ATTACHMENT E

THE PROPOSED DECISION
In the Matter of the Involuntary Reinstatement from Industrial Disability Retirement of:

KRISTIN A. YOUNGBLOOD,
Respondent,

and

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

Case No. 2018-0301
OAH No. 2018050147

PROPOSED DECISION

This matter was heard before Administrative Law Judge (ALJ) John E. DeCure, Office of Administrative Hearings (OAH), State of California, on November 28, 2018, in Sacramento, California.

Cynthia Rodriguez, Senior Staff Attorney, represented the California Public Employees’ Retirement System (CalPERS).

Kristin A. Youngblood (respondent) was present at the hearing and represented herself.

There was no appearance by or on behalf of the Valley State Prison for Women, California Department of Corrections and Rehabilitation (CDCR). CalPERS established that CDCR was properly served with the Notice of Hearing. Consequently, this matter proceeded as a default hearing against CDCR under Government Code section 11520.

Evidence was received and argument was heard. The record was held open for respondent to submit additional evidence by December 5, 2018, and for complainant to lodge any objections to that new evidence by December 12, 2018. Respondent timely submitted a copy of medical records created by Abel Quesada, M.D., dated February 24, 2018; the records were marked as respondent’s Exhibit P. Complainant timely lodged a written
objection, based on hearsay, which was marked as complainant’s Exhibit 12. The objection was overruled, but Exhibit P was received as administrative hearsay only, pursuant to Government Code section 11513, subdivision (d). The record was closed, and the matter was submitted for decision on December 12, 2018.

ISSUE

On the basis of an orthopedic (back) condition, is respondent permanently incapacitated from the performance of her usual duties as a Correctional Officer for CDCR?

FACTUAL FINDINGS

1. Respondent is 44 years old. She became a Correctional Officer (CO) with CDCR in 2001, and was employed as a CO at Valley State Prison for Women for approximately 12 years when she submitted an application for disability retirement in February 2013. Respondent’s employment for CDCR established her as a state safety member of CalPERS.

Respondent’s Disability Retirement Application

2. On February 13, 2013, respondent submitted a Disability Retirement Election Application (Application) to CalPERS. The Application identified the application type as “Industrial Disability Retirement.” In the Application, respondent’s disability was described as: “Lower back and bilateral hands/wrists.”

3. The Application identified the dates respondent’s disability occurred as August 8, 2011, May 7, 2010, and April 21, 2010. In response to the question asking how the disability occurred, respondent wrote:

   (Back) While walking in my assigned work area I tripped over a phone cord and stumbled causing injury to my lower lumbar region[]. (Bilateral hands/wrists) I initially injured my right hand/wrist when keying a large security door[]. I later developed injury to my left hand/wrist due to overcompensation.

1 Government Code section 11513, subdivision (d), provides:

   (d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.
4. The Application described respondent’s “limitations/preclusions” due to her injuries as: “No lifting over ten (10) lbs. [seditary work only and must be able to sit and stand as needed.” In response to the question asking how her injury affected her ability to perform her job, respondent stated: “Due to my physical condition and physical restrictions I am no longer able to perform the essential functions of job [sic].”

5. In the Application, respondent indicated she was not working in any capacity. In the space provided for “other information,” she stated:

At this point I continue to experience symptoms of pain in my lower lumbar region that travels down my right lower extremity and occasional spasms. As for my bilateral hands/wrists injuries I have had surgery to my right hand/wrist and will need additional surgery in the future. I will also need surgery to my left hand/wrist in the future. At this point I experience loss of strength as well as numbness and tingling in both hands/wrists.

6. On April 25, 2013, CalPERS notified respondent in writing that her application for disability retirement had been approved. Respondent was 39 years old when CalPERS approved her disability retirement.

7. Government Code (Code) section 21060, subdivision (a), provides that a member shall be retired from service upon her written application if she has obtained age 50 and is credited with five years of state service. Pursuant to Code section 21150, subdivision (a), a member credited with five years of state service may retire from service for disability regardless of age. Code section 21192 provides that CalPERS may require a recipient of a disability retirement allowance under the minimum age for voluntary retirement to undergo an examination to determine whether she is still incapacitated, physically or mentally, for duty in the position she held when retired for disability, and for the duties of the position.

8. CalPERS determined respondent was under the minimum age for voluntary service retirement applicable for safety members when she underwent the medical examination which led to CalPERS’ approval of her Application. In approximately October 2017, CalPERS notified respondent that her file was under review for a potential reexamination. CalPERS also asked her to complete a Retiree Questionnaire for CalPERS Disability Re-evaluation (questionnaire), which asked respondent to list the names, addresses, and contact information for the treating and/or examining physicians who treated her disabling condition(s) “for the past year only.” Respondent checked a box indicating that she had no such treating physicians, and wrote: “I have not been treated for my disability by my physician in the past year[.]” Respondent further noted on the questionnaire that her condition had not improved, stating: “Back pains and spasms still occur. Simple bending still causes severe pain at times[.] Inflammation still occurs at times[.]” Respondent checked a box indicating she did not feel she could return to her prior position, then stated:
Routine moving and simple exercise cause inflammation and pain sitting or standing for long periods of time cause [sic] symptoms to get worse.]

Respondent described her daily physical activity as including “walking, stretching, light bike riding (1-2 [times] per month)[,] light gardening, house cleaning.” She was currently taking Naproxen and Tylenol as needed, and using ice and heat packs as needed. She was currently self-employed as the owner of Youngblood Private Investigations, working part-time as a private investigator, with job duties including report-writing, surveillance, taking photographs, doing background investigations, and performing office work.

9. On January 5, 2018, Harry A. Khasigian, M.D., performed a reexamination and Independent Medical Evaluation (IME) of respondent on behalf of CalPERS and wrote a subsequent report detailing his findings.

10. Upon review of Dr. Khasigian’s report and other documentation regarding respondent’s orthopedic (back) condition, CalPERS determined that respondent was no longer disabled or incapacitated from performance of her duties as a CO. On January 31, 2018, CalPERS notified respondent and CDCR of its determination and informed both of their appeal rights. Respondent timely appealed CalPERS’ determination. All jurisdictional requirements have been met.

**Relevant Work History**

11. Respondent was approximately 26 years old when she entered the State of California’s correctional academy for training, after which she obtained employment at Valley State Prison for Women. On August 8, 2011, while at work, she tripped on a long telephone cord, contorted herself to stop from falling down, and became locked into a rigid but forward-flexed position, then went into a forward-bent position on her knees. She was transferred to an emergency department and was treated conservatively for a back condition. Respondent received rehabilitative treatment including physical therapy sessions, acupuncture sessions, and chiropractic care. She was placed on temporary total disability through the workers’ compensation insurance system and did not return to work as a CO. Respondent is presently a self-employed, part-time private investigator.

**Duties of a Correctional Officer**

12. As set forth in CDCR’s Essential Functions, the CO must: 1) work in both minimum and maximum security institutions and male and female institutions; 2) wear

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2 Respondent had a prior work incident on April 21, 2010, in which while turning a key in a lock with her right hand, the lock jammed. As she forced the lock, she felt pain in her right wrist. She was off work from May 2010 until February 2011, and had corrective surgery with good results.
protective equipment and breathing apparatus; 3) range qualify, maintain firearms in good condition, and fire weaponry in combat or emergencies; 4) swing a baton as a striking weapon; 5) disarm, subdue and restrain inmates; 6) inspect inmates for contraband and do body searches; 7) walk, run, and climb stairs, ladders, and bunkbeds; 8) crawl, crouch, stoop and bend over; 9) lift and carry medium to heavy weights during the workday; 10) wear a 15 pound equipment belt; 11) push, pull, and reach; move the head and neck; 12) move the arms, hands, and wrists to grip and squeeze; 13) work inside or outside; and 14) have a mental capacity to deal with very unpleasant situations including inmate graphic suicides. A CO also must be able to judge a situation and use appropriate force, including lethal force, under the threat of serious injury or death.

13. CDCR submitted a CalPERS Physical Requirements of Position/Occupational Title form containing information regarding the physical requirements of the CO position. The requirements include: 1) crawling and kneeling from occasionally up to three hours; 2) climbing, keyboard and mouse use from occasionally up to three-to-six hours; 3) bending and twisting the neck, power grasping, simple grasping, and repetitive use of hands from three to over six hours; 4) and sitting, standing, walking, squatting, bending the waist, and pushing and pulling from occasionally up to over six hours. Regarding lifting and carrying, the requirements include: 1) occasionally to up to three hours of lifting and/or carrying zero to 100-plus pounds; 2) occasionally up to three to six hours of lifting zero to 51 to 75 pounds; and 3) occasionally up to constantly (over six hours) lifting from zero to 50 pounds.

Further requirements include: 1) from never to up to three hours of exposure to dust, gas fumes, or chemicals; 2) from occasionally up to three hours of working at heights; 3) from occasionally up to three to six hours of operation of foot controls and use of special visual or auditory protective equipment; 4) from three hours to over six hours of working with biohazards; and 5) from occasionally up to over six hours of walking on uneven ground, driving, exposure to excessive noise, and exposure to extreme temperatures, humidity, and wetness.

14. The CDCR Correctional Officer Job Analysis provides that a CO may be assigned to work in many different posts in a correctional institution and must be able to perform the duties of all the various posts. These duties include the use of firearms and maintaining range qualification, providing security to inmates, observing conduct and behavior to prevent disturbances and escapes, patrolling for evidence of forbidden activities and infractions of rules, providing security to prison entrances, screening visitors, and supervising visiting locations. COs are involved in escorting inmates to specific on-site locations, and transportation of inmates to outside locations. Work shifts may change and cover any of three eight-hour shifts in a 24-hour day, including overtime which is sometimes mandatory.

**Expert Opinion**

15. CalPERS called Harry A. Khasigian, M.D., as its expert witness. Dr. Khasigian is board certified in orthopedic surgery and has been in private practice in
Sacramento, California, since 1979. He specializes in orthopedic surgery and sports medicine. On January 5, 2018, Dr. Khasigian examined respondent, took a history, reviewed her medical records and job duties, and issued an Independent Medical Examination (IME) report.³

16. In his IME report, Dr. Khasigian reviewed the history of respondent’s problems that led to her filing a disability claim. Respondent described her workplace injury in which she tripped over a phone cord and did not fall on the floor, but bent over sharply and could not stand upright from her bent-over position. Her chief complaints were: constant pain with some spasms in the low back; numbness in the fingers with tingling; a pinched nerve and tingling soreness in the legs; and stiffness and soreness in the upper shoulders. Painful activities included bending, squatting, kneeling, lifting, pushing and pulling. Respondent could sit and stand for 20 minutes, lift up to 10 pounds, sometimes carry grocery sacks, and do yardwork, wash a car, and sometimes vacuum. Her pain was worse when she awakened in the morning, rode in an automobile, and lay on her stomach. She felt better lying on her side with her knees bent. While testifying, Dr. Khasigian recalled respondent also complaining of right leg pain.

17. Respondent’s prior treatment included physical therapy, acupuncture, trigeminal nerve stimulation (TNS), hot packs, MRI scans, X-rays, and CT scans. She was not receiving any current treatment at the time of her IME, but used hot-and-cold packs with flare-ups, Tramadol (a Schedule IV opioid pain medication), a TNS unit, and stretching to relieve her symptoms. She described her pain as a constant ache, with flare-ups once or twice per year. “Bad” pain is moderate to severe with occasional spasms. Respondent’s pain was centered in the L5-S1 region and to the left para-spinals.

18. Dr. Khasigian reviewed the duty statements, job analysis, and physical requirements of the CO position with respondent. He also discussed them with respondent to formulate his opinion. Respondent stated she could not sit or stand for over six hours (because her back becomes numb), twist at the neck or waist, lift over 20 pounds (because her hands ached), and could not bend and squat. Respondent stated that due to her inability to stoop, she could not apply restraints to inmates, act in self-defense, run for 400 yards, climb stairs, crouch and occasionally crawl under inmates’ beds, stand continuously, stoop, bend, or lift up to 50 pounds frequently. Respondent stated she could not perform maximum security work, including wearing substantial equipment and qualifying to use a variety of guns. She said she was unable to run occasionally, stand and walk continuously, climb and stoop frequently, crawl or crouch occasionally.

19. Upon a physical examination of respondent’s lumbar spine, Dr. Khasigian measured respondent’s range of motion, and noted right and left flexion of 70 degrees, right

³ CalPERS instructed Dr. Khasigian to focus his IME on respondent’s orthopedic (back) condition because it was the basis for CalPERS’s approval of her Application. Any references to other medical conditions respondent may be experiencing are included for factual context only.
and left extension of 20 degrees, right and left rotation of 70 degrees, and right and left lateral bending of 30 degrees. He concluded that the lumbar range of motion findings were within the normal range. Respondent's thoracic spine was normal. Respondent's cervical spine range of motion was measured at right and left flexion of 90 degrees, right and left extension of 20 degrees, right and left rotation of 80 degrees, and right and left lateral bending of 30 degrees. He concluded that the cervical range of motion findings were within the normal range. He examined respondent's shoulders, with normal findings. Respondent reported that her shoulders ached due to low back pain, but her upper-extremities testing led to normal results. Respondent's lower extremities revealed normal longitudinal alignment, normal posture, gait, and station, normal heel walk, and toe walk. A right-leg straight leg raise of 60 degrees caused right low back pain but no pain extended into the leg. A left-leg straight leg raise of 65 degrees caused mid-back pain. A Lasegue's (straight leg-raise) test, which tests the sciatic nerve, located respondent’s pain as being in the mid-back region. A neurological examination was conducted, with normal results. Thighs and calves were measured and were found to be symmetrical.

20. Dr. Khasigian reviewed an MRI (magnetic resonance imaging) report by Amjad Safvi, M.D., dated November 19, 2011, as well as the original IME report by Mark Howard, M.D., dated August 4, 2014. In his 2011 MRI report, Dr. Safvi noted a diffuse disc protrusion, narrowing or bilateral lateral recesses, and hypertrophy of facet joints with no indication of how much hypertrophy was observed. At L4-5, there was a diffuse “disc protrusion” with narrowing of bilateral recesses. In his 2014 IME report, Dr. Howard noted a “smallish broad degenerative bulge at 3-4 . . . with some quite mild L3-4 lateral recess narrowing degeneration only at 4-5, again very small degenerative bulge,” and “no deformity presumed.” Dr. Howard’s impression was: “Chronic lumbago1 in the setting of degenerative disc disease at L3-4 and L4-5 small degenerative protrusions and minimal corresponding lateral recess stenosis at L3-4 and L4-5.” Dr. Khasigian noted that Dr. Howard’s finding was significantly different than the prior findings in Dr. Safvi’s 2011 IME report. In Dr. Khasigian’s opinion, Dr. Safvi’s MRI review appeared “amplified” or “over-elaborated,” because Dr. Howard’s subsequent findings in 2014 were within normal limits. In his IME report, Dr. Khasigian further noted that an electromyography (EMG) report (measuring muscles and their controlling nerve cells) dated December 28, 2011, resulted in normal findings, which ruled out radiculopathy.5

21. Dr. Khasigian also reviewed physician visit and treatment records following respondent’s work injury, and noted no unusual findings. His diagnoses were:

1. Degenerative disc disease at L3-4, L4-5, and L5-S1.
2. Normal nerve conduction studies and EMG with no evidence of radiculopathy in bilateral lower extremities.

4 Lumbago refers generally to back pain.

5 The MedlinePlus Medical Dictionary defines “Radiculopathy” as “any disease that affects the spinal nerve roots.” (http://c.merriam-webster.com/medlineplus/radiculopathy.)
In summary, Dr. Khasigian concluded:

[Respondent] suffered a twisting injury. She did not fall to the ground and did not suffer a blow but suffered a bending injury to her low back. She subsequently has not returned to work since the injury. Radiculopathy has been excluded by her normal neurological examinations and her normal EMG and nerve conduction studies. Her MRI, which was done a month post injury, shows degenerative disc disease which is not a traumatic condition and shows evidence of pre-existing status. Her current clinical examination is normal with no evidence of nerve root irritation or atrophy, inconsistencies between her straight leg raising tests, and a normal neurological exam with regard to motor, sensory, and reflexes.

Based on these findings, Dr. Khasigian opined in his IME report that respondent was not substantially incapacitated from the performance of her duties as a CO. Per CalPERS' instructions, Dr. Khasigian sought to determine whether there were objective findings of an acute traumatic injury or condition relevant to her work injury. He found “no evidence,” noting instead that her physical examination, EMG, and nerve conduction studies were normal. Her MRI showed no nerve root displacement or protrusion “because her EMG is negative and shows pre-existing degenerative disc disease,” a condition respondent worked with previously as a full-duty CO. Dr. Khasigian reasoned that since respondent’s only condition was degenerative disc disease, which appeared to be pre-existing, and because there was no objective medical evidence of a traumatic change, “there are no specific job duties she is unable to perform.”

22. CalPERS subsequently requested that Dr. Khasigian review additional medical records regarding respondent to determine whether they might modify or change his opinion. Dr. Khasigian issued a supplemental IME report on August 1, 2018, which included his review of a new MRI report from Dr. Safvi, who was the same physician who wrote the 2011 MRI report. The 2018 report indicated no significant changes in the spine from L2-3 to L5-S1. Dr. Khasigian noted that the 2018 report contained approximately “90 percent” of word-for-word reportage as in the 2011 report. He again disagreed with the characterization of “protrusions,” when in his opinion, the evidence showed only mild bulges. He maintained that the findings of Dr. Safvi in both reports were exaggerated and not supported by objective medical evidence. Five photos were also attached to the MRI report; Dr. Khasigian noted that the photos:

> do not show protrusions. They show bulging. They show no significant compression of the neural canal. They do not show asymmetrical compression or extrusion over a nerve root. The lateral view shows only very minimal degenerative disc disease at L3-L4 but nothing of significance.
As a result, Dr. Khasigian noted that his original opinion was unchanged.

23. CalPERS subsequently requested that Dr. Khasigian review additional medical records regarding respondent to determine whether they might modify or change his opinion. Dr. Khasigian issued a second supplemental IME report, dated November 13, 2018, which was a review of an undated note stating that a bilateral L4-S epidural steroid injection was scheduled for respondent on December 3, 2018. In his second supplemental report, Dr. Khasigian opined that "this epidural steroid meets none of the indications for its usage" because respondent’s negative EMG indicates she does not suffer from radiculopathy (i.e., a pinched or irritated nerve). His opinions regarding respondent’s condition remained unchanged.

Respondent’s Evidence

24. Respondent testified that she had no back ailments or conditions prior to her August 2011 work injury. Since then, she has had to use wrist braces for carpal tunnel syndrome in her left and right hands, a back brace, heating pads, ice packs, and a nerve stimulator. Respondent was wearing a back brace at hearing. She currently takes Tramadol (a narcotic pain medication and Schedule IV controlled substance) and Flexeril (a muscle relaxer requiring a prescription) for pain relief. She has three children, two of whom are grown, and one who is nine years old and still lives in the home.

25. Respondent called Perry Carpenter, D.C., to testify as a medical expert regarding her condition. Dr. Carpenter has been a practicing chiropractor since 1987, became a Certified Disability Evaluator in 1983, and has been a Qualified Medical Evaluator since December 2008. He reviewed respondent’s medical records, physically examined respondent, performed a “functional capacity evaluation” to determine whether respondent could fulfill particular job duties, and prepared an Independent Medical Evaluation on respondent’s behalf “to challenge” Dr. Khasigian’s January 2018 IME.

26. Dr. Carpenter reviewed the CO essential job duties with respondent and noted the limitations she described. Respondent claimed she could not work overtime due to problems with her hand, and lumbar spine. She said she cannot stand or walk for eight hours, and cannot wear a duty belt for any length of time, due to right hip pain. She cannot fire a handgun due to hand problems, and cannot fire a rifle due to lower back problems. She cannot swing a baton due to hand problems causing insufficient grip strength, and twisting her lower back, which causes spasms. She cannot disarm, subdue, and restrain an inmate due to hand-strength problems, and lumbar spine strength issues. She cannot defend herself against an armed inmate attack due to hand weakness, and back problems which would not allow her to wrestle with and overcome an inmate. She can walk no longer than 20 minutes continuously due to her lumbar spine aching and her right leg experiencing numbness. She cannot run due to the jolting causing her immediate spinal pain. She cannot climb stairs, ladders, or onto bunkbeds due to hand weakness and lumbar spine pain and weakness. She cannot sit to write or keep records due to her lumbar spine. Pain and numbness in her right
leg make it dangerous to operate a vehicle. Respondent claims she cannot lift 20 pounds, or brace against an inmate during an altercation, due to her hands and spine.

27. Respondent and Dr. Carpenter reviewed the Job Analysis, which describes many job duties similar to those set forth in the Essential Duties. She reported limited ability due to her lumbar spine in using a baton, restraint devices, a shotgun, or rifle, walking and standing over 20 minutes, crawling and crouching, stooping to do cell, inmate, yard, or common area searches, pushing or pulling, reaching overhead, arm movements involving twisting, leg and feet movements, and twisting the body. In cold weather, she gets a stiff back. Walking on uneven ground is jarring to her back.

28. According to Dr. Carpenter, respondent reported worsening back pain symptoms, and he scored her back pain in the range of a “severe disability.” Some range of motion observations indicated restricted movement due to lower back pain. Reflex findings were normal and constituted “a negative finding for radiculopathy.” Superficial tactile sensibility testing and motor examination indicated normal results. The lumbar spine neurologic examination was normal.

29. Dr. Carpenter took issue with Dr. Khasigian because he did not “take responsibility” to obtain the actual MRI images taken by Dr. Safvi in November 2011 and on May 15, 2018. In Dr. Carpenter’s IME, he describes how respondent “(at her own expense) conducted extensive research to locate and contact [Dr. Safvi],” and “sent [Dr. Safvi] a copy of the new MRI studies for his comparison reading.” Dr. Carpenter opined that the comparison findings of Dr. Safvi “describes interval worsening in the region (L3-L4 and L4-L5)” where respondent suffered her work injury, and “is clear on this interval worsening.” He further opined that Dr. Khasigian’s failure to change his opinion and find respondent substantially incapacitated, without reviewing the actual MRI images, is “below standard,” “irresponsible,” and an “egregious omission.”

30. Neither Dr. Carpenter nor respondent provided any evidence to show that they shared the MRI studies they obtained with either CalPERS or Dr. Khasigian prior to hearing. Dr. Carpenter testified that Dr. Safvi moved to Illinois in 2011 and was practicing there. Dr. Carpenter stated that this was the first time he had been involved in a CalPERS disability matter.

31. Dr. Carpenter concluded that there was objective medical evidence of spinal injury to multilevel discs and facets, and that “[b]ecause of injury and degenerative changes, the lumbar spine does not retain sufficient function for [respondent] to be able to perform the Essential Duties of a Correctional Officer.” For these reasons, he believed she was substantially incapacitated.
Additional Medical Records

32. At the hearing, respondent submitted additional medical records, which were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).^6

Discussion

33. When all the evidence is considered, complainant offered sufficient competent medical evidence from its expert witness, Dr. Khasigian, to establish that, at the time respondent was reevaluated for disability retirement, she was not substantially and permanently incapacitated from performing the usual duties of a CO. The medical evidence established that she suffered from degenerative disc disease, with no evidence of radiculopathy. Dr. Khasigian credibly explained that despite the findings by Dr. Safvi of disc "protrusion," the photos showed no real protrusions, but rather bulging, and no significant compression of the neural canal. The essentially normal findings upon physical examination further served to negate the MRI findings.

34. In reaching his opinion that respondent was not substantially and permanently incapacitated from performing the usual duties of a CO, Dr. Khasigian employed the standards that apply in these types of disability retirement proceedings. His opinion that respondent's orthopedic back condition was not adequately supported by objective medical evidence to establish substantial incapacitation from her job duties was persuasive and consistent with the medical records offered at hearing. Dr. Khasigian's testimony was balanced and credible.

35. Respondent offered the medical testimony of Dr. Carpenter, a chiropractor, to counteract CalPERS' evidence. Because Dr. Khasigian is a board-certified orthopedic surgeon, his opinions were given more weight; conversely, because Dr. Carpenter is not a physician, his opinions were afforded less weight.

36. The medical reports that were admitted as administrative hearsay did not support that respondent is substantially and permanently incapacitated from performing the usual duties of a CO. To the extent the doctors who authored those reports applied evaluation standards applicable in workers' compensation cases, their opinions can be given little weight in this proceeding. The standards in disability retirement cases are different from those in workers' compensation. (Bianchi v. City of San Diego (1989) 214 Cal.App.3d 563, 567; Kimbrough v. Police & Fire Retirement System (1984) 161 Cal.App.3d 1143,

6 Government Code section 11513, subdivision (d), in relevant part provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.
37. Dr. Carpenter’s opinion that respondent could not perform some of the essential functions and job duties of a CO was not consistent with the standards applicable in these types of disability retirement proceedings. In discussing respondent’s ability to perform various work duties as set forth above, Dr. Carpenter stated he had “a lot of input” into respondent’s answers, discussing details, examples, and other information. Many of the corresponding comments were speculative regarding what may happen, which makes the limitations Dr. Carpenter notes more prophylactic, and less focused on whether respondent could actually perform a particular job duty if so required. For example, shooting a rifle “on one knee is a problem because of back weakness,” yet there was no indication respondent had ever attempted to fire any type of gun — let alone a rifle on one knee — since she went off work. Respondent reportedly had “not tried to go back to work . . . because the prolonged time on her feet would cause her to be unable to function,” due to back pain. But pain and discomfort do not establish a permanent disability. Notably, respondent effectively denied being capable of performing almost all of the job duties of a CO; yet such a wide-ranging set of limitations was belied by the physical examination Dr. Khasigian performed for his IME, which led to essentially normal results. This disparity rendered respondent’s claims of reduced job capabilities less plausible. Similarly, Dr. Carpenter’s sharp criticism of Dr. Khasigian for not reviewing MRI images which respondent retrieved from an out-of-state physician, yet which were not made available to Dr. Khasigian for review, was unfair and diminished Dr. Carpenter’s credibility. The evidence established that Dr. Khasigian made himself available to the review process twice subsequent to his IME report; there was no indication that Dr. Khasigian was uncooperative or unavailable for consultation during this process.

38. In sum, when all the evidence is considered, respondent failed to establish that, at the time she was reevaluated for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a CO. Consequently, her disability retirement appeal must be denied.

LEGAL CONCLUSIONS

1. By virtue of her employment respondent is a state safety member of CalPERS. To qualify for disability retirement, respondent had to prove that, at the time she applied, she was “incapacitated physically or mentally for the performance of [her] duties in the state service.” (Gov. Code, § 21156, subd. (a)(1).) As defined in Government Code (Code) section 20026,

“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.

2. Respondent, who is 44, was approximately 39 years old when CalPERS made its determination to approve her Application for industrial disability retirement. Code section 21060, subdivision (a), provides that a member shall be retired from service upon her written application if she has obtained age 50 and is credited with five years of state service. Respondent was under the minimum age for voluntary service retirement applicable for safety members when she underwent the medical examination which led to CalPERS' approval of her Application. (Gov. Code, § 21151, subd. (a).)

3. Code section 21192 provides that CalPERS may require a recipient of a disability retirement allowance under the minimum age for voluntary retirement to undergo an examination to determine whether she is still incapacitated, physically or mentally, for duty in the position she held when retired for disability, and for the duties of the position. Code section 21193 provides that if an employee of the state is determined to be not incapacitated for duty in the position held when she retired for disability or in a position of the same class, she shall be reinstated, at her option, to that position.

4. The determination of whether respondent is substantially incapacitated must be based on an evaluation of whether, at the time she applied for disability retirement, she was able to perform the usual duties of a Correctional Officer, and not just the usual duties of her most recent position. (California Department of Justice v. Board of Administration of California Public Employees' Retirement System (Resendez) (2015) 242 Cal.App.4th 133, 139.)

5. 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 employee in Mansperger was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations and apprehend violators, issuing warnings and serving citations, and serving warrants and making arrests. He suffered an injury to his right arm while arresting a suspect. He could shoot a gun, drive a car, swim, row a boat (with some difficulty), pick up a bucket of clams, pilot a boat, and apprehend a prisoner (with some difficulty). He could not lift heavy weights or carry a prisoner away. The court noted that "although the need for physical arrests do [sic] occur in petitioner's job, they are not a common occurrence for a fish and game warden." (Mansperger, supra, 6 Cal.App.3d at p. 877.) Similarly, the need for him to lift a heavy object alone was determined to be a remote occurrence. (Ibid.) In holding that the game warden was not incapacitated for the performance of his duties, the Mansperger court noted that the activities he was unable to perform were not common occurrences and that he could otherwise "substantially carry out the normal duties of a fish and game warden." (Id. at p. 876.)
6. The court in Hosford v. Board of Administration (1978) 77 Cal.App.3d 855, reached a similar conclusion with respect to a state traffic sergeant employed by the California Highway Patrol. The applicant in Hosford had suffered injuries to his left ankle and knee, and had strained his back. The court noted that the sergeant “could sit for long periods of time but it would ‘probably bother his back;’ that he could run but not very adequately and that he would probably limp if he had to run because he had a bad ankle; that he could apprehend persons escaping on foot over rough terrain or around and over obstacles but he would have difficulty and he might hurt his back; and that he could make physical effort from the sedentary state but he would have to limber up a bit.” (Id. at p. 862.) Following Mansperger, the court in Hosford found that the sergeant:

is not disabled unless he is substantially unable to perform the usual duties of the job. The fact that sitting for long periods of time in a patrol car would “probably hurt his back,” does not mean that in fact he cannot so sit; . . . [t]he more strenuous activities, [a doctor] testified that Hosford could run, and could apprehend a person escaping over rough terrain. Physical abilities differ, even for officers without previous injuries. The rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the function, renders [the doctor’s conclusion that Hosford was not disabled] well within reason. (Ibid.)

In Hosford, the sergeant argued that his condition increased his chances for further injury. The court rejected this argument, explaining that “this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently existing.” (Hosford, supra, 77 Cal.App.3d at p. 863.) As the court explained, prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (Ibid.)

7. When all the evidence in this matter is considered in light of the courts’ holdings in Resendez, Mansperger, and Hosford, respondent did not establish that her appeal of CalPERS’ determination that she is no longer disabled or incapacitated from performance of her duties as a CO should be granted. There was not sufficient evidence based upon competent medical opinion that she is permanently and substantially incapacitated from performing the usual duties of a CO due to an orthopedic (back) condition. The testimony respondent offered from a chiropractor was less persuasive than the testimony of CalPERS’ expert, a longtime, board certified orthopedic surgeon. Respondent’s assertions that she would be unable to return to her position without experiencing substantial pain and inability to competently perform her duties does not serve to establish that she is substantially incapacitated from performing the duties of a CO. As CalPERS proved, the evidence did not establish that respondent’s back condition represented a permanent disability measurable by objective medical evidence. Consequently, respondent’s appeal of CalPERS' determination must be denied.
ORDER

The appeal of respondent Kristin A. Youngblood from CalPERS' determination that she is no longer disabled or incapacitated from performance of her duties as a Correctional Officer, and thus, no longer eligible for industrial disability retirement, is denied. Respondent is thereby reinstated, at her option, to that position.

DATED: January 11, 2019

JOHN E. DE CURE
Administrative Law Judge
Office of Administrative Hearings