

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Statement of Issues
(Application for Industrial Disability
Retirement) of:

MARLON J. CONCEPCION,

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION, CALIFORNIA
MEDICAL FACILITY, VACAVILLE,

Respondent.

Case No. 2015-0424

OAH No. 2015061080

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on February 25, April 18, and July 25, 2016.

Rory J. Coffey, Senior Staff Attorney, represented petitioner Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Ellen Mendelson, Attorney at Law, represented respondent Marlon J. Concepcion.

There was no appearance by, or on behalf of, California Department of Corrections and Rehabilitation, California Medical Facility, Vacaville (CDCR).

Evidence was received and the record was left open for closing written argument. CalPERS submitted an opening brief on October 20, 2016, which was marked exhibit 26. Respondent Concepcion submitted an opening brief on October 25, 2016, which was marked exhibit P. CalPERS opted not to submit a reply brief. Respondent Concepcion submitted a

reply brief on November 14, 2016, which was marked exhibit Q. The matter was submitted on November 14, 2016.

ISSUE PRESENTED

Whether respondent Concepcion was substantially incapacitated for the performance of his usual duties as a Registered Nurse for respondent CDCR, at the time he applied for an industrial disability retirement.

FACTUAL FINDINGS

1. Petitioner/complainant Anthony Suine filed the Statement of Issues solely in his official capacity as Chief of the CalPERS Benefits Services Division.

2. Respondent Concepcion was employed by respondent CDCR. At the time that respondent Concepcion filed his application for retirement, he was employed as a Registered Nurse at California Medical Facility, Vacaville, California (CMF). By virtue of his employment, respondent Concepcion is a state safety member of CalPERS subject to Government Code section 21151.

3. On or about August 21, 2013, respondent Concepcion signed an application for industrial disability retirement. In filing the application, disability was claimed on the basis of orthopedic (back) and psychological (depressive disorder) conditions. Respondent Concepcion retired for service effective July 10, 2013, and has been receiving his retirement allowance from that date.

4. CalPERS obtained medical reports concerning respondent Concepcion's claimed areas of injury from medical professionals. After review of the reports, CalPERS determined that respondent Concepcion was not permanently disabled or incapacitated for performance of the usual duties of a Registered Nurse at the time his application for industrial disability retirement was filed.

5. Respondent Concepcion was notified of CalPERS' determination and was advised of his appeal rights by a letter dated August 27, 2014.

6. Respondent Concepcion filed a timely appeal by letter dated September 10, 2014, and requested a hearing.

Usual Duties for a Registered Nurse Employed by Respondent CDCR at CMF

7. A document entitled "California Correctional Health Care Services: Registered Nurse Essential Functions List" was received in evidence to establish the usual duties of a Registered Nurse employed by respondent CDCR. The listed administrative

duties most relevant to respondent Concepcion's contention that he is substantially incapacitated from his usual duties include working in minimum and maximum security institutions and performing all of the duties within the scope of practice of a registered nurse. Among the listed "physical functions," the most relevant are having sufficient strength and agility to perform during stressful situations without compromising the health and well-being of the nurse or others; remaining alert and focused to evaluate and respond to dangerous or emergency situations; moving occasionally or continuously about the institution covering long distances; accessing all floors by flights of stairs; stooping, bending, twisting occasionally or continuously; frequently lifting and carrying loads up to 50 pounds; occasionally or frequently lifting over 100 pounds such as when preventing a patient from falling; and occasionally or frequently pushing or pulling. Among the listed nursing functions, the most relevant are administering medication and treatments; giving injections; and maintaining accurate and detailed reports in the medical record.

8. Attached to the document described above is what appears to be respondent Concepcion's own description of his usual duties. Respondent began the document with a description of the physical characteristics of his former workplace. The older buildings in which respondent worked are three-stories and the elevators were often inoperable or occupied by others so the top two floors must often be accessed by stairs. The doors separating areas are heavy. Prior to his retirement, respondent was working in a medical housing unit on a shift that began at 6:45 a.m. and ended at 3:00 p.m. His work involved prolonged, repetitive activities such as sitting, standing, walking, lifting, carrying, pushing and pulling. His work also involved bending, stooping, crouching and climbing. He had to use his hands to reach and handle objects.

9. In his statement of his usual duties, respondent included those usual duties listed among a CDCR nurse's essential functions that caused him particular difficulty. The first category he characterized as "Exertional Activities," and these included the requirement that a nurse move about the institution covering long distances in all types of weather and on varying surfaces. Respondent estimated that during his shifts, he walked a total of four to six miles. If respondent were designated a "first responder," he had to move briskly to the emergency and load a sometimes very heavy patient on a gurney. If assigned to the Emergency Room, he was on his feet six or seven hours and occasionally longer if held over after his shift. When assigned as "suicide watch" nurse, respondent had to sit for eight hours with short breaks. As the medication nurse, respondent must make two rounds to the cells of patients passing out medications and pushing and pulling a medication cart weighing over 100 pounds. Respondent's second category is "Non-Exertional Activities," under which he listed use of his fingers and hands and patient treatment. He described his difficulties when changing dressings on a patient involving reaching or turning the patient over. When assisting physicians performing minor surgical procedures, he must be on his feet for some time. He had difficulty inserting IV lines, pushing "crash carts," and responding quickly to emergencies. Respondent's last category is "Cognitive Activities," and he described his impaired ability to remain alert and focused, and to evaluate and respond to emergency situations.

10. Respondent Concepcion also submitted into evidence a CalPERS form entitled Physical Requirements of Position/Occupational Title for a Registered Nurse at CMF. The form was signed by respondent Concepcion and a CMF Return to Work Coordinator on August 20, 2013, and September 3, 2013, respectively. The form lists physical requirements and the frequency of such activities for the position held by respondent. The relevant activities include constant sitting, standing, walking, squatting, bending, twisting, reaching, pushing, pulling, power grasping, and fine manipulation. Also listed is frequent lifting of weight beyond 100 pounds.

11. Respondent Concepcion provided more details about his actual duties as a Registered Nurse prior to his retirement in his testimony at the administrative hearing. After the first of two injuries described below, respondent was moved from a psychiatric unit to an acute treatment ward. He was assigned the job of medication nurse on the ward. According to respondent Concepcion, the change was made because of weight lifting limitations imposed in connection with a worker's compensation claim he made for the first injury.

12. Respondent Concepcion's medication nurse tasks included making two rounds per shift to dispense medications prescribed for the inmate patients. He pushed the approximately 160-pound medication cart from cell to cell until his rounds were completed. If medications were needed that were not on the cart, he went to a lower level floor to obtain them. Respondent Concepcion also delivered food to the inmate patients between medication rounds, pushing one approximately 400-pound food cart and pulling another. Another responsibility was bathing inmate patients, which typically involved moving them from a hospital-style bed to a gurney for transportation to and from the showers or assisting their movements to and from the showers in wheelchairs. Respondent Concepcion also had to check urine bags for inmate patients with catheters, which necessitated bending down to inspect the bags.

Competent Medical Opinion

Complainant's Medical Opinion Evidence: Orthopedic Issues

J. Hearst Welborn, M.D.

13. Respondent Concepcion was evaluated by independent medical examiner J. Hearst Welborn, M.D., a board-certified orthopedic surgeon, at the request of CalPERS. Dr. Welborn examined respondent Concepcion on July 16, 2014, and prepared a report on the same day, which was received in evidence. Dr. Welborn testified at the administrative hearing and explained the contents of his report.

14. Dr. Welborn reviewed the cover letter sent to him by CalPERS outlining his assignment and the relevant legal standards. Dr. Welborn also reviewed the documents describing respondent Concepcion's usual duties which are summarized above. He reviewed medical records and associated documents.

15. Dr. Welborn obtained a history and description of respondent Concepcion's "present illness," by interviewing respondent Concepcion. Respondent Concepcion told Dr. Welborn that he was 53 years old and began having low back pain and bilateral leg pain on April 28, 2011, after he tried to lift a patient while working at CMF and fell after slipping on blood. Respondent Concepcion did not fall to the floor because he was able to hold on to a gurney. Respondent Concepcion was treated with pain medications and physical therapy. An MRI was performed. After two months of modified duty, he was returned to full duty. Respondent Concepcion told Dr. Welborn that he continued to have low back and leg pain.

16. Respondent Concepcion related to Dr. Welborn that he was injured again while working at CMF on August 28, 2012. On this occasion, he was giving an inmate patient medication when the patient tried to punch him. Respondent fell backwards trying to dodge the patient's fist and twisted his back. A second MRI was performed and respondent was taken off work. He was restricted to lifting no more than 85 pounds and because his job duties required him to lift 100 pounds, he was not able to work. He was treated with aqua therapy and pain medications. Respondent Concepcion also told Dr. Welborn that he had a Post-Traumatic Stress Disorder (PTSD) and suffered from depression.

17. Respondent rated his low back pain as 7 or 8 on a 10 point scale, or a 9 when he did not take prescribed pain medications. He said the pain was constant. He rated the pain in his buttocks at the same levels and said that it was also constant. He did not experience numbness, tingling or weakness in his legs. He walked with a cane most of the time to help with his balance. Respondent was taking Tramadol two to three times a day and Norco two or three times a week.

18. Dr. Welborn reviewed the September 8, 2011 and May 16, 2013 MRI reports. The first MRI revealed a two to three millimeter disc protrusion at level L4-5 and less than a two millimeter disc bulge at level L5-S1. Dr. Welborn reviewed the reports relating to past treatment and evaluation of respondent Concepcion. A September 23, 2013 EMG report showed no evidence of lumbar radiculopathy.

19. Dr. Welborn performed an orthopedic physical examination of respondent Concepcion. He reported tenderness in respondent's low back on palpation including what he described as "very tender" right L5-S1 and the S1 joint area. Respondent Concepcion could only flex his knees to 45 degrees and could not squat. Dr. Welborn recorded a positive response in respondent Concepcion's back when performing the straight leg raises while lying down and while sitting. Dr. Welborn's assessment included lumbar degenerative disc disease and lumbar strain.

20. Dr. Welborn concluded that respondent Concepcion was not substantially incapacitated, from an orthopedic standpoint, for performing his usual duties as a Registered Nurse. Dr. Welborn explained that respondent Concepcion complained of severe pain, but there were no significant findings in the MRI reports beyond some very mild degenerative changes that would cause the pain. Dr. Welborn described respondent's significantly limited motion in his lumbar spine examination as "self-limiting." Dr. Welborn felt that respondent

Concepcion did not put forth his best effort and was exaggerating his lumbar motion and low back pain.

Respondent's Medical Opinion Evidence: Orthopedic Issues

21. Respondent Concepcion did not call any qualified medical experts to testify regarding his orthopedic condition. Respondent Concepcion offered several reports authored by physicians specializing in pain management. These were prepared in the context of respondent's worker's compensation claims relating to his two injuries described above. As noted, none of these physicians testified at the administrative hearing and CalPERS raised a timely objection to the receipt of hearsay evidence. Thus, the reports were received as hearsay and, in accordance with Government Code section 11513, subdivision (a), in the face of a timely objection by the party-opponent CalPERS, they cannot be used as the sole evidence to support a finding of orthopedic disability.

Complainant's Medical Opinion Evidence: Psychiatric Issues

Michael Goldfield, M.D.

22. Respondent Concepcion was examined by independent medical examiner Michael Goldfield, M.D., a board-certified psychiatrist, at the request of CalPERS. Dr. Goldfield examined respondent Concepcion on July 8, 2014, and prepared a report on the same day, which was received in evidence. Dr. Goldfield testified at the administrative hearing and explained the contents of his report.

23. Dr. Goldfield reviewed the cover letter sent to him by CalPERS outlining his assignment and the relevant legal standards. Dr. Goldfield also reviewed the documents describing respondent Concepcion's usual duties which are summarized above. He reviewed medical records and associated documents.

24. In his report, Dr. Goldfield noted that respondent worked at CMF as a Registered Nurse from January 7, 2008, until he left the job in June of 2013. Respondent Concepcion described the August 28, 2011 injury as slipping on blood on the floor while trying to transfer an inmate patient from a backboard onto a gurney. Respondent Concepcion twisted his back trying to remain upright. Respondent Concepcion was off work for approximately one year from the injury. The diagnosis was lumbar strain. The August 28, 2012 injury occurred when respondent was giving out medications. An inmate patient tried to lunge at him and the correctional officer standing behind respondent Concepcion restrained the inmate. Respondent's movement to evade the inmate reinjured his back.

25. Respondent was reported absent without leave from May 1, 2013, and May 29, 2013, and was terminated. He appealed the termination and was permitted to resign effective June 7, 2013, and he waived his rights to return to work for CDCR.

26. Respondent Concepcion told Dr. Goldfield that he was seeing psychologist Frank Luchetti, who had diagnosed him as having PTSD and a pain disorder. He was seeing Dr. Luchetti every two weeks.

27. Respondent Concepcion told Dr. Goldfield that he felt depressed and cried "eight days out of the week." When Dr. Goldfield admonished respondent to be honest and not exaggerate, respondent Concepcion said he cried perhaps six or seven days out of a week and this began after the inmate lunged at him. Respondent Concepcion said that he only slept three hours a night and had difficulty concentrating. He had lost confidence in himself. When respondent Concepcion told Dr. Goldfield that he had been suicidal and tried to cut his wrists in April of 2014, Dr. Goldfield examined his wrists and found no scars.

28. Respondent Concepcion reported that beginning in December of 2013, he began having nightmares about the inmate lunging at him. He denied panic attacks, but described flashbacks about the inmate attack five times a week beginning in December of 2013.

29. Respondent said that he took Tramadol 50 mg. twice a day and Ultracet (Tramadol and acetaminophen) three times daily for his back. He brought the prescription bottles and Dr. Goldfield noticed that the bottles were full even though the prescriptions were dated January 6, 2014, and March 14, 2013 respectively.

30. Respondent Concepcion told Dr. Goldfield that he was not working, but Dr. Goldfield had reviewed records showing payments to respondent Concepcion for care of a private patient. When pressed about the apparent inconsistencies, respondent Concepcion acknowledged that he cared for a mentally impaired man with cerebral palsy and worked six to eight hours a day for four or five days a week in the home of the man's mother. His tasks included suctioning the patient's tracheotomy, feeding him through a gastrointestinal tube, and giving him medications. He had been doing the work since 2007 as time permitted and this included the time that he was off work because of the injuries that occurred at CMF.

31. Dr. Goldfield reviewed medical records provided to him. Respondent Concepcion's first psychological evaluation was performed by Dr. Green, a psychologist, on April 20, 2012. The results of psychological tests completed by respondent Concepcion suggested that respondent Concepcion may not have been forthright in his responses to questions to make his life look worse than it actually was. Respondent Concepcion perceived even the mildest pain he experienced as intolerable and disabling. He seemed to be more disabled than the objective medical information would predict. Respondent described high levels of anxiety and depression, as well as suicidal ideation. However, when asked if he had any of the specific clinical features associated with mental illness, respondent Concepcion answered "no" to each including unusual thoughts or peculiar experiences, undue suspiciousness or hostility, extreme moodiness, unhappiness and depression, and anxiety. Dr. Green concluded that respondent Concepcion's psychological condition did not impair his overall ability to participate in employment.

32. Dr. Goldfield reviewed the records of Dr. Luchetti, Ed.D., relating to respondent Concepcion's cognitive therapy sessions following the second injury. Dr. Luchetti took respondent Concepcion off work from March 20, until May 1, 2013, as temporarily totally disabled.

33. Dr. Goldfield noted that on October 3, 2013, Grace Jebara, MFT, diagnosed respondent Concepcion with PTSD and a Mood Disorder due to his general medical condition. She also diagnosed him as suffering from an Anxiety Disorder due to a general medical condition. She recommended cognitive treatment sessions.

34. Helena F. Taylor, Ph.D., issued a report dated December 2, 2013, addressed to the State Compensation Insurance Fund (SCIF). Part of the evaluation involved administration of the Minnesota Multiphasic Personality Inventory (MMPI)-2RF. The results were deemed invalid because respondent Concepcion reported a considerably larger than average number of symptoms rarely described by individuals with a genuine severe psychopathology. The Millon Clinical Multiaxial Inventory (MCMI)-3 noted exaggeration as respondent Concepcion reported more psychological symptoms than objectively existed. Other psychological test results placed respondent Concepcion in the severe range for depression and anxiety. Dr. Taylor diagnosed respondent as having PTSD, a Major Depressive Episode, and a pain disorder. Dr. Taylor felt respondent was not deliberately exaggerating his symptoms for secondary gain.

35. Dr. Goldfield diagnosed respondent Concepcion as suffering from Depressive Disorder Not Otherwise Specified with some anxiety. He characterized the depression as mild. Dr. Goldfield does not agree that respondent Concepcion has PTSD, in part because the second injury did not involve the level of threat required to make the diagnosis. Dr. Goldfield concluded that respondent Concepcion is able to do his job from an emotional standpoint. He is not substantially incapacitated for his usual duties as a Registered Nurse. Dr. Goldfield particularly noted that respondent Concepcion greatly exaggerated his emotional symptoms on psychological tests and that respondent Concepcion was able to care for a cerebral palsy patient for up to eight hours a day. Dr. Goldfield also noted that respondent Concepcion was able to perform as a Registered Nurse with weight lifting restrictions at CMF after his second injury and until his resignation.

Respondent's Medical Opinion Evidence: Psychiatric Issues

Frank J. Lucchetti, Ed. D.

36. Dr. Lucchetti is a California licensed clinical psychologist. SCIF designated him as respondent Concepcion's primary treating doctor for his worker's compensation claim based on his second injury. Dr. Lucchetti saw respondent in this capacity approximately twice a month from in or about February of 2013 until June of 2015 when Dr. Lucchetti retired as a worker's compensation provider. Dr. Lucchetti has since continued to see respondent as a private patient.

37. Dr. Lucchetti testified at the administrative hearing on behalf of respondent Concepcion and his worker's compensation summary reports were received in evidence. Dr. Lucchetti has diagnosed respondent as suffering from Depression, Recurrent, and PTSD. The symptoms relating to these conditions include sleep deprivation causing confusion, memory loss, emotional distractibility, tearfulness, and anxiety. Respondent scored 30 on the Beck Depression Inventory, a self-reporting instrument, indicative of a high level of depression. Dr. Lucchetti feels respondent Concepcion's psychological conditions are the cause of his pain complaints that otherwise seem excessive based on objective findings. Respondent's current treating worker's compensation physician is pain specialist Dr. Gary Martinovsky, who has prescribed Tramadol, Effexor and Norco for respondent Concepcion. The side effects of these medications include drowsiness and nausea.

38. Dr. Lucchetti first mentioned PTSD in his treatment plan as part of his November 19, 2015 treatment summary. Dr. Lucchetti feels that the combination of the dangerous prison environment in which respondent worked along with the particular incident on August 28, 2012, in which an inmate lunged at respondent Concepcion is sufficient to meet the Diagnostic and Statistical Manual (DSM) criteria for PTSD. The criteria include:

[T]he person has been exposed to a traumatic event in which both of the following were present: One, the person experienced, witnessed, or was confronted with a an event or events that involved actual or threatened death or serious injury or a threat to the physical integrity of self or others; and two, the person's response involved intense fear, helplessness, or horror. (DSM IV TR, §309.81.)

39. Dr. Lucchetti expressed that respondent Concepcion is disabled for performance of his usual duties as a Registered Nurse at CMF. However, he clarified that he meant that respondent Concepcion is not 100 percent able to perform such duties which presents a dangerous situation in a prison environment. Later, Dr. Lucchetti, in response to questions posed in cross-examination, said that while respondent is permanently partially disabled for purposes of worker's compensation benefits, Dr. Lucchetti does not have the expertise to determine if that is sufficient to qualify for industrial disability retirement benefits under CalPERS law. When recalled to testify on the third day of hearing, Dr. Lucchetti said that he felt that respondent Concepcion should not and cannot return to his registered nursing job at CMF. He reiterated that he believes that respondent Concepcion meets the DSM criteria for PTSD.

Resolution of Conflict between Medical Experts Regarding Respondent Concepcion's Psychological Condition

40. Dr. Goldfield's opinion that respondent Concepcion is not substantially incapacitated from his usual duties as a Registered Nurse at CMF was the more persuasive position. The pattern of exaggerated symptoms so evident in respondent Concepcion's orthopedic evaluations was apparent in his responses to standard psychological instruments

to the extent that some were deemed invalid on that basis. The medications that respondent has been prescribed are based on his greatly exaggerated complaints of persistent pain and what he presents as consequential depression and anxiety. There is also considerable doubt about whether respondent is even taking the prescribed medications based on the bottles examined by Dr. Goldfield. After Dr. Goldfield testified, respondent was recalled and said that he was unable to open the pill bottles for the newer prescriptions, so he had his sister open them and pour them into older bottles with larger caps. Respondent Concepcion's pain complaints related to his low back and lower extremities, so it is difficult to conceive of how they impacted the use of his hands. Thus, the acknowledged side effects of these medications should not be a separate basis for a finding of disability if the medications are not appropriate.

41. Dr. Goldfield was also more persuasive regarding whether respondent Concepcion suffers from PTSD. First, the lunging incident does not, as Dr. Goldfield noted, rise to the level of threat required for a traumatic event triggering PTSD symptoms. Second, as Dr. Goldfield also noted, respondent did not describe PTSD symptoms such as flashbacks occurring until December of 2013, approximately a year and a half after the incident, and Dr. Lucchetti's first mention of PTSD in his treatment summary occurred in November of 2015. Finally, PTSD symptoms are largely subjective and respondent's exaggeration of pain associated with his orthopedic injuries and his inflated description of his levels of depression and anxiety reflect that he is certainly inclined to fabricate symptoms if it benefits him.

Sub Rosa Video Taped Surveillance

42. Respondent Concepcion was secretly videotaped on approximately nine occasions between January 22 and July 17, 2014. The unedited videotapes were made available to respondent Concepcion's counsel and the edited version (showing respondent's movements) was received in evidence. Doctors Welborn, Goldfield and Lucchetti were provided the edited version of the surveillance tapes. The edited version shows respondent Concepcion walking, sitting, and getting in and out of vehicles. When walking, respondent Concepcion generally used his cane, but on two occasions he did not. He is shown driving a vehicle and riding as a passenger in a vehicle. Dr. Welborn, in a supplemental report, noted that respondent Concepcion moved easily when walking with his cane and on two occasions walked without it. Dr. Welborn considered the edited videotape provided to him in the formulation of his opinion that respondent Concepcion is not disabled. Respondent Concepcion explained in his testimony that doctors had told him to walk without a cane if possible to improve his balance and mobility. Dr. Goldfield summarized what he observed in the edited videotape in his July 8, 2014 report. Drs. Goldfield and Lucchetti did not rely on the videotape in the formulation of their opinions regarding respondent Concepcion's mental condition.

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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.) The party asserting the affirmative at an administrative hearing has the burden of proof including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn.5, citing *So. Cal. Jockey Club v Cal. etc. Racing Bd.* (1950) 36 Cal.2d 167, 177.)

2. Government Code section 20026 reads, in pertinent 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. Incapacity for performance of duty means the substantial inability to perform usual duties. (*Mansperger v Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876.) In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, at page 860, the court rejected contentions that usual duties are to be decided exclusively by State Personnel Board job descriptions or a written description of typical physical demands. The proper standard is the actual demands of the job. (See also, *Thelander v. City of El Monte* (1983) 147 Cal.App.3d 736.) The ability to substantially perform the usual job duties, though painful or difficult, does not constitute permanent incapacity. (*Hosford, supra*, 77 Cal.App.3d 854, at p. 862.)

4. Respondent Concepcion had the burden of producing evidence to support his application for industrial disability retirement, including the burden to produce “competent medical opinion” that his physical condition rendered him substantially incapacitated for the performance of his usual duties. Respondent Concepcion did not sustain his burden. CalPERS presented competent medical opinion evidence establishing that respondent Concepcion is not substantially incapacitated for the performance of his usual duties as a Registered Nurse at CMF by reason of his claimed orthopedic injuries. Respondent Concepcion did not offer any competent, i.e. non-hearsay, medical evidence to refute CalPERS’s evidence. With regard to respondent Concepcion’s claim that his psychological condition renders him substantially incapacitated, both parties presented competent medical evidence on this issue, but as noted in the Factual Findings, the CalPERS’s expert witness was more persuasive.

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ORDER

Respondent Concepcion's appeal from CalPERS' determination that he was not permanently disabled or incapacitated for the performance of his usual duties as a Registered Nurse at respondent CDCR's prison facility CMF at the time that his application for industrial disability retirement was filed is DENIED.

Dated: December 14, 2016

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Karl Engeman
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KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings