ATTACHMENT A

THE PROPOSED DECISION
ATTACHMENT A

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

In the Matter of the Involuntary Reinstatement from Industrial Disability Retirement of:

CLARK G. CROZER,

Respondent,

and

HIGH DESERT STATE PRISON,
CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Respondent.

REvised Proposed Decision on Remand

Administrative Law Judge Coren D. Wong (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on October 12, 2017, in Redding, California.

Rory J. Coffey, Senior Staff Attorney, represented the California Public Employees’ Retirement System (CalPERS).

Attorney Eugene B. Chittock of the Law Offices of Eugene B. Chittock represented respondent Clark G. Crozer, who was present throughout the hearing.

No one appeared for or on behalf of respondent High Desert State Prison, California Department of Corrections and Rehabilitation (CDCR), its default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to CDCR only.

Evidence was received and the record was left open for Mr. Crozer to submit a written declaration from his medical expert, complainant to respond to the written declaration, Mr. Crozer to reply to complainant’s response, and the parties to submit simultaneous written closing arguments. The Declaration of Jay Milton Beams was marked as Exhibit I, and the Declaration of Robert K. Henrichsen was marked as Exhibit 17.
Exhibits I and 17 were admitted for all purposes, pursuant to the parties’ agreement. Mr. Crozer did not reply to the Declaration of Robert K. Henrichsen, and neither party submitted a written closing argument. The record was closed and the matter was submitted on December 1, 2017.

On December 7, 2017, the ALJ issued an order reopening the record and asking the parties to respond to the following question: “What effect, if any, does the fact that Mr. Crozer reached the minimum age for service retirement pursuant to Government Code section 21060 after Dr. Henrichsen’s Independent Medical Examination have on the Board of Administration’s authority to order reinstatement pursuant to Government Code section 21193 if it is determined Mr. Crozer is no longer substantially incapacitated due to the orthopedic (neck) condition for which he was granted an industrial disability retirement?” Neither party responded to the ALJ’s question, and the record was closed and the matter resubmitted for decision on December 15, 2017.

The proposed decision was issued on January 9, 2018. On March 21, 2018, CalPERS’s Board of Administration non-adopted the Proposed Decision and remanded the matter back to the ALJ for a determination of why respondent’s expert did not testify at the original hearing and the receipt of additional medical evidence pursuant to Government Code section 11517, subdivision (c)(2)(D).

A hearing on remand was scheduled for June 20, 2018, based on the parties’ availability. The day prior to hearing, Mr. Chittock sent correspondence to the ALJ explaining neither he nor his client would appear at hearing. Upon receipt of the correspondence, the ALJ held a telephonic status conference with the parties. Based on Mr. Chittock’s representations that Mr. Crozer could not afford to pay his expert witness or Mr. Chittock to attend the hearing and neither Mr. Chittock nor his client would appear at hearing, the hearing on remand was vacated. The parties agreed to submit written closing briefs in lieu of oral closing statements.

The Administrative Record is marked as Exhibit 18,1 CalPERS’s Brief After Remand is marked as Exhibit 19, Mr. Chittock’s June 19, 2018 correspondence is marked as Exhibit J, and Mr. Crozer Closing Argument is marked as Exhibit K. The record was closed, and the matter was submitted for decision on July 13, 2018.

1 The Administrative Record includes: 1) Exhibits 1 through 17 and A through I, which were considered in issuing the Proposed Decision; 2) a transcript of the October 12, 2017 administrative hearing; 3) the January 9, 2018 Proposed Decision; 4) Agenda Item 8a from the March 21, 2018 Board meeting; and 5) an excerpt from the transcript of the March 21, 2018 Board meeting. Exhibit B was not included with the copy of the Administrative Record CalPERS provided to OAH.
SUMMARY

On February 11, 2011, CalPERS notified Mr. Crozer that his application for industrial disability retirement from his position as a Laundry Supervisor II with CDCR was approved “based upon [his] orthopedic (neck) condition.” CalPERS subsequently notified him that his file was under review to determine if he still met the eligibility requirements for industrial disability retirement. On June 17, 2016, CalPERS notified Mr. Crozer of its determination that his orthopedic (neck) condition is no longer disabling, and he is being reinstated to his former position. Mr. Crozer appealed that determination.

The sole issue on appeal is whether Mr. Crozer remains substantially incapacitated from the performance of his usual duties as a Laundry Supervisor II with CDCR due to the orthopedic (neck) condition for which he was originally granted industrial disability retirement. The persuasive medical evidence established he is no longer substantially incapacitated. Therefore, he must be reinstated to his former position as a Laundry Supervisor II with CDCR.

FACTUAL FINDINGS

Disability Retirement Election Application

1. On December 30, 2009, Mr. Crozer signed a Disability Retirement Election Application seeking industrial disability retirement, which CalPERS received five days later. On February 11, 2011, CalPERS notified him that his application was approved, because he was “substantially incapacitated from the performance of [his] usual duties as a Laundry Supervisor II with the Department of Corrections California State Prison-Lassen County, based upon [his] orthopedic (neck) condition.”

2. On September 26, 2013, CalPERS notified Mr. Crozer that his file was under review to determine if he still met the eligibility requirements for industrial disability retirement, and requested information from his physician about the current status of his orthopedic (neck) condition. CalPERS subsequently sent him to Robert K. Henrichsen, M.D., for an Independent Medical Evaluation (IME).

3. On June 17, 2016, CalPERS sent Mr. Crozer correspondence notifying him of its determination that his orthopedic (neck) condition is no longer substantially incapacitating, and he is being reinstated to his former position as a Laundry Supervisor II with CDCR. Mr. Crozer timely appealed CalPERS’s determination. Anthony Suine, Chief of CalPERS’s Benefit Services Division, signed the Accusation solely in his official capacity on May 9, 2017.
Employment History

4. Mr. Crozer began working for CDCR on August 18, 1997, and his last position was as a Laundry Supervisor II. He typically worked an eight-hour shift, five days a week. He is a state safety member of CalPERS by virtue of his employment with CDCR.

5. Mr. Crozer sustained two industrial injuries to his neck while working for CDCR. The first occurred on November 1, 2006, while he was pushing a heavy “net” full of clothes along an overhead track system between a washing machine and a dryer. The second injury occurred while he was performing the same activity on January 9, 2009. He never returned to work at CDCR after the second injury.

Laundry Supervisor II Position

6. The California State Personnel Board Specification for “Laundry Supervisor II” defines the position as follows:

Under general direction in a large State correctional facility in the Department of Corrections or Department of the Youth Authority to plan, organize, and supervise the operations of the laundry; to supervise the maintenance of laundry equipment and supplies; to instruct laundry workers; to maintain order and supervise the conduct of inmates, wards, residents, or patients; to protect and maintain the safety of persons and property, may instruct, lead, or supervise inmates, wards, or resident workers; and to do other related work.

7. The job specification describes the following as the typical tasks performed by a Laundry Supervisor II:

Assigns work, supervises, and gives instructions and training to employees and helpers from the resident population; evaluates their performance and takes or recommends appropriate action; supervises the receiving, marking, sorting, wrapping, and distributing of laundry; supervises the preparation and use of soaps, starches, bluing, and bleaching solutions and approved washing formulas; supervises the operation of washers, starch cookers, extractors, ringers, dryers, flatwork ironers, presses, and sterilizers; as necessary assist in the performance of the foregoing tasks; adjusts, oils, and makes minor repairs on laundry equipment and machinery; makes inspections and maintains approved laundry practices and standards of safety and sanitation; requisitions, receives, inspects, stores, and inventory supplies; keeps records and prepares reports; maintains order and supervises the conduct of persons
committed to the Departments of Corrections and the Youth Authority; prevents escapes and injury by these persons to themselves or others or to property; maintains security of working areas and work materials; inspects premises and searches inmates, wards, residents, or patients for contraband, such as weapons or illegal drugs.

8. A Laundry Supervisor II is expected to be capable of performing the following physical activities for the following durations during an eight-hour shift:²

Frequently: Standing, walking, and repetitive use of hand(s).

Occasionally: Sitting, crawling, kneeling, climbing approximately 20 feet, squatting, bending (neck), bending (waist), twisting (neck), twisting (waist), reaching (above shoulder), reaching (below shoulder), pushing and pulling no more than 100 feet, fine manipulation, power grasping, simple grasping, and lifting/carrying up to 75 pounds.

Never: Running, keyboard use, mouse use, and lifting/carrying greater than 75 pounds.

9. In its simplest terms, Mr. Crozer described the duties of his former job as supervising the operations of the laundry room at CDCR. This included training and supervising inmates assigned to the laundry room.

10. Each inmate is given a “net” in which to put his dirty laundry and send to the laundry room for laundering. Several individual nets are emptied into a larger net in the laundry room. Once full of dirty laundry, the larger net is hoisted onto an overhead track system that workers use to manually push the laundry to a washing machine. The washing machines are top-loading machines, and a cord is pulled to open the net and drop the laundry into a washing machine. After the laundry has been laundered, the wet laundry is loaded back into a net, which is then hoisted to the overhead track system and manually pushed to a dryer. The dryers are top-loading machines, and a cord is pulled to open the net and drop the wet laundry into a dryer. Once the dryer is finished, the laundry is loaded back into a net, which is then hoisted to the overhead track system and manually pushed to the area in which clean laundry is folded. The contents of the net are emptied, and the clean laundry is folded.

11. Under normal operating procedures, inmates assigned to the laundry facility are responsible for completing the laundry process described in Factual Finding 10, and the laundry supervisor's role in the process is to supervise the inmates. When CDCR is under "lockdown," however, none of the inmates is allowed to leave his cell, and the laundry room

² "Frequently" is three to six hours, and "occasionally" is up to three hours.
supervisor and other employees are required to perform the tasks otherwise performed by the inmates.

12. Mr. Crozer estimated that CDCR was on lockdown about twice a month while he worked there, with the longest lasting between two and three months. Generally, one other employee helped him with the laundry during lockdowns, and sometimes a correctional officer also helped. Mr. Crozer estimated he and whoever helped him completed between 15 and 20 nets of laundry each shift during lockdowns. He also estimated that each large net weighed between 200 and 250 pounds when filled with dry clothes (before the washing machine and between the dryer and the area in which clean laundry was folded), and between 400 and 500 pounds when filled with wet clothes (between the washing machine and the dryer).

13. Regardless of whether CDCR was on lockdown, Mr. Crozer was responsible for maintaining each of the four dryers in the laundry room after the inmates left the laundry facility each day. This required him to remove three doors from each dryer, remove any lint that had built up in the dryer vent, inspect the parts of the dryer, and replace each door. He estimated that each door weighed between 45 and 50 pounds. The inmates were not allowed to maintain the dryers because of the security risk if one of them was to hide inside a dryer in an effort to escape.

14. Mr. Crozer was also responsible for moving 55 gallon drums of chemicals using a handcart. He estimated each drum weighed between 440 and 500 pounds when full, and he moved them approximately 75 to 80 feet down a loading dock. Once he moved the drums, the contents were transferred to a larger container through a pump system. The inmates were not allowed to move the drums when Mr. Crozer worked at CDCR because one of them had used the chemicals to make a bomb in the past.

15. Mr. Crozer's testimony was corroborated by the testimony of Floyd Bates, a laundry supervisor at CDCR from 1995 through August 1999, except Mr. Bates estimated CDCR was under lockdown once a week for one to three days when he worked there.

**Medical Evidence**

**CALPERS’S Evidence**

16. At CalPERS's request, Dr. Henrichsen, a board-certified orthopedic surgeon, performed an IME of Mr. Crozer on May 24, 2016. He prepared a report documenting his IME, a supplemental report, and a declaration, all of which were admitted into evidence. He also testified at hearing.

17. At the time of the IME, Mr. Crozer complained of reduced range of motion in his neck upon flexion to the right. He also complained of pain on the right side of the occiput, which radiated down and across his trapezius muscle and down the back of his arm.
to the elbow on his right. He also complained of numbness and tingling in his right hand, and that he would drop items he was holding in that hand.

18. Mr. Crozer walked from the waiting room into the examination room with a careful gait, but did not walk with a limp or in any other obvious manner indicative of pain avoidance or lower extremity weakness. Dr. Henrichsen’s physical examination was limited to the neck and upper extremities.

19. Physical examination of Mr. Crozer revealed a slight reduction in the range of motion of his neck and right shoulder, but a normal range of motion of his left shoulder and both lower extremities. His neck muscles were soft posteriorly, and there was some tenderness on the right side and at the cervicothoracic junction. He had no specific areas of muscle spasm, trigger points, or nodules in the posterior part of his neck or across his trapezius muscle.

20. Examination of Mr. Crozer’s shoulders and parascapular muscles revealed some atrophy of the right supraspinatus musculature. Loading of the scapular muscles revealed winging on the right, but not the left.

21. Dr. Henrichsen concluded Mr. Crozer is unable to lift more than 50 pounds with his right arm above his shoulder. He also has a reduced ability to reach with his right arm above his shoulder. However, Dr. Henrichsen opined that neither restriction constitutes a substantial incapacity from the performance of Mr. Crozer’s usual job duties.

22. After Dr. Henrichsen completed his IME, CalPERS provided a record of Mr. Crozer’s October 18, 2016 visit to his primary care physician and a new qualitative occupational description for the position of Laundry Supervisor II. After reviewing those documents, Dr. Henrichsen prepared a supplemental IME report, in which he criticized Mr. Crozer’s physician’s conclusion that Mr. Crozer could not lift more than 10 pounds as being “without objective support.” Dr. Henrichsen concluded, “No musculo-skeletal objective findings are present, [Mr. Crozer] is able to accomplish his occupation.” He further concluded, “No, [Mr. Crozer’s] examination does not demonstrate that he is incapacitated for performance of his duties as described in the occupational description you have submitted.”

23. At hearing, Dr. Henrichsen testified in a manner consistent with his original and supplemental IME reports. Additionally, he opined Mr. Crozer could physically lift more than 50 pounds with his right arm above his shoulder and reach with his right arm above his shoulder without restriction, but doing so would cause pain. Dr. Henrichsen explained that the restrictions imposed in his original report were merely prophylactic ones designed to avoid further pain.
24. Dr. Henrichsen reviewed at hearing a compact disc containing a copy of a February 28, 2017 MRI of Mr. Crozer's cervical spine and a radiological report of that MRI. The radiologist's finding of a "hemiated disc midline and left of midline impacting the cervical cord significantly at its junction with the existing nerve" at the C5-6 level did not change Dr. Henrichsen's opinion that Mr. Crozer is not substantially incapacitated, because the herniation is on the left side and Mr. Crozer's symptoms are on the right. Dr. Henrichsen explained that symptoms are generally on the same side as the herniation, unless the cause of the symptoms is something other than the herniation. He further explained that the MRI showed no herniation on the right side, and the disc at C6-7 "is normal the canal is normal and the foramina are normal."

MR. CROZER'S EVIDENCE

25. Mr. Crozer produced Jay M. Beams, M.D., at hearing, but there was insufficient time to take Dr. Beams's testimony and Mr. Crozer did not want to return for a second day of hearing. As an accommodation, the parties agreed to receive Dr. Beams's written declaration into evidence as if he testified at hearing. The declaration does not specify the area of medicine in which Dr. Beams practices or specializes.

26. Dr. Beams had no concerns with Dr. Henrichsen's physical findings after examining Mr. Crozer on May 24, 2016. However, he criticized Dr. Henrichsen's opinion that Mr. Crozer is not substantially incapacitated as being based on incomplete factual information.

27. In particular, Dr. Beams explained Dr. Henrichsen "did not have access to recent MRI's and EMG's that are relevant." He further stated, "The MRI of his cervical spine showed that he did have disc protrusions and there was evidence of disc desiccation in his discs in his neck. He did not have Dr. Demeer's consultation." He also explained,

Dr. Henrichsen did not take into account his other injuries that he had while in the military, and he did not have the advantage of an MRI of the cervical spine, which shows femoral stenosis and significant central canal stenosis. He has mild disc bulge at C5-6, mild central canal stenosis and mild disc bulges at C6-7.

28. Dr. Beams opined:

It is my opinion that Mr. Crozer is incapable of performing the extraction of the laundry from the laundry machines, where the wet laundry can weigh in excess of 50 pounds. I do not believe that he is capable of pushing an overhead weight of 250 pounds.

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3 The radiology report identifies the images as being of the lumbar spine. However, Dr. Henrichsen reviewed the compact disc, and confirmed the images are in fact of the cervical spine.
into the dryer above his head by pushing and pulling a strap. Additionally, I do not believe that he is capable of lifting 50 pounds above his head and cleaning the laundry out and then replacing it and doing this task multiple times a day.

29. Mr. Crozer also introduced medical reports written by Michael A. Sommer, M.D., an orthopedic surgeon treating him through the workers' compensation system. On July 12, 2017, he presented to Dr. Sommer with complaints of pain "about the right side of the head extending down into the posterolateral neck, across the top and posterior aspect of the shoulder, and then trending down the arm to include tingling and numbness about the ulnar hand."

30. Physical examination of Mr. Crozer revealed tenderness in the cervical spine and the superomedial scapular angle on the right side. Range of motion of his right shoulder was normal, until level with his shoulder, and pain in his neck prevented him from abducting or flexing his right arm beyond 90 degrees.

31. Dr. Sommer concluded Mr. Crozer is substantially incapacitated from the performance of his usual duties as a Laundry Supervisor II. He explained:

I have performed literally hundreds of exams of people who work in the California prison, including both correctional officers and civilian supervisors. One of the most important lessons that I have learned in this is that when the prison is in lockdown, these people have to do all the work as there are no inmates to help them. I have not a shadow of a doubt that Mr. Crozer is in fact substantially incapacitated for this work.

Additional Factual Findings on Remand

32. The ALJ issued the Proposed Decision on January 9, 2018. CalPERS's Board of Administration non-adopted the Proposed Decision and remanded the matter back to the ALJ to receive additional medical evidence at its March 21, 2018 board meeting.

33. The hearing on remand was scheduled for June 20, 2018. The day prior to hearing, Mr. Chittock sent the ALJ correspondence, in which he wrote:

This letter is to inform you that neither Mr. Crozer or [sic] myself will be attending the hearing scheduled for tomorrow, June 20, 2018. Mr. Crozer cannot possibly pay to make the trip and thus we are submitting this cover letter and statement to be added to the record. Although we would like to appear in person, our final argument has been prepared and we request it be read and consider [sic] prior to making your final
determination. With any questions or concerns please contact my office.

34. Included with the correspondence was a document entitled Statements for the Record; and Declaration of Eugene B. Chittock in Support of Clark G. Crozer. Mr. Chittock declared, under penalty of perjury, that Mr. Crozier was injured while working for CDCR, he suffered other injuries prior to working for CDCR which were exacerbated by the work he performed as a Laundry Supervisor II and his subsequent injury, he was granted an industrial disability retirement, and CalPERS decided to review his disability status to determine whether he remains substantially incapacitated “just prior to his 50th birthday.”

35. Mr. Chittock further declared that Mr. Crozer “has spent his entire savings and has even taken out loans to defend himself in this review process.” Mr. Crozer is no longer able to afford to appear at hearings in person or pay for experts or Mr. Chittock.

36. Finally, Mr. Chittock declared that Mr. Crozer has exhausted his financial resources trying to defend himself in this matter. He has requested that CalPERS pay for Mr. Crozer’s expert, but it has refused.

37. Attached to Mr. Crozer’s Closing Argument is a copy of Taylor L. MacDonald, M.D.’s, February 13, 2018 radiology report of an MRI of Mr. Crozer’s right shoulder. Dr. MacDonald’s findings were:

Osseous structures are intact. No acute fracture. No abnormal marrow edema. No focal osseous lesion. No Hill-Sachs or os acromiale deformity. There is some degenerative spurring present along the anteroinferior aspect of the glenoid (series 501 image 12) along the anterior margin.

There is intermediate partial-thickness tearing of the articular surface fibers of the supraspinatus. There is mild tendinopathy of the residual fibers. The infraspinatus, teres minor, subscapularis tendons are intact. Biceps tendon is well seated within the bicipital groove. There is tendinopathy involving the interscapular biceps tendon. Limited evaluation of the glenoid labrum on this nonarthrographic exam. No discrete para labral cyst is identified.

The anterior band of the inferior glenohumeral ligament is thickened and somewhat poorly defined, correlate for prior

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4 Mr. Chittock’s June 19, 2018 correspondence and the enclosed Statements for the Record; and Declaration of Eugene B. Chittock in Support of Clark G. Crozer are marked collectively as Exhibit J, and Exhibit J is admitted for all purposes, without objection.
injury. No significant glenohumeral effusion. No abnormal fluid collection within the subacromial/subdeltoid bursa.

There is mild arthrosis of the acromioclavicular joint. There is a type II acromion present.

38. The following were Dr. MacDonald’s impressions of the MRI of Mr. Crozer’s right shoulder:

1. Intermediate grade partial-thickness tearing of the articular surface fibers of the supraspinatus. No full-thickness tear, retraction, atrophy.

2. Degenerative spurring along the anteroinferior aspect of the glenoid with thickening of the anterior band of the inferior glenohumeral ligament. Correlate clinically for prior injury or instability.

3. Mild arthrosis of the acromioclavicular joint.

39. Mr. Crozer presented no evidence of the medical significance, if any, of Dr. MacDonald’s findings or impressions. Nor did he offer any explanation how, if at all, those findings or impressions support the conclusion he is still substantially incapacitated.

40. Mr. Crozer also attached to his closing argument a copy of Gregg W. McAninch’s February 14, 2018 radiology report of an MRI of Mr. Crozer’s brachial plexus. The report included the following findings:

Comparison same date MRI right shoulder, MRI brain 3/29/2017 and MRI cervical spine 2/20/17.

Comment: Disc protrusion at C5-C6 on MRI cervical spine 2/20/17 is eccentric to the left.

Contrast: IV 7 cc gadolinium.

Craniocervical alignment appears at anatomic. Visualized brain, great vessels, thyroid, parotid/and mandibular glands and lung apices appear normal. No bulky adenopathy identified. Symmetric normal musculature is identified. Specifically, no atrophy identified.

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5 Drs. MacDonald’s and McAninch’s reports (Exhibit K) are admitted for all purposes, without objection.
There appears to be a small left paracentral osteophyte at C3-C4 with minimal anterior cord contact. No syrinx or contusion. Left paracentral intrusion with high signal intensity zone at C5-C6 appears to have resolved. Mild convex left upper thoracic scoliosis is incidentally noted.

Reportedly, no right neural foraminal narrowing identified. The bilateral brachial plexus are well-demonstrated maintain normal MRI signal intensity and morphology.

No abnormal area of enhancement detected.

41. The following were Dr. McAninch’s impressions:

1. Normal MRI of the brachial plexi, bilaterally. No abnormal area of enhancement. No atrophy seen.

2. Compared to MRI cervical spine 2/20/17, resolved left paracentral protrusion at C5-C6 with small left paracentral osteophyte at C3-C4, of doubtful clinical significance.

42. Mr. Crozer presented no evidence of the medical significance, if any, of Dr. McAninch’s findings or impressions. Nor did he offer any explanation how, if at all, those findings or impressions support the conclusion he is still substantially incapacitated.

Discussion

USUAL DUTIES OF A LAUNDRY SUPERVISOR II

43. The persuasive evidence established Mr. Crozer’s usual duties as a Laundry Supervisor II at CDCR included those described in Factual Findings 10 through 15. Mr. Bates’s explanation that the job specification discussed in Factual Findings 6 and 7 is “generic” for all Laundry Supervisory IIs in correctional institutions throughout the State of California was persuasive and uncontested.

SUBSTANTIAL INCAPACITY

44. Dr. Henrichsen’s opinion that Mr. Crozer is no longer substantially incapacitated from the performance of his usual duties as a Laundry Supervisor II with CDCR was more persuasive than Drs. Beams’s and Sommer’s to the contrary. Dr. Henrichsen is a board-certified orthopedic surgeon. His reports were detailed and thorough, and provided a sufficient explanation for his opinion. His opinion was supported by the results of his physical examination of Mr. Crozer. His testimony was comprehensive, and persuasively explained the bases for his opinion. His explanation why the disc herniation at C5-6 is not substantially incapacitating was persuasive and unrebutted. He persuasively
articulated his understanding of the standard for qualifying for a CalPERS’s disability retirement, and how that standard differs from that which is applicable to qualifying for workers’ compensation benefits.

45. On the other hand, there was no evidence of the area of medicine in which Dr. Beams practices or specializes. Additionally, his opinion that Mr. Crozer remains substantially incapacitated was not based on his physical examination of Mr. Crozer, but based solely on his review of reports prepared by Drs. Henrichsen and Sommer. His criticism of Dr. Henrichsen’s opinion for not including consideration of recent EMG studies or Dr. Demeer’s consultation was not persuasive because neither was introduced into evidence or discussed by Dr. Beams. Dr. Beams’s reliance on evidence of injuries Mr. Crozer suffered while in the military was discredited by the fact that Mr. Crozer worked for CDCR for more than 11 years after sustaining those injuries. His conclusion that a recent MRI showed evidence of “mild central canal stenosis and mild disc bulges at C6-7” was not supported by the evidence, and he did not rebut Dr. Henrichsen’s explanation why the disc herniation at C5-6 is not substantially incapacitating.

46. Dr. Sommer did not testify, and his opinion that Mr. Crozer remains substantially incapacitated was not tested on cross-examination. He has been treating Mr. Crozer through the workers’ compensation system, and there was no evidence of his awareness of the different standards applicable to qualifying for a CalPERS’s disability retirement and qualifying for workers’ compensation benefits. (Compare Coca-Cola Bottling Company v. Superior Court (1991) 233 Cal.App.3d 1273, 1284 [“A compensable injury [under workers’ compensation] is one which causes disability or need for medical treatments”] with Mansperger v. Public Employees’ Retirement System (1970) 6 Cal.App.3d 873, 877 [“We hold that to be ‘incapacitated for the performance of duty’ within section 21022 means the substantial inability of the applicant to perform his usual duties”].)

Additional Discussion on Remand

47. None of the additional evidence Mr. Crozer presented on remand supports the conclusion that he is substantially incapacitated. Evidence of his financial circumstances does not constitute medical evidence that can support a finding of substantial incapacity. Additionally, he provided no authority for the proposition that CalPERS is required to pay for an indigent member’s expert witness and/or attorney.

48. Dr. MacDonald’s February 13, 2018 radiology report is not relevant to these proceedings. Mr. Crozer was granted an industrial disability due to an orthopedic (neck) condition. CalPERS reevaluated his disabled status to determine whether he remains substantially incapacitated due to that condition. Any substantial incapacity he may have due to a shoulder condition is not relevant. Besides, there is no evidence of the medical significance, if any, of Dr. MacDonald’s findings or impressions.

49. Dr. McAninch's February 14, 2018 radiology report is not persuasive, because there is no evidence of the medical significance, if any, of his findings or impressions. Additionally, he concluded that the disc protrusion at C5-C6 has "resolved." And while he found a "small left paracentral osteophyte at C3-C4," he concluded it is "of doubtful clinical significance."

Summary

50. CalPERS has the burden of producing competent medical evidence establishing Mr. Crozer is no longer substantially incapacitated from the performance of his usual duties as a Laundry Supervisor II at CDCR due to the orthopedic (neck) condition for which he was originally granted industrial disability retirement. It satisfied its burden through Dr. Henrichsen's reports and testimony, and Mr. Crozer did not rebut that evidence for the reasons explained in Factual Findings 44 through 50. Therefore, Mr. Crozer should be reinstated to his former position as a Laundry Supervisor II with CDCR.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. CalPERS has the burden of proving Mr. Crozer is no longer substantially incapacitated from the performance of his usual duties as a Laundry Supervisor II with CDCR due to the orthopedic (neck) condition for which he was originally granted industrial disability retirement. (Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 204, fn. 19.) It must meet its burden by a preponderance of the evidence. (Evid. Code, § 115.) This evidentiary standard requires CalPERS to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (People ex rel. Brown v. Tri-Union Seafoods, LLC (2009) 171 Cal.App.4th 1549, 1567.) In other words, CalPERS need only prove it is more likely than not that Mr. Crozer is no longer substantially incapacitated due to the orthopedic (neck) condition. (Lillian F. v. Superior Court (1984) 160 Cal.App.3d 314, 320.)

Applicable Law

2. After Mr. Crozer retired for industrial disability, CalPERS's Board of Administration had authority to require him to undergo medical evaluation at any time prior to his reaching the minimum age for voluntary retirement for service. (Gov. Code, § 21192.) "If the determination pursuant to Section 21192 is that [he] is not so incapacitated for duty in the position held when retired for disability... and his... employer offers to reinstate [him], incapacitated' suggests the scope of the board's evaluation is limited to determining whether the conditions for which disability retirement was granted continue to exist. The statute does not provide the board with authority to identify new physical, mental, or emotional conditions which might adversely affect the exercise of [the member's] duties"].
his . . . disability retirement allowance shall be canceled immediately . . . .” (Gov. Code, § 21193.) The minimum age for voluntary retirement for service applicable to Mr. Crozer is 50, and he did not reach that age until after Dr. Henrichsen performed his IME. (Gov. Code, § 21060, subd. (a).)

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

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

5. It is irrelevant to this appeal that Mr. Crozer reached 50 years of age as of the date of hearing, because Government Code section 21193 compels his reinstatement as a Laundry Supervisor II upon a determination he is no longer substantially incapacitated, without regard to his age. And while such determination must be based on competent medical evidence, he had not reached age 50 as of the date of Dr. Henrichsen’s IME.

Additional Legal Conclusions on Remand

6. Government Code section 11517, subdivision (a), provides: “A contested case may be originally heard by the agency itself and subdivision (b) shall apply. Alternatively, at the discretion of the agency, an administrative law judge may originally hear the case alone and subdivision (c) shall apply.” When the agency elects to have the matter originally heard by an administrative law judge, the administrative law judge “shall prepare within 30 days after the case is submitted to him or her a proposed decision in a form that may be adopted by the agency as the final decision in the case.” (Gov. Code, § 11517, subd. (c)(1).) The agency shall take one of the following actions within 100 days of receiving the proposed decision, or the proposed decision is deemed adopted:
Reject the proposed decision and refer the case to the same administrative law judge if reasonably available, otherwise to another administrative law judge, to take additional evidence. If the case is referred to an administrative law judge pursuant to this subparagraph, he or she shall prepare a revised proposed decision, as provided in paragraph (1), based upon the additional evidence and the transcript and other papers that are part of the record of the prior hearing. A copy of the revised proposed decision shall be furnished each party and his or her attorney as prescribed in this subdivision.

(Gov. Code, § 11517, subd. (c)(2)(D).)

Conclusion

7. CalPERS met its burden of producing competent medical evidence that Mr. Crozer is no longer substantially incapacitated from the performance of his usual duties as a Laundry Supervisor II with CDCR due to the orthopedic (neck) condition for which he was originally granted industrial disability retirement. Mr. Crozer did not rebut that evidence for the reasons explained in Factual Finding 50. Therefore, Mr. Crozer must be reinstated to his former position as a Laundry Supervisor II with CDCR.

ORDER

Respondent Clark G. Crozer's appeal from CalPERS's determination that he is no longer substantially incapacitated from the performance of his usual duties as a Laundry Supervisor II with CDCR due to the orthopedic (neck) condition for which he was originally granted industrial disability retirement and must be reinstated to that position is DENIED.

DATED: July 27, 2018

[Signature]
COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings