

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:

EDWARD G. KELLY,

Respondent,

and

CALIFORNIA STATE PRISON, CORCORAN,
CALIFORNIA OF CORRECTIONS AND
REHABILITATION,

Respondent.

Agency Case No. 2018-1127

OAH No. 2018120714

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 11, 2019, in Sacramento, California.

Rory J. Coffey, Senior Attorney, represented complainant, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

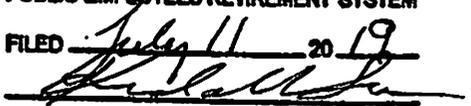
Edward G. Kelly, respondent, represented himself.

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

The matter was submitted on June 11, 2019.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED July 11 20 19



ISSUE

Is respondent,¹ who was granted a disability retirement in 2012, still permanently disabled or substantially incapacitated from performing the usual and customary duties of a Correctional Officer?

FACTUAL FINDINGS

Background

1. Respondent was employed at California State Prison Corcoran (CSP-Corcoran) as a Correctional Officer. By virtue of his employment, respondent was a state safety member of CalPERS. On September 4, 2012, respondent filed with CalPERS an application for industrial disability retirement based upon an orthopedic (back) condition. On April 24, 2013, 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 April 17, 2018, 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 May 22, 2018, conducted by Robert Henrichsen, M.D., an orthopedic surgeon and Independent Medical Examiner.

4. On October 2, 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 December 21, 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. Kelly.

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 a CDCR Return to Work Coordinator and signed by respondent on April 16, 2012, identifies physical activities performed by a Correctional Officer at CSP-Corcoran. Constant activities are those that occur over six hours per day. They are identified as walking; reaching (below the shoulder); fine manipulation; simple grasping; repetitive use of hands; and lifting/carrying 0 to 10 pounds. Frequent activities are identified as activities that occur between three and six hours a day. They are identified as sitting; standing; twisting at the neck; reaching (above the shoulder); pushing and pulling; keyboard and mouse use; and carrying 11 to 25 pounds up to 1.5 miles; and walking on uneven ground. Occasional activities are those that occur up to three hours a day. They are identified as running; kneeling, climbing, squatting, bending at the neck and waist; twisting at the waist; power grasping; lifting/carrying 51 to over 100 pounds; driving; working with heavy equipment; exposure to excessive noise, extreme temperature, and chemicals; and working with biohazards.

Testimony of Robert Henrichsen, M.D.

9. Dr. Henrichsen has been licensed to practice medicine since 1968. He completed his residency in orthopaedic surgery at the Los Angeles Orthopaedic Hospital in 1973. After completing a fellowship in the surgical treatment of rheumatoid arthritis musculo-skeletal deformities, Dr. Henrichsen became board-certified in orthopaedic surgery in 1974. He has practiced general orthopedics in private practice for over 40 years. His practice now consists of approximately 25 to 30 percent patient care, with the remainder medico-legal evaluations. He has been a CalPERS Independent Medical Examiner since 2003 and is a Qualified Medical Evaluator for workers' compensation. He has multiple professional memberships relating to orthopedics. Based on his training and experience, Dr. Henrichsen was well qualified to render an expert opinion in this matter.

10. Dr. Henrichsen performed an Independent Medical Examination of respondent for CalPERS on May 22, 2018. Dr. Henrichsen'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. His report and testimony are summarized as follows:

11. Respondent worked as a correctional officer for 11 to 12 years before he was injured on June 1, 2010, and went off work. The injury occurred when he lifted a pan of oatmeal out of a cart, which resulted in him having shooting pain down his back and legs. Later, respondent went to pull a case of toilet paper from an overhead rack, which caused him pain when he twisted. After the injury, respondent could not stand up straight and had sharp pain. He had at least one epidural injection that provided temporary benefit. He used a low back support for approximately two years and a cane for about four years. He receives acupuncture treatments that have helped with the pain.

12. Respondent reported he has low back attacks approximately every two months, which sometimes incapacitate him in bed for three or four days. He understands what triggers the pain, and if he walks too long or does any activity too long, he will restrict the activity to prevent the pain from becoming problematic. When he does have a back pain, he also has numbness and tingling into his legs as well as cold feet. He takes 800 mg of ibuprofen often twice per day and sometimes uses a lidocaine patch. Respondent reported difficulty with sitting, standing, walking, climbing stairs, and some bathroom and dressing needs. On the day of the exam, respondent reported a 4 out of 10 on a pain scale. The worst is an 8, with an average of 3 to 4, which aggravates to a 6 or 7 with activities.

13. Dr. Henrichsen performed a physical exam of respondent. Respondent walked with a slightly flexed position (camptocormia) in his spine. Dr. Henrichsen took spine measurements and determined that respondent walked with his back flexed at 15 degrees, with an intact heel-to-toe gait. Respondent had normal strength to stand on his heels and toes. Dr. Henrichsen did not believe there was any mechanical reason for respondent to walk with his back in a flexed position. A Trendelenburg test for hip muscle weakness was negative. Respondent could squat to 90 percent of normal and arise, which respondent said produced some back pain. A femoral nerve traction test allowed respondent to bring each heel within 10 cm of the ipsilateral buttock, but no referred symptoms. Dr. Henrichsen also took three measurements each for spine extension, flexion, lateral bending, and rotation. All values were within normal limits. On palpation of the lower back, respondent reported pain at the L5 vertebral level. There was no crepitus, which is the crunching or grinding of bone. Dr. Henrichsen also examined respondent's hips and legs. Dr. Henrichsen did not observe any atrophy.

14. Dr. Henrichsen ordered X-rays that showed some mild arthritic changes and possibly a small amount of space-height reduction at L4-L5 and L5-S1. Overall, the X-rays showed some small degenerative disease at L5-S1 but no significant abnormalities that would preclude him from his correctional officer position.

15. Dr. Henrichsen reviewed the physical requirements and standards for a correctional officer. He has also treated correctional officers in his practice. Dr. Henrichsen noted in his report that he was not provided any MRI reports. Dr. Henrichsen believed that the previous determination of respondent's incapacity was based on respondent's report of symptoms and prophylactic restrictions.

16. After Dr. Henrichsen completed his evaluation, an MRI was performed on respondent's spine on August 10, 2018. Dr. Henrichsen reviewed the films, which showed disc protrusions at L4-L5 and L5-S1. There was also an annular tear at L5-S1. However, the protrusions were not producing overt stenosis, which is narrowing of the canal surrounding the nerve. There was no nerve root compression in the foramina laterally. There was some facet arthritic wear consistent with his age. Dr. Henrichsen noted that respondent presented with some reduction in his range of motion, but this was inconsistent with the MRI findings. Moreover, the reduction in the range of motion does not rise to the level of substantial impairment. Dr. Henrichsen did not believe that respondent is presently substantially incapacitated for his occupational duties.

Respondent's Testimony

17. Respondent is 48 years old. As he reported to Dr. Henrichsen, he injured his back at work on June 1, 2010, which was his last day of work. He used a back brace and cane for four years in order to walk. He entered a physical therapy program that taught him how to recognize triggers and deal with the pain. He understands what he needs to do to prevent flare-ups and ease acute pain. For example, if he has an upcoming family function, he will limit his activities beforehand. He has learned proper technique and form to reduce injury. He has also strengthened his core, which has helped with flare-ups since it reduces the impact on the lower back. He no longer plays sports or goes hiking. He has not run in the past nine years. His children have seen him in so much pain that he has had to crawl on the floor. Respondent opened his own pizza restaurant, but after four months, he had to sell the restaurant because his back pain prevented him from being able to work.

18. At CSP-Corcoran, respondent worked in the maximum security unit. Because it is the highest level of supervision, correctional officers are required to perform more work than officers in other units, such as janitorial duties, lifting and carrying inmates from the floor, and carrying them up and down stairs. In a riot situation, officers are required to wear protective equipment that weighs from 60 to 80 pounds. Once, he had to stand in the yard wearing this equipment for four hours. Respondent testified that life and death are at stake for himself, staff, and inmates. He fears that if he has a flare-up, he could become incapacitated and put himself and others at risk for grave harm.

19. Respondent does not believe that Dr. Henrichsen used due diligence in reviewing all of respondent's medical records. As Dr. Henrichsen noted in his report, there were many records that Dr. Henrichsen did not have to review, including the actual MRI study from 2015. Respondent noted that a letter he received from CalPERS told him that Dr.

Henrichsen would review all of the medical records respondent submitted, which did not occur in this case.

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 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.)² 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.)³ 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.)

Evaluation

9. CalPERS had the burden of establishing that respondent is still incapacitated for duty as a Correctional Officer with CDCR. (Gov. Code, § 21192.) Dr. Henrichsen conducted an Independent Medical Examination on May 22, 2018, and concluded that respondent was no longer substantially incapacitated. Dr. Henrichsen is an experienced and qualified orthopaedic surgeon. He was a credible witness.

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.

10. Dr. Henrichsen found no physical exam abnormalities that correlate with the level of symptomatology reported by respondent. The most recent MRI, taken on August 10, 2018, showed some mild arthritic wear and disc protrusion. However, there was no evidence of stenosis or nerve root compression. The MRI results did correlate with the location that respondent reported experiencing pain, and although mild and intermittent pain could be expected, the objective findings did not indicate that respondent was incapable of substantially performing the duties of a Correctional Officer. While Dr. Henrichsen did not review all of respondent's past medical records, this does not mean that Dr. Henrichsen's conclusions are flawed. Dr. Henrichsen was tasked with making a determination of respondent's present-day condition. The medical records of course provide information on the origin of the condition and past treatments, but ultimately, Dr. Henrichsen's conclusions were based on an up-to-date physical examination, review of symptoms, and imaging studies. Put another way, regardless of what respondent's condition might have been in the past, it is his present condition that is most relevant to the determination of whether respondent is presently disabled.

11. Finally, respondent did not offer any competent medical evidence at the hearing. There was no expert testimony to challenge Dr. Henrichsen's conclusions. 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 Edward G. Kelly'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, California State Prison, Corcoran is affirmed.

DATED: July 10, 2019

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ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings