ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Involuntary Reinstatement from Disability Retirement of:	Case No. 2015-0433
CHRISTOPHER DAULTON,	OAH No. 2016070689
Respondent,	
and	
CALIFORNIA STATE PRISON, CORCORAN, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,	
Respondent.	

PROPOSED DECISION

This matter was heard before John E. DeCure, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on December 19, 2017, in Fresno, California.

Kevin Kreutz, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Barry J. Bennett, Attorney at Law, represented Christopher Daulton (respondent), who was present.

There was no appearance by or on behalf of the California State Prison, Corcoran (Correctional Facility), Department of Corrections and Rehabilitation (CDCR or Department). CalPERS established that CDCR was properly served with the Notice of Hearing. Consequently, this matter proceeded as a default hearing against CDCR under Government Code section 11520.

Evidence was received and the record closed on December 19, 2017.

ISSUE

Is respondent permanently disabled or substantially incapacitated from performance of his duties as a Correctional Officer (CO) at the Correctional Facility, on the basis of an orthopedic left-hand, thumb condition?

FACTUAL FINDINGS

Respondent's Employment History

1. Respondent is currently 51 years old. He began working for CDCR in June 2000. His position with CDCR was as a CO; this makes him a safety member of CalPERS for purposes of retirement status. He worked in this capacity until January 19, 2012, the date of the injury that led to his retirement. The injury was caused by an incident in which he was assaulted by an inmate while escorting the inmate through a metal "grill gate." Respondent was using his left hand to grip the inmate's right bicep when the inmate attacked him, twisting respondent's left hand and thumb. As a result of the January 2012 injury, respondent lost the ability to grip objects firmly with his left hand and experienced extreme pain when attempting to do so. Although he sought and received extensive medical care and treatment for his left hand, he did not recover sufficiently from the injury and did not return to work.

2. Respondent filed his Application for Industrial Disability Retirement Benefits (Application) on September 4, 2012. CalPERS approved his application, and he was medically retired on the basis of industrial disability effective July 6, 2013.

Relevant Duties of a Correctional Officer

3. As set forth in the CDCR CO Essential Functions, the CO must be range-qualified in the use of firearms and other areas relating to a sworn position, and must fire weapons in a combat/emergency situation. The CO must be able to swing a baton with force to strike an inmate; disarm and subdue, and apply restraints to an inmate; and defend against an inmate armed with a weapon. The CO must occasionally "brace while restraining an inmate during an altercation or while performing a body search." The Essential Functions statement further describes the CO's employment of hand and wrist movement:

> frequently to continuously move/use as well as grasp and squeeze with their hands and wrists while performing their regular duties. Fine finger dexterity is required when report writing (i.e. incident reports) and in the loading and unloading of weapons searching of inmates and in the operation of various communication devices. Move/use hands and wrists independently of each other.

4. According to the CO Job Analysis and a CalPERS "Physical Requirements Information" form completed by respondent's employer, the physical requirements of the CO position[1] are each set forth in terms of frequency, which is categorized as "never," "occasionally" (up to three hours), "frequently" (three to six hours), and "constantly" (over six hours).

5. The CO primary physical activities and their corresponding frequencies were reported as follows: sitting and standing (frequently); running (occasionally); walking (constantly); crawling, kneeling, climbing, and squatting (occasionally); bending neck and waist (occasionally); twisting neck (frequently); twisting waist (occasionally); reaching above shoulder (frequently) or below shoulder (constantly); pushing and pulling (frequently); fine manipulation (constantly); power grasping (occasionally); simple grasping (frequently); repetitive use of hands (frequently); keyboard and mouse use (occasionally); lifting and carrying 0-10 pounds (constantly), 11-25 pounds (frequently), 26-50 pounds (occasionally), 51-75 pounds (occasionally), 76-100 pounds (occasionally), or 100-plus pounds (occasionally); walking on uneven ground (frequently); and driving (occasionally).

