ATTACHMENT A

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

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

RAYMOND B. CANTU,  
Respondent,

and

CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION - CALIFORNIA INSTITUTION FOR MEN,  
Respondent.

PROPOSED DECISION


Charles H. Glauberman, Senior Staff Attorney, represented Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System.

Andrew D. Smith, Attorney at Law, represented Raymond B. Cantu.

There was no appearance by or on behalf of California Department of Corrections and Rehabilitation - California Institutions for Men.

The matter was submitted on May 24, 2018.¹

¹ The record remained open for written closing argument. CalPERS' Closing Brief in Support of Determination was filed on April 27, 2018 and marked Exhibit 19. Respondent Raymond B. Cantu's Closing Brief in Opposition of CalPERS' Determination was filed on May 14, 2018 and marked as Exhibit K. CalPERS' Reply Brief in Support of Determination was filed on May 24, 2018 and marked Exhibit 20.
FACTUAL FINDINGS

Jurisdiction

1. Anthony Suine (complainant) filed Accusation Case No. 2017-0148 in his official capacity as Chief, Benefit Services Division, California Public Employees’ Retirement System (CalPERS).

2. California Department of Corrections and Rehabilitation – California Institution for Men (respondent CDCR) employed Raymond B. Cantu (respondent Cantu) as a Correctional Officer. By virtue of his employment, respondent Cantu was a state safety member of CalPERS.

3. On June 10, 2013, respondent Cantu signed an application for Industrial Disability Retirement.

By letter, dated October 7, 2013, complainant notified respondent Cantu: “Your application for industrial disability retirement has been approved. You have been found substantially incapacitated from the performance of your usual duties as a Correctional Officer with the Department of Corrections Institutions for Men, based on your orthopedic (left knee and right shoulder) conditions.”

4. Complainant reviewed Government Code section 21060 and determined that respondent Cantu was under the minimum age for voluntary service retirement applicable to members of his classification when he underwent the medical examination pursuant to the terms of Code section 21192.

5. Because respondent Cantu was below the age for voluntary service retirement, in 2016, complainant obtained or received medical reports concerning respondent Cantu’s orthopedic (left knee and right shoulder) conditions from competent medical personnel. After review of the reports, complainant determined that respondent Cantu was no longer disabled or incapacitated from performance of his duties as a Correctional Officer.

6. By letter, dated December 7, 2016, complainant notified respondent Cantu and respondent CDCR of its determination and informed the parties of their right to appeal the determination.

7. Respondent CDCR did not appeal.

8. Respondent Cantu filed a timely appeal, requesting a hearing.

In his appeal, respondent Cantu stated that he continued to be substantially incapacitated from performance of his job duties as a Correctional Officer with respondent

On May 24, 2018, the record was closed, and the matter was submitted.
CDCR as found in the decision which approved his industrial disability retirement, dated December 7, 2013.

9. Respondent Cantu's appeal is limited to the issue of whether he is disabled or incapacitated from performance of his usual duties.

*Industrial Disability Injuries*

10. The injury that resulted in respondent Cantu's disability retirement occurred on April 13, 2011. While on duty, respondent Cantu slipped on a wet floor and hyperextended his left knee. He felt pain and a pop in that knee. In late 2011, he fell at home. After his left knee buckled, he fell to the ground, landed on the right side of his chest and noted pain in his right shoulder. After the injury in April 2011, respondent Cantu never returned to work.

*Duties and Physical Requirements of Position*

11. The duties and physical requirements of a Correctional Officer are set forth in (1) Essential Functions of the Correctional Office, and (2) Physical Requirements of Position/Occupational Title.

The "essential functions" require that a Correctional Officer must: (1) work in minimum and maximum security institutions, (2) wear personal protective equipment, such as stab proof vests and breathing apparatus, (3) qualify with firearms, (4) swing a baton with force, (5) defend against inmates armed with weapons, (6) subdue inmates and apply restraints, and (7) inspect an inmate for contraband and conduct body searches.

The physical requirements require that a Correctional Officer must: (1) walk occasionally to continuously, (2) run occasionally and run in an all-out effort when responding to alarms or serious incidents up to 400 yards over varying surfaces, including stairs, (3) climb occasionally to frequently series of steps as well as ladders, (4) crawl and crouch occasionally, (5) stand occasionally to continuously, (6) stoop and bend occasionally to frequently, (7) lift and carry frequently, lift and carry 20 to 50 pounds on a regular basis and occasionally carry up to 100 pounds, (8) continuously wear equipment belt weighing 15 pounds, (9) push and pull occasionally to frequently, (10) reach overhead occasionally while performing regular duties, and (11) engage in frequent hand and wrist movements.

*Medical Evidence*

12. The medical evidence included, among other things, (1) reports and testimony of Robert J. Kolesnik, M.D. (Dr. Kolesnik), (2) reports and testimony of David Wood, M.D. (Dr. Wood), (3) reports of Soheil Aval, M.D. (Dr. Aval), and (4) an MRI report of the right knee, dated February 20, 2017.
Dr. Kolesnik testified on behalf of complainant and concluded that respondent Cantu was not disabled or incapacitated from performance of his usual duties. Doctors Aval and Wood disagreed with Dr. Kolesnik’s opinion and supported respondent Cantu’s position that he remains disabled and incapacitated from performance of his usual duties. Considering the foregoing, it was necessary to determine which opinion was more reliable.

13. California courts have repeatedly underscored that an expert’s opinion is only as good as the facts and reasons upon which the opinion is based. (Kememur v. State of California (1982) 133 Cal.App.3d 907, 924.) In evaluating the opinions of the physicians, a number of factors were considered, including the education, training and experience of each physician, the bases of the opinions, whether there were objective considerations, including whether the witness appeared to be biased.

Doctors Kolesnik and Wood each is licensed to practice medicine in the State of California; each is a board certified orthopedic surgeon; each orthopedist has practiced for more than 25 years; each physician’s medical practice has included evaluating and performing surgeries of shoulders and knees. In rendering his opinion, each appeared to understand the facts and circumstances of the industrial injury that resulted in the filing and approval of respondent Cantu’s application for disability retirement. In rendering his opinion, each reviewed the medical records; each reviewed the duties and physical requirements of the position of Correctional Officer; each performed physical examination of respondent Cantu and thereafter issued reports.

There was a question regarding whether Dr. Aval was respondent Cantu’s treating physician. However, he was the only physician who evaluated respondent Cantu in 2013 and again in 2016. His testimony regarding respondent Cantu’s medical condition in 2013 and whether the condition of his right shoulder and left knee continued to be stable or had improved or worsened in 2016 may have been of assistance. However, he did not testify. His reports were admitted as administrative hearsay.

Doctors Wood’s and Aval’s conclusions were more consistent with respondent Cantu’s physical appearance at hearing. Respondent Cantu was obese; he had difficulty walking and appeared to be in pain.

14. When he testified, Dr. Kolesnik explained his Independent Medical Examination (IME) of respondent Cantu and the report he issued thereafter, dated October 11, 2016. During his testimony, Dr. Kolesnik explained, as part of the physical examination, the tests he performed, the reasons for the tests and his findings.

15. Respondent Cantu reported the following subjective complaint to Dr. Kolesnik. He experienced intermittent, aching discomfort about the right shoulder with repetitive and overhead use. He noted some loss of active motion and stated that he was unable to throw with his right shoulder. The pain did not wake him at night. He denied any other complaints of pain or numbness in this right upper extremity.
Respondent Cantu noted intermittent pain about the anterior aspect of the knee with more severe involvement laterally than medially; he had occasional pain posterolaterally. Respondent Cantu noted intermittent soft tissue swelling, buckling, and locking; he felt as if something moved within the knee. He stated that he was unable to run and had extreme difficulty descending stairs but no difficulty with ascending stairs. His symptoms had not changed over the past six months.

Respondent Cantu reported that he did not receive physical therapy at that time and took ibuprofen on an as needed basis.

16. When he evaluated respondent Cantu’s right shoulder, Dr. Kolesnik administered certain objective tests. On the passive range of motion test, Dr. Kolesnik placed the joint through range of motion (flexion and abduction) and moved the shoulder; and respondent Cantu did not participate or have any role in this test. According to Dr. Kolesnik, the results on the passive range of motion test indicated that there was a lack of full effort by respondent Cantu; the shoulder is the most mobile joint in the body; in his opinion, if respondent Cantu had a true loss of any motion of the shoulder, usually the muscles and ligaments around the shoulder would contract and prevent full passive range of motion. Respondent Cantu’s loss of motion was minimal; there was no fixed contracture of the shoulder. Respondent Cantu was able to fully flex and abduct that shoulder equal to that of his uninvolved shoulder. In addition, Dr. Kolesnik administered the Neer sign test; he passively raised respondent Cantu’s arm in forward flexion. Had respondent Cantu experienced pain with that maneuver, this could indicate tendonitis or inflammation of the rotator cuff tendon. Respondent Cantu had no pain. Therefore, the result of this test was negative. Finally, Dr. Kolesnik administered the Supraspinatus test. In doing so, he instructed respondent Cantu to hold his arm in forward flexion, slight abduction, and maintain the arm horizontal (parallel) to the ground; then Dr. Kolesnik pushed down on respondent Cantu’s arm while respondent Cantu actively resisted. Had he experienced pain, it would have indicated tendonitis or inflammation or pathology affecting the supraspinatus tendon and muscle. Respondent Cantu did not have pain when the test was administered. Therefore, the result of this test was negative. Based on the results of the Neer sign and supraspinatus tests, Dr. Kolesnik determined that there were no fixed contractures and no atrophy or deformity about the shoulder. Based on his examination, Dr. Kolesnik’s impression was that, “outside of the healed arthroscopy incisions”, respondent Cantu’s right shoulder was essentially normal.

In assessing respondent Cantu’s right shoulder, Dr. Kolesnik examined respondent Cantu’s upper arms and elbows because they are part of his upper extremity. The circumference of his upper arms was equal at 37 centimeters, indicating no defects, deformity or atrophy, essentially normal.

In assessing respondent Cantu’s right shoulder, Dr. Kolesnik examined respondent Cantu’s forearms, wrists and hands for the same reason. In examining these body parts, Dr. Kolesnik administered the Jamar dynamometer test. The Jamar dynamometer is a handheld device that the patient squeezes and measures the patient’s grip strength. On this test,
respondent Cantu demonstrated decreased grip strength in his right hand. In Dr. Kolesnik's opinion, respondent Cantu's effort was “fair but not maximal”. Dr. Kolesnik acknowledged that this was a subjective evaluation on his part and explained. Respondent Cantu had no atrophy in the arm; usually someone who has a shoulder injury, unless he is not using that extremity at all, is going to have normal grip strength. On the motor strength test, respondent Cantu’s results were normal. Circumference of respondent Cantu’s forearms was equal at 32 centimeters. Dr. Kolesnik determined that there was no evidence of atrophy, and range of motion was normal.

17. Dr. Kolesnik examined respondent Cantu’s knees. There were well-healed arthroscopy incisions on the left. There was no effusion or soft tissue swelling about the left knee. Alignment of both knees was normal. There was no joint line tenderness. No medial or lateral collateral ligamentous laxity of the left knee was noted; stress testing did not elicit pain. Dr. Kolesnik administered the Lachman’s test (a test that stresses the anterior or cruciate ligament, the ligament inside the knee), the interior drawer sign, and McMurray’s test (if positive, it could indicate a torn cartilage, torn meniscus, torn shock absorber of the knee). The results of the Lachman’s test and McMurray’s test were negative on the left. On the range of motion test on respondent’s Cantu’s knees, Dr. Kolesnik found that respondent Cantu “had a lack of five degrees of full flexion of the left knee as compared to the right knee”. Dr. Kolesnik noted that there was mild discomfort about the anterior aspect of the left knee at the extremes of both flexion and extension. He noted no patellofemoral crepitus bilaterally. Dr. Kolesnik measured the circumferential measurements of respondent Cantu’s knees. The left knee was one-half centimeter smaller than the right knee, indicating no swelling or fluid inside the left knee.

Based on his physical examination, Dr. Kolesnik opined that respondent Cantu’s left knee was essentially normal; he had almost full range of motion, and no atrophy or deformity of the leg.

18. Following his (October 11, 2016) IME examination and review of records, Dr. Kolesnik opined that there are no duties of a Correctional Officer that respondent Cantu is not able to perform as a result of his orthopedic (right shoulder and left knee) conditions.

19. Following his IME examination, at the request of CalPERS, Dr. Kolesnik reviewed additional documents and thereafter issued reports.

- In his report, dated October 30, 2018, Dr. Kolesnik made it clear that he “again [emphasis added] reviewed the Physical Requirements of Positional/Occupational Title of Correctional Officer and Essential Function [sic] of Correctional Officer for the Department of Corrections and Rehabilitation.”

- In his report, dated November 8, 2018, Dr. Kolesnik stated that he reviewed the progress note of Dr. Aval, dated July 26, 2016.
• In his report, dated July 11, 2017, Dr. Koiesnik stated that he reviewed the report of Dr. Wood, dated May 10, 2017.

