

ATTACHMENT E

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:

DAVID M. SIMPSON,

and

CALIFORNIA STATE PRISON LOS
ANGELES COUNTY, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Respondents.

Case No. 2018-1165

OAH No. 2019010744

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on May 22, 2019, in Los Angeles, California.

Austa Wakily, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS). Respondent David M. Simpson (respondent) appeared and represented himself. No appearances were made by or on behalf of respondent California State Prison Los Angeles, California Department of Corrections and Rehabilitation.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on May 22, 2019.

FACTUAL FINDINGS

Parties and Jurisdiction

1. On January 11, 2019, Anthony Suine, Chief of the Benefits Services Division of CalPERS, filed the Accusation while acting in his official capacity.

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CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
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2. At the time he filed his application for disability retirement, respondent was employed as a Correctional Officer by the California State Prison Los Angeles County, California Department of Corrections and Rehabilitation (CDCR). By virtue of his employment, respondent is a state safety member of CalPERS.

3. On August 24, 2015, respondent submitted an application for industrial disability retirement (application). In the application, respondent claimed that his disability occurred due to "continuous trauma from performing [his] duties as a Correctional Officer and working in a hostile environment." (Ex. 3.) Respondent indicated in the application that his injury resulted in the following limitations/preclusions: "No prolonged walking/sitting. No lifting/pushing/pulling over 20 lbs. No reaching above [his] head or gripping. Must avoid contact with inmates." (*Ibid.*) Respondent wrote that, because of his physical condition, he was no longer able to perform the essential functions of his job.

4. CalPERS approved respondent's application, and he retired for disability on the basis of orthopedic (mid-back) conditions effective January 29, 2015. In 2018, CalPERS determined that respondent was under the minimum age for voluntary service retirement applicable to members of his classification under Government Code section 21060, subdivision (a). CalPERS directed respondent to undergo further medical examination in order to consider respondent's reinstatement from retirement.

5. In approving respondent's application for industrial disability retirement and in considering respondent's reinstatement from retirement, CalPERS reviewed the case of *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d. 873, 877, and determined the phrase "incapacitated for the performance of duty" in Government Code section 21151 means "substantial inability of the applicant to perform the usual job duties." Further, CalPERS determined that, under this standard, a member is not entitled to a CalPERS disability retirement if he/she can substantially perform his/her "usual job duties."

6. After a review of the medical reports concerning respondent's orthopedic (mid-back) condition, CalPERS determined that respondent was no longer disabled or incapacitated from the performance of his duties as a Correctional Officer.

7. In a letter dated October 11, 2018, CalPERS notified respondent and CDCR of its determination that respondent should be reinstated from retirement.

8. In a letter dated October 29, 2018, respondent timely appealed the reinstatement and requested an administrative hearing.

9. The issue on appeal is whether respondent remains permanently disabled or substantially incapacitated from the performance of his usual job duties as a Correctional Officer with CDCR.

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Respondent's Job Duties

10. Respondent worked as a Correctional Officer for CDCR from April 2000 to January 27, 2014, when he was placed on temporary disability.

11. According to a description issued by CDCR, a Correctional Officer "must range qualify with departmentally approved weapons; keep firearm in good condition; fire weapon in combat/emergency situation; must be able to swing baton with force to strike an inmate; disarm, subdue and apply restraints to an inmate; defend self against an inmate; inspect inmates for contraband; conduct body searches." (Ex. 13.) The description further indicated that the daily job duties of a Correction Officer include the following: walking, standing, and running; climbing and crawling; lifting and carrying; reaching overhead; pushing/pulling; among other physical activities. Walking, standing, and climbing are occasional to continuous activities. Running and crawling are occasional activities. Lifting and carrying are continuous to frequent activities, which involve carrying in the light (20 pounds maximum) to medium (50 pounds maximum) range frequently throughout the day. Reaching is an occasional to frequent activity, which involves reaching overhead in the performance of cell or body searches. Pushing and pulling are occasional to frequent activities, which involve opening and closing locked gates and cell doors throughout the work day.

12. On June 10, 2015, respondent signed a "Physical Requirements Position/Occupational Title" form (Physical Requirements form), which was submitted to CalPERS. According to the Physical Requirements form, when working as a Correctional Officer, respondent: (1) constantly (over 6 hours a day), sat; stood; ran; walked; bent his neck; twisted his neck and waist; engaged in fine manipulation, power grasping, simple grasping, and repetitive use of his hands; lifted and carried weights between zero to 25 pounds; walked on uneven ground; drove; worked with heavy equipment; was exposed to excessive noise; was exposed to extreme temperature, humidity, and wetness; operated foot controls or repetitive movement; used special visual or auditory protective equipment; worked with biohazards; worked at heights; (2) frequently (three to six hours a day) climbed; bent at the waist; pushed and pulled; lifted and carried between 26 pounds to 50 pounds; was exposed to dust, gas, fumes, or chemicals; and (3) occasionally (up to three hours a day) crawled; kneeled; squatted; reached above his shoulders; used a keyboard and mouse; and lifted and carried between 51 and 100 pounds.

The April 5, 2016 Independent Medical Evaluation

13. CalPERS initially approved respondent's application for industrial disability retirement based on an Independent Medical Evaluation (IME), dated April 5, 2016, performed by Zenia Cortes, MD.

14. As a part of the IME of respondent, Dr. Cortes interviewed respondent, obtained a medical and work history, and conducted a physical examination. She also

reviewed respondent's job description, the physical requirements of a Correctional Officer, and respondent's medical records.

15. Dr. Cortes noted that, at the time of the evaluation, respondent was a 38-year-old right-hand dominant male. When asked to provide his medical history, respondent stated that he began to have mid back pain approximately eight to nine years earlier and sought treatment privately around 2008. From 2008 to 2013, respondent was referred to aquatic therapy, a neurologist, and pain management. In addition, he had four epidural steroid injections and eight sessions of acupuncture without benefit. Respondent also underwent more than 40 sessions of chiropractic treatment for his low back and both of his hips.

16. At the time of the April 5, 2016 IME, respondent complained of headaches, neck pain, and pain in the bilateral shoulders, bilateral arms, bilateral elbows, bilateral forearms, bilateral wrists, bilateral hands, upper back, mid back, low back, bilateral hip, bilateral thighs, bilateral knees, bilateral legs, and bilateral ankles and feet.

17. Dr. Cortes performed a physical examination of respondent, with a focus on the following areas: cervical spine, bilateral shoulders, bilateral elbows, bilateral wrists, bilateral hands, thoracic/lumbar spine, bilateral hips, bilateral knees, bilateral ankles, and bilateral feet. She administered range of motion tests for all areas described above and a grip strength test. Moreover, Dr. Cortes measured the girth of respondent's biceps, forearms, thighs, and calves. Dr. Cortes noted that none of the body parts she examined exhibited swelling or ecchymosis.¹ She noted that respondent's left shoulder, as well as both of respondent's knees, showed some mild tenderness. Respondent had normal range of motion in his bilateral elbows, bilateral hands, bilateral hips, thoracic/lumbar spine, and bilateral feet. Respondent's range of motion was restricted without pain in his cervical spine, bilateral shoulders, bilateral wrists, and bilateral ankles. The results of respondent's grip strength test demonstrated that he had some decreased grip strength in his right hand. However, respondent's girth measurements were all within the normal range.

18. Based on her review of respondent's prior medical records and the physical exam, Dr. Cortes diagnosed respondent with unspecified scoliosis and chronic pain syndrome. She opined that respondent was substantially incapacitated for the performance of his usual job duties. Additionally, she wrote:

[Respondent] has numerous subjective complaints and limited objective findings. It is more likely that the patient is limited from a mental condition than he is from a physical condition. However, there are some specific job duties that he is unable to do from a physical condition. The patient is unable to do repetitive bending or twisting of neck based on his limited range of motion found on examination. He is also limited in his

¹ Ecchymosis is a discoloration of the skin resulting from bleeding underneath, typically caused by bruising.

ability to reach above or below shoulder level primarily due to his left shoulder, but he also has some mild limitations with his right shoulder. The patient will also be limited in power grasping and simple grasping due to decreased grip strength on the right.

(Ex. 8, p. 25.)

The August 8, 2018 Independent Medical Evaluation

19. On August 8, 2018, John D. Kaufman, M.D., conducted an IME of respondent at the request of CalPERS. Dr. Kaufman is a board-certified orthopedic surgeon with over 40 years of experience in his field. He contracts with CalPERS to perform IMEs.

20. As a part of the IME of respondent, Dr. Kaufman interviewed respondent, obtained a medical and work history, and conducted a physical examination. He also reviewed respondent's job description, the physical requirements of a Correctional Officer, and respondent's medical records.

21. Dr. Kaufman noted that, at the time of the evaluation, respondent was a 40-year-old right-hand dominant male. During his interview with Dr. Kaufman, respondent complained of pain in his neck, bilateral shoulders, bilateral elbows, bilateral wrists/hands, entire back, bilateral hips, bilateral knees, and bilateral ankles and feet.

22. Dr. Kaufman performed a physical examination of respondent, with a focus on the following areas: cervical spine, lumbar spine, bilateral shoulders, bilateral elbows, bilateral wrists, bilateral hands, bilateral hips, bilateral knees, bilateral ankles, and bilateral feet. Dr. Kaufman administered range of motion tests for all areas described above, but did not administer any grip strength tests. He indicated that respondent had normal range of motion in all areas that were examined. Dr. Kaufman also noted that none of the body parts he examined exhibited deformity or swelling, although the examination of respondent's elbows, ankles, and knees revealed some swelling. Additionally, Dr. Kaufman measured the girth of respondent's biceps, forearms, wrists, thighs, and calves, and found that they displayed symmetry, demonstrating that there was no atrophy in respondent's upper and lower extremities. Furthermore, X-rays were taken of respondent's lumbar spine, which showed a 10-degree right lumbar scoliosis and slight narrowing of the L5-S1 interspace.

23. Based on the patient history provided by respondent, the medical findings from the physical examination, and the review of prior medical records, Dr. Kaufman found that there was no objective evidence of significant pathology related to respondent's neck, thoracic spine, bilateral shoulders, bilateral knees, bilateral ankles, and bilateral hands. Furthermore, Dr. Kaufman commented, "[Respondent's] 10-degree scoliosis is minimal and would not be expected to produce any significant symptoms or need any significant treatment. [Respondent] has symptoms of pain in multiple areas, however no objective evidence can be found of any serious problems related to any of these areas." (Ex. 11, p. 9.) Dr. Kaufman concluded, "Because of the lack of objective evidence of significant problems

related to [respondent's] symptoms, I do not feel that the member is unable to perform his job duties. I do not feel that [respondent] is substantially incapacitated for the performance of his duties." (*Ibid.*)

Respondent's Evidence

24. At the administrative hearing, respondent submitted Magnetic Resonance Imagery (MRI) Reports dated May 1, 2019, and May 9, 2019, from Robert Rabiea, M.D., and Stephen Shinault, D.O., respectively. According to the May 1, 2019 report, Dr. Rabiea took MRIs of respondent's cervical spine and lumbar spine. Of respondent's cervical spine, Dr. Rabiea wrote, "Mild to moderate dextroscoliosis² of the cervical spine. Otherwise normal cervical spine. No disc herniation. . . ." (*Id.* at p. 5.) Of respondent's lumbar spine, Dr. Rabiea wrote, "Degenerative disc disease L5-S1. Bulging disc at this level without focal disc herniation. Mild levoscoliosis³ of the lumbar spine." (*Id.* at p. 7.) According to the May 9, 2019 report, Dr. Shinault took MRIs of respondent's left knee and left shoulder. Dr. Shinault noted respondent's left knee showed no evidence of tear, fracture, joint effusion, or significant muscular atrophy. With regard to respondent's left shoulder, Dr. Shinault wrote that there was evidence of "minor diffuse tendinosis" and "minor subscapularis tendinosis, but otherwise, there was no evidence of tear, fracture, joint effusion, or significant muscular atrophy. (Ex. A, p. 2.)

25. Respondent also submitted a Panel Qualified Medical Evaluation (PQME) Report, dated June 11, 2018, from Mark Ganjianpour, M.D., as well as a Supplemental Medical-Legal Report dated December 1, 2018, from Dr. Ganjianpour. These reports were prepared as a part of respondent's workers' compensation claim. According to the PQME Report, on June 11, 2018, Dr. Ganjianpour performed a physical examination of respondent and took X-rays of respondent's cervical spine, lumbar spine, bilateral shoulders, bilateral hips, and bilateral knees. Based on his examination and review of the X-rays, Dr. Ganjianpour diagnosed respondent with "thoracic spine scoliosis apex at T6 approximately 40 degrees," "lumbar spine L4-L5 and L5-S1 degeneration with facet arthropathy," and "left shoulder impingement with weakness of the rotator cuff on external rotation, rule out rotator cuff tear." (Ex. B, p. 13.) Dr. Ganjianpour opined, "[Respondent] should have work restrictions of maximum lifting of 10 pounds, no repetitive bending, and twisting at the waist level. No frequent standing and walking more than two hours out of an eight-hour day and no squatting and kneeling." (*Id.* at p. 15.)

26. At the administrative hearing, respondent disagreed with Dr. Kaufman's opinion that he could return to work. Respondent testified that he continues to experience pain and that he is unable to work an eight-hour day shift without the assistance of narcotics. Respondent also contended that Dr. Kaufman failed to examine his mid-back during the IME and that Dr. Kaufman discounted his scoliosis of the mid-back.

² Dextroscoliosis is a type of scoliosis where the spine curves to the right.

³ Levoscoliosis is a type of scoliosis where the spine curves to the left in a C shape.

27. Respondent did not call any other witnesses to testify regarding his medical condition.

Dr. Kaufman's Testimony

28. At the administrative hearing, Dr. Kaufman testified credibly and consistently with the findings and conclusions of his report. In addition, Dr. Kaufman reviewed respondent's May 1, 2019 and May 9, 2019 MRI Reports. According to Dr. Kaufman, the MRI of respondent's left knee and cervical spine was normal. Although minor diffuse tendinosis and minor subscapularis tendinosis was found in respondent's left shoulder, Dr. Kaufman explained that minor tendinosis is a strain-type injury, involving the stretching of the muscle, and would not prevent respondent from performing his usual job duties as a Correctional Officer. The MRI Report of respondent's lumbar spine also confirmed Dr. Kaufman's finding that there was a slight narrowing of the L5-S1 interspace. However, Dr. Kaufman stated that nothing in the two MRI Reports changed his prior opinions regarding respondent's medical condition and his ability to return to his job.

29. Although Dr. Kaufman did not address the difference between his diagnosis of a 10-degree scoliosis and Dr. Ganjianpour's diagnosis of a 40-degree scoliosis, Dr. Kaufman clarified that he had examined respondent's entire back as a part of the IME. Dr. Kaufman explained that in his IME Report, he only used medical terms to describe the back. In medical terms, the thoracic spine runs from the base of the neck to the base of the rib cage, and the lumbar spine consists of five vertebrae extending from the base of the rib cage (with no ribs attached) to the hips. As a part of the IME, Dr. Kaufman examined respondent's thoracic spine and lumbar spine, which includes what is known in layman terms as the mid back. Dr. Kaufman further explained that respondent's scoliosis is mild in nature and does not prevent him from performing his essential job duties as a Correctional Officer.

LEGAL CONCLUSIONS

1. In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof, including the both the initial burden of going forward and the burden of persuasion, by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, note 5.) This matter involves an Accusation, and thus complainant bears the burden of proof by a preponderance of the evidence. (Gov. Code, § 11503; *In the Matter of the Application for Reinstatement from Industrial Disability of Willie Starness*, CalPERS Precedential Decision 99-03.) Based on Factual Findings 1 through 29, complainant has met this burden.

2. Government Code section 20026, states, in pertinent part:

“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.

3. Government Code section 21151 provides, in pertinent part:

(a) Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service. . . .

4. Government Code section 21156 provides, in pertinent part:

If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service 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. . . .

5. Government Code section 21060, subdivision (a), provides in pertinent part:

A member shall be retired for service upon his or her written application to the board if he or she has attained 50 years of age and is credited with five years of state service. . . .

6. Government Code section 21192 provides in pertinent part:

The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination The examination shall be made by a physician or surgeon, appointed by the board . . . at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board . . . shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency . . . where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

7. Respondent was 40 years old when he underwent the IME with Dr. Kaufman pursuant to Government Code section 21192. Thus, he was under the minimum age for

voluntary service retirement applicable to members of his classification under Government Code section 21060.

8. The analysis of whether a recipient of an industrial disability retirement is “still incapacitated” for the performance of her usual job duties under Government Code section 21192 “is limited to determining whether the conditions for which disability retirement was granted continue to exist.” (*California Department of Justice v. Board of Administration of California Public Employees’ Retirement System* (2015) 242 Cal.App.4th 133, 141.) “Incapacitated for the performance of duty,” means the “substantial inability of the applicant to perform his usual duties,” as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees’ Retirement System, supra*, 6 Cal.App.3d at p. 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) Restrictions which are imposed only because of a risk of future injury are insufficient to support a finding of disability. (*Hosford, supra*, 77 Cal.App.3d at pp. 862 –863.) The fact that a small percentage of duties could not be performed does not result in a substantial inability to perform. (*Ibid.*) The claimed disability may not be prospective and speculative and must be presently in existence. (*Ibid.*)

9. In *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, the Court of Appeal held that a deputy sheriff was not permanently incapacitated for the performance of his duties. The court stated, “A review of the physician’s reports reflects that aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the appellant’s condition are dependent on his subjective symptoms.” (*Id.* at p. 697). In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, the court found that discomfort, which may make it difficult for an employee to perform his duties, is not sufficient in itself to establish permanent incapacity. (See also, *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.)

10. Here, respondent offered the opinions of Dr. Ganjianpour in contending that he is incapacitated for the performance of his usual job duties as a Correctional Officer. Dr. Ganjianpour diagnosed respondent with “thoracic spine scoliosis apex at T6 approximately 40 degrees,” “lumbar spine L4-L5 and L5-S1 degeneration with facet arthropathy,” and “left shoulder impingement with weakness of the rotator cuff on external rotation, rule out rotator cuff tear.” (Ex. B, p. 13.) However, Dr. Ganjianpour did not testify at the administrative hearing to explain his findings and diagnosis. Additionally, because Dr. Ganjianpour’s PQME Report was prepared as a part of respondent’s workers’ compensation claim, there was no evidence that his opinions were rendered based on the substantial incapacity standard in disability retirement cases. A workers’ compensation ruling or settlement is not binding on the issue of eligibility for disability retirement because the two systems exist for entirely different reasons, and they were established to attain wholly independent objectives. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at p. 207, citing *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132.)

11. Dr. Ganjianpour's opinions were also refuted by Dr. Kaufman's findings and diagnosis. Dr. Kaufman's report and expert testimony established that respondent's complaints were exaggerated and that respondent was not substantially incapacitated to perform his usual job duties. Dr. Kaufman's opinion was reasonable and supported by the evidence. Dr. Kaufman conducted a thorough physical examination of respondent and took X-rays of respondent's lumbar spine. Based on his physical examination and the X-rays, Dr. Kaufman concluded that little objective evidence can be found of any serious problems relating to the areas where respondent complained of pain. Dr. Kaufman did diagnose respondent with s scoliosis of the back but determined that it was mild in nature. This diagnosis is supported by Dr. Rabiea's May 1, 2019 MRI Report, which found that respondent suffered mild to moderate moderated detroscoliosis of the cervical spine and mild levoscoliosis of the lumbar spine.

12. Under these circumstances, Dr. Ganjianpour's opinions are given little weight. Dr. Kaufman is deemed to be a more credible expert witness, and his opinions are afforded greater weight.

13. Based on the record presented in this case, respondent failed to present competent medical opinion that he is still substantially incapacitated for his job duties, and he offered only subjective symptoms of on-going pain. The totality of the evidence established that respondent is no longer incapacitated for the performance of his duties as a Correctional Officer with the CDCR based on an orthopedic condition (mid-back), even though his condition may cause him discomfort or difficulty in the performance of his usual job duties.

ORDER

Respondent David M. Simpson's appeal from CalPERS's determination that he is no longer substantially incapacitated for the performance of his usual job duties as a Correctional Officer with respondent California State Prison Los Angeles, California Department of Corrections and Rehabilitation is DENIED.

DATED: June 19, 2019

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Ji-Lan Zang
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Ji-LAN ZANG
Administrative Law Judge
Office of Administrative Hearings