6. Various other CO activities were reported as follows: working with heavy equipment (never); exposure to excessive noise (occasionally); exposure to extreme temperature, humidity, or wetness (occasionally); exposure to dust, gas, fumes, or chemicals (occasionally); working at heights (occasionally); operation of foot controls or repetitive movement (never); use of special visual or auditory protective equipment (never); and working with bio-hazards (occasionally).

Respondent's Medical Evaluation and Application

7. On September 4, 2012, respondent filed his Application with CalPERS. In his Application, respondent reported an injury date of January 18, 2012. He identified "left hand/thumb" as his specific disability. Respondent was treated by David Tenn, M.D., in Visalia. Respondent described the "limitations/preclusions" due to his injury as "No pushing, pulling or lifting over 15 lbs., and limited use of the left hand." When asked to describe how his injury had affected his ability to perform his job, respondent stated: "Due to my physical conditions and doctor's restrictions, I am no longer able to perform the essential functions of my job."

8. The Application allowed respondent to provide further information. He stated, in relevant part:

> I have since received ongoing medical treatment for my injury. Recently, I was advised by my primary treating physician that he is going to refer me to a hand specialist for further medical

[1] Physical requirements of the job outline the frequency with which an incumbent is required to lift, carry, push, pull, move, or tolerate exposure to noise, light, or other bio-hazards.

> treatment. It should also be noted that an MRI has been conducted, which revealed that I have damage to a tendon in my left thumb. As a result, I may need to undergo surgery to repair the injury I sustained . . . .

9. On July 19, 2013, CalPERS wrote a letter to respondent, informing him that his Application had been approved.

2014 Reexamination

10. By letter dated August 10, 2014, respondent was notified that his case was being reexamined by CalPERS. He was instructed to provide a signed Authorization to Disclose Protected Health Information (form BSD-35), names and addresses of all physicians treating him within the last year for the disabling conditions, and the name of his current employer. He was also informed that a second Independent Medical Examination (IME) might be arranged.

11. Respondent attended an IME with Ghol Ha'Eri, M.D., on November 11, 2014. Dr. Ha'Eri is a board certified orthopedic surgeon, has practiced for 50 years, and has been licensed in California for 35 years. He currently works in private practice in Bakersfield, and in two other offices in Southern California. Dr. Ha'Eri prepared an IME report dated November 11, 2014, which was submitted into evidence. He reviewed the CDCR CO job description and available medical records. Dr. Ha'Eri obtained a medical history from respondent and administered a physical examination. He testified about his findings and IME report.

12. Respondent reported to Dr. Ha'Eri a history of injury to his left hand and thumb as a result of an inmate's attack on January 18, 2012.[2] Respondent was referred to Richard Avena, M.D., a hand specialist who diagnosed respondent with a left thumb sprain and flexor pollicis[3] tendonitis. Respondent reported having undergone an IME conducted by orthopedic surgeon Mohinder Nijjar, M.D., in June 2013, and having undergone an Agreed Medical Examination (AME) conducted by orthopedic surgeon William Previte, D.O., in January 2013. Respondent's present complaints were: 1) left thumb pain and stiffness associated with left hand grip weakness; 2) left knee pain and episodes of catching/locking; and 3) lower back pain. Dr. Avena recommended conservative medical care, including physical therapy. Dennis Miller, M.D., an occupational medicine specialist, was currently treating respondent, whose condition was described as permanent and stationary "a few months ago."

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[2] Respondent also described the history of two other work-related injuries, affecting his lower back and left knee, but Dr. Ha'Eri was asked by CalPERS to limit his evaluation to respondent's left thumb injury.

[3] The flexor pollicis longus is a forearm and hand muscle that flexes the thumb.

13. Dr. Ha'Eri performed a physical examination, which was generally unremarkable. Examination of respondent's left thumb and hand showed no swelling, and mild tenderness about the metacarpophalangeal joint. The left thumb was "slightly stiff" in flexion, as the tip of the thumb in flexion missed the fifth metacarpal head by one-half an inch. The carpometacarpal joint, metacarpophalangeal joint, and interphalangeal joint were all noted as stable to manipulation. Circumferential measurements of right-side and left-side segments of the arms and legs were uniform.

14. A "Jamar dynamometer" was used by Dr. Ha'Eri's office assistant to measure respondent's right-hand and left-hand grip strength on three consecutive attempts.[4] The three right-hand grip strength results were: 110 pounds; 110 pounds; and 100 pounds. The three left-hand grip strength results were: 10 pounds; 10 pounds; and 10 pounds.

15. Dr. Ha'Eri reviewed several notable medical records, which he summarized in his IME report in non-chronological order as he received them, as follows.

a. A January 20, 2012, initial visit and examination of left thumb injury with Dr. Tenn, who placed respondent on work limitations. Dr. Ha'Eri also reviewed Dr. Tenn's records of additional follow-up visits that occurred from January 30 to April 18, 2012.

b. A July 12, 2012, initial visit and examination of left thumb injury with Richard Clymore, D.C. Dr. Ha'Eri also reviewed additional follow-up visits that occurred from September 6, 2012, to June 26, 2013, and noted that Dr. Clymore referred respondent to Dr. Avena.

c. Patient visits with Dr. Avena on November 27, 2012, and April 15 and 18, 2013. Conservative care, consisting of physical therapy, was recommended.

d. Patient visits with Dr. Miller, D.O., on July 31 and December 4, 2012, and August 8, 2014. It was noted that respondent received physical therapy. Dr. Miller's August 8, 2014 note contained his opinion that respondent suffered from chronic tenosynovitis (i.e., inflammation of the tendon sheath) of his left thumb.

e. Dr. Ha'Eri reviewed the IME of Dr. Hijjar, and the AME of William Previte, D.O. He further reviewed records of physical therapy visits respondent had with DASH Therapy.

f. Dr. Ha'Eri reviewed a May 4, 2012 left-hand MRI reported by radiologist William Vlymen, M.D., which showed an ulnar collateral ligament sprain to the metacarpophalangeal joint of the left thumb, and flexor pollicis longus tendonitis.

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[4] The dynamometer has a dual scale readout which displays isometric grip force from zero to 200 pounds. It has a peak hold needle which automatically retains the highest reading until the device is reset.

g. Dr. Ha'Eri reviewed a February 7, 2013 left-hand MRI reported by radiologist Kenneth Chang, M.D., which showed a mild sprain of the ulnar and radial collateral ligaments sprain to the metacarpophalangeal joint of the left thumb.

16. Ha'Eri's diagnoses were left thumb sprain and tendonitis.

17. In his IME report, Dr. Ha'Eri opined that there were no specific job duties respondent would be unable to perform due to the left-thumb/hand condition, and that therefore, respondent was not substantially incapacitated from the performance of his job duties as a CO. "The left thumb sprain/tendonitis occurred on 1/18/12," Dr. Ha'Eri wrote. "There are no objective abnormal findings to show a continued presence to date." In response to CalPERS' question as to whether respondent cooperated with the examination, put forth his best effort, or exaggerated his complaints to any degree, Dr. Ha'Eri stated:

> Mr. Daulton was cooperative during his examination. He appeared he was putting forth his best effort. However[,] there were no significant abnormal objective findings to substantiate his claim of continuing pain and weakness in his left thumb/hand.

18. Dr. Ha'Eri provided a "Clarification/Supplemental Report," dated January 24, 2015 in response to a further CalPERS inquiry regarding his opinion that respondent could perform the duties of his CO position, despite his left thumb condition. In his response, Dr. Ha'Eri noted the February 7, 2013, MRI report and findings of Dr. Chang, which showed a mild sprain of the ulnar and radial collateral ligaments sprain to the metacarpophalangeal joint of the left thumb. Dr. Ha'Eri then stated that the "Jamar measurement of hand grip strength is a subjective finding and is controlled by the physical efforts of the claimant." Thus, Dr. Ha'Eri concluded, respondent was capable of performing his duties as a CO "without limitations."

19. At hearing, Dr. Ha'Eri opined that respondent's grip was "fine," and that the thumb injury did not involve a rupture in ligature, but was instead a sprain and strain. Dr. Ha'Eri opined that such an injury typically heals within two to three months. Because Dr. Ha'Eri did not note swelling, he saw no evidence of chronic inflammation. His examination notation of "mild tenderness" indicates that these are subjective findings, since respondent would have reported tenderness to him.[5] He noted "no instability" of the thumb and middle joint, and no deformity. Although he noted stiffness in respondent's flexion when respondent bent his thumb across his palm, Dr. Ha'Eri noted only a "minimal degree" of discomfort. He also believed the second MRI, taken in February 2013, showed respondent's condition had "progressively improved."

20. Dr. Ha'Eri believed that, as he noted in his IME, respondent was a reliable reporter of his condition and "was putting forth his best effort." However, Dr. Ha'Eri opined

[5] Dr. Ha'Eri had no independent recollection of his IME with respondent.

that the Jamar dynamometer was a "subjective" test because the patient supplies the force when gripping the dynamometer. Dr. Ha'Eri admitted that he had not administered the dynamometer testing to respondent, but had given that task to an assistant.

21. Dr. Ha'Eri opined that respondent's left-hand Jamar dynamometer grip-testing results of three consecutive scores of 10 pounds were essentially unexplainable, because the corresponding MRIs of respondent's left hand should have showed more objective evidence of a disruption. On cross-examination, Dr. Ha'Eri was asked to consider respondent's other Jamar dynamometer test results as follows:

> -right hand 118/115/115 pounds, left hand 20/20/15 pounds (November 2012);
>
> -right hand 90/90/100 pounds, left hand 20/18/13 pounds (April 2013);
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> -right hand 110/110/105 pounds, left hand 5/0/5 pounds (August 2014);
>
> -right hand 100/95/100 pounds, left hand 10/0/15 pounds (September 2014).

Dr. Ha'Eri was unsure why these test results showed respondent consistently had so little grip strength in his left hand. The results gave no indication that respondent was not putting forth his best effort during the testing. However, Dr. Ha'Eri suggested in general that respondent's treating physicians needed "justification" to continue treatment. In his experience, treating physicians will try to appease, and agree with, the patient in order to prolong treatment. Overall, Dr. Ha'Eri considered respondent's treatment to be neither necessary nor reasonable.

Respondent's Evidence

22. Respondent described his work history as involving the use of both hands while shooting a .38 caliber pistol and a Glock pistol, loading and supporting the pistols with his left hand while firing with his right. Respondent also fired a "ranch rifle" with his right hand, while supporting the rifle and manipulating the magazine with his left hand. Respondent used an expandable baton, manipulating it with both hands when jabbing, power-striking, swinging, blocking, and applying force in combat/ emergency situations. Following the workplace injury, respondent never regained his left-hand ability to grip objects with sufficient force to perform his CO duties, and as a result, never returned to work.

23. Presently, respondent still cannot perform a variety of ordinary tasks with his left hand. He constantly uses his "good" right hand, and has trouble employing his left hand when gripping objects, doing yardwork, personally grooming himself, and cooking. He

owns a firearm, which he can only control using his right hand. He only uses his right hand to lift substantial objects. Over time the pain in his left hand has worsened, making left-hand gripping a painful and embarrassing experience. Respondent wears a left-hand brace, and regularly does hand-stretching movements, to keep his hand from atrophying further. He takes Celebrex[6] and medical marijuana, for pain.

24. Gary D. Hatcher, D.O., a board-certified osteopathic physician and surgeon since 1986, has a medical practice specializing in occupational environmental medicine, with a focus on treating injured workers due to work-related impairments and disabilities. On November 10, 2017, he performed an IME on respondent, taking a medical history and performing a physical examination. He also reviewed respondent's medical records, including Dr. Ha'Eri's IME and supplemental reports. Dr. Hatcher then wrote an IME report, dated December 8, 2017, detailing his findings.

25. Dr. Hatcher testified that there is no reliable timeframe for recovery from the type of left-hand injury respondent sustained. Patients may recover within two to six months, or longer, or they may never recover. Dr. Hatcher opined that the evidence indicates respondent sustained a "micro-injury," which can be caused by the micro-tearing of muscle fibers (the sheath around the muscle and the connective tissue), and tendon stress. Respondent's micro-injury is located in his second metacarpophalangeal joint. When such an injury does not heal, the brain signals pain and discomfort to the body during gripping, which causes the patient to release the grip to protect the body from further injury. This explains respondent's history of achieving consistently very low left-hand gripping scores in his Jamar dynamometer testing. Such an injury is too minute to be surgically repaired, but with some patients, physical therapy will work. In respondent's case, the medical records show that physical therapy did not heal the injury. Dr. Hatcher further noted respondent's loss of movement in the left-hand thumb joint upon examination.

26. Dr. Hatcher found respondent to be a credible reporter. Respondent's very low left-hand Jamar dynamometer scores (of 8/6/6 pounds) during Dr. Hatcher's IME testing were consistent with respondent's injury and medical history. Dr. Hatcher witnessed respondent experiencing substantial pain when squeezing with his left hand. Dr. Hatcher considers Jamar dynamometer testing to result in objective findings when properly administered, and when the subject makes an appropriate effort, because the device provides an accurate reading of how many pounds of squeezing pressure the subject exerts on three successive attempts. Dr. Hatcher disagreed with Dr. Ha'Eri's contention that such findings are subjective and unreliable solely because a subject may attempt to manipulate the results. In this case, there was no such evidence of manipulation. Dr. Hatcher believed Dr. Ha'Eri erred by delegating the Jamar dynamometer testing to an assistant, and failing to observe respondent while the three tests were performed, as this was an important part of Dr. Ha'Eri's IME process.

[6] Celebrex is a non-steroidal, anti-inflammatory prescription drug.

27. Dr. Hatcher disagreed with Dr. Ha'Eri's suggestion that respondent's treating physicians had dishonestly over-treated respondent for his injury. In his years of medical experience, Dr. Hatcher has not found treating physicians to perpetuate patient care unnecessarily; and in this case, his review of respondent's records did not support such a conclusion.

28. Dr. Hatcher further disagreed with Dr. Ha'Eri's claim that no objective findings supported respondent's left-hand pain and discomfort. As set forth above, Dr. Hatcher considered respondent's history of Jamar dynamometer results to be a reliable, objective measure of his injury. Respondent's loss of movement in the joint itself was further objective evidence of his injury. When Dr. Hatcher tested respondent's left thumb for abduction (i.e., moving away from the palm), the result was two centimeters, which is abnormal. Respondent's MRI results were also consistent with his injury, in that they objectively showed evidence of a continuing injury.

29. According to Dr. Hatcher, respondent cannot perform the duties of a CO requiring use of his baton, discharging his guns, restraining inmates, defending himself from attacks, or breaking up fights. All of these functions require respondent to employ a firm grip with his left hand, which he can no longer sustain. All of these functions are vital to respondent's safety, the safety of his coworkers, and the safety of inmates.

Assessment of Respondent's Disability

30. Respondent presented credible evidence that he continues to suffer from the left-hand disability he sustained in 2012 when attacked by an inmate. Dr. Hatcher provided a credible assessment of respondent's injury, medical history, and current condition, concluding that respondent still suffers from an injury which substantially incapacitates him from performing several key duties of a C.O.

31. Dr. Ha'Eri's testimony was inconsistent and ultimately unpersuasive. On one hand, he opined that use of the Jamar dynamometer leads only to subjective findings, because the subject provides the gripping pressure to the device. Yet, he failed to explain how a person who records three closely similar, or identical, test results could falsely modulate the gripping pressure, without knowing the results of each successive test.[7] Dr. Ha'Eri also failed to reconcile this opinion with his impression that respondent was a cooperative, reliable reporter who made his best effort to comply with the IME testing. Nor did Dr. Ha'Eri afford any apparent weight to the high degree of consistency of respondent's other Jamar dynamometer results which were recorded over a period of several years.

32. Dr. Ha'Eri's view that respondent's injury should have resolved within two to three months was similarly inconsistent and not supported by the evidence, and was belied by respondent's lengthy history of care and treatment without any substantial progress or

[7] On a Jamar dynamometer, the display dial which measures the subject's grip-pressure faces directly away from the subject, so the subject cannot see the results of the test.

speedy recovery. Dr. Ha'Eri's opinion that respondent received unnecessary over-treatment from unscrupulous physicians was wholly speculative, as he failed to note any actual instances of improper or baseless medical care.

33. Dr. Ha'Eri did not explain how respondent's inability to effectively apply gripping power with his left hand would nonetheless still make him capable of fulfilling the job duties of a CO. Dr. Ha'Eri based his opinion on his medical conclusion that because respondent does not suffer from a left-hand injury, he is fit for CO duty. Yet, as set forth above, Dr. Ha'Eri did not persuasively establish the bases of any such medical conclusion.

34. Based on all of the evidence presented, CalPERS did not establish that respondent was no longer substantially incapacitated from performing the usual activities as a Correctional Officer at a State Correctional Facility. Dr. Ha'Eri's IME opinion was unpersuasive as set forth above. Respondent submitted competent evidence of continued impairment, contravening CalPERS's position that respondent was no longer disabled.

LEGAL CONCLUSIONS

1. By reason of his employment, respondent is a state safety member of CalPERS and eligible for disability retirement under Government Code section 21151, subdivision (a).

2. The burden of proof flows from the type of process initiated and lies with the party making the charges. (*Martin v. State Personnel Board* (1972) 26 Cal.App.3d 573, 582.) Respondent has been receiving industrial disability retirement benefits since approximately July 2013. CalPERS filed this Accusation to force his involuntary reinstatement from disability retirement. As such, the burden rests with CalPERS to prove its contentions based on competent medical evidence by a preponderance of the evidence.

3. The Board "may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her." (Gov. Code, § 21192.)

4. "If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system. If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position . . ." (Gov. Code, § 21193.)

5. The role of disability retirement is to address the needs of employees who are unable to work because of a medical disability. (Gov. Code, § 21153.) Pursuant to Government Code section 21192:

> [W]hile termination of an unwilling employee for cause results in a complete severance of the employer-employee relationship [citation], disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. Until an employee on disability retirement reaches the age of voluntary retirement, an employer may require the employee to undergo a medical examination to determine whether the disability continues.

An employee on disability retirement may apply for reinstatement on the ground of recovery. (*Ibid.*) "If an employee on disability retirement is found not to be disabled any longer, the employer may reinstate the employee, and his disability allowance terminates. (Gov. Code, § 21193.)" (*Haywood v. American Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, 1305.)

6. CalPERS did not meet its burden of proving by competent medical evidence that respondent is no longer substantially disabled for performance of his duties as a Correctional Officer at a State Correctional Facility. For the reasons set forth in Findings 31 through 34, Dr. Ha'Eri's professional opinion that respondent is not substantially incapacitated for performance of his duties as a CO was inconsistent and, ultimately, unpersuasive. Although CalPERS did not meet its burden, respondent notably submitted competent medical evidence of impairment to contravene CalPERS' evidence.

ORDER

CalPERS failed to establish that respondent is no longer substantially incapacitated from the performance of the usual duties of a CO. The Accusation is dismissed.

DATED: January 18, 2018

DocuSigned by:
John DeCure
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JOHN E. DeCURE
Administrative Law Judge
Office of Administrative Hearings