• In his report, dated August 31, 2017, Dr. Koiesnik stated that he had reviewed the report of Dr. Wood, dated July 26, 2016.

After reviewing the foregoing documents, Dr. Koiesnik did not change his opinion about whether respondent Cantu was substantially and permanently incapacitated for performance of his usual duties as a Correctional Officer on the basis of his orthopedic (right shoulder and left knee) conditions.

20. Dr. Kolesnik’s testimony was consistent with his reports; in addition, his testimony was clear and consistent during the hearing.

21. Respondent Cantu’s medical evidence came from Dr. Wood. Prior to hearing, he issued reports, dated May 10, 2017, and July 31, 2017. When Dr. Wood testified, there were inconsistencies in his testimony; at times, his testimony was inconsistent with his reports. The following are some examples.

On direct examination, Dr. Wood testified that respondent Cantu would be able to strike an inmate with his baton. A few minutes later, he testified that respondent Cantu would be unable to strike an inmate with a baton because of his shoulder.

Dr. Wood testified that he did not think that respondent Cantu could push or pull in the process of closing locked doors, could not run up to 400 yards and could not climb stairs. In his report, dated July 31, 2017, Dr. Wood stated: “It is my feeling as a correctional officer, he is on his feet all day for the most part walking up and down aisles, running, jumping, pushing, and pulling [sic] and these would all be painful episodes to him.”

In his report, dated May 10, 2017, Dr. Wood stated that respondent Cantu’s flexion range of motion was 140 degrees on the right and 180 degrees on the left; his shoulder abduction range of motion was 140 degrees on the right and 180 degrees on the left. During his testimony, Dr. Wood stated that his report’s findings were incorrect and in conflict with his testimony.

On direct examination, Dr. Wood testified that respondent Cantu could squat, crawl and kneel but not for more than 15 minutes. On redirect, Dr. Wood changed his opinion and stated that he did not think that Dr. Wood could fully squat or kneel at all. Then, on the second redirect examination, Dr. Wood testified that he felt the definition of squat in the job description should have been interpreted as a full squat. Then, when commenting on respondent Cantu’s ability to squat in his report, dated July 31, 2017, Dr. Wood made no reference to whether the ability is partial or full. Dr. Wood did not change his testimony regarding respondent Cantu’s ability to crawl, contradicting previous testimony regarding respondent Cantu’s inability to crawl.
The inconsistencies regarding whether respondent Cantu was able to perform certain physical requirements or whether he could do so with pain called into question whether Dr. Wood understood the criteria for determining whether respondent Cantu was substantially incapacitated from performing his usual duties.

22. In summary, Dr. Kolesnik’s opinion was more reliable and trustworthy regarding respondent Cantu’s medical conditions and whether he was capable of performing his usual and customary duties as a Correctional Officer than Dr. Wood’s. Therefore, Dr. Wood’s medical opinions and those of Dr. Aval were disregarded.

23. Respondent Cantu testified regarding the physical requirements of the position of Correctional Officer that he was incapable of performing. However, his testimony alone did not constitute competent medical evidence and therefore was not sufficient to refute Dr. Kolesnik’s findings.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Complainant had the burden of establishing by a preponderance of competent medical evidence that respondent is no longer incapacitated from performing the usual duties as a Correctional Officer.

2. The standard of proof by which complainant must meet his burden is preponderance of the evidence. (Evid. Code, §115.)

Relevant Statutes

3. Section 20026 states, in part:

“Disability” and “incapacity for performance of duty” as a basis for retirement, mean disability of permanent or extended and uncertain duration, as determined by the board, . . . on the basis of competent medical opinion.

4. Section 21060, subdivision (a) states, in part:

A member shall be retired for service upon his or her written application to the board if he or she has attained age 50 and is credited with five years of state service . . .
5. Section 21151, subdivision (a) states:

Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

6. Section 21156 states in 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, unless the member is qualified to be retired for services and applies therefore prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability. In which event, the board shall retire the member for service.

8. Section 21192 states, in part:

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. The board ... shall also cause the examination to be made upon application for reinstatement to the position held at retirement or any position in the same class, of a person who was incapacitated for performance of duty in the position at the time of a prior reinstatement to another position. The examination shall be made by a physician or surgeon, appointed by the board. ... 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.
9. Section 21193 states, in part:

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 individual was an employee of the state . . . 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. However, in that case, acceptance of any other position shall immediately terminate any right to reinstatement. A recipient who is found to continue to be incapacitated for duty in his or her former position and class, but not incapacitated for duty in another position for which he or she has applied for reinstatement and who accepts employment in the other position, shall upon subsequent discontinuance of incapacity for service in his or her former position or a position in the same class, as determined by the board under Section 21192, be reinstated at his or her option to that position.

**Case Law**

10. In 1970, the Court of Appeal held that to be "incapacitated for the performance of duty" within Government Code section 21022 (now section 21151) means "the substantial inability of the applicant to perform his usual duties." *(Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.)*

In *Mansperger*, the applicant was a fish and game warden, whose duties included apprehending violators, removing dead animals from the road, raising lobster traps, rescuing people from the water, inspecting boats, feeding animals in unusual weather conditions and assisting in controlled hunts.

Ultimately, the court found that Mansperger was not disabled for retirement purposes, although he suffered some physical impairment, because he could still substantially perform most of his usual duties. Thus, a crucial distinction exists between a person who suffers some impairment and one who suffers the substantial impairment required to qualify for disability retirement.
The Mansperger test was applied in Hosford v. Board of Administration (1978) 77 Cal.App.3d 854 [143 Cal.Rptr. 760]. Horace Hosford, a state traffic officer with the California Highway Patrol, suffered a back injury lifting an unconscious victim. The injury aggravated previous injuries suffered in two prior accidents. The court examined Hosford’s case in the context of his rank as a sergeant and the duties of his position, as well as the degree to which any physical problem might impair performance of his duties.

As in Mansperger, the court found that Hosford could substantially perform his usual job duties, although he suffered some physical impairment.

Even officers in top physical condition may suffer injuries in performing these tasks, and effectiveness certainly cannot be equated with brute strength. Each officer must be expected to have an awareness of his own limitations in facing emergency situations. . . . Even Hosford’s expert . . . appeared at one point to concede that Hosford was presently capable of performing such strenuous activities. . . .

(77 Cal.App.3d 854, 864. Emphasis in original.)

Mansperger, Hosford, and numerous subsequent cases demonstrate that mere difficulty in performing certain tasks is not enough to support a finding of disability. (See, e.g., Harmon v. Board of Retirement of San Mateo County (1976) 62 Cal.App.3d 689 [133 Cal.Rptr. 154]; Cansdale v. Board of Administration (1976) 59 Cal.App.3d 656 [130 Cal.Rptr. 880]; Bowman v. Board of Administration (1984) 155 Cal.App.3d 937 [202 Cal.Rptr. 505].) A person must be substantially incapacitated from performing his usual job duties. (Ibid.)

Evaluation

13. In 2013, CalPERS granted respondent Cantu’s application for industrial disability retirement on the basis of his orthopedic (right shoulder and left knee) condition. In 2016, because respondent Cantu was below the age for voluntary service retirement complainant obtained and received medical reports concerning respondent Cantu’s orthopedic condition from competent medical professionals. After review, complainant determined that respondent Cantu was no longer disabled or permanently incapacitated from performance of his usual duties as a Correctional Officer. After being notified of the foregoing, respondent Cantu appealed.

In order for respondent Cantu to be reinstated to his position as a Correctional Officer, complainant must establish that respondent Cantu is no longer disabled or incapacitated from performance of his usual duties as a Correctional Officer and must do so by competent medical evidence. Both parties provided competent medical evidence albeit conflicting. Dr. Kolesnik concluded that respondent Cantu has no medical condition that prevents him for performing the usual duties of a Correctional Officer. Dr. Wood disagreed.
Dr. Kolesnik’s opinions were more credible and persuasive than Dr. Wood’s. Respondent Cantu’s testimony regarding the tasks that he cannot perform or can perform with pain does not form the basis for a finding of substantial incapacity.

14. Competent medical evidence established that respondent Cantu is no longer substantially incapacitated from performing his usual and customary duties.

ORDER

1. Raymond Cantu’s orthopedic (left knee and right shoulder) conditions are no longer disabling; as such, he is no longer substantially incapacitated from performing his usual duties as a Correctional Officer with the California Department of Corrections and Rehabilitation - California Institution for Men. The decision of California Public Employees’ Retirement System is affirmed.

2. Raymond Cantu is reinstated as a Correctional Officer with California Department of Corrections and Rehabilitation – California Institution for Men.

3. The appeal of Raymond Cantu is denied.

DATED: July 16, 2018

VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings