ATTACHMENT A

THE PROPOSED DECISION
BEFORE THE
BORAD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES’ RETIREMENT SYSTEM

In the Matter of the Application for
Disability Retirement of: Case No. 2016-0564
JAYNE M. BARTOLME, OAH No.2016090727
Respondent,
and
DEPARTMENT OF THE CALIFORNIA
HIGHWAY PATROL,
Respondent.

PROPOSED DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, heard this matter in Los Angeles, California on October 3, 2017. John Shipley, Senior Staff Attorney, represented petitioner California Public Employees’ Retirement System (CalPERS). Respondent Jayne M. Bartholme appeared and represented herself at the hearing. No appearance was made on behalf of respondent Department of California Highway Patrol.

The record was closed and the matter was submitted for decision at the conclusion of the hearing. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

FACTUAL FINDINGS

1. Anthony Suine signed the Statement of Issues in his official capacity as Chief, Benefit Services Division of CalPERS.

2. The Department of the California Highway Patrol has employed respondent Bartholme in several capacities, including as a field officer for 11 years commencing in 1999, as a sergeant for eight years commencing in 2002, and as a lieutenant commencing in 2011 until her service retirement in 2015. Bartholme qualifies as a state safety patrol member of CalPERS pursuant to Government Code section 20390, which is set forth in CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM.
Legal Conclusion 2. Respondent has applied for industrial disability retirement, and CalPERS has denied her application. Respondent filed an appeal. Thereafter, these proceedings ensued.

3. In several documents admitted at the administrative hearing, respondent describes her duties and responsibilities as a lieutenant. She writes, for example, the following:

My position as, Field Operations Officer Lieutenant, required me to respond to all major incidents including fatal collisions, pursuits, officer involved collisions officer involved shootings, response to varied command posts and numerous other duties. I also managed 7 field sergeants and 76 uniform officers. . . .
(Exh. 5.)

4. Respondent’s description of her duties and responsibilities is consistent with an extensive itemization of the typical tasks set forth in Lieutenant, California Highway Patrol California State Personnel Board Specification, which was admitted at the administrative hearing as Exhibit 12.

5. Respondent has a history of hypertension dating back to 2007. On November 17, 2014, she experienced a “particularly stressful day at work and she felt palpitations.” Based on that 2014 event, respondent filed a claim for permanent disability benefits with the State Compensation Insurance Fund (State Fund). On behalf of the State Fund, Roger Acheatel, M.D. conducted a quality medical examination (QME) of respondent and prepared a July 7, 2015 QME report in which he provides the following hypertension diagnosis and supporting findings:

The medical findings are of hypertensive heart disease with findings of left ventricular hypertrophy and diastolic dysfunction of the left ventricle. This is consistent with hypertension etiology. This would be considered to be industrially caused in that the hypertension is on an industrial basis with the presumption afforded peace officers.

Applying the AMA Guidelines Ms. Bartholme would be rated according to Chapter 4 1 Hypertensive Cardiovascular Disease According to Table 4-2 she would fall into Class 3 with a 30% impairment of the whole person in light of being on antihypertensive medications, with evidence of left ventricular hypertrophy by echocardiography but no symptoms of heart failure.
(Exh. A.)

6. On July 27, 2015, the State Fund wrote respondent advising her that Dr. Acheatel’s QME report indicates that her November 17, 2014 injury “has resulted in permanent disability that we estimated to be 57%.” (Ibid.) The State Fund also advised
respondent that it “accepts the results of the evaluation” and provided respondent with an outline of the payments for permanent disability she was entitled to receive. *(Ibid.)*

7. In October 2015, Jack J. Kleid, M.D, a cardiologist treating respondent recommended that she undergo a treadmill exercise stress test. The stress test was within normal limits, meaning no significant cardiovascular disease was present. Additionally, Dr. Kleid performed an echocardiogram on respondent. The results showed a normal functioning heart with mild left ventricular concentric hypertrophy consistent with hypertension.

8. On December 8, 2015, CalPERS received a Disability Retirement Election Application (Disability Application), in which respondent identifies her specific disability as “hypertension” and the date of occurrence as November 17, 2014. Respondent explains the occurrence of her disability and its limitations and effects on her job performance in the Disability Application as follows:

   Experience racing heart and headaches when performing daily job duties. Frequent anxiety from numerous job[s]. These has [sic] progressed over past years. . . . Unable to perform several of the required 14 critical tasks. High blood pressure, heart palpitations, chest pain, frequent headaches, BP currently not controlled by medications. Lack of concentration. . . . My illness prevents my ability to perform the mandatory physical requirements—walk, run, lift/carry, jump, climb, and push/pull heavy objects for required distances and under required situations. . . . Due to my very high blood pressure and subsequently anxiety, I was placed off duty in Sept 215 thru Nov 29. 2015. On Nov 30, 2015 I was placed on limited duty consisting of a 4hr work day. Although I am taking two separate medications for my high blood pressure, my blood pressure remains high. Writing, reviewing and analyzing documents extensive standing and walking at major incident scenes results in heart palpitations sweating and headaches. The palpitations cause me anxiety which reduces my concentration when performing daily tasks.

   *(Exh. 3.)*

9. On December 28, 2015, CalPERS requested Hashem Fatemi, M.D., a cardiologist certified by the American Board of Internal Medicine/Cardiovascular Disease, to conduct an independent medical examination (IME) of respondent and to prepare a medical report in which he answers certain specific questions.

10. Dr. Fatemi reviewed respondent’s job description and medical records in preparation for the IME. Dr. Fatemi examined respondent on January 12, 2016. He examined respondent’s neck checking for engorged or distended veins. He found no abnormalities. He listened to different parts of respondent’s chest and that there were no audible sounds, such as crackles, which would be a sign of accumulated fluids. He declared that respondent’s lungs were completely clear. He listened to respondent’s heart to determine whether respondent’s heart beat was regular or irregular. He concluded that
respondent did not have arrhythmia and that her heart rate was normal. He examined respondent’s abdomen by pressing different areas with his hands as he observed whether respondent’s reacted in a manner indicating soreness or tenderness. His examination of respondent’s abdomen revealed no irregularities. He examined respondent’s extremities by checking the pulse in her arms and legs and for the presence of edema, which would indicate volume over load and thus certain heart irregularities. His examination of respondent’s extremities revealed no peripheral edema. He queried respondent about her medications and he confirmed that respondent was taking low dosages of Losartan and amlodipine for her blood pressure and hydrochlorothiazide, a water pill.

11. Dr. Fatemi prepared an IME report in which he finds that respondent “has been suffering for hypertension for at least 8 years. During which time she has been on and off medications. It appears that most recently her regimen is not adequately controlling her blood pressure levels. The symptoms of palpitations are occasional and apparently are more pronounced during stress.” (Exh. 8.) In the IME report he prepared, Dr. Fatemi opines, “I do not believe that she is substantially incapacitated for the performance of her job duties.” Dr. Fatemi answered questions regarding respondent’s ability to perform her job duties and whether her employment caused, aggravated, or accelerated her condition as follows:

There are no objective findings that would prevent Ms. Bartholme from continuing with her job duties. There are no critical physical activities that she should not be able to perform. I feel that better control of her blood pressure however, would lead to reduced symptoms and better conditioning for performing her job duties. [¶ . . ¶]

It is definitely possible that there is some aggravation of levels of her blood pressure by her job duties, especially those requiring more strenuous physical exertion and also circumstances that lead to increased stress. However, I feel again that with better control of her hypertension the symptomatology should be controlled better.

(Ibid.)

12. Consistent with the IME report he prepared, Dr. Fatemi explained at the administrative hearing that when he examined respondent her blood pressure was elevated above the normal 130/80 limits. Respondent’s blood pressure was 144/100, which, according to Dr. Fatemi, “if is persistent and getting worst would prevent [respondent] from performing her duties. But, with dietary measures and medication, [respondent] should be able to control it. . . . If her blood pressure got worst despite measures to reduce it, I would be a concern.”

13. After Dr. Fatemi completed his IME report, CalPERS provided him with a February 5, 2016 progress report and accompanying EKG report from Dr. Kleid, the cardiologist treating respondent. Dr. Kleid reported respondent’s blood pressure was 134/82, and that respondent was taking Losartan and Amlodipine. Dr. Kleid reported that respondent’s EKG was normal showing no evidence of hypertensive disease. Dr. Kleid
nonetheless opines in his February 5, 2016 progress report that, "This patient cannot go back to her previous job with the California Highway Patrol because she shouldn’t be doing any activities that she did before, as this will trigger hypertension and progression of the disease." (Exh. B.) Dr. Kleid’s opinion is incongruous with the objective medical data showing that with medication respondent’s hypertension was under control as recorded in the February 5, 2016 progress report he prepared. Diminished weight is accorded Dr. Kleid’s opinion.

14. Dr. Fatemi explained at the administrative hearing that he prepared a Supplemental Report incorporating the medical data provided in Dr. Kleid’s February 5, 2016 progress report. In the Supplemental Report, Dr. Fatemi opines as follows:

Based on my objective findings [respondent] can perform her job duties and I do not feel there is any element in her job that would not qualify for her continuous performance. Better control of hypertension should improve her capacity to perform her physical requirements and reduce the chance of any symptomatology. [¶ ... ¶]

No change in my prior response, which I explained that there is a possibility of aggravation of her blood pressure by her job duties, especially those requiring more strenuous physical exertion. However, with better control of her hypertension, which is being achieved, the symptomatology will be controlled better.

(Ibid.)

15. At the administrative hearing, Dr. Fatemi testified that he “felt better” after Dr. Kleid’s February 5, 2016 progress report. Dr. Fatemi noted that a significant improvement in respondent’s blood pressure—134/82—indicates respondent’s compliance with the right medications and probable control of her sodium intake. Dr. Fatemi affirmed his initial opinion that respondent is not substantially incapacitated from performing her job duties.

16. Respondent challenged the both the IME report and the Supplemental Report Dr. Fatemi prepared and his opinions expressed in those reports at the administrative hearing. She pointed out that the names of her treating physicians are misspelled in Dr. Fatemi’s reports. She asserted that her duties as a lieutenant are not presented in full in the IME report. She objected to the brevity of the Supplemental Report.

17. Drs. Acheatel and Kleid, physicians who have treated respondent, did not testify at the administrative hearing, and therefore offered no explanation illuminating their medical findings and opinions set forth in their respective QME and February 5, 2016 progress note. (See Factual Findings 5 and 13.)

18. The abbreviated description of respondent’s job duties and the misspelling of the names of respondent’s treating physicians in the reports Dr. Fatemi prepared do not undermine the substance of Dr. Fatemi’s credible opinion that respondent is not substantially
incapacitated from performing her job duties as a lieutenant. Dr. Fatemi credibly testified that he conducted a full review of respondent’s medical records notwithstanding the brevity of his discussion of those records in the reports he prepared. Dr. Fatemi clarified that, since respondent recently underwent an echocardiogram by Dr. Kleid, there was no need to subject respondent to another one. Dr. Fatemi lucidly explained how the objective medical data establish respondent’s hypertension and how that data support his opinion that respondent is not incapacitated from performing her duties as a lieutenant. Significant weight is accorded Dr. Fatemi’s opinion.

LEGAL CONCLUSIONS

1. “(a) Any member of the Department of the California Highway Patrol ... shall be capable of fulfilling the complete range of official duties administered by the commissioner ... and other critical duties that may be necessary for the preservation of life and property. Members of the California Highway Patrol shall not be assigned to permanent limited duty positions which do not require the ability to perform these duties. [¶] (c) Nothing in subdivision (a) entitles a member of the California Highway Patrol to, or precludes a member from receiving, an industrial disability retirement.” (Vehicle Code, § 2268.)

2. “Patrol member’ includes all members employed in the Department of the California Highway Patrol . . . whose principal duties consist of active law enforcement service . . .” (Gov. Code, § 20390, sub. (a.).)

3. “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 . . . regardless of age or amount of service.” (Gov. Code, § 21151, subd. (a.).)

4. “This section shall apply only to serious bodily injuries, and shall not be applied to disabilities that are the result of . . . [¶] . . . [¶] (4) Stress-related disabilities.” (Gov. Code, § 21428.1, subd. (b.).)

5. “Serious bodily injury” includes any of the following:

(1) Total loss of sight in one or both eyes.

(2) Total loss of hearing in both ears.

(3) Amputation or total loss of function in a hand, arm, foot, or leg.

(4) A spinal cord injury resulting in paralysis which causes the complete loss of function in a hand, arm, foot, or leg.
(5) Physical injury to the brain resulting in serious cognitive disorders or paralysis which causes the complete loss of function in a hand, arm, foot, or leg.

(6) Injury to a major internal organ which substantially limits one or more "major life activities." Major life activities are functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning, and performing substantial gainful employment.

