ATTACHMENT C

RESPONDENT’S ARGUMENT REGARDING THE PETITION FOR RECONSIDERATION
Respondent's Argument
Dear Board Members,

I'm writing this to urge you to reconsider your decision in the above matter. I feel the decision is based off a poor IME Evaluation that I had in 2017 by Dr. Khasigian. I have had three doctors Dr. Bruce Perry, Dr. Alan Fonseca, and Dr. Robert Henrichsen all say I am unable to do the job of Correctional Officer with the Department of Corrections and Rehabilitation.

One the above mentioned doctors was a IME with CalPers. Dr. Henrichsen stated in 2015 I was not able to perform the job of a Correctional Officer, and am permanently incapacitated because of my on the job injury.

I am waiting for Workers Compensation to approve an MRI of my lower back and standing x-rays of both my knees. Dr. Fonseca strongly suspects that the MRI and x-rays will show further damage and disability to my knees and back from his evaluation October 11th, 2018. He reviewed the MRI that Dr. Khasigian reviewed and told me in laymans terms that my ACL ligament was thinning and would more than likely lead to additional tear in my right knee.

I ask again to be allowed a chance to run the Emergency Response Course at the Correctional Academy to prove I am capable to perform the duties required of a Correctional Officer with the Department of Corrections and Rehabilitation.

Sincerely,

Marcus Tincher
normal, he had no pain while standing, his leg extension and alignment were normal, and his movements were smooth. Notably, Dr. Khasigian measured respondent’s right and left thighs and found them to be the same size. Respondent had no muscle atrophy in his right leg, which Dr. Khasigian noted is common in an injured leg. His range of motion in both knees was normal. Because respondent showed no objective sign of continuing injury or knee abnormality, he did not ask respondent to demonstrate whether he could kneel, squat, or perform other physical activities required of a correctional officer.

8. Based on Dr. Khasigian’s review of respondent’s injury and medical history, he opined that respondent suffered a routine type of injury from which most recover within months. Respondent incurred his injury nearly eight years ago. This length of disability is uncommon following a meniscus tear. Dr. Khasigian admitted that respondent might experience some pain while performing some duties associated with his position as a Correctional Officer, but he opined that respondent is no longer substantially incapacitated from performing the usual duties of a Correctional Officer.

Respondent’s Evidence

9. At the hearing, respondent explained that he has been on retirement disability since 2012. In 2015, CalPERS notified respondent that he would be subject to re-evaluation to determine whether he was still substantially incapacitated from the usual duties of a Correctional Officer. After undergoing an IME with Dr. Robert Henrichsen, respondent was found to still qualify for disability retirement. Respondent stated that he understands that CalPERS can reassess his continuing disability until he is of retirement age.

10. Following respondent’s injury, his doctor recommended that he have an MRI to show the extent of the injury. That MRI was not approved for approximately four months, during which time respondent did physical therapy. His surgery was not approved until approximately seven months after his injury. Respondent believes this delay significantly exacerbated his injury, such that his body will “never be 100-percent like it was before [he] got hurt.” Respondent coaches his children’s soccer, basketball, and baseball teams. He asserted that he cannot run with them, however. He cannot run more than 40 yards, which is far less than his job required. He cannot kneel, twist or pivot at the knee, run stairs, or run at full speed. All of these activities are part of the daily activities of a Correctional Officer.

11. Respondent currently works at a wrecking yard in a mostly sedentary position. At home, respondent “does what [his] wife tells [him] to do.” He can vacuum, mow the lawn, take out the trash, and perform some other tasks. He occasionally wears a knee brace when doing household chores. He takes the stairs in his house slowly. Respondent takes Motrin for pain and ices his knee occasionally.

12. Respondent submitted a recent progress report created by his orthopedic doctor, Dr. Bruce Perry. Dr. Perry noted that respondent had full range of motion in his knee. He noted no tenderness or swelling, and all tests for stability were normal. Respondent’s gait was also normal. Dr. Perry reviewed the July 13, 2017 MRI findings and
noted a "question of subtle tear of the medial meniscus," and some cartilage thinning. Dr. Perry took x-rays, and noted "a mild degree of narrowing of the tibio-femoral space." Dr. Perry recommended that respondent receive a second cortisone injection in his knee, as respondent experienced reduced pain following the first injection. He also recommended that respondent focus on icing his knee regularly.

13. Respondent wanted to go back to work following his injury. He asserted he would be willing to attempt to complete the Emergency Response Course so he can demonstrate whether he is capable of being a Correctional Officer. He believes he would not be able to complete this course.

Discussion

14. When all the evidence is considered, complainant established, based on competent medical evidence, that respondent is no longer substantially and permanently incapacitated from performing the usual duties of a Correctional Officer. Dr. Khasigian's testimony and report that respondent's right and left leg strength were similar and that respondent's reports of pain are not medically substantiated were persuasive. Respondent has no deterioration in strength, reflex, or range of motion. Dr. Khasigian's physical examination of respondent, as well as his review of respondent's medical records, supports his medical opinion.

15. The burden of proving that respondent is no longer substantially incapacitated from performing the usual duties of his position was on complainant. Once complainant met that burden, respondent must refute the evidence offered. He failed to do so. He called no expert witness to testify at hearing. He submitted his latest progress report from his orthopedic doctor to support his ongoing disability. This report, however, is consistent with Dr. Khasigian's findings that, while respondent might experience pain, there is no objective sign of acute injury. Dr. Perry's suggestion was for respondent to have another cortisone injection when respondent's worker's compensation insurance so authorizes.

16. In sum, respondent failed to offer sufficient competent medical evidence at the hearing to refute complainant's showing that he is no longer substantially incapacitated from performing the usual duties of a Correctional Officer. The request for reinstatement from industrial disability must be granted.

LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Correctional Officer, respondent is a member of CalPERS, subject to Government Code section 21151, subdivision (a).

2 Government Code section 21151, in relevant part, provides:
Overall, judgments by some healthcare providers were made based upon symptoms and not well confirmed or not at all confirmed by findings.

Eventually it was determined he had some early joint space narrowing, but in my opinion, the x-ray report was not satisfactory and the films were not present for review. What would be more helpful is when both knees have standing x-rays is to determine if there is a percentage difference, measurement difference, or something mechanical that a physician can understand better.

It is also interesting to note that about two months after his second surgery Mr. Tincher was considering going elk hunting and doing mountain bike riding while elk hunting during one of the therapy summaries, but when one looks at the overall records, it seemed like there were lots of symptoms not too well supported by his overall findings. A review of Dr. Perry's records clearly identifies that difference.

I have reviewed the medical qualifications for disability retirement. It is my understanding and is clearly identified that prophylactic restrictions are not a basis for disability retirement and a person actually has to be physically or mentally incapable of accomplishing their occupational tasks to qualify for CalPERS disability retirement.

I will answer the questions from 12/11/2014 in the order of which they were received:

1. Are there specific job duties that you feel the member is unable to perform because of a physical or mental condition?

   Yes. He is not able to accomplish climbing on a frequent basis over three hours. He is not able to run up to 400 yards, but he is able to run on an occasional basis. He is not able to disarm, subdue, and apply restraints on an inmate more than two times per work shift.

2. In your professional opinion, is the member presently substantially incapacitated for the performance of his duties? If yes, on what date did the disability begin?

   Based upon the current information, yes, Mr. Tincher is substantially incapacitated for the performance of his duties. I consider his climbing at three to six hours to be a substantial part of his occupational description based on the description I was presented and also his explanation of his work of working on different floors or the need to go up and down stairs for different floors. I do not consider running up to 400 yards to be a substantial portion of his occupation. My visual review of the x-rays of 10/3/2014 may...
change my opinion. I suggest to CalPERS those x-rays be presented for my visual review. His disability began on 10/3/2014.

3. If incapacitated, is the incapacity permanent or temporary?

Yes, this incapacity is permanent.

4. Is the member cooperating with the examination and putting forth the best effort, or do you feel there is exaggeration of complaints to any degree?

He does exaggerate his symptoms based upon my examination. He has much more symptoms than findings. It was also my assessment after the evaluation that he is not interested or motivated to return to correctional officer work.

If one looks carefully at his knee joint and the surrounding musculature, it can be seen that from a true objective examination standpoint, the knee is functioning well; it is not perfect, and he does have some symptoms, but again, it is my clear understanding that prophylactic restrictions and symptoms are not a reason for substantial incapacity to work. However, it also remains my opinion that the climbing more than on an occasional basis is a substantial portion of his occupation, and because of that, he is not physically able to continue such climbing.

Thank you for the opportunity to evaluate Mr. Tincher. Please contact me if I can be of further assistance.

SOURCE OF ALL FACTS AND DISCLOSURE

The source of all facts was the history given by the patient and review of the previous examiner's medical reports. I personally interviewed the patient, performed the physical examination, reviewed the history with the patient, reviewed the medical records provided, dictated this report, and it reflects my professional observations, conclusions and recommendations. I declare under penalty of perjury that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge and belief, except as to information I have indicated I have received from others. As to that information, I declare under penalty of perjury that the information accurately describes the information provided to me and, except as noted herein, that I believe it to be true.

Sincerely,

Robert Henrichsen, M.D.
Orthopedic Surgery
RH:hspeet