

**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 Industrial  
Disability Retirement of:

SAN JUANA N. NAVARRO,

Respondent,

and

CALIFORNIA DEPARTMENT OF  
CORRECTIONS & REHABILITATION –  
WASCO STATE PRISON,

Respondent.

Case No. 2015-0887

OAH No. 2015101025

**PROPOSED DECISION**

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, was assigned this matter for decision based on the written record pursuant to the parties' agreement.<sup>1</sup>

Austa Wakily, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Attorney Bill Shibley of the Law Office of Steven R. Pingel represented respondent San Juana N. Navarro, who was present throughout the hearing.

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<sup>1</sup> This matter was heard by Administrative Law Judge Gene Cheever, Office of Administrative Hearings, State of California, on November 15, 2016, in Fresno, California. During a January 20, 2017 Telephonic Status Conference, the parties were informed that ALJ Cheever is not available and a new ALJ would be assigned the case. The parties were given the option of retrying the case before the new ALJ, or having the new ALJ decide the matter based on the written record. The parties chose the latter.

No one appeared for or on behalf of respondent California Department of Corrections & Rehabilitation – Wasco State Prison, its default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to that party only.

Evidence was received, the record was closed, and the matter was submitted for decision on February 1, 2017.

### SUMMARY

The sole issue on appeal is whether Ms. Navarro was permanently and substantially incapacitated for the performance of her usual job duties as a Correctional Officer for the California Department of Corrections & Rehabilitation – Wasco State Prison (CDCR – Wasco State Prison) due to an orthopedic (lower back and right arm) condition at the time she submitted her Disability Retirement Election Application. Ms. Navarro did not satisfy her burden of producing persuasive medical evidence establishing she was substantially incapacitated at that or any other time. Therefore, her Disability Retirement Election Application seeking an industrial disability retirement should be denied.

### FACTUAL FINDINGS

#### *Procedural Background*

1. Ms. Navarro is a state safety member of CalPERS subject to Government Code section 21151, subdivision (a),<sup>2</sup> by virtue of her employment as a Correctional Officer with CDCR – Wasco State Prison. She signed, and CalPERS received, a Disability Retirement Election Application (application) seeking industrial disability retirement benefits on June 6, 2014.

2. CalPERS denied Ms. Navarro's application by correspondence dated February 6, 2015. Ms. Navarro timely appealed the denial, and Anthony Suine, Chief of CalPERS's Benefit Services Division, signed the Statement of Issues solely in his official capacity.

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<sup>2</sup> That statute provides, in relevant part:

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

### *History of Alleged Disability*

3. Ms. Navarro described her specific disability on her application as follows: “(Lower back) Bulging discs at the L3/4 & L5/S1 levels with right lower extremity radiculopathy. (Right arm) I have no diagnosis to date, however, I experienced numbness and significant loss of strength.” She indicated her disability occurred on December 27, 2010.

4. Ms. Navarro explained at hearing that she and her partner were attempting to handcuff an inmate on December 27, 2010, when the inmate became combative and hit Ms. Navarro’s partner in the torso. Ms. Navarro used her baton to strike the inmate, while a third correctional officer intervened and sprayed everyone with pepper spray. As Ms. Navarro and her partner continued to struggle to subdue the inmate, she slipped and fell to her knees and then on her right side.

5. After the inmate was subdued, Ms. Navarro went to the medical station to file an incident report. As she was walking to the medical station, she began “getting a sharp pain running down the back of my leg.” The pain was “from the back all the way, shooting down all the way to the back of my leg.” She grabbed a pen to write her report, and noticed she “had no strength in my right hand.”

6. Ms. Navarro filed a workers’ compensation claim, and was taken to Central Valley Occupational Medical Group in Bakersfield, California, for medical treatment on the day of the incident. At the time, she complained of pain in the right forearm, both knees, and the lower back, primarily on the right side. She had no complaints of numbness to the extremities. X-rays were negative for fractures and dislocations. She was prescribed pain medication, and taken off of work.

