ATTACHMENT E

THE PROPOSED DECISION
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:

ANTHONY PEREZ,
Respondent,

and

PLEASANT VALLEY STATE PRISON,
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
Respondent.

Case No. 2018-0147
OAH No. 2018030479

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, Office of
Administrative Hearings, State of California on September 27, 2018, in Sacramento,
California.

Elizabeth Yelland, Senior Staff Attorney, represented California Public Employees'
Retirement System (CalPERS).

Respondent Anthony Perez was present at the hearing and represented himself.

There was no appearance by or on behalf of the Pleasant Valley State Prison,
California Department of Corrections and Rehabilitation (Department). The Department was
duly served with a Notice of Hearing. The matter proceeded as a default against the
Department, pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed and matter was submitted for decision
on September 27, 2018.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED October 12, 2018

CTS
BACKGROUND AND ISSUE

Respondent was employed as a Correctional Officer (CO) for the Department. On or about February 28, 2013, respondent applied for industrial disability retirement, on the basis of right shoulder and right knee conditions (orthopedic conditions). Respondent’s application was approved effective July 24, 2013. Because respondent was under the minimum age for voluntary service retirement, pursuant to Government Code section 21192, on October 18, 2017, CalPERS sent respondent to an Independent Medical Evaluation (IME). Thereafter CalPERS reviewed the IME report concerning respondent’s orthopedic conditions and determined that respondent was no longer substantially incapacitated from performing the duties of a CO with the Department. Respondent appealed from CalPERS’ determination.

The issue for Board determination is whether CalPERS established that respondent is no longer substantially incapacitated from performing the usual duties of a CO on the basis of his orthopedic conditions.

FACTUAL FINDINGS

1. On or about February 28, 2013, respondent submitted an application for industrial disability retirement (application) with CalPERS. At the time, respondent was employed as a CO by the Department, at Pleasant Valley State Prison. By virtue of his employment, respondent is a state safety member of CalPERS.

2. In filing the application, respondent claimed that his specific disability involved his bilateral knees and right shoulder. Respondent wrote that his “right knee has been diagnosed with a torn meniscus and damaged anterior cruciate ligament (ACL).” He received no diagnosis or treatment for his left knee. He received a diagnosis of “impingement as well as a tendon and labrum tear” for his right shoulder. Respondent submitted two “Physician’s Report on Disability” (Physician Report) forms in support of his application. The Physician Report completed by Ronald Castonguay, M.D., on February 12, 2013, stated that respondent was temporarily disabled and that his incapacity would last between six months and one year. The Physician Report completed by Dennis Miller, D.O., on February 6, 2013, also noted that respondent’s incapacity would last eight months to one year.

3. On July 23, 2013, CalPERS notified respondent that his application for industrial disability retirement was approved. The letter stated that respondent was found to be substantially incapacitated from the performance of his usual duties as a CO for the Department, based upon his right knee and right shoulder conditions. Respondent was informed that he may be reexamined periodically to determine his qualification for reinstatement if he was under the minimum age for service retirement. Respondent was 45 years old at the time of his retirement. He was under the minimum age for service retirement.
4. On July 19, 2017, CalPERS notified respondent that it would conduct a reexamination of his disability retirement. Part of the reexamination included an IME to be performed by Ernest Miller, M.D., on October 18, 2017.

5. On November 22, 2017, following the IME conducted by Dr. Miller, CalPERS notified respondent that based upon a review of the IME report prepared by Dr. Miller, CalPERS determined that respondent was no longer substantially incapacitated from performing the job duties of a CO for the Department. Respondent was informed that he would be reinstated to his former position. Respondent was advised of his appeal rights. Respondent filed an appeal and request for hearing by letter dated December 18, 2017.

6. On March 12, 2018, Anthony Suine, Chief, Benefit Services Division, Board of Administration, CalPERS, signed and filed the Accusation. Thereafter, the matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

**Respondent’s Employment History and Work Injury**

7. Respondent was hired by the Department in approximately 1994. He worked as a CO at Pleasant Valley State Prison at the time of his retirement. On April 30, 2012, respondent was injured at work attempting to move a box containing textbooks from the top of a cabinet. Respondent lost his grip on the box and the box fell on him, striking the top of his head and knocking him to the ground. A second box containing textbooks then fell on top of him, injuring his right knee and right shoulder.


**Duties of a Correctional Officer**

9. As set forth in the Essential Functions statement, a CO must be able to perform the following relevant functions:

- Must be able to perform the duties of all the various posts
- Must be able to work overtime. Overtime is mandatory and could be 8 hours at one time and on very rare occasions up to 16 hours in situations such as a riot
- Must be able to wear personal protective equipment (stab proof vest), and clothing and breathing apparatus to prevent injuries and exposure to blood borne pathogens
- Must be able to swing baton with force to strike an inmate
• Disarm, subdue and apply restraints to an inmate
• Walk occasionally to continuously
• Run occasionally, run in an all-out effort while responding to
alarms or serious incidents, distances vary from a few yards up
to 400 yards; running may take place over varying surfaces
including uneven grass, dirt areas, pavement, cement, etc.;
running can include stairs, or several flights of stairs
maneuvering up or down
• Climb occasionally to frequently, ascent/descent or climb a
series of steep stairs, several tiers of stairs or ladders as well as
climb onto bunks/beds while involved in cell searches; must be
able to carry items while climbing stairs
• Crawl and crouch occasionally, crawl or crouch under an
inmate’s bed or restroom facility while involved in cell
searches, crouch while firing a weapon or while involved in
property search
• Stand occasionally to continuously, stand continuously
depending on the assignment
• Sit occasionally to continuously sit while performing record
keeping or report writing activities, observing designated areas
• Stoop and bend occasionally to frequently stoop and bend while
inspecting cells physically searching inmates from head to toe
and while performing janitorial work including mopping and
cleaning
• Lift and carry continuously to frequently lift and carry in the
light (20 pound maximum) to medium (50 pound maximum)
range frequently throughout the workday and in the very heavy
lifting range (over 100 pounds) occasionally lift and carry an
inmate and physically restrain the inmate including wrestling an
inmate to the floor drag/carry an inmate out of a cell, perform
lifting/carrying activities while working in very cramped spaces.

10. On February 1, 2013, a Return-to-Work Coordinator for the Department
signed a “Physical Requirements of Position/Occupational Title” form (Physical
Requirements form), which was submitted to CalPERS. According to the Physical
Requirements form, when working as a CO, respondent: (1) frequently (three to six hours a
day) sat, stood, walked, climbed, bent and twisted his neck and waist, reached below the
shoulders, pushed and pulled, engaged in fine manipulation, simple grasped, repetitively
used his hands, carried up to 50 pounds, walked on uneven ground, was exposed to extreme
temperature, humidity, and wetness, worked at heights, and worked with biohazards; and (2)
ocasionally (up to three hours), ran, crawled, kneeled, squatted, reached above his
shoulders, power grasped, used a keyboard and mouse, lifted between 51 and over 100-
pounds, drove, worked with heavy equipment, operated foot controls or repetitive movement,
and used special visual or auditory protective equipment.
Independent Medical Evaluation by Ernest Miller, M.D.

11. On October 18, 2017, at the request of CalPERS, Dr. Miller conducted an IME of respondent. Dr. Miller prepared a report and testified at the hearing. Dr. Miller is a board-certified orthopedic surgeon. He obtained his medical degree from the University of Maryland in 1974. Between 1974 and 1978, he attended the University of California, Los Angeles Orthotics School, and completed a surgical internship at the Madigan Army Medical Center in Tacoma, Washington. Dr. Miller has practiced orthopedic medicine for over 40 years. He operates a private practice, treating patients with orthopedic conditions. However, he no longer performs surgery. Dr. Miller is a Qualified Medical Examiner and performs evaluations for CalPERS.

12. As part of the IME, Dr. Miller required respondent to complete a detailed questionnaire, interviewed respondent, and conducted a physical examination. He also reviewed the Physical Requirements form and essential functions for respondent’s position. Dr. Miller reviewed respondent’s medical records related to his orthopedic conditions.

RESPONDENT’S COMPLAINTS AND REVIEW OF MEDICAL RECORDS

13. Dr. Miller obtained a history of respondent’s employment, orthopedic conditions, and treatment. Respondent explained that he injured his right knee and shoulder. He underwent surgery. Respondent also reported that in 1995, he underwent surgery on his left shoulder for a rotator cuff tear. Respondent did not report that he was experiencing any symptoms or complaints related to his orthopedic conditions. He took Motrin for pain as needed. Respondent reported that he worked as front desk clerk at a motel in Florida.

14. Dr. Miller noted that respondent’s medical records indicated he sustained right knee and right shoulder injuries on April 30, 2012, when two boxes fell on him striking his right shoulder and right knee. At the time of the incident, respondent complained of right knee and right shoulder pain. He was diagnosed with a “right shoulder contusion, right knee contusion, and normal physical examination with no bruising or instability, but some abrasions are noted on the right knee.” Respondent was also given the diagnosis of “tendinitis of the right shoulder.”

Dr. Miller also noted that a medical report dated July 20, 2012, “indicated diagnoses of lateral meniscal and anterior cruciate tear of the right knee and impingement syndrome of the right shoulder.” A MRI of respondent’s right shoulder was recommended. A month later, medical reports noted that respondent complained of “lateral joint pain of the right knee with aching and throbbing pain.” The treating physician made a diagnosis of “lateral meniscal tear of the right knee.”

Dr. Miller’s report notes that respondent reported that his work injury occurred on April 30, 2013. However, respondent’s application and other records submitted at hearing demonstrate the incident occurred on April 30, 2012.
15. On September 14, 2012, respondent underwent an arthroscopic examination of his right knee. A medial meniscectomy was performed, which, Dr. Miller explained, was the removal of the portion of medial meniscus that was torn. Thereafter, respondent completed physical therapy with no reports of problems.

16. On November 12, 2012, respondent was diagnosed with "pain of the right shoulder and superior labral tear of the right shoulder." On December 14, 2012, respondent underwent an arthroscopic examination of his right shoulder that included removal of a labral tear and a "subacromial decompression," to address symptoms of shoulder impingement. As of February 12, 2013, respondent continued to complain of right shoulder joint pain.

**PHYSICAL EXAMINATION**

17. Dr. Miller conducted a physical examination of respondent. Dr. Miller observed respondent's gait which was normal. His standing position was level, leg lengths were even and extremity alignment was normal. He observed respondent's neck, shoulders and upper extremities, which he noted were "unremarkable." Dr. Miller tested respondent's grip strength which was strong on both sides. Respondent's shoulder muscle strength was likewise normal on both sides. His shoulder range of motion was normal. The measurements of respondent's biceps, forearms, knees, and calves were the same on the both sides indicating no atrophy. The measurements of respondent's thighs indicated a one-inch difference with the right thigh slightly bigger than the left. Respondent's straight-leg range of motion for his knees were both normal. The meniscal signs in respondent's knees were also negative.

**DIAGNOSIS AND OPINION**

18. Dr. Miller opined that respondent's physical examination was normal. Respondent reported no symptoms or complaints. Respondent had normal range of motion of his right shoulder and right knee, with no muscle weakness. Dr. Miller diagnosed respondent with:

1. Status post rotator cuff repair, left shoulder, healed with full range of motion.

2. Status post subacromial decompression surgery, right shoulder, healed with full range of motion.

3. Status post arthroscopic examination partial medial meniscectomy, right knee, healed with full range of motion.


19. Dr. Miller opined that respondent has "recovered completely from bilateral shoulder operations and right knee surgery." He found no objective evidence that
respondent's orthopedic conditions preclude respondent from performing the functions of a CO, based on Dr. Miller's review of the essential functions and physical requirements of the CO position. He further opined that respondent is not substantially incapacitated for the performance of his duties as a CO.

**Respondent's Testimony**

20. Respondent understood that at the time he filed his application, his treating physicians opined that his disability was temporary and would only last for six months to one year. Within one year of filing his application, respondent moved to Florida so that his wife could open a business. For the first year after respondent moved to Florida, he stayed home to care for his daughter. In February 2015, he began working full-time as a front counter clerk at a beach motel. His job is to check people into their rooms. He recently reduced his hours to part-time to spend more time with his 12-year-old daughter.

21. Respondent has not undergone any treatment on his right shoulder or right knee since 2013. When he relocated to Florida, he attempted to find a doctor who would accept his workers' compensation insurance, but he has been unable to do so. Respondent does not engage in any type of physical therapy. He lives in a condominium on the beach and climbs two flights of stairs three to ten times per day, which he considers part of his exercise routine. He recently started wearing a watch that keeps track of how far he walks and climbs. He avoids lifting more than 40 or 50 pounds, so that he does not experience pain. When he does experience pain he takes Motrin.

22. Respondent contended that Dr. Miller's evaluation was biased and hostile. He contended that the total visit with Dr. Miller took approximately one hour. Dr. Miller informed respondent that his disability application should not have been approved. Respondent also contended Dr. Miller performed a minimal examination that included obtaining measurements and testing his strength. He does not believe that Dr. Miller properly examined his orthopedic conditions because he did not require respondent to push, pull crawl, squat and kneel. Respondent contended that he should be given the opportunity to undergo another IME evaluation with a different doctor.

**Discussion**

23. CalPERS established that respondent is no longer substantially incapacitated from performing the usual duties of a CO for the Department. Dr. Miller persuasively testified that respondent has recovered from the surgeries and there is no objective medical evidence that respondent is unable to perform the duties of a CO for the Department. Furthermore, both physicians that completed Physician Reports in support of respondent's application stated that his incapacity was temporary and should not exceed one year. It has been over five years since the physicians completed the reports. Since that time respondent has not undergone any additional treatment. Respondent presented no medical evidence to rebut CalPERS' evidence.
When all the evidence is considered, CalPERS submitted sufficient evidence to meet its burden. As a result, CalPERS' request that respondent be involuntarily reinstated from industrial disability retirement is granted.

LEGAL CONCLUSIONS

Standard of Proof

1. CalPERS had the burden of proving by a preponderance of the evidence that respondent is no longer substantially incapacitated for the performance of his usual job duties as a CO with the Department and should be reinstated to his former position. (In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes (January 22, 2000, Precedential Decision 99-03). Evidence that is deemed to preponderate must amount to "substantial evidence." (Weiser v. Board of Retirement (1984) 152 Cal.App.3d 775, 783.) To be "substantial," evidence must be reasonable in nature, credible, and of solid value. (In re Teed's Estate (1952) 112 Cal.App.2d 638, 644.

Applicable Law

2. Respondent is a safety member of CalPERS by virtue of his former employment as a CO for the Department. He was granted disability retirement based on his orthopedic conditions pursuant to Government Code section 21151, subdivision (a), which provides the following:

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.

3. In accordance with Government Code section 21192, CalPERS reevaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

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. . . . Upon the basis of the examination, the board or the governing body 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.

4. Government Code section 21193 governs the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty and provides, in relevant 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.

5. Government Code section 20026 defines "disability" and "incapacity for performance of duty," and, in relevant part, provides:

"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.

6. In Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the substantial inability of the applicant to perform his usual duties." (Italics in original.) The court in Hosford v. Board of Administration (1978) 77 Cal.App.3d 855, held that a disability or incapacity must currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient. Furthermore, in Harmon v. Board of Retirement (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff's subjective complaints alone, without competent medical evidence to substantiate the complaints, were insufficient to support a finding that he was permanently incapacitated for the performance of his duties.

7. When all the evidence is considered, CalPERS established that respondent is no longer substantially incapacitated for the performance of his usual duties as CO for the Department. Consequently, CalPERS' request that respondent be involuntarily reinstated from industrial disability retirement is granted.
ORDER

Respondent's appeal is DENIED. The request of California Public Employees’ Retirement System to involuntarily reinstate respondent Anthony Perez from industrial disability retirement is GRANTED.

DATED: October 11, 2018

MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings