ATTACHMENT A

THE PROPOSED DECISION

BEFORE THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Reinstatement from Industrial Disability Retirement of: DONALD R. COONTZ, JR., Respondent, and CALIFORNIA STATE PRISON – WASCO, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondent.	Case No. 2017-0491 OAH No. 2017090393

PROPOSED DECISION

The hearing in this matter was before David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, in San Luis Obispo, California, on February 15, 2018.

Kevin Kreutz, Senior Staff Counsel, represented complainant Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS). Donald R. Coontz, Jr. (respondent or respondent Coontz) represented himself.

Respondent California State Prison – Wasco, California Department of Corrections and Rehabilitation (CDCR) did not appear at the hearing.

Complainant seeks to deny respondent's continuing disability retirement allowance on grounds that the medical evidence no longer supports his orthopedic disability. Respondent asserts that he continues to be disabled for the performance of his duties.

Oral and documentary evidence was received at the hearing. The matter was submitted for decision on February 15, 2018.

FACTUAL FINDINGS

1. Complainant filed the Accusation in his official capacity.

2. At the time respondent filed his application for disability retirement, he was employed by respondent CDCR as a correctional officer. By virtue of his employment, respondent was a state safety member of CalPERS.

3. As described in more detail below, CalPERS notified respondents Coontz and CDCR on February 17, 2017, of its determination that respondent Coontz was no longer disabled from performance of his duties. Respondent Coontz filed a timely appeal and requested an administrative hearing.

4. There was no evidence whether respondent CDCR requested an administrative hearing. Proper notice of the hearing was served on respondent CDCR. There was no appearance on behalf of respondent CDCR at the time of the hearing. The default of respondent CDCR is found.

5. Respondent Coontz was a correctional officer for 15 years before his injury. Most of that time he was employed at the state prison in Wasco. The physical requirements of respondent's duties are taken from a list of essential functions of correctional officers (ex. 8) and physical requirements of the position (ex. 9). As relevant here, respondent would have used head and neck movement frequently to continuously, including observation and surveillance of inmates; neck movements side to side and flexing downward; hand and wrist movement frequently to continuously, including to grasp and squeeze; fine finger dexterity to write reports and load weapons, to search inmates and operate communication devices; bracing occasionally, as in when restraining an inmate; and twisting of the body frequently to continuously. The duties and functions forms note that correctional officers are at risk to inmate behaviors such as aggressive or violent inmates; must determine the amount of force needed and carry that out, including firing of his weapon, swinging a baton with force, and as needed to subdue and apply restraints to an inmate; lift and carry weight, including occasionally carrying an inmate and physically restrain the inmate; pushing and pulling to open and close gates and as may occur during an altercation or to restrain an inmate.

6. Respondent experienced pain in his neck and tingling or numbness in his hands over a period of time, which got progressively worse. On May 30, 2012, Respondent was dealing with a noncompliant inmate when, while sliding a window panel sideways, he felt a pinch in his neck and again experienced neck pain and numbness in his hands to the extent that he could no longer deal with the pain. He sought treatment and submitted a Workers' Compensation (WC) claim relating to psychological stress, bilateral knees, back and neck.

7. a. On February 3, 2014, respondent submitted an application for industrial disability retirement. In the application (ex. 3), respondent described his disability as follows:

(Psychological stress) I have not been given a precise diagnosis to date however was advised that I had burned out [.] (Neck) I have developed bone spurs in my cervical region which began to penetrate spinal cord [.] Additionally I have compressed nerves at several levels C4/5 C5/6 & C6/7, which have created stenosis and cause me to have constant pain numbness and headaches [.] (Bilateral knees) No diagnosis to date [.]

(*Id.*, p. 2.)

b. Respondent wrote that the injuries occurred as follows:

(Psychological stress) I had a nervous breakdown when dealing with the client inmate. Over the course of my career I have had numerous other events that have attributed to my condition. (Neck) While closing a very heavy window which was worn out and did not roll freely I experienced pain in the neck upper extremities. (Bilateral knees & back) These injuries have resulted due to cumulative trauma over the course of my career.

(*Ibid.*)

c. Respondent indicated that his limitations and preclusions due to the injuries were: no running, overhead lifting, heavy lifting, pushing, pulling, gripping or grasping, prolonged sitting, standing, or walking, working in a hostile environment and avoid inmate contact.

8. Respondent's application, as initially presented at the hearing, did not include any Physician's Report on Disability, a form usually required by CalPERS in considering an application for disability retirement. At the request of the ALJ, Mr. Kreutz produced a report from Daniel M. Silver, M.D., an orthopedist, signed October 1, 2013, which was added to exhibit 3. This report was received in evidence as administrative hearsay.[1] Dr. Silver was aware of the injury in May 2012. Diagnoses included cervical spinal stenosis with degenerative disc, confirmed by MRI's and positive findings in all diagnostic studies. In Dr. Silver's opinion, respondent was totally temporarily disabled.[2]

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[1] The term "administrative hearsay" is a shorthand reference to the provisions of Government Code section 11513, subdivision (d), to the effect that hearsay evidence that is objected to, and is not otherwise admissible, may be used to supplement or explain other evidence but may not, by itself, support a factual finding. It may be combined with other evidence to provide substantial evidence sufficient to support a finding. (*Komizu v. Gourley* (2002) 103 Cal.App.4th 1001.)

[2] This evidence supplements and explains other evidence that CalPERS granted respondent's application for industrial disability retirement, the medical records summarized in exhibit 7, and respondent's testimony.

9. In his report, Dr. Silver answered "Yes" to the question whether respondent was substantially incapacitated from the performance of the usual duties of his position, noting that respondent was disabled due to limited use of his upper extremities, and that the incapacity was permanent.

10. Respondent testified that he consulted with and was treated by Dr. Silver as part of his WC claim. There were no records in evidence relating to initial examinations of respondent, his later treatment, or any examination by a physician chosen by CalPERS, if any, from the date of injury until January 9, 2013. As noted in more detail below, Brendan McAdams, M.D., examined respondent on February 8, 2017, and included in his report a summary of records he reviewed, described as almost three inches thick, from January 9, 2013 through July 29, 2014. At the hearing, respondent provided records of MRI's of his cervical spine in September 2012 and May 2017, and a report of examination on November 20, 2017, by Dr. Alan Moelleken, which appear to be related to respondent's WC claim. These records are received in evidence as administrative hearsay and are discussed in more detail below.

11. CalPERS approved Coontz's retirement for disability effective March 1, 2014, on the basis of an orthopedic (neck) condition. The approval letter (ex. 11) makes no reference to Coontz's inclusion of psychological stress and bilateral knees in his application for disability retirement.

12. a. The first medical records summarized by Dr. McAdams are a nerve conduction study and EMG by Dr. Do on January 9, 2013. Findings included moderate bilateral carpal tunnel syndrome and abnormal EMG of bilateral chronic active C5 – C6 radiculopathy. A CT scan of the cervical spine in February 2013 was essentially negative, with mild right bulging. In July 2013 Dr. Silver referenced the CT scan as well as chronic severe spinal stenosis with degenerative joint disease and osteophytes. Dr. Silver's report in August 2013 added that a previous nerve conduction study revealed mild carpal tunnel syndrome. A report by Dr. Payman in October 2013 recommended urgent decompression and fusion of C4 to C7. In October 2013 Dr. Silver reported on knee pain as well as a lumbosacral MRI, apparently performed in November 2013. It described compromise of exiting nerves at the L5 – S1 level. There were also positive findings regarding both knees. Dr. Silver described respondent's neck as being supple with full range of motion.[3]

b. Dr. Silver prepared an operative report December 13, 2013 regarding left wrist decompression of the carpal ligament. Follow-ups described severe pain and more medications; by January 2014, respondent could perform a full fist. In January 2013, Dr. Silver referred respondent to Dr. Payman for evaluation for neck surgery. An MRI of the cervical spine in February 2014 found right sided pathology and disc compression of the nerve root at C4 – C5 and nerve root impingement at C6 – C7. In March 2014, Dr. Silver, after a comprehensive reevaluation, concluded that respondent needed urgent surgery. In April 2014

[3] By reference to standard resources, the cervical vertebrae start at C1, by the head, and go down to C7, in the neck and shoulder area. Below that are thoracic vertebrae (T1 to T12), and lumbar vertebrae (L1 to L5).

Dr. Payman ordered a CT scan and the report described probable compression of nerve roots at C4 – C5 and C5 – C6. As of July 2014, Dr. Silver found respondent's condition to be permanent and stationary, for purposes of the WC claim.

13. Respondent described his job as including a fair degree of physical activity. He often worked double shifts. He repetitively moved the window that ultimately resulted in injury. Respondent experienced pain in his hands beginning about one year before the injury. He tried to work through it. After the injury in May 2012, he stated that the WC doctors informed him that he would be retired and could not come back to work. Respondent stated he dealt with the pain but did not want surgery yet. He explained that his father had received back surgery and was extremely stiff afterwards. Respondent expressed concern that, if he were ordered to return to work, it would present a danger to himself and his partners if he could not help when help was needed. He described coworkers as a family. Respondent explained that he is functional, however parts of his arms and hands go numb at times. He also suffers headaches and believes he would not be able to concentrate if he were working in the prison. He also believes that he would have to attend the training Academy again, and would fail due to his physical limitations.

14. Respondent has had relatively little treatment since 2014. Prior to that he had performed range of motion exercises, use of a heating pad and topical creams. Through a friend he obtained work at a tackle shop.

15. a. Respondent submitted an MRI report of his cervical spine (May 14, 2017; ex. B) and an orthopedic progress report (November 20, 2017; ex. A). Both are in evidence as administrative hearsay. The MRI included positive findings of disc osteophytes at C4—C5 through C7—T1, with some impingement of neural pathways and a disc bulge, supporting conclusions of central and right lateral stenosis. This evidence supplements and explains the medical records summarized by Dr. McAdams and respondent's testimony relating to his medical condition.

b. The report from orthopedist Dr. Moelleken included that respondent complained of increased pain in his neck and down his arms, and increased headaches. Respondent reported that he wanted to have surgery but was waiting for the outcome of this CalPERS proceeding. His work at the tackle shop involved selling reservations on a computer. Respondent had minimal relief from physical therapy from August through October 2017, or from medications, although a painkiller reduced pain from the level of nine out of ten to six/seven out of ten, for about three hours. Respondent described his pain as including constant aching and stabbing neck pain; radiating burning pain in the back of the head causing headaches; radiating pain, numbness and tingling down both upper arms to the hands involving all fingers, weakness in both arms, especially in the hands, including difficulty holding onto objects and dropping them. The pain was aggravated by most activities, including driving, lifting objects, lying on his back, looking over his shoulders, holding objects, sitting, standing and walking for 30 minutes. There was reduced range of motion in most cervical measurements. Several aspects of examination of both upper and lower arms were normal, including reflexes. The doctor confirmed central and right lateral stenosis, and abnormal nerve

conduction study relating to C7 radiculopathy, as well as x-rays confirming disk space narrowing and osteophytes. Diagnoses included chronic neck pain, cervical radiculopathy, and right carpal tunnel syndrome. Surgical options were discussed with respondent.

16. a. CalPERS directed respondent to undergo examination by Dr. McAdams, who examined respondent on February 8, 2017. Before the examination, Dr. McAdams reviewed the medical records noted above. Dr. McAdams obtained medical history information from respondent, who reported chief complaints of numbness in his hands, soreness in his neck, and headaches.

b. Dr. McAdams observed respondent walk into the examination room without demonstrating evidence of discomfort. He sat in the examination room, appearing comfortable and cooperative. Respondent's head had full flexion and essentially no extension. He could rotate his head 40 degrees to the right and between 10 and 15 degrees to the left, stating he could not move further. His arms had full elevation, with excellent strength and musculature. In a test of sensation with a pinwheel, respondent jerked his hand away saying his left hand was hypersensitive in all the fingers by comparison to the right. He described some hypersensitivity in the right ring finger. Forearm girth was roughly equal. Dr. McAdams noted that respondent's hands "appeared to be those of an individual who uses them in a vigorous way, as they are callused and have some ground in dirt." (Ex. 7, p. 3.) Respondent described localized discomfort from palpation of the cervical spine. He had no pain with elevation of his shoulders or discomfort from downward force on the elevated shoulders.

c. Respondent carefully rolled over to assume the prone position. He initially maintained his head straight holding himself up with his arms. When asked to move his arms, respondent turned his head fully to the left with no complaint of pain.

d. Dr. McAdams made a diagnoses of "complaints of pain, multiple areas, no reproducible objective findings." (Ex. 7, p. 6.) He answered questions posed by CalPERS staff. In response to question number 1, regarding specific job duties the member was unable to perform, Dr. McAdams wrote: "Based on the objective findings, which there are none, other than the surgical scar . . . on the right wrist, I can find no job duties that I feel the member is unable to perform due to his neck condition. I base this on the fact that absent any history of symptom complex that would be radicular and his significantly positive Waddell signs, i. e., straight leg raising 30 degrees producing neck pain, as well as his refusal to rotate his neck in one moment and later fully rotating in it just a matter of a few minutes later. He definitely was manipulating the examination." (Exhibit 7, p. 6.) Accordingly, it was Dr. McAdams' professional opinion that respondent was not substantially incapacitated from the performance of his duties based on his neck complaints. Dr. McAdams again referenced the absence of positive physical findings and further noted the absence of a pattern of complaint consistent with any nerve root irritation. He again referenced positive signs of manipulating the examination.

17. Respondent challenged Dr. McAdams's examination as insufficient. He noted the report indicated the examination took one hour, but his own estimate was much less. On cross-examination, Dr. McAdams testified that his physical examinations typically last between 10 to 15 minutes, and that the one hour reference was a standard period required by the company that arranges for him to do examinations. Respondent also noted, and demonstrated, that his hands have no ground in dirt and no calluses.

18. a. Dr. McAdams testified in support of his report and conclusions. He had no independent recollection of examining respondent, but reviewed his report. Dr. McAdams described the mechanism of neck pain that can radiate to the hands, and the testing that would be used to determine whether there was an objective incapacity. He acknowledged that the medical records he reviewed included some objective findings that indicated a pathology which, in his opinion, was more indicative of wear and tear, as bone encroachment into a space for a nerve root takes time. Dr. McAdams also discussed treatments including non-invasive medications, or removal or fusion of discs. He did not find in respondent sufficient evidence of a pattern of cervical problems. For example, if there was a cervical issue radiating, he would look for numbness and tingling along the entire arm, not just in the hands. Dr. McAdams found it unusual that respondent had hypersensitivity in all fingers of his left hand only one finger in his right hand. He termed this a hysterical finding. Dr. McAdams was influenced by the distraction testing of placing respondent in the prone position, where respondent rotated his neck in a direction he stated he could not previously when sitting upright. Although Dr. McAdams noted that respondent had some limitation in neck movement, he believed it was more likely due to spasm. However, he did not see sufficient evidence to support the conclusion of cervical spine compression. Dr. McAdams has examined numerous correctional officers, well over 100, and it is aware that it can be a vigorous job requiring a high level of function. However, absent any objective findings regarding substantial incapacitation, he concluded that respondent could perform the usual duties.

b. Respondent's recent MRI and orthopedic report (exs. A and B) were prepared after the examination by Dr. McAdams. Dr. McAdams reviewed these reports. He did not find anything to cause him to change his opinions. He found some aspects of the report to be corroborative of his own findings, including, for example, a full range of motion of the cervical spine. However, the MRI shows degenerative changes that are not consistent with the findings and conclusions of the orthopedist.

19. On February 17, 2017, CalPERS notified respondent that based on Dr. McAdams's report it had concluded that he was no longer disabled for the performance of his duties and that he would be reinstated to his former position in accordance with Government Code section 21192. On March 1, 2017, respondent appealed CalPERS' determination.

20. On balance, the credible medical evidence and opinion establishes that respondent is no longer incapacitated for the performance of duty by reason of an orthopedic neck condition. In March 2014, CalPERS granted disability retirement to respondent based on Dr. Silver's report from October 2013, including Dr. Silver's conclusion that respondent was substantially incapacitated from his job duties. At the time of the initial CalPERS

determination, Dr. Silver's opinions were supported by sufficient evidence, such as respondent's injury and Dr. Silver's examinations, testing and treatment. Respondent's injuries and wrist surgery remained undisputed at the hearing, and respondent presented testimony consistent with his continuing pain and limitations. However, substantial time has passed since October 2013. Dr. McAdams, and this tribunal, were somewhat limited by the absence of records from a significant period after respondent's injury. Nevertheless, Dr. McAdams offered a current opinion, with sufficient explanation and support, that respondent is no longer substantially incapacitated from his duties for CDCR. While the examination was short, Dr. McAdams was convincing in explaining the significance of his findings and conclusions, as well as some inadequacies of the medical records of other physicians. Respondent did not submit sufficient, admissible evidence to counter those findings and conclusions.

LEGAL CONCLUSIONS

1. Respondent CDCR was properly served with notice of the hearing, and did not appear for the hearing. Under Government Code section 11520, CalPERS could proceed and take action in the absence of CDCR.

2. Government Code section 20026 defines the following relevant terms: "'Disability' and 'incapacity for performance of duty' as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion."

3. Government Code section 21156 provides, in pertinent part: "If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability. . . ."

4. Pursuant to Government Code section 21192: "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 . . . . The examination shall be made by a physician or surgeon, appointed by the board . . . at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board . . . shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency . . . where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement."

5. In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, the court considered the issue of burden of proof in an administrative hearing concerning retirement benefits and found "the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence."

In this matter, CalPERS contends that respondent is no longer substantially incapacitated from performance of his usual job duties. The burden of proof is on CalPERS to present evidence to support its contention.

6. "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that one is unable to say that the evidence on either side of an issue preponderates, the finding on that issue must be against the party who had the burden of proving it. (*People v. Mabini* (2000) 92 Cal.App.4th 654, 663.) "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' (Citations omitted) . . . . 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 evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325; italics in original.) To meet the burden of proof by a preponderance of the evidence, the party with the burden of proof "must produce substantial evidence, contradicted or uncontradicted, which supports the finding." (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 329.) Preponderance of the evidence means that "the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325.)

7. The term "incapacitated for the performance of duty" has been interpreted to mean that the employee is substantially unable to perform the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876-877.) The disability or incapacity must presently exist; a risk or possibility of future injury, which might then cause disability or incapacity, is insufficient. (*Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 863.)

8. Except for Dr. Silver's two-page report from October 2013 and Dr. McAdams' report, the remaining medical records were developed in the process of respondent's WC claim. There is a difference between the nature of WC proceedings and disability retirement proceedings that plays a part in consideration of the weight given to the different reports. A workers' compensation ruling or settlement is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567.) As explained in *English v. Board of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal.App.3d 839, disability retirement is based on a showing if the employee is incapable of performing his duties, whereas WC regulations require only that the employee show that his injury is "likely" to preclude his return to work. This latter standard is much more lenient than the former.

> This difference between the two standards is magnified when the language of these two provisions is viewed in the context of the medical reports which invariably serve as evidence in these cases. Medical reports holding that an injury is "*likely*" to preclude a return to work are by their nature, much easier to procure than reports which flatly state that an injury does prevent an employee

from returning to the job. The issue determined for the purpose of the vocational rehabilitation bureau is thus not "identical" to the issue the Board was required to decide in ruling on appellant's petition for disability retirement. . . .

(*Id.*, at p. 844; italics in text.)

As noted in *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, the two systems were distinguished as existing for entirely different reasons and that they were established to attain wholly independent objectives. "A finding by the [WC Appeals Board] of permanent disability, which may be partial for the purposes of workers' compensation, does not bind the retirement board on the issue of the employee's incapacity to perform his duties. . . ." (*Id.*, at p. 215.)

9. By reason of Factual Finding numbers 5 through 20, CalPERS established by a preponderance of the evidence that respondent is no longer incapacitated for the performance of duty within the meaning of Government Code sections 20026 and 21156, by reason of an orthopedic condition related to his neck.

10. This determination does not affect respondent's claims in his application for industrial disability retirement that he is disabled based on psychological stress or bilateral knees.

ORDER

The appeal of respondent Donald R. Coontz, Jr., is denied.

DATED: March 12, 2018

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David B. Rosenman
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DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings