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:

JUAN G. NIELSEN,
Respondent,

and

CALIFORNIA REHABILITATION CENTER,
CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent.

Agency Case No. 2018-0457
OAH No. 2018100684

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 24, 2019, in San Bernardino, California.

Charles H. Glauberman, Senior Attorney, represented complainant, Anthony Suine, Chief, Benefit Services Division, California Public Employees’ Retirement System (CalPERS).

Andrew B. Scott, Attorney at Law, represented respondent, Juan G. Nielsen, who was present.

No appearance was made on behalf of respondent, California Rehabilitation Center (CRC), California Department of Corrections and Rehabilitation (CDCR). The matter proceeded as a default against this respondent pursuant to Government Code section 11520, subdivision (a).

The matter was submitted on April 24, 2019.
ISSUE

Is respondent,1 who was granted a disability retirement in 2015, no longer permanently disabled or substantially incapacitated from performing the usual and customary duties of a Correctional Officer?

FACTUAL FINDINGS

Background

1. Respondent was employed at CRC as a Correctional Officer. By virtue of his employment, respondent was a state safety member of CalPERS. On September 24, 2015, respondent filed with CalPERS an application for industrial disability retirement based upon an orthopedic (bilateral knee) condition. On January 25, 2016, CalPERS notified respondent that it had approved his application, and he was retired for disability effective immediately.

2. Provisions of the Government Code authorize CalPERS to re-evaluate members who are under the minimum age for voluntary retirement to determine if they remain eligible for a disability retirement. If CalPERS determines that the member is no longer incapacitated or permanently disabled, it may cancel the disability retirement allowance and seek to have the member reinstated.

3. On October 4, 2017, and again on November 7, 2017, CalPERS notified respondent that it was reviewing his disability retirement status and requested respondent return a questionnaire and provide a “Treating Physician Packet” to respondent’s treating physician. CalPERS required respondent to undergo an evaluation on February 28, 2018, conducted by Robert Kolesnik, M.D., an orthopedic surgeon and Independent Medical Examiner.

4. On April 18, 2018, CalPERS notified respondent that after reevaluation it concluded that respondent is no longer substantially incapacitated from the performance of the job duties of a Correctional Officer with CDCR and he was being reinstated to his former position.

5. Respondent timely appealed that determination.

6. On September 13, 2018, complainant signed an accusation seeking to reinstate respondent to his former position as a Correctional Officer with CDCR. The sole issue on appeal is whether respondent remains disabled or substantially incapacitated from performance of the duties of a Correctional Officer. This hearing ensued.

1 All future references to “respondent” are to Mr. Nielsen.
Duties of a Correctional Officer

7. CDCR's list of usual and customary job duties and essential functions of a correctional officer require that a correctional officer must: work in minimum and maximum security institutions; wear personal protective equipment such as stab proof vests and breathing apparatus; qualify with firearms; swing a baton with force; defend against inmates armed with weapons; subdue inmates and apply restraints; conduct body searches; walk occasionally to continuously; run occasionally in an all-out effort when responding to alarms or serious incidents from a few yards to 400 yards; crawl, crouch, stoop, and bend; search cells and other tightly enclosed spaces; stand continuously for long periods of time; lift and carry 20 to 50 pounds on a regular basis, perhaps up to 100 pounds on an occasional basis; reach overhead occasionally while performing cell or body searches; twist the body frequently and continuously while performing regular duties; and engage in frequent hand and wrist movement.

8. The CalPERS Physical Requirements of Position/Occupational title worksheet, completed by an individual with the title "RTWC-AGPA" and signed by respondent on August 31, 2016, identifies physical activities performed by a Correctional Officer at California Rehabilitation Center. Constant activities are those that occur over six hours per day. They are identified as sitting; standing; walking up to 1.5 miles; and lifting/carrying 0 to 25 pounds up to 1.5 miles. Frequent activities are identified as activities that occur between three and six hours a day. They are identified as bending at the neck and waist; twisting at the neck and waist; pushing and pulling; fine manipulation; power grasping; simple grasping; carrying 26 to 50 pounds up to 200 yards; walking on uneven ground; driving; and exposure to extreme temperature and chemicals; use of protective equipment; and working with biohazards. Occasional activities are those that occur up to three hours a day. They are identified as reaching above and below the shoulder; repetitive use of hands; keyboard/mouse use, lifting/carrying 51 to over 100 pounds up to 200 yards; exposure to excessive noise, dust/gas/chemicals; working at heights; operation of foot controls; and working with biohazards.

Testimony of Robert Kolesnik, M.D.

9. Dr. Kolesnik completed his residency in orthopedic surgery at the University of Southern California in 1984. After completing a fellowship in hand and microvascular surgery, Dr. Kolesnik became board-certified in orthopedic surgery in 1985. He specializes in conditions of the hand and upper extremities but has been practicing general orthopedics for the past 30 years. He has multiple professional memberships relating to orthopedics and has made numerous professional presentations concerning orthopedics in academic settings. He is also published in a peer-reviewed journal. Based on his training and experience, Dr. Kolesnik was well qualified to render an expert opinion in this matter.

10. Dr. Kolesnik performed an Independent Medical Examination (IME) of respondent for CalPERS on February 28, 2019. Dr. Kolesnik's evaluation of respondent's condition was based on a review of medical records, consideration of the occupation
description, a physical exam, and an interview of respondent. He prepared a report documenting his findings. He concluded that respondent was not substantially incapacitated from the performance of his usual and customary work duties of a correctional officer.

11. On December 28, 2013, respondent was descending stairs at work when he missed a step and hyperextended his right knee. He immediately noted pain and swelling; he reported the injury to his employer who referred him to US HealthWorks for an evaluation. On March 4, 2014, Jack Akmakjian, M.D., an orthopedic surgeon, diagnosed respondent with an anterior cruciate ligament (ACL) tear and referred him to Ronny Ghazal, M.D., another orthopedic surgeon. MRI imaging of the knee revealed a high and “likely complete tear” of the ACL. Dr. Ghazal performed an arthroscopic ACL reconstruction on December 12, 2014. Grade III osteoarthritis of the medial femoral condyle was noted and a chondroplasty was performed. During respondent’s rehabilitation period, he began to complain to pain to his left knee, which Dr. Ghazal attributed to overuse, secondary to favoring this leg. MRI imaging of the left knee was obtained on June 11, 2015, which revealed a 5 mm area of thickening of the medial collateral ligament proximally. Mild thinning of the cartilage of the medial femoral condyle and medial tibial plateau were noted.

12. Respondent reported pain over the anterior aspects of both knees, with greater severity in the left. He complained of increased pain in both knees along with pain and numbness along the lateral aspect of his right hip, thigh, calf, and foot with standing for more than 20 minutes and with walking for more than two blocks. Respondent reported that he could only lift objects light to medium in weight. He experiences pain with walking, negotiating stairs, driving, shopping, cooking, and performing housework.

13. Dr. Kolesnik performed a physical exam of respondent. An examination of the knees showed no lateral or medial collateral ligamentous laxity, either at 30 degrees of flexion or full extension. A Lachman’s test, which tests the stability of the ACL, was negative bilaterally. Respondent experienced no pain with stress testing. The knee circumferences differed by only one-half centimeter, which is a normal deviation. Respondent reported mild pain anteriorly throughout the arc of motion of both knees. No patellofemoral crepitus was noted in either knee, which a crunching or grinding of the bone. Dr. Kolesnik noted no atrophy in the hamstrings, quadriceps or calves, which is significant because muscles will waste-away if not being used. Respondent’s gait was normal and he could walk without difficulty, despite reporting pain in both knees. He was able to toe and heel walk without difficulty, but again noted pain over the anterior aspects of both knees. He was able to partially squat, but again reported diffuse pain above both knees with the maneuver. Motor strength was evaluated as normal in all major muscles in both legs and sensation was intact to light touch.

14. Dr. Kolesnik reviewed the physical requirements and standards for a correctional officer. He has also treated correctional officers as well as worked in a prison. After reviewing respondent’s history, symptomology, his medical records, and the job description, Dr. Kolesnik determined that respondent could return to his occupation as a correctional officer.
15. After Dr. Kolesnik completed his evaluation, CalPERS sent him the IME completed by orthopedic surgeon Hose Kim, M.D., on November 16, 2015, which CalPERS used as the basis for granting respondent’s disability retirement. Dr. Kolesnik submitted a supplemental evaluation to CalPERS on March 13, 2018. Dr. Kolesnik reviewed Dr. Kim’s finding, which are as follows: Dr. Kim noted that following respondent’s ACL reconstruction, respondent began experiencing pain in his left knee. Respondent complained of pain in both knees that increased with walking/standing more than 15 minutes. On physical examination, Dr. Kim noted respondent could squat half-way with difficulty due to right knee pain on the medial/posterior aspects. Both knees were stable with negative pivot shift. Dr. Kim concluded that respondent was unable to perform activities such as prolonged standing or walking (continuously for more than two hours) and kneeling/squatting. He also opined that respondent could not lift/carry up to 25 pounds for 1.5 miles constantly, lift/carry up to 50 pounds frequently, and lift/carry more than 100 pounds occasionally. As such, Dr. Kim concluded that respondent was substantially incapacitated for the performance of his job duties.

Dr. Kolesnik’s review of Dr. Kim’s IME did not change opinion that respondent is not presently substantially incapacitated. Based on Dr. Kim’s findings, Dr. Kolesnik disagreed with Dr. Kim’s determination that respondent was substantially incapacitated.

Respondent’s Testimony

16. Respondent is not currently employed. The last day he worked was when he injured his knee on December 28, 2013. Respondent began working at CRC in January 2006. Respondent worked eight-hour shifts and was subjected to mandatory overtime, where he might be required to work another shift back-to-back. CRC houses level 2 and level 3 inmates; level 4 are the most dangerous. Most of the inmates were in a gang, which frequently led to racially-related violence among the inmates. Respondent responded to a riot three years into the job. He was the first officer to arrive on scene. Approximately 85 inmates were fighting. He went in before other officers and began spraying pepper spray. The procedure is to order the inmates to lie on the ground. Officers then restrain them with flex-cuffs. There were also frequent false alarms. Officers were expected to run to the scene to aide another officer. Respondent does not believe he could subdue an inmate, drag or lift an individual, or run to an emergency. He said he cannot squat all the way down and kneeling is impossible. He is not able to run and no longer goes to the gym. He could not complete the academy again because he is unable to run. Respondent cannot stand for long periods of time. He said his knees begin to hurt and his left knee goes numb. He said he definitely could not stand for three hours.

Testimony of Ronny Ghazal, M.D.

17. Dr. Ghazal is an orthopedic surgeon who received his medical degree in 1987. He completed an internship in general surgery and residency in orthopedic surgery at Loma Linda University Medical Center. Dr. Ghazal has been board-certified by the American Board of Orthopedic Surgery since 1995 and also holds a subspecialty certification in
orthopedic sports medicine. He has been in private practice since 1993. Dr. Ghazal is affiliated with multiple hospitals and a member of several professional organizations. Since 1993, he has held an academic appointment at Loma Linda University School of Medicine. Dr. Ghazal’s practice is primarily geared toward sports medicine, but he is also a Workers’ Compensation Qualified Medical Examiner who performs numerous evaluations and treatment for workers’ compensation cases. He specializes in knee and shoulder surgeries. His office is located near several correctional institutions. He believes he has treated more correctional officers and deputies than any other orthopedic surgeon in the area. Dr. Ghazal testified that he is “vaguely familiar” with the standard CalPERS uses for evaluating disability retirements as he was involved in another disability retirement matter.

18. Dr. Ghazal began treating respondent in November 2014. He performed respondent’s ACL reconstruction. Dr. Ghazal observed a loss of cartilage in the right knee when he performed the arthroscopic ACL reconstruction. Respondent was slow to recover from the surgery. He last examined respondent on September 21, 2018. Dr. Ghazal observed patellofemoral crepitus and inflammation. There was no instability with extension or flexions. The x-rays showed osteoarthritis. He issued work restrictions from kneeling, squatting, running or jumping, and no standing or walking more than 50 percent of shift. Dr. Ghazal said he rarely gives prophylactic work restrictions — if he issues a work restriction it is because he believes a patient cannot perform a certain task. Dr. Ghazal believes respondent’s condition has worsened from when he initially began treating respondent in 2014. Dr. Ghazal does not believe respondent could stand for up to six hours, run, or squat. In an emergency situation, because of the adrenaline, respondent might be able to perform some of these tasks. However, his knees would then swell and he would be incapable of doing these tasks any more. For example, if he went up and down stairs his knees would swell due to the incongruity of the cartilage and he would be physically unable to take another step up the stairs.

19. There is nothing physically that prevents respondent from squatting, but it would be very painful and the increased pressure between the two bones would then cause inflammation. This would prevent him from squatting again. The problem with respondent’s left knee is that he does not have sufficient cartilage in the medial compartment. It is moderately severe today but at some point he will need a total knee replacement. The x-ray showed a narrowing of the medial compartment measuring 4.4 mm. A normal value would be 10 mm.

Additional Relevant Medical Records Following Respondent’s Retirement

20. Respondent was evaluated by Lee Silver, M.D., an orthopedic surgeon and Qualified Medical Evaluator. Dr. Silver prepared a qualified medical evaluation November 20, 2018. The physical exam revealed a half-centimeter difference in thigh circumference and same circumference of the calves. There was minimal swelling in both knees without effusion. There was no collateral ligament laxity. There was no crepitus in either knee. There was tenderness in both knees over the patellar tendon, patellofemoral joint, medial and lateral joint lines, and medial and lateral tibial plateaus. Dr. Silver reviewed additional
medical records and authored a supplemental report on February 14, 2019. Dr. Silver diagnosed respondent with right knee sprain with chondromalacia and left knee sprain with evidence of medial compartment mild degenerative arthritis but normal x-ray.

LEGAL CONCLUSIONS

Purpose of the Retirement Law

1. The legislative purpose of public employee pension programs is well-established. They serve two objectives: To induce persons to enter and continue in public service, and to provide subsistence for disabled or retired employees and their dependents. Disability pension laws are intended to alleviate the harshness that would accompany the termination of an employee who has become medically unable to perform his duties. (Haywood v. American River Fire Protection Dist. (1998) 67 Cal.App.4th 1292, 1304.)

Burden and Standard of Proof

2. CalPERS had the burden of proving by a preponderance of the evidence that respondent is no longer incapacitated from performing the duties of a Correctional Officer. (Evid. Code, §§ 500, 115.)

Applicable Statutes

3. Government Code section 20026 defines the terms “disability” and “incapacity for performance of duty,” when used as a basis for retirement, to mean a “disability of permanent or extended and uncertain duration” that is based on “competent medical opinion.”

4. Government Code section 21151, subdivision (a), provides that a state safety or state peace officer who is “incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability. . . regardless of age or amount of service.”

5. Government Code section 21156 provides that if the evidence demonstrates that the member 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. The determination of incapacitation shall be based on competent medical opinion.

6. Government Code section 21192 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, 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 examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. 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, the university, or contracting 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.

7. Government Code section 21193 provides:

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 recipient was an employee of the state or of the university 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.

Appellate Authority

8. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his customary
duties, even though doing so may be difficult or painful, the employee is not incapacitated and does not qualify for a disability retirement. (Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 886-887.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (Hosford v. Bd. of Administration (1978) 77 Cal.App.3d 854.) Further, an applicant for disability retirement must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (Id. at p. 863.)

CalPERS Precedential Decision


2 The applicant in Mansperger was a fish and game warden with peace officer status who had suffered work-related injuries to his right arm that prevented him from lifting and carrying heavy loads. (Id. at p. 875.) He remained able to perform most of his usual duties, including apprehending a prisoner, but could not lift heavy weights or carry the prisoner away. (Ibid.) In affirming CalPERS's decision that he was not physically incapacitated from performing his duties as a fish and game warden, the court noted that although the need for physical arrests did occur in Mansperger's job, they were not a common occurrence for a fish and game warden. (Id. at p. 877.) Similarly, the need for him to lift a heavy object alone was determined to be a remote occurrence. (Ibid.) In holding Mansperger was not incapacitated for the performance of his duties, the court noted the activities he was unable to perform were not common occurrences and he could otherwise "substantially carry out the normal duties of a fish and game warden." (Id. at p. 876.)

3 In Hosford, the court held that in determining whether an individual was substantially incapacitated from his usual duties, the courts must look to the duties actually performed by the individual, and not exclusively at job descriptions. Hosford, a California Highway Patrol (CHP) Sergeant, suffered several back injuries. As a result, he experienced continuing pain, and believed he was in danger of further injury when he had to overpower people who resisted arrest. (Id. at p. 857.) In determining eligibility for a disability retirement, the court evaluated Hosford's injuries according to the job duties required of his position as a sergeant, as well as the degree to which any physical problem might impair the performance of his duties. Thus, the actual and usual duties of the applicant must be the criteria upon which any impairment is judged. Generalized job descriptions and physical standards are not controlling, nor are actual but infrequently performed duties to be considered. The court noted that a sergeant's supervisory role meant both that he might need to make arrests and subdue prisoners and that he would be subjected to such physical demands less frequently than would traffic officers. (Id. at pp. 860-861.) The court found that although Hosford suffered some physical impairment, he could still substantially perform his usual duties. The court also rejected Hosford's contention that he was substantially incapacitated from performing his usual and customary duties because his medical conditions created an increased risk of future injury.
decisions involved whether the member was disabled. In Starnes, the member receiving
disability retirement benefits requested reinstatement to his former position of a CHP
Sergeant. Following an IME by a physician who opined that Starnes was no longer disabled,
CalPERS ordered Starnes reinstated. CHP appealed and retained its own physician, who
concluded that Mr. Starnes was incapacitated. The ALJ found that CalPERS’s retained
physician applied the appropriate standard and denied CHP’s appeal challenging the
reinstatement.

Evaluation

10. CalPERS had the burden of establishing that respondent is still incapacitated
for duty as a Correctional Officer with CDCR. (Gov. Code, § 21192.) Dr. Kolesnik
conducted an IME on February 28, 2018, and concluded that respondent was no longer
substantially incapacitated. Dr. Ghazal, who has evaluated and treated respondent for his
initial injury, disagreed with Dr. Kolesnik’s determination that respondent is no longer
incapacitated from performing the duties of a Correctional Officer.

11. Both Dr. Kolesnik and Dr. Ghazal are experienced and qualified orthopedic
surgeons. They were both credible witnesses. In resolving any conflict in the testimony of
expert witnesses, the opinion of one expert must be weighed against that of another. In doing
so, consideration should be given to the qualifications and believability of each witness, the
reasons for each opinion, and the matter upon which it is based. Relying on certain portions
of an expert’s opinion is entirely appropriate. A trier of fact may “accept part of the
testimony of a witness and reject another part even though the latter contradicts the part
accepted.” (Stevens v. Parke Davis & Co. (1973) 9 Cal. 3d 51, 67.) The trier of fact may
also “reject part of the testimony of a witness, though not directly contradicted, and combine
the accepted portions with bits of testimony or inferences from the testimony of other
witnesses thus weaving a cloth of truth out of selected material.” (Id., at 67-68, quoting fr om
Neverov v. Caldwell (1958) 161 Cal. App. 2d 762, 767.) The fact finder may also reject the
testimony of a witness, even an expert, although it is not contradicted. (Foreman & Clark
Corp. v. Fallon (1971) 3 Cal. 3d 875, 890.)

12. Dr. Kolesnik found no physical exam abnormalities that correlate with the
level of symptomatology reported by respondent. Dr. Kolesnik believed respondent was
capable of substantially performing the duties of a Correctional Officer. He noted no
crepitus, neither which was observed by Dr. Silver during his November 2018 exam. Dr.
Ghazal believed that in an emergency, respondent could perform the physical requirements
of the job, but doing so would cause the knee to swell, which would make him incapable of
performing those tasks any longer. However, this conclusion is speculative, and a disability
which is prospective and speculative does not satisfy the requirements of the Government
Code. (Hosford, supra, at p. 863.)

13. Dr. Kolesnik’s testimony that respondent could perform the duties of a
correctional officer was reasonable and based on the physical findings he made during his
examination of respondent. Dr. Kolesnik’s physical findings were not materially different
than those made by Dr. Kim in 2015. At that time, Dr. Kim concluded that respondent was substantially incapacitated. Dr. Kolesnik disagreed with Dr. Kim's opinion - had Dr. Kolesnik evaluated respondent in 2015 he would not have found him to be substantially incapacitated. Although there was no evidence that respondent's condition has improved since he was retired for disability, this does not preclude CalPERS from reinstating respondent. CalPERS established that presently, respondent can substantially perform his customary duties; even though doing so may be difficult or painful, respondent is not incapacitated and does not qualify for a disability retirement. (Mansperger, supra, at pp. 886-887.) CalPERS satisfied its burden of establishing that respondent is no longer substantially incapacitated from the performance of his usual duties as a Correctional Officer.

ORDER

Respondent Juan Nielsen's appeal is denied. CalPERS's request to reinstate respondent to his former position as a Correctional Officer with the California Department of Corrections and Rehabilitation is affirmed.

DATED: May 24, 2019

ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings