

**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:

ADAM M. HEALY,

Respondent,

and

CALIFORNIA STATE PRISON –  
CORCORAN, CALIFORNIA DEPARTMENT  
OF CORRECTIONS AND  
REHABILITATION,

Respondent.

Case No. 2016-0327

OAH No. 2016050897

**PROPOSED DECISION**

Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, heard this matter on November 8, 2016, in Sacramento, California.

Senior Staff Attorney Cynthia Rodriguez represented the California Public Employees' Retirement System (CalPERS).

Ellen Mendelson, Attorney at Law, represented Adam M. Healy (respondent) who was present.

There was no appearance by or on behalf of California State Prison – Corcoran, California Department of Corrections and Rehabilitation (CDCR). CalPERS properly served CDCR with the Notice of Hearing. This matter proceeded as a default against CDCR pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on November 8, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED December 12 2016



## ISSUE

Is respondent still substantially incapacitated from performing the usual duties of a Correctional Officer for CDCR due to an orthopedic (left upper extremity) condition?

## FACTUAL FINDINGS

### *Procedural History*

1. Respondent is 45 years old. He worked for CDCR as a Correctional Officer for approximately 13 years. On November 10, 2011, respondent applied for industrial disability retirement. On April 12, 2012, CalPERS approved respondent's application, based on an orthopedic (left upper extremity) condition. Respondent disability retired, effective March 6, 2012, at 40 years old.

2. In 2015, CalPERS initiated a re-examination of respondent to assess his ability to perform his former job duties pursuant to Government Code section 21192, because respondent was under the minimum age for voluntary service retirement. The re-examination involved a review of information obtained from medical providers, including an Independent Medical Evaluation (IME) performed by Harry A. Khasigian, M.D., on September 15, 2015, and information obtained from respondent regarding the scope, nature, and earnings of any employment.

3. After reviewing respondent's medical and employment information, CalPERS determined that respondent was no longer substantially incapacitated from performing the duties of a Correctional Officer. Respondent appealed from CalPERS' determination.

### *Respondent's Disability Retirement Application*

4. In his disability retirement application (Application), respondent described his disability, as follows:

(Neck, back and upper extremities) On 10/01/09 while performing my duties as a Correctional Officer at the California State Prison-Corcoran (CSP-COR), I was assaulted by an inmate and a struggle ensued. In the course of the struggle, I suffered the above mentioned injuries. I have since received medical treatment, however, without significant success. Currently, I continue to experience extreme pain which travels from the upper shoulder region down through both my arms. Additionally, I experience constant pain and stiffness in my neck region. (Lower back) On 04/18/99 I suffered an injury to my lower back when I was assaulted by an inmate. I have since continued to receive medical treatment for this injury.

Currently, I experience lower back pain which radiates down my lower extremities. At this point my condition affects my ability to perform the essential functions of my job. Also my recent injury in combination with this injury have an adverse effect on my ability to continue to perform the essential functions of my job. My treating physician has also indicated that it is very likely I will no longer be able to perform my job as a Correctional Officer due to these injuries.

5. In response to the question on the Application that asks what limitations or preclusions resulted from his injury or illness, respondent stated: "No inmate contact, over head lifting, heaving lifting, pulling, pushing, gripping or grasping." In response to the question asking how his injury or illness affected his ability to perform his job, respondent stated: "Due to my physical condition and doctors restrictions, I am no longer able to perform the essential functions of my job." In response to the question asking whether he was currently working in any capacity, respondent stated: "No."

#### *Duties of a Correctional Officer*

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

7. The Physical Demands section of the Job Analysis specifies that a Correctional Officer must occasionally (one-third or less of the workday) to continuously (two-thirds or more of the workday) walk, stand, and sit, depending on the assignment; occasionally to frequently (from one-third to two-thirds of the workday) climb, stoop or bend; and occasionally run, crawl, and crouch. It also specifies that a Correctional Officer must be able to lift and carry 20 to 50 pounds frequently; lift and carry over 100 pounds occasionally; physically restrain, lift and carry an inmate; push and pull while opening and closing locked gates and cell doors throughout the work day; reach while performing regular duties, including operating automatic doors, searching inmates and their property, issuing keys and equipment, and locking and unlocking doors; reach overhead while performing cell or body searches, seeking out contraband, obtaining necessary supplies, and operating tower spotlights; move and use their arms freely while performing their regular duties; have adequate head and neck movement to observe inmates; and move, use and grasp with their hands and wrists while performing their regular duties, including when opening and closing locked gates and cell doors, applying restraint devices, operating computers, loading and unloading weapons, operating radios, operating spotlights, and using weapons.

8. The essential functions of a Correctional Officer are set forth in the CDCR, Division of Adult Institutions Correctional Officer Essential Functions form. The form lists 37 essential job functions of a CDCR Correctional Officer, including the following:

- Must be able to perform the duties of all the various posts.
- Must range qualify with departmentally approved weapons, keep firearm in good condition, fire weapon in combat/emergency situations.
- Must be able to swing a baton with force to strike an inmate.
- Disarm, subdue and apply restraints to an inmate.
- Defend self against inmate armed with a weapon.
- Run occasionally; run in an all-out effort while responding to alarms or serious incidents distances varying from a few yards to up to 400 yards, running may take place over varying surfaces including uneven grass, dirt areas, pavement, cement, etc. Running can include stairs or several flights of stairs maneuvering up or down.
- Climb occasionally to frequently ascent/descent or climb a series of steps/stairs, several tiers of stairs or ladders as well as climb onto bunks/beds while involved in cell searches, must be able to carry items while climbing stairs.
- Crawl and crouch occasionally. Crawl or crouch under an inmate's bed or restroom facility while involved in cell searches. Crouch while firing a weapon or while involved in property searches.
- Stoop and bend occasionally to frequently. Stoop and bend while inspecting cells, physically searching inmates from head to toe, and while performing janitorial work, including mopping and cleaning.
- 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 an inmate, including wrestling an inmate to the floor. Drag/carry an inmate out of the cell. Perform the lifting/carrying activities while working in 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.
- Reaching occasionally to continuously overhead while performing cell or body searches, etc.
- Must have the mental capacity to judge an emergency situation, determine the appropriate use of force, and carry out that use of force. Use of force can range from advising an inmate to cease an activity to firing a lethal weapon at an inmate when another life is threatened with great bodily harm or death.

9. On June 20, 2015, a CDCR representative completed a Physical Requirements of Position/Occupational Title form for respondent's position. According to that form, a Correctional Officer must be able to engage in the following physical activities:

- Constantly (over 6 hours) walking, reaching (below shoulder), fine manipulation, simple grasping, repetitive use of hands, and lifting or carrying up to 10 pounds.
- Frequently (up to 6 hours) sitting, standing, twisting (at the neck), reaching (above shoulder), pushing and pulling, lifting or carrying 11 pounds to 25 pounds, and walking on uneven ground.
- Occasionally (up to 3 hours) running, crawling, kneeling, climbing, squatting, bending (at the neck and waist), twisting (at the waist), power grasping, keyboard use, mouse use, lifting or carrying 26 pounds to in excess of 100 pounds, and driving.

*Respondent's Testimony*

10. Respondent began working for CDCR in 1996. He completed a series of physical fitness examinations and specialized trainings to qualify for his position. This included tests that demonstrated his grip strength and ability to push, pull, lift, and carry certain objects. His weapons qualification tests required him to demonstrate that he could effectively utilize a rifle by supporting it with his non-dominant hand while squeezing the trigger with his dominant hand. He also had to demonstrate that he could utilize a baton proficiently, by performing a series of baton strikes and blocks.

11. As part of his daily routine at Corcoran State Prison, respondent participated in cell searches multiple times each day that required him to restrain inmates, and to move mattresses weighing approximately 30 pounds as well as storage containers weighing as much as 50 pounds. Respondent also had to regularly defend himself and others from inmate attacks. He described the inmate attacks as "constant," and stated that "if [an inmate attack did not occur] everyday, it [occurred] every couple of days." Respondent obtained multiple injuries due to inmate attacks during his time at CDCR, including being stabbed in the hand and being kicked in the torso, which resulted in two ruptured discs in his lower back.

12. On October 1, 2009, respondent was attacked by an inmate after he approached the inmate and asked for identification. The inmate punched respondent in the jaw, throat, and chest several times. Respondent returned punches and eventually utilized pepper spray and his baton to subdue the inmate. When the altercation ended, respondent had bruises on his neck and face and thought his jaw was broken. He was evaluated by his primary treating physician, Marc Johnson, M.D., and returned to work on his next scheduled workday.

13. After returning to work, respondent's neck began to stiffen. Over the course of approximately a month, his neck became "tighter and tighter" until he "was unable to move his head from left to right." In November 2009, respondent saw Dr. Johnson multiple times regarding his neck stiffness. Respondent was diagnosed with Thoracic Outlet Syndrome and brachial plexopathy. He received work restrictions which placed him on light duty and recommended that he avoid inmate contact. Those work restrictions effectively

took respondent off work. He applied for disability retirement in November 2011, and was independently evaluated by Alice Martinson, M.D., in March 2012. In her April 2012 IME Report to CalPERS, Dr. Martinson determined that respondent was substantially incapacitated for the performance of his usual duties as a Correctional Officer. Respondent disability retired, shortly thereafter.

14. Respondent testified that he still cannot meet certain job requirements due to his condition. He asserted that as a result of the October 2009 altercation, he has numbness in three fingers on his left hand, has difficulty grasping, has a loss of strength in his left arm, and has difficulty raising his left arm to shoulder level. Respondent claimed that due to these limitations he cannot proficiently use a baton or rifle because he cannot perform two-arm baton strikes and cannot raise and support a rifle with his non-dominant hand to fire it. Respondent also asserted that his condition prevents him from protecting himself or others from inmates. He takes Tramadol for pain relief, and testified that this prevents him from performing the job duties of a Correctional Officer because it makes him less alert. Respondent is also concerned that his current condition will preclude him from completing physical requirements of Correctional Officer training. He completes certain exercises every day as recommended by his physical therapist, which has resulted in some pain relief and improved flexibility.

15. Respondent currently works as a security shift manager and supervisor for Caesars' Harrah's and Harveys Lake Tahoe Hotels and Casinos. He supervises security officers and also performs managerial duties related to security personnel, including payroll, scheduling, disciplinary actions, and promotions. He described his primary responsibility as guest service. He is not required to carry a firearm to perform his duties.

#### *2011 Physician's Report on Disability*

16. To support his claimed incapacity, respondent submitted a CalPERS Physician's Report on Disability (Physician's Report), signed by Dr. Johnson on November 2, 2011. The Physician's Report was admitted into evidence as administrative hearsay, and has been considered to the extent permitted under Government Code section 11513, subdivision (d).<sup>1</sup> Respondent did not call a medical expert to testify on his behalf or offer any non-hearsay medical evidence to support his claimed ongoing incapacity.

17. The Physician's Report is one of the documents respondent submitted to CalPERS in 2011 as part of his disability retirement application package. The document specifies that respondent saw Dr. Johnson on October 2, 2009 and had subjective complaints

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<sup>1</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 be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

of back, neck and arm pain due to a work related injury. In this report, Dr. Johnson provides the following diagnoses: (1) Left shoulder strain, pain, limited range of motion; (2) Thoracic Outlet Syndrome; and (3) brachial plexopathy. Dr. Johnson opined that respondent was permanently incapacitated from the performance of his usual job duties due to “no use of his left arm.” The Physician’s Report indicates that Dr. Johnson reviewed respondent’s job description, but did not review the Physical Requirements of Position/Occupational Title form for respondent’s position prior to reaching his medical opinion.

*Dr. Martinson’s 2012 IME Report*

18. Respondent submitted Dr. Martinson’s April 2012 IME Report, which CalPERS previously reviewed as part of the application package that led to his disability retirement status. Her IME Report was admitted into evidence as administrative hearsay, and has been considered to the extent permitted under Government Code section 11513, subdivision (d).<sup>1</sup> Dr. Martinson’s IME Report was prepared shortly after her evaluation of respondent on March 9, 2012. The report reflects that Dr. Martinson performed a very thorough evaluation of respondent, which included a physical examination and a review of substantial medical records. At that time, Dr. Martinson diagnosed respondent with “[c]hronic regional pain syndrome left upper extremity, etiology undetermined;” and “[n]o evident musculoskeletal or neurological pathology in the cervical spine, lumbar spine and lower extremities.” In the report, Dr. Martinson opined that respondent was incapacitated for the performance of his usual duties because his “left upper extremity abnormalities” prevented him from performing several essential job functions. In response to a question from CalPERS that asks whether respondent’s incapacity was permanent or temporary, Dr. Martinson responded as follows:

Since the exact diagnosis and therapeutic plan has not been made for this man at this time, I can only conclude that his incapacity is permanent. If [at] some point in the future his abnormalities are pinpointed and successfully dealt with, he could be re-evaluated for return to duty.

*CalPERS’ Expert*

INDEPENDENT MEDICAL EVALUATION BY HARRY A. KHASIGIAN, M.D.

19. Harry A. Khasigian, M.D., testified at hearing. Dr. Khasigian is a board-certified orthopedic surgeon and certified Fellow of the American Academy of Orthopedic Surgeons with training and experience in the diagnosis and treatment of orthopedic conditions. On September 15, 2015, he performed an IME on respondent and prepared a nine-page report.

20. Respondent told Dr. Khasigian that he experienced pain when he engaged in “lifting, pushing, pulling and reaching with the shoulder” and that he had been previously diagnosed with brachial plexopathy and Thoracic Outlet Syndrome. He complained of pain



and weakness in his left arm and burning in the lateral three fingers on his left hand, pain in his spine, and pain and muscle tightness in his left scapula. The results of Dr. Khasigian's physical examination of respondent were largely normal, except that the Jamar Dynamometer examination indicated reduced strength in respondent's left hand.

21. Dr. Khasigian diagnosed respondent with "[s]capular pain, unknown etiology," and opined that respondent was temporarily incapacitated for the performance of his usual job duties, based on his subjective complaints of pain. By way of a letter, dated October 16, 2015, CalPERS informed Dr. Khasigian that the opinions in his IME report must be based on objective findings and not subjective complaints. Additionally, the letter specified that "[b]ased on the Medical Qualifications for Disability Retirement standard ... a member must have 'an actual and present (not prospective) inability to substantially perform the member's actual and usual job duties. If a disability is not currently present but just may occur in the future, the member is currently ineligible for CalPERS disability retirement. Furthermore, prophylactic restrictions are not a basis for a disability retirement.'" Through this letter, CalPERS requested that Dr. Khasigian review the Medical Qualifications for Disability Retirement again and respond to certain questions from CalPERS based on objective findings.

22. On October 27, 2015, Dr. Khasigian prepared a 15-page Amended IME Report, in which he again diagnosed respondent with scapular pain of unknown etiology. He opined that although respondent complained of weakness in his left upper extremity with pushing and pulling, power grasping, repetitive use, and fine manipulation, there was no apparent physical dysfunction or impairment upon examination. He added that there was no atrophy or motor or sensory weakness despite respondent having been on disability for six years. Dr. Khasigian concluded that respondent was not presently substantially incapacitated for the performance of his usual job duties.

#### TESTIMONY OF DR. KHASIGIAN

23. Dr. Khasigian's testimony at hearing was consistent with his Amended IME Report. He reiterated when he concluded respondent was substantially incapacitated for the performance of his usual job duties in the September 2015 IME Report, his opinion was based largely on respondent's subjective complaints of pain and was not supported by objective medical findings. After receiving the letter from CalPERS asking for clarity, he realized that he has applied an incorrect standard and prepared the Amended IME Report utilizing the standard applicable for CalPERS disability retirement. He stated that respondent's physical examination was normal and did not support his claimed incapacity. He found no atrophy or loss of motion to indicate dysfunction. There was no evidence of fractures and neither the MRI nor EMG showed any abnormalities.

24. It was also Dr. Khasigian's opinion that respondent had been misdiagnosed on several occasions by medical providers. He opined that the Thoracic Outlet Syndrome diagnosis was incorrect, because respondent had no arterial blockage and because "men don't get Thoracic Outlet Syndrome." He felt the brachial plexopathy diagnosis was also a

misdiagnosis because respondent's brachial plexus MRI was completely normal and showed no compression of the brachial plexus or arteries.

*Discussion*

25. Incapacity for performance of duty must be based on competent medical evidence. (Gov. Code § 20026.) Dr. Khasigian opined that respondent is not substantially incapacitated from performing his job duties. He reached this opinion based on his medical training and expertise, examination of respondent, review of respondent's medical records, and application of the standard used for CalPERS disability retirement. Dr. Khasigian testified that respondent's claimed incapacity was not supported by his examination or respondent's medical records and there was no competent medical evidence that respondent was precluded from performing his usual job duties. No medical expert testified on behalf of respondent. His medical evidence was provided entirely through the hearsay statements of Drs. Johnson and Martinson. Those statements alone are not sufficient to support a finding in an administrative hearing.<sup>1</sup> While respondent testified in detail about his limitations and that he believes those limitations prevent him from performing certain job requirements, he did not present competent medical evidence to establish that he is currently substantially incapacitated for the performance of his job duties. As a result, CalPERS' request that respondent be involuntarily reinstated from industrial disability retirement is granted.

## LEGAL CONCLUSIONS

1. In accordance with Government Code section 21192, CalPERS re-evaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

The board ... may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination .... The examination shall be made by a physician or surgeon, appointed by the board .... Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency ... where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

2. Government Code section 21193 governs the reinstatement of a recipient of disability retirement determined to no longer be substantially incapacitated for duty and, in relevant part, provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

3. Government Code section 20026 defines “disability” and “incapacity for performance of duty,” and, in relevant part, provides:

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board ....on the basis of competent medical opinion.

4. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term “incapacity for performance of duty” as used in Government Code section 20026 (formerly section 21022) to mean “the *substantial* inability of the applicant to perform his usual duties.” (Italics in original.) In *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 862 the court held that a disability or incapacity must currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient. Furthermore, in *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff’s subjective complaints alone, without competent medical evidence to substantiate the complaints, were insufficient to support a finding that he was permanently incapacitated for the performance of his duties.

5. When all the evidence is considered, CalPERS established through competent medical evidence that respondent is no longer substantially incapacitated for the performance of his usual duties as Correctional Officer for CDCR. Although respondent asserted subjective complaints of disability and hearsay evidence of incapacity in 2011 and 2012, he did not present competent medical evidence to establish that he is presently permanently and substantially incapacitated from performing his usual duties as a Correctional Officer for CDCR. Consequently, CalPERS’ request that respondent be involuntarily reinstated from industrial disability retirement is granted.

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**ORDER**

**Respondent's appeal is DENIED. The request of California Public Employees' Retirement System to involuntarily reinstate respondent Adam M. Healy from industrial disability retirement is GRANTED.**

**DATED: December 8, 2016**

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*Ed Washington*  
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**ED WASHINGTON**  
**Administrative Law Judge**  
**Office of Administrative Hearings**