(7) Any other serious physical injury that results in the inability to perform substantial gainful employment. (Gov. Code, § 21428.1, subd. (d).)

6. "'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." (Gov. Code, § 20026.)

7. Courts have long established that to be "incapacitated for the performance of duty" an applicant for a disability retirement must have a "substantial inability" to perform his or her "usual duties." (Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 876.) "Substantial inability" means more than difficulty in performing the tasks common to one's profession. For example, Hosford v. Board of Administration of the Public Employees' Retirement System (1978) 77 Cal.App.3d 854, involved a California Highway Patrol sergeant who suffered a back injury lifting an unconscious motorcycle accident victim. This injury aggravated previous injuries suffered in two prior accidents. The sergeant established that he experienced pain from prolonged sitting. The court found the sergeant's physical impairments insufficient to support a finding of disability because he was substantially able to perform his usual duties as a highway patrol sergeant although he experienced back pain.

8. Whether an individual is substantially unable to perform his or her usual duties requires an examination of the duties actually performed by the individual. Generalized job descriptions and physical standards are not controlling. Infrequently performed duties are not controlling. Contentions that a task should be avoided as a prophylactic restriction are to be rejected as the court did in the Hosford case. The highway patrol sergeant in the Hosford case claimed that his back injuries created an increased risk for further injury. In rejecting that claim, the court stated that the sergeant's "assertion does little more than demonstrate his claimed disability is only prospective (and speculative), and not presently in existence." (Id. at 863.)

9. A medical conclusion of permanent disability under the workers' compensation system is not the equivalent of "incapacitated for the performance of duty" under the public employees' retirement system. (Reynolds v. City of San Carlos (1981) 126
Cal.App.3d 208.) As explained in Reynolds, the workers’ compensation scheme and the public employees’ retirement system have distinct objectives requiring different eligibility standards. The objective of workers’ compensation is “to provide adequate compensation for employees, public or private, who are injured in the course and scope of their employment while such employees are disabled and incapable of earning a living.” (Id. at 213.) The public employees’ retirement system, on the other hand, was “adopted primarily for the betterment of government. It’s objective is not only to recognize the public obligation to certain employees who after long and faithful service become incapacitated by age or physical disabilities, but it is also to make certain that these employees will be replaced by more capable employees for the betterment of the public service without undue hardship on the employees removed (Citations.)” (Id.)

10. Respondent has the burden of proving by a preponderance of the evidence that she presents with a substantial inability to perform her usual duty that entitles her to a disability retirement. (See Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1332.) “Preponderance of the evidence means evidence that has more convincing force than that opposed to it.” (Citations.) . . . [T]he sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is 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.) (Emphasis in text.) To meet her burden of proof by a preponderance of the evidence, respondent “must produce substantial evidence, contradicted or un-contradicted, which supports the finding [of disability].” (In re Shelley J. (1998) 68 Cal.App.4th 322, 339.)

11. Respondent has not sustained her burden of establishing that she has a substantial inability to perform her usual duties as a lieutenant with the Department of California, Highway Patrol. It is undisputed that respondent presents with hypertension. Drs. Acheatel, Kleid, and Fatemi all opine that she does. It is further undisputed that respondent’s hypertension is a manifestation of the stress she experienced discharging her duties a lieutenant the course and scope of her employment. In fact, the State Fund compensated respondent for the manifestation of her hypertension in the course and scope of her employment. Respondent’s hypertension, however, is not an industrial disability that incapacitates her from performing her duties within the meaning of the laws governing the California public employees’ retirement system. Government Code section 21428.1, subdivision (b)(4), so provides; it expressly exempts stress-related disabilities from a catalog of qualifying serious bodily injuries. (See Legal Conclusion 5.) There is no evidence that respondent presents with any of those types serious bodily injuries. To the contrary, the credible evidence establishes that medication successfully controls respondent’s hypertension. It is only prospective, as Dr. Klied claims, that respondent’s hypertension would progress should she resume her duties as a lieutenant. Such speculative risk of injury does not, as the Hosford case holds, support a finding of substantial disability. It is not established that respondent is qualified for an industrial disability retirement.

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ORDER

Respondent Jayne M. Bartholme’s appeal of the decision by the California Public Employees’ Retirement System denying her application for disability retirement is denied.

DATED: October 27, 2017

JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings