were received. One version of the essential functions list includes the following:

Must be able to work in both minimum and maximum security institutions as well as male and female institutions

Must be able to perform the duties of all the various posts

Must be able to work overtime. Overtime is mandatory and could be 8 hours at one time and on very rare occasions up to 16 hours in situations such as a riot.

[¶] . . . [¶]

[Must be able to] disarm subdue and apply restraints to an inmate

Defend self against an inmate armed with a weapon

[¶] . . . [¶]

Lift and carry continuously to frequently lift and carry in the light (20 pound maximum) to medium (50 pound 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/carrying activities while working in a very cramped space [Lack of punctuation in original.]

Pushing and pulling occasionally to frequently push and pull while opening and closing locked gates and cell doors throughout the work day pushing and pulling may also occur during an altercation or the restraint of an inmate [Lack of punctuation in original.]

24. A second version of the Essential Functions list included the following

Head and neck movement frequently to continuously throughout the workday. Move or use head/neck while performing his regular duties including observing and the surveillance of inmates. . . .

Arms movement occasionally to continuously.

Hand and wrist movement frequently to continuously. Move/use as well as grasp and squeeze with their hands and wrists while performing their regular duties. . . .

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.

[¶] . . . [¶]

Perform regular duties on a wide range of working surfaces . . . .

Remain functional with exposure to fumes, gas, and various chemicals . . . . Must be able to defend self, staff, and inmates during incidents when chemical agents are being deployed.

[¶] . . . [¶]

25. On April 2, 2015, Mr. Peterson signed a document related to his position as Correctional Officer titled, "Physical Requirements of Position/Occupational Title." The document details the frequency with which correctional officers are required to perform specific physical tasks. In this document, under the category "Constantly over 6 hours," the "Physical Requirements of Position/Occupational Title" document identifies sitting, standing, running, walking, bending (neck), twisting (neck), twisting (waist), power grasping, simple grasping, repetitive use of hands, and lifting and carrying up to 25 pounds 1.5 miles. In the second unsigned and undated version of this document, the many of these tasks are listed under the category "Frequently 3 – 6 hours."

*Mr. Peterson's Testimony at the Hearing*

26. Mr. Peterson's job title was Facility B, Building 5, Control Booth Officer. As Control Booth Officer, Mr. Peterson was responsible for monitoring all inmate activities in five prison yards, each consisting of two tiers of cells. He monitored all entries and exits into Building 5 while he was in a Plexiglas booth. He controlled the inmate cell doors. He maintained the supplies needed by the officers assigned to building 5, including keys, handcuffs, and batons. He was required to walk to and from the window in his booth to talk to inmates. He carried a "mini 14" firearm across his chest, a radio and a personal alarm. Mr. Peterson began to find it difficult to walk around, stand continuously, turn 270 degrees to observe all areas under his supervision, and stretch to give equipment to other officers as needed.

The Department of Corrections required correctional officers to accept overtime assignments. Mr. Peterson was required to work overtime two to three times a week. Overtime assignments were randomly assigned, and Mr. Peterson was expected to fulfill the job duties of any position in the prison.

27. Mr. Peterson testified about the pain he experienced in his back, shoulders, elbows and feet. He sought medical attention for these conditions in 2010. When his symptoms became more painful, he feared he could not competently do his job and that he was putting other officers at risk as a result. He testified that approximately one month before he retired, the inmates staged a riot in his building. He found he was unable to constantly stand at the booth's window to monitor the inmates without support from another officer. He testified he was in "almost incapacitating" pain. On another occasion, a high custody inmate had a medical emergency and was seizing. As there was limited staff to assist, Mr. Peterson went into the inmate's cell to pull the inmate out, but he had to back out because the pain was too great, and he could not remove the inmate without help from another officer. As a first responder, these incidents convinced Mr. Peterson that he was unable to perform the usual and customary duties of the job, he was a safety risk to other officers, and to explore retirement. He stated he did not want to retire; he liked his work and much preferred to be back at his job.

28. After Drs. Simpkins and Bergey evaluated him, Mr. Peterson provided the Department of Correction's return-to-work coordinator with the results of his examinations. The return-to-work coordinator told him that, given the restrictions placed on his employment by medical doctors, Mr. Peterson was not capable of performing the essential job duties of his position, and he could not return to work.

29. Mr. Peterson's testimony was credible and genuine. He did not appear to exaggerate or equivocate when answering questions. His testimony demonstrated a true and sincerely held belief that his medical conditions compromised his ability to perform the essential job duties and jeopardized the safety of other correctional officers, staff and inmates.

## LEGAL CONCLUSIONS

### *Statutory and Regulatory Authorities*

1. Mr. Peterson has the initial burden to establish that he was, at the time of his application, permanently disabled or substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer. (Evid. Code, §§ 500; 550.) The standard of proof is a “preponderance of the evidence.” (Evid. Code, § 115.)

2. Government Code section 20026 provides in part:

“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. Government Code section 21151, subdivision (a), provides that “[a]ny 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.”

4. Government Code section 21152, subdivision (d), provides that an application for disability retirement can be filed by a CalPERS member.

5. Government Code section 21154 provides in part:

The application shall be made only (a) while the member is in state service, . . . On receipt of an application for disability retirement of a 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. . . .

6. Government Code section 21156, subdivision (a)(1) provides:

If 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, . . .

7. Government Code section 21166 provides:

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.

The jurisdiction of the Workers' Compensation Appeals Board shall be limited solely to the issue of industrial causation, and this section shall not be construed to authorize the Workers' Compensation Appeals Board to award costs against this system pursuant to Section 4600, 5811, or any other provision of the Labor Code.

*Case Law Authorities*

8. In order for Mr. Peterson to receive a disability retirement, he must establish he is disabled and incapacitated for the performance of duty as a correctional officer with the Department of Corrections. The phrase "incapacitated for the performance of duty" means "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Further, Mr. Peterson must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863.)

9. The applicant in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations and to apprehend violators; issuing warnings and serving citations; serving warrants and making arrests. He suffered injury to his right arm while arresting a suspect. There was evidence that Mr. Mansperger could shoot a gun, drive a car, swim, row a boat (but 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 the prisoner away. The court noted "although the need for physical arrests does occur in petitioner's job, they are not a common occurrence for a fish and game warden." (*Id.* at p. 877.) Similarly, the need for him to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding the applicant was not incapacitated for the performance of his duties, the court noted the activities he was unable to perform were not common occurrences and he could otherwise "substantially carry out the normal duties of a fish and game warden." (*Id.* at p. 876.)

10. In *Hosford*, the court held that in determining whether an individual was substantially incapacitated from his “usual duties,” the court must look to the duties actually performed by the individual, and not exclusively at the job descriptions. Horace Hosford, a state traffic officer with the California Highway Patrol, suffered a back injury lifting an unconscious victim. In determining eligibility for a disability retirement, the court evaluated Mr. Hosford’s injuries according to the job duties required of his position as a sergeant, as well as the degree to which any physical problem might impair the performance of his duties. Thus, the actual and usual duties of the applicant must be the criteria upon which any impairment is judged. Generalized job descriptions and physical standards are not controlling nor are actual but infrequently performed duties to be considered. The *Hosford* court found that although Mr. Hosford suffered some physical impairment, he could still substantially perform his usual duties.

The *Hosford* court also rejected Mr. Hosford’s contention that he was substantially incapacitated from performing his usual and customary duties because his medical conditions created an increased risk of future injury. The court held the disability must be presently existing and not prospective in nature.

#### *Evaluation*

11. Competent medical opinions support a finding that Mr. Peterson is disabled and substantially incapacitated from performance of the job duties of a correctional officer. In performing their evaluations of Mr. Peterson, Drs. Simpkins and Bergey interviewed Mr. Peterson and discussed his actual job duties and activities. There is no evidence that Dr. Kolesnik did more than review the Department of Corrections documents relating generally to all correctional officers. Dr. Kolesnik did not consider the duties Mr. Peterson actually performed and, for that reason, his opinion regarding Mr. Peterson’s ability to perform his job duties is less persuasive.

12. Despite Dr. Simpkins’s opinion that Mr. Peterson was able to perform the usual and customary duties of his job, Dr. Simpkins imposed work restrictions that, in fact, rendered Mr. Peterson incapable of carrying out his usual and customary duties. Among other things, Dr. Simpkins determined that Mr. Peterson was precluded from heavy lifting, twisting and torqueing, bending, prolonged weight-bearing and walking on uneven terrain. He further determined that Mr. Peterson’s injuries occurred during the course and scope of his employment. According to the Department of Corrections documents, Mr. Peterson’s job duties require, among other things, that he must be able to work overtime; perform the duties of all of the posts in which a correctional officer may be assigned; subdue an inmate and apply restraints unassisted; twist his body, including his neck and waist, in all directions frequently to continuously; perform his duties on “a wide range of surfaces;” be able to defend himself and others; and carry up to 25 pounds for 1.5 miles. Mr. Peterson described additional job duties and requirements that were precluded by the restrictions imposed by Dr. Simpkins. When the Department of Corrections Return-to-Work Coordinator was presented with Dr. Simpkins work restrictions, he or she determined Mr. Peterson could not return to work.

13. Dr. Bergey performed a physical examination of Mr. Peterson and ordered him to undergo a functional capacity evaluation. After receiving the results of that evaluation, and in consideration of his examination of Mr. Peterson, Dr. Bergey opined that Mr. Peterson was unable to perform his usual and customary job duties and was “a candidate for a medical retirement.”

14. Although Dr. Kolesnik testified at the hearing, he had no independent recollection of Mr. Peterson and simply testified from his report. Dr. Kolesnik candidly testified that he could not prove or disprove that Mr. Peterson experienced the pain he described because the symptoms were subjective and may not appear from a physical examination. Dr. Kolesnik did find evidence that Mr. Peterson had certain conditions that could cause discomfort and pain. Dr. Kolesnik spent only 45 minutes interviewing and examining Mr. Peterson. His experience with job duties of correctional officers was limited at best and he did not discuss Mr. Peterson’s job duties with him.

15. CalPERS requested the administrative law judge consider *In Re Keck*, Precedential Decision 00-05, September 29, 2000, in reaching a determination in this case. The case was considered but, the facts were found to be significantly distinguishable from those in the present case. In the *Keck* matter, the administrative law judge found that expert testimony established that the applicant was exaggerating her symptomatology. This finding was based on inconsistencies within the applicant’s records of medical examinations conducted by other physicians. Medical professionals were unable to find any objective basis to support several of the symptoms claimed by the claimant. Additionally, the claimant’s condition appeared to improve at times.

In the present case, no evidence was presented that there were inconsistencies in Mr. Peterson’s records. While Dr. Kolesnik opined that Mr. Peterson may have been exaggerating symptoms, Dr. Kolesnik agreed that he could not state with certainty that Mr. Peterson was not in pain as he claimed to be. Further, there was objective evidence to substantiate Mr. Peterson’s symptoms. There were medical findings of bulging discs and degenerative disease that could be the basis for the symptoms Mr. Peterson described.

16. Significantly, Mr. Peterson described two specific instances in which he was unable to perform his job duties as required due to his medical condition. No evidence was presented to dispute those events. Mr. Peterson’s testimony supported Dr. Simpkins’s and Bergey’s reports and opinions of his ability, or lack thereof, to perform essential functions of his job.

17. Based on the above, Mr. Peterson established he is substantially incapacitated from performing the usual and customary duties of a correctional officer with the Department of Corrections City within the meaning of *Mansberger* and *Hosford, supra.*

ORDER

Albert R. Peterson's appeal of CalPERS's determination that he was not permanently disabled or incapacitated from performance of his duties as a Correctional Officer at the time he filed his application for industrial disability is granted.

DATED: September 23, 2016

DocuSigned by:  
*Susan J. Boyle*  
B190697BEFC743F...

---

SUSAN J. BOYLE  
Administrative Law Judge  
Office of Administrative Hearings