

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:

NATASHA D. BROOME,

Respondent,

vs.

PAROLE AND COMMUNITY SERVICES
DIVISION, CALIFORNIA DEPARTMENT
OF CORRECTIONS,

Respondent.

Case No. 2016-0207

OAH No. 2016060679

PROPOSED DECISION

Theresa M. Brehl, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on January 19, 2017.

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

Mark Ellis Singer, Attorney at Law, Faunce, Singer & Oatman, represented respondent Natasha D. Broome.

Respondent Parole and Community Services Division, California Department of Corrections and Rehabilitation, did not appear.

The matter was submitted on January 19, 2017.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Feb 16, 2017
Kathy Forley

ISSUE

Was Ms. Broome permanently disabled or substantially incapacitated from performing her usual and customary duties as a Parole Agent I, Adult Parole, at the time she applied for industrial disability retirement?¹

PROTECTIVE ORDER

Ms. Broome's medical records and reports, received as Exhibits 7, R1-R32, inclusive, R34-R40, inclusive, and R45, are subject to a protective order sealing these documents because it was not practical to redact information from them. Ms. Broome was the only individual respondent and simply redacting Ms. Broome's name and other identifying information would not protect her privacy. The protective order governs the release of documents to the public. A reviewing court, parties to this matter, their attorneys, and a governmental agency decision maker or designee under Government Code section 11517 may review the documents subject to the protective order.

SUMMARY OF DECISION

There was no dispute that Ms. Broome suffered from orthopedic conditions in her right shoulder, elbow, wrist, and hand. CalPERS contended that Ms. Broome was not substantially incapacitated from performing her usual and customary duties, based on the opinion of an expert who did not consider the usual and customary duties of a Parole Agent I when rendering his opinions because he believed a Parole Agent I was primarily a clerical position. Ms. Broome established by a preponderance of the evidence that she was substantially incapacitated from performing the usual and customary duties of her position as a Parole Agent I when she applied for industrial disability retirement. Accordingly, Ms. Broome's application for industrial disability retirement is granted.

FACTUAL FINDINGS

Background

1. Ms. Broome was hired by the Parole and Community Services Division of the California Department of Corrections and Rehabilitation in May or June 2001 as a "Parole Agent I, Adult Parole." She worked in that position until December 2012, when she was placed off work by her treating doctor and pursued workers' compensation benefits. Ms. Broome did not return to work as a parole agent and retired from state service effective

¹ As was asserted in the statement of issues, at page 4, lines 15-16, "[i]f disability is found to exist, any dispute as to whether the disability is industrial or nonindustrial will be resolved pursuant to Government Code section 21166."

September 15, 2015. She is a state safety member of CalPERS under Government Code section 21151.

2. Ms. Broome submitted an application for industrial disability retirement on June 3, 2015, based on an orthopedic condition. In her application, she described her disability as “carpal tunnel syndrome in right wrist, right shoulder injury.” She listed limitations caused by her condition as: “Limited range of motion in right hand/shoulder. No repetitive motions in right hand/shoulder/arm[.] No lifting over 25 lbs. No heavy pushing/pulling/grasping.” In response to the question, “How has your injury or illness affected your ability to perform your job?” she stated, “I have constant tingling in my right hand/fingers making it difficult for me to do extensive paperwork. I am unable to draw and/or fire a weapon or physically restrain a suspect or assist fellow officers[.]”

3. CalPERS notified Ms. Broome by letter, dated October 29, 2015, that her application for industrial disability retirement had been denied. In that letter, CalPERS notified Ms. Broome of her appeal rights. Ms. Broome timely appealed CalPERS’ determination on November 10, 2015. CalPERS submitted its statement of issues on March 9, 2016, and this hearing ensued.

4. Based on proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default against respondent Parole and Community Services Division, California Department of Corrections and Rehabilitation, pursuant to Government Code section 11520.

Duties and Functions of Parole Agent I

5. A Parole Agent I’s usual and customary duties are set forth in several documents: The California State Personnel Board’s Specification for Parole Agent I, Adult Parole; the California Department of Corrections and Rehabilitation Division of Adult Parole Operations, Southern Region Field Unit, Duty Statement, Parole Agent I, Adult Parole; the CalPERS Physical Requirements of Position/Occupational Title form completed by Ms. Broome and her employer; and the Department of Corrections and Rehabilitation, Division of Adult Parole Operations, Parole Agent I, Essential Functions.²

6. The California State Personnel Board’s Specification for the position Parole Agent I, Adult Parole, defines the position as follows:

Under supervision, to (1) carry a case load involving office and field work in the assessment, supervision and guidance of adult parolees/releasees from State correctional institutions or residing in a community correctional facility; (2) function as a

² Ms. Broome and Jeff Faust, one of her former co-workers, described the usual and customary duties of a parole agent during their testimony, as discussed in Factual Findings 10 and 11.

District Hearing Agent; or (3) process out-of-State placements in the interstate Parole Unit; and do other related work.

That document lists the following "Typical Tasks" of the position:

Supervises parolees/releases; works with parolees'/releasees' friends and relatives, community service agencies, and law enforcement agencies; arranges for services for parolees/releasees who have identified needs in such areas as employment, housing, medical care, counseling, education, and social activities; arranges for and verifies release programs for about-to-be released adult offenders; may participate in the screening of cases for placement in a community correctional facility; conducts investigations when parole violation or criminal behavior is alleged which includes interviewing, surveillance, and search and seizure; apprehends and arrests parolees/releasees who are suspected of involvement in criminal activities or violation of parole; testifies in administrative hearings and judicial proceedings; provides information to other community agencies regarding specific parolees/releasees or the policy and procedures of the California Department of Corrections; participates in the assessment of parolees'/releasees' risk to the community and the type of services required; makes recommendations to administrative paroling authority regarding case dispositions; and prepares various types of reports and correspondence.

7. The California Department of Corrections and Rehabilitation Division of Adult Parole Operations, Southern Region Field Unit, Duty Statement, Parole Agent I, Adult Parole breaks down the duties by percentage:

- 50% Counsels parolees/releasees, helping them to make crime free adjustment; interviews friends and relatives of parolees/releasees to explain and interpret the parole program and to obtain information relating to parolee/releasees' adjustment; works with and secures the cooperation of law enforcement agencies; investigates cases of parole violators compiling evidence.
- 25% Prepares reports to the paroling authorities relating to change of status; attends and testifies at parole Revocation (Morrisey) Hearings; prepares other required reports and case histories; dictates correspondence, maintains necessary records.

- 15% Apprehends and arrests violators and transports to municipal jail or state prison facilities for return to custody; participates regularly in firearms training and defensive tactics training including escape and restraint maneuvers executed while standing, prone and a variety of other body positions.
- 10% Keeps informed of Departmental and Divisional policies; participates in training both in and out service; reads and applies all policy and manual directives; works at narcotic training stations.

8. The CalPERS Physical Requirements of Position/Occupational Title form completed by Ms. Broome and her employer lists physical activities a Parole Agent I performs, divided into four categories based on the amount of time a parole agent may engage in the activities: Never, Occasionally (up to three hours), Frequently (three to six hours), and Constantly (over six hours). According to that form, a Parole Agent I: "Never" works with heavy equipment; "Occasionally" sits; stands; runs up to 300 yards; walks for up to 1.5 miles; crawls; kneels; climbs up to 150 steps; squats; bends waist; reaches above shoulder; reaches below shoulder; pushes and pulls up to 25 miles; uses a keyboard and mouse; lifts/carries 51 pounds to over 100 pounds for 200 yards; walks on an uneven surface for up to 1.5 miles; drives up to 8 or 9 hours;³ is exposed to excessive noise, extreme temperature, humidity, wetness, dust, gas, fumes, or chemicals; works at variable heights; operates foot controls or repetitive movement; and/or works with biohazards such as blood-borne pathogens, sewage, or hospital waste; "Frequently" sits; stands, walks up to 1.5 miles, climbs up to 150 steps, bends neck, bends waist; twists neck; twists waist; reaches below shoulder; pushes and pulls up to 25 miles; engages in fine manipulations, power grasping, simple grasping, or repetitive use of hands; uses keyboard; lifts/carries 26 to 50 pounds up to 200 yards; walks on uneven ground up to 1.5 miles; drives up to 8 or 9 hours; is exposed to excessive noise, extreme temperature, humidity, wetness, dust, gas, fumes, or chemicals; works at variable heights; and/or operates foot controls or repetitive movement; and "Constantly" sits; stands; walks up to 1.5 miles; bends neck; twists neck; twists waist; engages in fine manipulations, power grasping, simple grasping, or repetitive use of hands; lifts/carries 0 to 25 pounds up to 1.5 miles; drives up to 8 or 9 hours; and/or is exposed to extreme temperature, humidity, or wetness.

In the comments section of the CalPERS Physical Requirements of Position/Occupation Title form completed by Ms. Broome and her employer, it states:

Must be able to perform all of the essential functions on the attached Parole Agent - Essential Functions.

³ "[U]p to 8 hours" was typed on the form, and "up to 9 hours" was handwritten.

9. The Department of Corrections and Rehabilitation, Division of Adult Parole Operations, Parole Agent I, Essential Functions (Essential Functions) states:

The parole Agent I (PA-I) peace officer carries a caseload involving office and field work in the assessment, supervision, and guidance of parolees/releasees from State correctional institutions or residing in a community correctional facility. The PA-1 must also be able to perform in an institution, parole region headquarters/field unit and/or headquarters office as needed. The PA-1 must be able to work in conditions that require all of the following functions:

Physical / Mental Tasks:

- Ability to conduct investigations to include surveillance, search and seizure, apprehending and arresting.
- Ability to disarm, subdue, and apply restraints.
- Ability to defend self or others.
- Ability to search subjects for contraband in buildings/dwellings, homes, vehicles, etc. Conduct body searches when required.
- Ability to range qualify every quarter with departmentally-approved weapons and carry chemical agents. Utilize existing weaponry in accordance with established policy.
- Ability to qualify with expandable baton.
- Ability to utilize appropriate safety equipment, protective clothing (bullet-proof vests, etc.), breathing apparatus, latex, to prevent blood/air borne pathogens.
- Ability to defend self and others when chemical agents are being deployed.
- Ability to remain aware/alert in his or her observations/identification of security risks.
- Ability to identify an emergency situation, determine the appropriate use of force, and carry out that use of force.

- Ability to recall an incident in order to accurately document the incident in writing.
- Ability to walk continuously.
- Ability to run when responding to emergencies or serious incidents. Distances vary from a few yards to several hundred yards. Running may take place over varying surfaces including uneven grass, dirt areas, pavement, cement, and can include stairs or several flights of stairs maneuvering up or down.
- Ability to climb: Ascend/descend or climb a series of steps/stairs, several tiers of stairs or ladders while involved in searches; must be able to carry items while climbing stairs.
- Ability to crawl and crouch.
- Ability to stand continuously depending on the assignment.
- Ability to sit while performing record keeping or report writing activities, observing designated areas, and driving activities from six to eight hours per day.
- Ability to stoop and bend.
- Ability to lift and carry in the light to medium range (0-50 pounds) frequently throughout the workday and in the very heavy range, occasionally; physically restrain, including wrestling someone to the floor; partially lift and drag a person out of a dangerous situation.
- Ability to push and pull while opening and closing locked gates and doors throughout the work day. Pushing and pulling may also occur during an altercation or the restraint of a person.
- Ability to reach overhead.
- Ability to move head and neck throughout the workday, including observing and surveillance of parolees/subjects in the community. Neck movements include both side to side as well as flexing downward and backward.

- Ability to move arms when writing reports, driving, and restraining individuals.
- Ability to move hands and wrists as well as grasp and squeeze his or her hands and wrists. Appropriate finger dexterity is required in the performance of administrative type duties and in the loading and unloading of weapons, searching subjects, and in the operation of various communication devices. Move/use hands and wrists independently of each other.
- Ability to brace occasionally while restraining, during an altercation, or while performing a body search.
- Ability to press occasionally with legs/feet (while driving a vehicle, etc.)
- Ability to twist the body frequently to continuously in all directions.
- Vision acuity of 20/60 or better in each eye without correction and corrected vision of 20/20 in each eye.
- Hearing acuity: Possess the bilateral ability to hear, with or without correction, to recognize and distinguish voices, to recognize the direction from which sound is coming, to hear faint voices/whispers, hear situations when not able to see lips (e.g. when masks are used or a person's back is turned), hear sounds (e.g. alarms, monitors, timers); detect body sounds (e.g. breathing, heartbeats) and/or hear to receive information through verbal communication in various situations (e.g. indoors/outdoors, chaotic, noise, traffic).
- Ability to perform regular duties indoors or outdoors, or a combination of indoors and outdoors.
- Ability to perform regular duties while exposed to varying weather conditions and temperatures as well as in temperature-controlled environments including after dark.
- Ability to perform regular duties on a wide range of working surfaces, which may become slippery due to weather or spillage of liquids and grease.

- Ability to exit from a stopped vehicle quickly in emergency situations.

Administrative Tasks:

- Ability to work in accordance with the bargaining unit contract requirements.
- Ability to work over 40 hours per week and, in emergency situations, to accomplish specific work.
- Ability to communicate effectively, verbally, and in writing. Communication ranges from conversing on the telephone to face-to-face.
- Ability to be supervised by assigned supervisor or manager.
- Ability to enter and update numerous statewide parolee databases using a computer.
- Ability to assess, supervise, and guide an adult parolee population.
- Ability to manage and maintain a caseload involving office and fieldwork. Fieldwork may consist of field calls to parolees' homes, places of employment, and collateral contacts. Office work includes writing reports, file management, data entry, and telephone calls.
- Ability to maintain and accurately document his or her case files and field books.
- Ability to read and write reports, memos, letters, notes, document files, etc.
- Ability to count.
- Ability to testify at hearings and judicial proceedings. Must have the ability to recall a case, understand a question, and answer the question.
- Possess a valid California driver's license in order to operate a motor vehicle.

Ms. Broome's Testimony

10. Ms. Broome underwent a pre-employment physical before she was hired by the Department of Corrections in 2001. After she was hired, Ms. Broome attended the required six-week academy training and was the first in her class. The academy training consisted of classroom work, physical calisthenics, and Parole Agent Standard Training (PAST) every day. The PAST training included training on restraints, self-defense, and arrests.

Ms. Broome held the Parole Agent I position until she stopped working in 2012. Ms. Broome described the usual and customary duties of a parole agent. She reviewed the Essential Functions, confirmed it accurately described the job duties, and stated that she performed all the functions listed when she worked as a parole agent. The job was not primarily clerical. The parole unit had a separate clerical staff. As a parole agent, she was responsible for supervising parolees in the office and in the field, including going to parolees' homes, conducting arrests, attending hearings, and going to jails. She spent one to two days per week in the office and the rest of her work was in the field. Ms. Broome needed to carry her field bag, which contained a three to four-inch binder with parolee face sheets and notes on parolees and test equipment for the fluid testing she was required to conduct in the field.

Ms. Broome was required to participate in and pass quarterly PAST training. The quarterly PAST training included doing pushups, jumping jacks, and stretching; performing cuffing and basic arrests; engaging in weapon retention, which involved fighting someone trying to take her weapon; practicing self-defense, such as getting out of a choke hold; and conducting full felony arrests, with a team taking a person down. Ms. Broome also needed to pass firearm qualifications four times a year. At the firearm qualifications, her equipment was checked, and she needed to load and shoot her firearm from different distances and positions, such as from cover, from the ground, or while kneeling. One to two times per year, there would also be obstacles involved.

Parole agents cannot predict when they might need to engage in physical activity outside of training. Ms. Broome explained that she needed "to be prepared for anything." "Things go down, even in the office." Parolees get into fights at the office, and parolees may need to be arrested or taken into custody either in the field or at the office. A parole agent may need to fight a parolee who decides he or she does not want to get into the car when taken into custody or may need to chase an arrestee or parolee who decides to try to flee.

Ms. Broome is right handed. She started to notice problems with her right shoulder, wrist, and elbow in 2009 or 2010. She described it as an ache and "not the same flexibility." She felt pain after activities, and she could not serve when playing tennis. She went to Kaiser in late 2009 due to pain she experienced from writing, after firing her side arm, and while doing a "press check." She explained that doing a "press-check" involved holding a gun and pulling the slide to make sure a bullet was in the chamber. When she performed a press-check, "it hurt and felt shaky."

Ms. Broome's last day of work was December 10 or 12, 2012. She was not sure when her most recent PAST training or firearm qualification was before her last day of work. She did not remember difficulty passing the most recent PAST training, although she recalled experiencing "pain the last time." Ms. Broome was unsure whether she would have been able to make it through a firearm qualification at the time she stopped working. She had not been performing as well. Before she stopped working, although she did her job, she did not feel safe. She was not at "100%," and she felt she "might not be safe to the public."

While it was possible Ms. Broome could have performed some of the physical requirements of a parole agent, she stated that she could not do many of the essential functions due to the condition of her right shoulder, wrist, and hand. She was unable to perform the law enforcement duties of a parole agent, which required that a parole agent be ready to use a weapon and conduct parolee home visits alone. She was constantly aware of her right shoulder, arm, wrist, and hand, and she could not do "simple things." She did not have the strength to do the physical activities required. She could not perform a search and seizure, disarm or subdue someone, or defend herself. She was not able to snap her wrist to use the expandable baton. Although she could assess a situation and determine the appropriate use of force, she "could not carry out the proper use of force because of the pain and weakness in her right arm and hand." She could not crawl or crouch. She could not lift 0 to 50 pounds. She could not restrain someone, wrestle someone to the floor, drag a person out of danger, or push or pull locked gates and doors. She could not push or pull overhead, including being unable to reach up and pull herself up or out. Because she could not grab and squeeze with her right hand, she could not load and unload a weapon, engage in the activities necessary for conducting a search, or perform frequent typing or constant notetaking. She could not brace or twist, as those activities necessarily required use of her right arm and shoulder.

Jeff Faust's Testimony

11. Jeff Faust, one of Ms. Broome's former co-workers, testified about the usual and customary duties of a parole agent, including the training required. He began working for the state as a corrections officer in 1986 and retired from state service in December 2015. Between 2001 and 2008, Mr. Faust was a Parole Agent I for the Division of Adult Parole Operations, and he worked with Ms. Broome during the time frame from 2005 through 2007. In 2005, they were in the same parole unit, and he was assigned as Ms. Broome's field training officer to orient her to the Fontana area.

Mr. Faust explained that parole agents wear two hats; working in a social worker role, and out in the field in a law enforcement role. They are peace officers under Penal Code section 830.5.⁴ Parole agents deal with convicted felons, who have been convicted of "the whole range of felonies." Parole agents are assigned cases to supervise parolees, which

⁴ Penal Code section 830.5, subdivision (a), states that parole agents are peace officers, whose responsibilities include supervising parolees, apprehending escaped prisoners, transporting parolees, and assisting other law enforcement officers.

includes conducting initial interviews of parolees, assessing each of the individual parolees, and developing parole plans. Each parolee needs different supervision. Parole agents are required to conduct surveillance of parolees; arrest parolees, sometimes in the office and sometimes in the field; participate in search warrants, including searches of homes and persons; and apprehend fugitives. Mr. Faust explained that a "search and seizure" may require a parole agent to conduct a body search and a search of the area in the immediate control of a parolee, which may include a room, vehicle, home, shed, or even a storm drain. In order to conduct such a search, a parole agent needs to be able to reach. Mr. Faust noted that while a parole agent's supervisor may instruct a parole agent to obtain the assistance of other law enforcement, it is the parole agent's job to accomplish the goal assigned.

Mr. Faust described the required training. Parole agents undergo quarterly PAST training exercises regarding the physical techniques used in the field. Those techniques include wrist locks, take downs, restraints, drawing firearms, and how to position one's self on a suspect. Mr. Faust described "take downs" as physically taking a suspect to the ground. The PAST training also includes simulated combat training, using stunt dummies and different types of strikes. Parole agents must engage in weapons training and complete firearm qualifications on a quarterly basis. Weapons training includes training on the use of side arms and firearms, pepper spray, and expandable batons. During firearm qualification, parole agents shoot with full gear and must be able to load and shoot.

Mr. Faust reviewed the Essential Functions document, and he confirmed that it accurately described the physical duties that parole agents need to be able to perform. He stated that a parole agent would need to reach overhead to search for items, search for a person, and/or to defend him or herself. He explained that parole agents may need to search cupboards and top shelves because parolees "don't hide things where it is easy to get to." For example, he stated that a parole agent may need to reach overhead to climb a ladder while searching for a person who might be hiding in an attic. If a parole agent is knocked to the ground, the parole agent might need to use his or her arms in defense. If the parole agent could not raise his or her arms, the parole agent might not be able to defend him or herself, or others. If the inability to defend oneself results in a parole agent being disarmed by a felon, it could also place others at risk. Mr. Faust noted there is no predictability when a parole agent might need to engage in such activities. They need to "plan for the worst, hope for the best." Mr. Faust explained, "People don't want to go back to jail," and they may "run and physically resist."

Mr. Faust noted that physical limitations, such as an inability to raise one's arms or lift anything over 25 pounds would limit a parole agent's "use of force" options. That parole agent would also not be able to lift or move a person or lift his or her gear bag, which weighs 40 pounds or more. Mr. Faust stated the job is not primarily clerical.

Eddie W. Shaw's Testimony

12. Eddie W. Shaw is Ms. Broome's husband. They have been married since August 2008. Mr. Shaw and Ms. Broome used to work in the same building, although they

did not ever work in the same parole unit. Mr. Shaw testified about recent limitations to Ms. Broome's activities due to the condition of her right shoulder, wrist, and hand. He was not very good at estimating the time periods when things occurred.

Mr. Shaw did not notice Ms. Broome's limitations until recently. He described her as an avid bicycle rider, who has now shortened her rides, and can no longer lean over the handle bars of her bicycle as she had done in the past. She tried to take up tennis, but she had to stop because she cannot hold the tennis racket. They have a cast iron skillet that she cannot carry or wash because it is too heavy. They used to go to the shooting range together to practice their shooting off-duty. He noticed that she could only hold the weapon for a short period of time, and she needed to go to a smaller, lighter weapon with a modified grip. Eventually, she started to say she did not want to go to the shooting range with him. She was then wearing a wrist support. Mr. Shaw also said Ms. Broome drove with her hands on the wheel at "twelve" and "five" and lowered the steering wheel to put less pressure on her right arm. The one to two-year-old children in their family are too heavy for her to pick up.

Expert Testimony

13. Both parties offered expert testimony and expert reports. CalPERS' expert was Robert J. Kolesnik, M.D., and Ms. Broome's expert was Mark Bernhard, D.O. The parties stipulated that both experts were qualified to provide expert opinion testimony in this case.

DR. KOLESNIK'S REPORT AND TESTIMONY

14. Dr. Kolesnik is a medical doctor licensed to practice in California. His specialty is orthopedic surgery. He is a Diplomate of the American Board of Orthopedic Surgery and a Fellow of the American Academy of Orthopedic Surgeons. He obtained his undergraduate Bachelor of Science Degree in Biology in 1975 from the University of Southern California and his Medical Degree in 1979 from the University of Southern California.

Dr. Kolesnik conducted an orthopedic independent medical evaluation of Ms. Broome on October 15, 2015. He spent thirty minutes with Ms. Broome, one hour on records review, and one hour preparing his report. His opinions were based on his examination of Ms. Broome, review of her medical records, and review of the state personnel board's specification for a Parole Agent I, which he referred to during his testimony as the "parole agent duty statement." His testimony was consistent with his written report. During his testimony, he read from his report, and most of his answers were almost verbatim from his report.

In his report, he summarized Ms. Broome's complaints as follows:

There is constant aching about the anterior and superior aspect of the right shoulder. There is intermittent sharp pain in the

same area with motion and lifting activities, but she states this has become less frequent. She does note occasional popping about the right shoulder. She notes occasional pain at rest and the pain wakes her up at night when she sleeps on the right shoulder. There is aching discomfort along the ulnar aspect of her right hand, with involvement of the ring and small fingers. There is constant numbness in the same digits, with intermittent numbness and tingling in the thumb, index, and middle fingers. She asserts that the wrist and hand pain and numbness occasionally wake her up at night. Her symptoms have not changed over the past six months.

Dr. Kolesnik's report noted the following with respect to his examination of Ms. Broome's right shoulder: There was "no point tenderness, swelling, or deformity about the right shoulder"; "no atrophy or muscle sag"; the overlying skin was "intact, without laceration, erythema, ecchymosis or increased warmth"; there was "mild discomfort about the right shoulder at the extremes of all motions"; and "[n]eer sign on the right is negative, while the supraspinatus test [was] mildly positive." With respect to his examination of her upper arms and elbows, his report noted: "No atrophy, swelling, tenderness, or deformity"; "triceps and biceps tendons and musculature [were] intact"; she denied "any pain with range of motion of right elbow"; there was "no tenderness of Tinel's sign over the ulnar at the right cubital tunnel"; "[t]he elbow flexion test [was] positive at 45 seconds"; and the patient noted "increased numbness and tingling in the ring and small fingers." Dr. Kolesnik's report stated the following regarding his examination of Mr. Broome's forearms, wrists, and hands: There was "[n]o swelling, tenderness, or deformity"; "flexor and extensor compartments of both forearms [were] soft and nontender"; "no tenderness or Tinel's sign over the median nerve at the carpal tunnel"; "[p]ressure over the median nerve at the right carpal tunnel did not elicit any pain or tenderness"; "Phalen's test [was] positive on the right at ten seconds, with the patient noting increased numbness in the index, middle, ring and small fingers"; she denied "any pain with range of motion of either wrist"; "full range of motion of the fingers and thumb bilaterally"; "[a]ll the digits [were] pink and warm with capillary refill of one second"; "no thenar, hypothenar, or interosseous wasting."

His report noted that the Jamar dynamometer measurements, in kilos, were 12/10/10 in the right hand and 30/28/28 in the left hand, showing her right hand was weaker than her left hand. Dr. Kolesnik explained that the Jamar dynamometer measures grip strength and the measurements are "entirely subjective." The measurements he noted were normal for the left hand, but the right hand was not within normal limits. Dr. Kolesnik described her effort in performing that test as "fair," based on his experience. However, he did not believe she was exaggerating her symptoms.

In the "assessment" portion of his report, Dr. Kolesnik opined that Ms. Broome suffered from the following conditions, which were consistent with the diagnoses reached by Ms. Broome's expert:

1. Right shoulder impingement syndrome and rotator cuff and biceps tendinitis.
2. Possible right cubital tunnel syndrome (ulnar neuropathy at the elbow).
3. Right carpal tunnel syndrome.

Under the heading "Answers to Questions," Dr. Kolesnik provided the following answers to four questions:⁵

Question #1

In my professional opinion, there are no specific job duties that the member is unable to perform due to the above listed conditions.

Question #2

In my professional opinion, the member is not presently and substantially incapacitated for the performance of her duties as a parole agent[.]

Question #3

The patient cooperated with the examination and I do not feel that there was any exaggeration of complaints. Her effort was fair in the performance of the Jamar grip strength measurements.

Question #4

The above listed diagnosis/conditions were aggravated by her employment, but I do not feel that they were caused by her employment. Her job duties as a parole agent involved no overhead use of the right shoulder, no repetitive lifting, pushing, or pulling with the right upper extremity, and no repetitive motion of the right shoulder, wrist, and hand. In my professional opinion and based on reasonable medical probability, these complaints/conditions would be present if the member had not been employed as a parole agent.

⁵ Dr. Kolesnik did not include the questions he was answering in his report. Nor were the questions provided during the hearing.

During his testimony, Dr. Kolesnik reiterated his opinion that “there were no specific duties” Ms. Broome “was unable to perform.” He stated that her job as a parole agent was “mainly clerical work,” and she “might need to do field work and arrests.” He acknowledged he was aware a parole officer was considered a peace officer, and he said he was familiar with the duties of a peace officer. He could not recall whether he had reviewed the essential functions of a Parole Agent I. On cross-examination, when he was asked whether he evaluated Ms. Broome as a peace officer, he responded that he “evaluated Ms. Broome as a patient.”⁶

DR. BERNHARD’S TESTIMONY AND REPORTS

15. Dr. Bernhard is a doctor of osteopathic medicine licensed to practice in California. He obtained his Bachelor of Science Degree in Zoology from Arizona State University in 1974 and his Doctor of Osteopathic Medicine Degree from Chicago College of Osteopathic Medicine in 1978. He is a Diplomate of the American Board of Physical Medicine and Rehabilitation and a Qualified Medical Evaluator.⁷ Dr. Bernhard testified by telephone.

Dr. Bernhard was Ms. Broome’s treating physician beginning in March 2012. Dr. Bernhard took Ms. Broome off work in December 2012, and he prepared monthly Primary Treating Physician’s Progress Reports dated December 20, 2012, through April 21, 2015. In those progress reports, he placed Ms. Broome off work as Temporarily Totally Disabled beginning December 20, 2012, until July 9, 2014, when he determined she was “Permanent and Stationary” and released her to work with restrictions. His testimony was consistent with his written reports.

In Dr. Bernhard’s July 9, 2014, Primary Treating Physician’s Permanent and Stationary Report, he listed the following diagnoses related to her right shoulder, arm, wrist, and hand:

1. RIGHT WRIST PAIN
2. RIGHT CARPAL TUNNEL SYNDROME,
ELECTRODIAGNOSTICALLY POSITIVE
3. RIGHT SHOULDER IMPINGEMENT
4. RIGHT WRIST TENDINITIS

⁶ This answer did not make sense given that Dr. Kolesnik was not treating Ms. Broome, and his answer appeared to be an attempt to evade answering the question asked.

⁷ CalPERS counsel interrupted Dr. Bernhard’s testimony regarding his background, stating that she stipulated that he was qualified to render expert opinions in this case.

The report noted that Dr. Bernhard released Ms. Broome to return to work with the following restrictions:

The patient is not to lift greater than 25 pounds. She should avoid heavy lifting and pulling. No pushing or pulling greater than 45 pounds. Limited to repetitive pinching and grasping frequently with the injured hand. Limited to repetitive hand motions on a frequent basis with the right injured hand. The patient will require intermittent use of a hand-wrist brace.

According to Dr. Bernhard's July 9, 2014, report, he diagnosed Ms. Broome with carpal tunnel syndrome of her right hand in June 2012, and in March 2013, an MRI of Ms. Broome's right shoulder "demonstrate[ed] partial tear or tendinosis of the subscapularis tendon, subacromial bursitis, hypertrophic arthritic changes of the AC joint, and impingement syndrome." Her complaint at the time of the July 9, 2014, examination was "shoulder, right wrist, and dorsal wrist pain."

Dr. Bernhard's July 9, 2014, report listed factors of disability related to her right shoulder, arm, wrist, and hand:

SUBJECTIVE FACTORS: Subjective factors with respect to the right wrist and right arm are weakness, pain, numbness in the right hand; worse at night; consistent with nocturnal symptoms.

Subjective factors with respect to the shoulder are intermittent slight pain becoming more than slight on occasion with lifting more than 25 pounds, pushing and pulling with the right arm in flexion or extension.

[¶] . . . [¶]

OBJECTIVE FACTORS: Objective factors with respect to the right wrist and right arm include findings on physical performance/functional capacity evaluation, demonstrating standardized grip strength weakness on the right major injured hand compared to the left minor uninjured hand; abnormal electrodiagnostic studies, demonstrating prolonged latency; findings consistent with sensory impairment on light touch, consistent with median nerve compromise in the right hand.

Objective factors with respect to the right shoulder include findings on MRI, demonstrating impingement signs, as well as findings on physical performance/functional capacity evaluation

demonstrating weakness in the upper extremity, commensurate with impingement.

Dr. Bernhard submitted a Physician's Report on Disability to CalPERS, dated April 21, 2015. On that form, Dr. Bernhard responded "Yes" to each of the following questions under the "Member Incapacity" heading: "Is the member currently substantially incapacitated from performance of the usual duties of the position of their current employer?" "Will the incapacity be permanent?" "Was the job duty statement/job description reviewed to make your medical opinion?" "Was the *Physical Requirements of Position/Occupational Title* form reviewed to make your medical opinion?" and "Was information reviewed that the member provided?" When asked to describe the "specific job duties/work activities that the member is unable to perform due to incapacity," Dr. Bernhard wrote:

No frequent gripping, typing, writing, pinching, grasping. No more than occ. overhead work (< 10% of the workday, no lifting > 5 lbs.)

Under the "Diagnosis" heading, the form requested for each such diagnosis listed: The "objective examination findings," "diagnostic tests-dates and findings," and "restrictions/limitations, if so specify." Dr. Bernhard wrote that diagnosis 1 was "right carpal tunnel syndrome," the objective examination findings were "pain on dorsal ulnar wrist," the diagnostic test, date, and findings were "electrodiagnostically positive - 6/24/2012 carpal tunnel syndrome," and the restrictions/limitations were "no frequent gripping, typing, writing, pinching, grasping." Dr. Bernhard wrote that diagnosis 2 was "right shoulder impingement," the objective examination findings were "on palpation, tenderness is noted in the subdeltoid bursa," the diagnostic test, date, and findings were "MRI right shoulder - 3/12/13 partial tear or tendinosis," and the restrictions/limitations were "no more than occ. overhead working (< 10% of the workday & no lifting > 5 lbs.)."

Dr. Bernhard reviewed the essential functions of a parole agent and testified regarding Ms. Broome's ability to perform the activities listed. According to Dr. Bernhard, Ms. Broome could not engage in searches, seizures, apprehensions, or arrests due to the compromised strength of her right shoulder. He explained that his opinion was based on the fact that she suffered from tendinitis of the rotator cuff and impingement syndrome as shown on the MRI, she could not freely engage in a full range of motion of her right shoulder, and she suffered from decreased grip strength. Although Dr. Bernhard acknowledged that some of Ms. Broome's duties were clerical, he noted the physical functions of her job required her to be able to "abruptly exert maximum force." He stated that she could not perform the following essential functions: disarming, defending, searching ("some yes, some not"), range qualifying, qualifying with the expandable baton, defending herself from chemical attack, carrying out use of force (she could evaluate the appropriate use of force, but she could not execute the use of force), climbing stairs or ladders, crawling or crouching, using her right arm overhead, lifting in the light to medium range, wrestling someone to the floor, and pushing or pulling locked gates or doors. He explained that due to her inability to reach

overhead and/or grasp and squeeze with her right hand, she could not load and unload weapons, search for items overhead, or engage in activities that might involve resistance to the shoulder.

Dr. Bernhard reviewed Dr. Kolesnik's report, and he generally agreed with Dr. Kolesnik's diagnostic assessments. He disagreed with Dr. Kolesnik's conclusions because Dr. Kolesnik did not assess all the functions of Ms. Broome's job when reaching his conclusions.

Dr. Bernhard testified that he was generally familiar with the classification of "substantial incapacitation." During cross-examination, CalPERS's counsel asked him if he knew the "CalPERS's definition" of "substantial incapacitation," to which he responded that he guessed he did not.⁸

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for an industrial disability retirement has the burden of establishing eligibility by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

2. "Preponderance of the evidence means evidence that has more convincing force than that opposed to it." [Citations.] The sole focus of the legal definition of "preponderance" in the phrase "preponderance of the evidence" is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.)

Purpose of Disability Retirement

3. The Public Employees' Retirement Law is set forth in Government Code section 20000 et seq. The general purpose of the public retirement system is "to prevent hardship to state employees who because of age or disability are replaced by more capable employees. The pension system serves as an inducement to enter and continue in state service [citation], and the provisions for disability retirement are also designed to prevent the hardship which might result when an employee who, for reasons of survival, is forced to attempt performance of his duties when physically unable to do so." (*Quintana v. Board of Administration* (1976) 54 Cal.App.3d 1018, 1021.)

⁸ As is discussed in the Legal Conclusions portion of this decision, "disability" and "incapacity for performance of duty" are defined by Government Code 20026 and the case law interpreting the Government Code.

Applicable Statutory Authority

4. Government Code section 21151, subdivision (a), states, “Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.”

5. Government Code section 21156 provides:

(a)(1) If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.

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

(b)(1) The governing body of a contracting agency upon receipt of the request of the board pursuant to Section 21154 shall certify to the board its determination under this section that the member is or is not incapacitated.

(2) The local safety member may appeal the determination of the governing body

6. Government Code section 20026 defines “disability” and “incapacity for performance of duty” as follows:

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board, or in the case of a local safety member by the governing body of the contracting

agency employing the member, on the basis of competent medical opinion.

Case Law Regarding Incapacity for Performance of Duty

7. An employee is eligible for a disability retirement if he can demonstrate that he is incapacitated from performing the duties of his position. "Incapacitated" means the employee has a substantial inability to perform the usual duties of the position. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887.)⁹

In *Mansperger, supra*, there was no dispute that Mansperger, who was a fish and game warden, had suffered an injury that caused him to be unable to engage in heavy lifting. The sole issue in dispute was whether his physical limitations amounted to "incapacity for the performance of duty." (*Mansperger, supra*, 6 Cal.App.3d at p. 876.) After concluding that "incapacity for the performance of duty" under the Government Code meant "the substantial inability of the applicant to perform his usual duties," the appellate court assessed the facts in that case (*Id.* at pp. 876-877) as follows:

While it is clear that petitioner's disability incapacitated him from lifting or carrying heavy objects, evidence shows that the petitioner could substantially carry out the normal duties of a fish and game warden. The necessity that a fish and game warden carry off a heavy object alone is a remote occurrence. Also, although the need for physical arrests do occur in petitioner's job, they are not a common occurrence for a fish and game warden. A fish and game warden generally supervises the hunting and fishing of ordinary citizens. Petitioner testified that, since his accident, he was able to perform all his required duties except lifting a deer or lifting a lobster trap out of kelp.

8. A similar result was reached in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854. In that case, a California Highway Patrol (CHP) officer applied for industrial disability retirement, claiming he feared his back injuries placed in him danger of further injury if he was required to overpower someone resisting arrest. CalPERS's determination that he was not substantially incapacitated from performing the usual duties of his job was upheld on appeal. The appellate court determined that the fact that an injury increases an individual's chances of further injury does little more than demonstrate that the injury is prospective, hence, speculative, and presently not in existence. (*Id.*, at p. 862-863.) Accordingly, fear of further injury or fear of aggravation of an existing injury is insufficient to support a finding of disability. (*Ibid.*)

⁹ The *Mansperger* decision analyzed the language then contained in Government Code section 21022, which language is now contained in Government Code section 20026.

9. The *Mansperger* and *Hosford* cases were discussed in *The Matter of the Application for Disability Retirement of Ruth A. Keck and Los Angeles County Schools (Keck)* (2000) CalPERS's Precedent Decision 00-05. In that case, it was determined that Ms. Keck was able to substantially perform her usual duties as a school clerk typist and secretary despite her orthopedic (neck and back) conditions. In *Keck*, the medical evidence consisted of the testimony and written report of CalPERS's medical expert and written medical reports by doctors who had evaluated Keck's condition. Keck did not offer any expert testimony at the hearing. (Factual Finding 9.)¹⁰ In the proposed decision adopted by CalPERS, the administrative law judge found that competent expert testimony established petitioner exaggerated her symptoms (Factual Finding 21); petitioner failed to present any expert testimony to controvert CalPERS's expert's opinions (Factual Finding 22); Keck's doctors' written reports evaluating her condition did not specifically apply the "CalPERS disability standard" set forth in the *Mansperger* and *Hosford* cases (Factual Finding 22); and the Social Security Administration's Decision regarding Keck's application for social security disability benefits was not relevant (Factual Finding 26). The decision concluded Keck failed to present sufficient competent medical evidence to establish that her orthopedic conditions prevented her from performing the usual duties of her position as a clerical typist and secretary. (Legal Conclusion 8.)¹¹

The *Keck, supra*, decision also stated (Legal Conclusion 2):

In *Hosford, supra*, 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. In determining eligibility for disability retirement, 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.

10. In *Thelander v. City of El Monte* (1983) 147 Cal.App.3d 736, a probationary police officer was found eligible for industrial disability retirement because she was unable to complete Police Officer Standard Training, which was one of the requirements of the job, and which would have trained her on "the countless duties which a field officer might be

¹⁰ Because Precedent Decision 00-05 does not contain page numbers, references are made to the factual finding and legal conclusion paragraph numbers in that decision.

¹¹ Contrary to the arguments in CalPERS's request for official notice and closing brief, the facts in *Keck* were not the same as the facts in the present case and this case does not present the "identical issue" as was considered in *Keck*. Unlike the situation in *Keck*, Ms. Broome's job required her to engage in law enforcement activities, Ms. Broome offered competent expert testimony by an expert who considered the actual duties of her job, and CalPERS's expert opined that Ms. Broome did not exaggerate her symptoms.

required to perform at any given moment” (*Id.*, at pp. 742-743.) The appellate court noted, “If every officer must be capable of and prepared for the worst everyday, then that is the ‘usual’ duty of the job.” (*Id.*, at p. 742.)

11. The *Mansperger* and *Hosford* decisions were more recently considered in a case with similarities to the present case, *Beckley v. Board of Administration of California Public Employees’ Retirement System* (2013) 222 Cal.App.4th 691. In that case, the appellate court affirmed the trial court’s judgment that found Beckley eligible for disability retirement due to his orthopedic condition (carpal tunnel syndrome and low back injury) because he was incapacitated from performing critical duties required of a CHP officer. Beckley had served as a CHP officer and had been reassigned to a Public Affairs Officer (PAO) position before he applied for retirement disability. The PAO position was not considered a limited duty position. As a PAO, he was not assigned a beat to patrol, but he drove a patrol car, was expected to engage in law enforcement activities, and had done so on occasion. Beckley’s doctor took him off work because he was unable to perform “the 14 critical activities, required by CHP,” because he was “unable to safely extract a 200-pound victim from a vehicle and lift, carry, and drag the victim 50 feet; physically subdue and handcuff a combative subject; change a flat tire; drive for extended periods of time; and run up and down stairs.” (*Id.*, at p. 694.)

Law Applicable to Analysis of Expert Opinion Testimony

12. California courts have repeatedly underscored that an expert’s opinion is only as good as the facts and reasons upon which that opinion is based. (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 924.) “Like a house built on sand, the expert’s opinion is no better than the facts on which it is based [W]here the facts underlying the expert’s opinion are proved to be false or nonexistent, not only is the expert’s opinion destroyed but the falsity permeates his entire testimony.” (*Ibid.*)

13. An expert witness “does not possess a carte blanche to express any opinion within the area of expertise. [Citation.]” (*Jennings v. Palomar Pomerado Health Systems* (2003) 114 Cal.App.4th 1108, 1117.) “Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon [by] other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. [Citations.]” (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135-36.)

Evaluation

14. The evidence was uncontroverted that a parole agent is a peace officer and the essential functions of the position required Ms. Broome to perform a wide range of physically demanding activities in order to supervise parolees in the office and in the field. Her position was not a mainly clerical position. As a parole agent, Ms. Broome was required to be able to conduct searches and seizures; exert appropriate physical force to subdue, restrain, and arrest parolees; use weapons; and defend herself and others. Ms. Broome and

Mr. Faust credibly testified about the usual and customary duties of her position, and their testimony was consistent with documents setting forth the duties of a parole agent, including the essential functions document which listed the physical requirements for the position in great detail.

Ms. Broome credibly testified about her inability to perform many of the essential functions of the job as a result of her orthopedic conditions. She cannot engage in searches that require use of her right arm overhead; she cannot exert the physical force necessary to subdue and restrain a person resisting arrest; she cannot properly operate firearms or an expandable baton; she cannot defend herself or others. Her inability to perform the physical demands of the job would place her and others at risk.

15. Both experts were in agreement regarding the condition of Ms. Broome's right shoulder, arm, wrist, and hand, but they disagreed as to whether her condition rendered her incapacitated from performing the usual duties of a parole agent.

Although CalPERS's expert witness, Dr. Kolesnik, testified that there were no duties Ms. Broome could not perform, he did not consider Ms. Broome's actual job duties. Instead, he based his opinion on the assumption that she was "mainly" a clerical worker and that it was not necessary for her to reach overhead to do her job. He stated in his report that: "Her job duties as a parole agent involved no overhead use of the right shoulder, no repetitive lifting, pushing, or pulling with the right upper extremity, and no repetitive motion of the right shoulder, wrist, and hand." That statement was contradicted by Ms. Broome's and Mr. Faust's testimony and by the documents that set forth the duties of the parole agent position. As explained in *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 924, an expert's opinion is only as good as the facts and reasons upon which that opinion is based. No weight was placed on Dr. Kolesnik's conclusion regarding Ms. Broome's ability to perform the usual and customary duties of her position because his opinion on that subject was not supported by the record.

On the other hand, Dr. Bernhard considered Ms. Broome's actual job duties when rendering his opinions. Thus, Dr. Bernhard's testimony regarding Ms. Broome's inability to perform a substantial amount of her actual job duties was given greater weight.

16. Ms. Broome proved by a preponderance of the evidence that she was substantially incapacitated from performing the usual and customary duties of a Parole Agent I at the time she applied for an industrial disability retirement.

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ORDER

Natasha D. Broome's application for an industrial disability retirement is granted.

DATED: February 15, 2017

DocuSigned by:
Theresa M. Brehl
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THERESA M. BREHL
Administrative Law Judge
Office of Administrative Hearings