7. Ms. Navarro continued conservative treatment through the workers’ compensation system. She was released to return to work on December 10, 2012, but was taken back off of work after one week due to an exacerbation of her symptoms. She continues conservative treatment through the workers’ compensation system, and has not returned to work.

### *Physical Requirements of a Correctional Officer*

8. A document entitled “Physical Requirements of Position/Occupational Title” signed by the Return to Work Coordinator for CDCR – Wasco State Prison and Ms. Navarro indicates a Correctional Officer must be able to perform the following physical tasks for the following durations:

Constantly:<sup>3</sup> Sitting, standing, bending at the neck, twisting at the neck, twisting at the waist, fine manipulation, power grasping, simple grasping, repetitive use of hands, lifting/carrying up to 25 pounds, and driving.<sup>4</sup>

Frequently: Climbing, bending at the waist, reaching below the shoulder, pushing and pulling, and lifting/carrying between 26 and 50 pounds.

Occasionally: Running, walking, crawling, kneeling, squatting, reaching above the shoulder, keyboard use, mouse use, and lifting and carrying greater than 50 pounds.

### *Medical Evidence*

#### CALPERS'S EVIDENCE

9. At CalPERS's request, Ghol B. Ha'Eri, M.D., a board-certified orthopedic surgeon, performed an independent medical examination (IME) of Ms. Navarro on December 9, 2014. He prepared a report documenting his IME, and that report was admitted into evidence. He also testified at hearing.

10. At the time of the IME, Ms. Navarro complained of pain in the right side of her neck, which radiated to her right scapular area and right arm and hand. She also complained of low back pain, which radiated to her right leg and was associated with a feeling of numbness in that leg. She had no complaints of pain in either knee. She reported taking Vicodin, as needed, for pain. She also reported she had not returned to work since the December 27, 2010 incident.

11. Physical examination of Ms. Navarro's upper extremities revealed no tenderness or swelling. Range of motion of both elbows and wrists upon flexion, extension, pronation (elbows), supination (elbows), radial deviation (wrists) and ulnar deviation (wrists) was within normal limits. There was no locking of any of the fingers on either hand, and Tinel's sign was negative for carpal tunnel, bilaterally. Finkelstein's test was negative for tenosynovitis, bilaterally.

12. Physical examination of Ms. Navarro's cervical spine revealed posterior cervical tenderness extending to her trapezius muscle on the right side. However, there was no muscle spasm. Range of motion was within normal limits upon flexion, but was limited

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<sup>3</sup> "Constantly" is more than six hours, "frequently" is three to six hours, and "occasionally" is up to three hours.

<sup>4</sup> The most frequent duration was attributed to those tasks for which multiple durations were indicated.

to one-half or less of normal upon extension, right and left lateral bending, and right and left lateral rotation.

13. Ms. Navarro reported tenderness in her lumbosacral area extending to her right buttock. There was no paravertebral muscle spasm. There was only a slight decrease in range of motion upon extension, right and left lateral bending, and right and left lateral rotation.

14. Neurologic examination did not reveal any signs of muscle atrophy due to lack of use in Ms. Navarro's upper or lower arms, bilaterally, thighs, or calves. She had reduced grip strength in her right hand as compared to her left.

15. Dr. Ha'Eri opined Ms. Navarro was unable to perform some of her job duties due to the physical condition of her cervical and lumbar spine. Specifically, he opined she was unable to lift or carry items weighing more than 25 pounds; frequently bend at the waist; squat; forcefully push or pull items; drive for more than three hours in a day; defend herself against an armed inmate; or disarm, subdue, and apply restraint to an inmate. Therefore, Dr. Ha'Eri concluded Ms. Navarro was substantially incapacitated for the performance of her duties as a Correctional Officer, but such incapacity was for less than six months.

16. CalPERS sent Dr. Ha'Eri correspondence requesting clarification of his opinion and reminding him of the appropriate standard for determining whether a member is substantially incapacitated. In response, he submitted a supplemental report in which he concluded Ms. Navarro was not substantially incapacitated. He explained:

After further review of the medical records which do reveal degenerative changes at multiple levels of the spine, it is this examiner's opinion that these changes are not to the level of severity that they would interfere with the claimant's ability to perform her job as a Correctional Officer. Furthermore, there is no neurologic deficit noted in my clinical examination that would warrant the claimant being limited. I here are [sic] no current electrodiagnostic studies to support the presence of a severe neurological deficit.

17. Subsequently, CalPERS obtained an updated MRI of Ms. Navarro's cervical spine and the results of an electrodiagnostic study of her right upper extremity, and forwarded those records for Dr. Ha'Eri's review. Dr. Ha'Eri reviewed the additional records and drafted a supplemental report, in which he commented:

After review of the submitted medical records, this examiner's opinions have not changed. Based on objective findings, the claimant has degenerative changes at multiple levels of the spine. These changes are not severe enough to interfere with claimant's ability to perform her job as a Correctional Officer.

My opinion remains the same, that the claimant is not incapacitated at this time.

18. Dr. Ha'Eri testified in a manner consistent with his original IME report and two supplemental reports. He explained his original opinion that Ms. Navarro was substantially incapacitated on a temporary basis was based on his erroneous use of the standard applicable to workers' compensation claims, rather than that which is applicable to determining eligibility for a disability retirement. Once CalPERS pointed out his error to him and he applied the proper standard, he concluded Ms. Navarro was not substantially incapacitated.

19. Additionally, Dr. Ha'Eri opined Ms. Navarro suffers from degenerative changes to her cervical and lumbar spine which pre-existed the December 27, 2010 incident. He explained that the imaging study of the spine which first revealed those changes "was performed like something like a month and a half after the injury and showed all of those changes. Those things happened over years, not over six weeks."

#### MS. NAVARRO'S EVIDENCE

20. As previously discussed, Ms. Navarro filed a claim for workers' compensation benefits and obtained medical treatment from Central Valley Occupational Medical Group after the December 27, 2010 incident. She continued to treat conservatively through the workers' compensation system through at least the day before hearing in this matter.

#### *KAMAL ELDRAGEELY, M.D.*

21. Dr. Eldrageely was Ms. Navarro's initial primary treating physician at Central Valley Occupational Medical Group, although at least some of the treatment was provided by Kent Simmons, a physician assistant. Physical examination of Ms. Navarro's upper extremities on December 27, 2010, showed no abrasions, obvious erythema, ecchymosis, or edema present. Her right arm was tender in the area between the wrist and mid-forearm area. She had tenderness in her cervical spine in the area just below the right medial scapula. Her lumbar spine was tender in the right lower back from the right midline into the right iliac lateral crest area. She was able to forward flex, with guarding, so that her fingertips touched her knees. Extension was approximately 15 degrees. She was given an injection of Toradol and prescriptions for ibuprofen and Vicodin for pain, and a prescription for a muscle relaxant. She was released from work until her next appointment.

22. Dr. Eldrageely and Mr. Simmons continued to treat Ms. Navarro conservatively and extend her time off from work. On November 15, 2012, Ms. Navarro was able to forward flex her lumbar spine so that her fingertips touched her knees, with some guarding. Extension was 15 degrees, and straight leg raising on the right while sitting caused low back pain, but no hip pain. A similar test on the left did not produce any pain. Ms. Navarro was released from work through December 6, 2012.

23. Ms. Navarro returned for treatment on December 6, 2012. At that time, she was able to forward flex her lumbar spine so that her fingertips touched her knees. Extension had improved to 20 degrees. Straight leg raising continued to produce pain on the right, and also produce pain on the left. Nonetheless, she was released to full duty, starting December 10, 2012.

24. Ms. Navarro returned for treatment on December 17, 2012, and reported she had returned to work one week prior. After one or two days of working, she began experiencing low back pain with right foot pain and numbness. Physical examination of her lumbar spine showed that she was able to forward flex so that her fingertips touched mid-shin, with pain. She was taken back off of work, and never returned.

*RICHARD SALL, M.D.*

25. Dr. Sall is board-certified in occupational medicine, general surgery, and forensic medicine. He took over Ms. Navarro's treatment on February 19, 2014, after Dr. Eldrageely passed away.<sup>5</sup> Dr. Sall wrote on his Primary Treating Physician's Progress Report for that date that "a thorough physical examination was performed," but did not document his findings. None of his subsequent Primary Treating Physician's Progress Reports documented his findings upon physical examination, despite each stating that "a thorough physical examination was performed."

26. Dr. Sall prepared a Primary Treating Physician's Permanent and Stationary Report, in which he declared Ms. Navarro permanent and stationary as of October 14, 2016. He concluded she was unable to return to her job as a Correctional Officer, but imposed work restrictions limiting her ability to lift, push, or pull items weighing greater than a 25 pounds; perform overhead work with her right arm; kneel, crawl, crouch, bend, and twist; and walk or stand.

27. At hearing, Dr. Sall identified several of Ms. Navarro's job duties that he believed she could not perform. He speculated there were others she could not perform as well. Therefore, he opined she was substantially incapacitated for the performance of her duties as a Correctional Officer. He stated his conclusion was based on the standard applicable to workers' compensation claims, and he was not familiar with CalPERS's standard for determining whether a member is entitled to a disability retirement. Dr. Sall explained, "No, I am - - I just deal with that, you know, the AMA guides, 5th edition. I do not have any other books to go by in California."

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<sup>5</sup> Dr. Sall testified at hearing that he first treated Ms. Navarro on March 28, 2013. However, no Primary Treating Physician's Progress Report was introduced for that date, and the reports immediately before and after that date identify Dr. Eldrageely and Mr. Simmons as the treatment providers.



CHARLES POTTER, M.D.

28. Dr. Potter, an orthopedic surgeon, examined Ms. Navarro on July 8, 2013, in his capacity as the Agreed Medical Examiner in her workers' compensation matter. Physical examination of her lumbar spine showed reduced range of motion upon flexion, extension, right and left lateral flexion, and right and left rotation. Straight leg raising on the right produced pain in the posterior aspect of the leg and the buttocks, bilaterally. Range of motion of both elbows and wrists was within normal limits. Tinel's and Phelan's signs were negative for carpal tunnel, bilaterally. There was only a slight reduction in the range of motion of both knees upon flexion.

29. Dr. Potter concluded Ms. Navarro was permanent and stationary. He opined that Ms. Navarro was not able to return to her job as a correctional officer because of her low back pain. He explained his opinions and conclusions were based on the AMA Guides to Permanent Impairment, Fifth Edition.

30. Dr. Potter wrote four supplemental reports to his Agreed Medical Examiner report, none of which documented his having performed a subsequent physical examination of Ms. Navarro. His most recent report answered the question of whether he believed Ms. Navarro injured her cervical spine during the December 27, 2010 incident, which was posed by one of the attorneys in the workers' compensation matter. Dr. Potter answered, "At this point in time, I do not believe that this happened. I reviewed the previous medical records and saw nothing in the medical records with regard to the cervical spine."

VOCATIONAL EVALUATION

31. Ms. Navarro underwent a functional capacity evaluation on June 5, 2014, as part of her workers' compensation matter. The purpose of the assessment was to determine her current work abilities and limitations, and it included a review of her medical history, subjective reports, and objective physical testing. The assessment was not performed by a trained medical professional, and contained the following caveat: "The performance levels documented in this report should be considered to be *less than* the client's safe maximal abilities, with the likelihood of being capable of working at a higher level. Ms. Navarro admitted self-limiting her effort in order to *avoid re-exacerbating her pain symptoms.*" (Emphasis added.)

32. Ms. Navarro was also evaluated by Najarian Counseling Services, Inc., for purposes of determining her potential for returning to gainful employment and her earning capacity. The evaluation was not performed by a trained medical professional, and did not include a physical examination. Instead, the sole medical evidence the evaluator relied upon was Dr. Potter's four medical reports.

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### *Discussion*

33. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish she was substantially incapacitated for the performance of the usual duties of a Correctional Officer with CDCR – Wasco State Prison at the time she applied for industrial disability retirement. Dr. Ha'Eri's opinion that Ms. Navarro was not substantially incapacitated was persuasive. His original IME report was detailed and thorough, his first supplemental report provided sufficient explanation for the change in his opinion, and his second supplemental report adequately explained why the supplemental records did not cause him to change his opinion. His opinion was supported by the results of his physical examination of Ms. Navarro. His hearing testimony was comprehensive, and persuasively explained the reason for his changing his initial opinion.

34. Ms. Navarro had the burden of producing sufficient competent medical evidence to establish she was substantially incapacitated at the time she applied for industrial disability retirement. She failed to do so. Her sole medical expert witness at hearing – Dr. Sall – admitted his lack of familiarity with the standard applicable for determining a member's eligibility for disability retirement. He instead used the standard applicable to workers' compensation claims in forming his opinion that Ms. Navarro was substantially incapacitated. Furthermore, none of his treatment records documented his findings upon physical examination, despite each indicating that "a thorough physical examination was performed." Dr. Potter wrote in his Agreed Medical Examiner report that he utilized the workers' compensation standard in determining Ms. Navarro was unable to perform her former duties as a Correctional Officer. Drs. Sall's and Potter's opinions are entitled to little weight because the standards in CalPERS's disability retirement cases are different from those in workers' compensation matters. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Kimbrough v. Police & Fire Retirement System* (1984) 161 Cal.App.3d 1143, 1152-1153; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132.)

Similarly, Dr. Eldrageely's and Mr. Simmons's treatment records are not entitled to any weight because there was no explanation of the standards they used when evaluating Ms. Navarro. Additionally, Dr. Eldrageely's findings upon physical examination for the visit on which he took Ms. Navarro back off of work (December 17, 2012) showed an improvement in forward flexion of her lumbar spine when compared to his previous findings when he released her to return to work (December 6, 2012).

### *Summary*

35. Ms. Navarro failed to produce sufficient persuasive medical evidence to establish she was substantially incapacitated for the performance of the usual duties of a Correctional Officer employed by CDCR – Wasco State Prison at the time she applied for industrial disability retirement. Therefore, her Disability Retirement Election Application seeking industrial disability retirement benefits should be denied.

## LEGAL CONCLUSIONS

### *Applicable Burden/Standard of Proof*

1. Ms. Navarro has the burden of proving she qualifies for industrial disability retirement, and she must do so by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

### *Applicable Statutes*

2. Government Code section 20026 provides, in pertinent part:

"Disability" and "incapacity for performance of duty" as the 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 21156, subdivision (a), provides, in pertinent part:

(1) 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 . . . .

(2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

4. The courts have interpreted the phrase "incapacitated for the performance of duty" to mean "the substantial inability of the applicant to perform [her] usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) It is not necessary that the person be able to perform any and all duties since public policy supports employment and utilization of the disabled. (*Schrier v. San Mateo County Employees' Retirement Association* (1983) 142 Cal.App.3d 957, 961.) Instead, the frequency with which the duties she cannot perform are usually performed as well as the general composition of duties she can perform must be considered. (*Mansperger v. Public Employees' Retirement System, supra*, 6 Cal.App.3d at pp. 876-877 [while applicant was unable to lift or carry heavy objects due to his disability, "the necessity that a fish and game warden carry a heavy object alone is a remote occurrence"].)

5. Discomfort, which may make it difficult for one to perform her duties, is insufficient to establish permanent incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207 [mere discomfort which makes it difficult to perform one's job does not constitute a permanent incapacity]; citing, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability retirement. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

*Conclusion*

6. Ms. Navarro did not meet her burden of producing competent medical evidence demonstrating she was substantially incapacitated for the performance of her usual duties as a Correctional Officer with CDCR – Wasco State Prison due to an orthopedic (lower back and right arm) condition at the time she applied for a disability retirement. Therefore, her Disability Retirement Election Application seeking industrial disability retirement benefits should be denied.

ORDER

The application of San Juana N. Navarro for industrial disability retirement benefits is DENIED.

DATED: February 7, 2017

DocuSigned by:

*Coren D. Wong*

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COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings