

**ATTACHMENT A**

**THE PROPOSED DECISION**

**BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA**

**In the Matter of the Application for Industrial Disability**

**Retirement of:**

**KAMBIZ N. KAMFIROUZI**

**WEST VALLEY-MISSION COMMUNITY COLLEGE DISTRICT**

**Respondents**

**Agency Case No. 2018-0507**

**OAH No. 2018080407**

**PROPOSED DECISION**

Administrative Law Judge Regina Brown, State of California, Office of Administrative Hearings, heard this matter on April 29, 2019, in Oakland, California.

Austa Wakily, Senior Attorney, represented complainant California Public Employees' Retirement System (CalPERS).

Kambiz N. Kamfirouzi appeared and represented himself at hearing.

Richard C. Bolanos, Partner, and Juliana Kresse, Attorney, with Liebert Cassidy Whitmore represented West Valley-Mission Community College District.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED 8/15 2019  
dju.

The record remained open for the filing of closing briefs which were received on June 28, 2019. CalPERS's closing brief was marked for identification as Exhibit 15 and West Valley-Mission Community College District's closing brief was marked for identification as Exhibit G. On July 15, 2019, West Valley-Mission Community College District filed a reply brief and motion to strike CalPERS' closing brief which was marked for identification as Exhibit H.<sup>1</sup>

The record closed and the matter was submitted for decision on July 15, 2019.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. Respondent Kambiz N. Kamfirouzi (Kamfirouzi) began working for respondent West Valley-Mission Community College District (District) as a police officer in June 2001. By virtue of his employment, he is a local safety member of CalPERS subject to Government Code section 21151.

2. On November 21, 2017, the District filed an employer-originated industrial disability retirement application with CalPERS based on Kamfirouzi's orthopedic condition, which was specifically noted as "MRI common extensor tendon with tendinopathy and high-grade partial tear of the right elbow latter." On April 13, 2018, CalPERS denied the application because it had determined that Kamfirouzi was

---

<sup>1</sup> The District's motion to strike CalPERS' closing brief, because it allegedly misrepresents the evidence in the record, is denied.

not permanently disabled or incapacitated from performance of his duties as a police officer with the District at the time the application was filed.

3. Respondents filed timely appeals and requested an administrative hearing.

4. Anthony Suine filed the Statement of Issues in his official capacity as Chief of the Benefit Services Division, CalPERS.

5. This issue is whether at the time of the application Kamfirouzi was substantially incapacitated from the performance of his usual and customary duties as a police officer for the District on the basis of his orthopedic (right elbow) condition.

## **Background**

6. Kamfirouzi performed general law enforcement duties for the District on an assigned shift at a college campus. His job duties as a police officer with the District included: responding to emergency and non-emergency calls for service; protecting life and property while ensuring the safety and security of students and staff; investigating suspicious and criminal activity; and providing medical or other aid as needed. He was also required to identify, pursue and arrest suspects and detain violators by means of lawful use of force, and restrain or subdue individuals using standard police techniques. Physical requirements of the position required him to occasionally lift and carry over 100 pounds up to three hours and to frequently lift and carry 26 to 50 pounds for three to six hours.

7. The District's police department provides general law enforcement services for West Valley College in Saratoga, and Mission College in Santa Clara, which are 13 miles apart. Officers may also respond to satellite campuses in remote locations.

There are seven officers, a sergeant, a lieutenant and a chief on the force. On a typical day, there are two officers and a supervisor on duty, and the operational hours are 6:30 a.m. to 2:00 a.m., seven days a week. Officers respond to emergency calls regarding suspicious persons and disturbances and they sometimes deal with mentally ill individuals.

### **Work-Related Injury**

-8. On June 1, 2016, Kamfirouzi injured his right elbow during a defensive tactics training and immediately sought treatment in the emergency room. He was referred to U.S. Healthworks Medical Group and was prescribed physical therapy and anti-inflammatory medication. An MRI of the right elbow taken on September 26, 2016, revealed common extensor tendinosis with high grade partial tear (lateral epicondylitis) and mild cartilage thinning in the radiocapitellar joint. Kamfirouzi had additional physical therapy, but the pain worsened. He was treated by hand specialist Jing Hsieh, M.D., who administered a steroid injection into his right elbow which provided temporary pain relief.

9. In October 2016, Kamfirouzi sought treatment with orthopedic surgeon Bal Bagwat, M.D. Dr. Bagwat saw him approximately once a month and prescribed various treatments including platelet-rich plasma injections, additional physical therapy sessions, an anti-inflammatory medication patch, and use of a forearm tension band splint. Dr. Bagwat did not have Kamfirouzi undergo another MRI. Dr. Bagwat found that Kamfirouzi had persistent focal pain overlying the lateral right elbow and an 11 percent grip strength deficit that corresponded to an upper extremity impairment. Dr. Bagwat concluded that the lateral epicondylitis had not completely healed. The last time that Kamfirouzi sought treatment with Dr. Bagwat was in September 2017.

10. On September 11, 2017, in his written report, Dr. Bagwat concluded that Kamfirouzi's right elbow condition had reached maximum medical improvement and was permanent and stationary. Dr. Bagwat imposed permanent restrictions on Kamfirouzi including: no lifting, pushing, or pulling over 60 pounds with his right arm; that he wear a right forearm tension split; and that he was restricted from engaging in combative activities. According to Dr. Bagwat, Kamfirouzi was permanently precluded from returning to his regular work as a police officer.

11. Kamfirouzi engaged in the reasonable accommodation process with the District based on Dr. Bagwat's report. Kamfirouzi was provided with periodic temporary modified duty which included attending trainings and performing office work. Because of the restrictions, he could not perform patrol work, make arrests, engage in physical confrontations with suspects, or transport individuals in a medical crisis. Ultimately, the District could not provide Kamfirouzi with a long-term permanent modified duty position. The District applied for disability retirement on Kamfirouzi's behalf. He is on paid administrative leave pending the outcome of this matter.

### **Independent Medical Examination**

12. Orthopedic surgeon William R. Stearns, M.D., conducted an independent medical examination (IME) of Kamfirouzi on April 2, 2018; at the request of CalPERS, and submitted a report after reviewing the medical records.

13. During the physical examination by Dr. Stearns, which lasted approximately one hour, Kamfirouzi demonstrated maximum tenderness over the posterior lateral radiocapitellar joint with mild soft tissue swelling. Each elbow had five degrees of hyperextension and flexion to 140 degrees without crepitude. The range of motion was normal. He had minimal pain with enforced extension of the right elbow.

He had no tenderness over the right radial neck. His right hand had greater grip strength than his left hand. He is right-handed. A measurement of his elbow flexion strength showed that he had a little less strength on the right than the left. Circumference measurements indicated no significant atrophy of either upper extremity. Dr. Stearns found that there was some loss of strength in his elbow flexion and extension, but without evidence of atrophy, he did not feel that the loss of strength was a significant finding.

14. Dr. Stearns diagnosed Kamfirouzi with right elbow lateral epicondylitis – resolved and right elbow mild osteoarthritis. Dr. Stearns agreed that Kamfirouzi has a functional limitation of a maximum of 60 pounds of lifting, pushing and pulling capacity with his right arm. However, Dr. Stearns found that this functional limitation was consistent with mild radiocapitellar arthritis which is not a disabling condition and did not preclude Kamfirouzi from participating in combative duties, such as apprehending suspects. Dr. Stearns found that with the assistance of his left arm, Kamfirouzi should be able to lift more than 100 pounds with both arms. Dr. Stearns concluded that Kamfirouzi is not substantially incapacitated from performing his duties as a police officer.

15. On March 12, 2019, CalPERS provided Dr. Stearns with additional medical records covering the period of October 31, 2016 to September 11, 2017, and Kamfirouzi's job description. In a supplemental IME report, dated April 16, 2019, Dr. Stearns found that the new records did not change his opinion from the previous IME report.

## **Medical Opinion Testimony**

### **DR. STEARNS'S TESTIMONY**

16. Dr. Stearns received his doctor of medicine at the University of Illinois in 1968, and became a Board-certified orthopedic surgeon in 1979.

17. At hearing, Dr. Stearns confirmed his findings that Kamfirouzi is able to perform his regular work as a police officer even with the functional limitation, reduced grip strength and limited flexion.

18. Dr. Stearns also confirmed that during the physical examination, Kamfirouzi had no pain with forceful resistant right wrist and digit extension of the forearm supination. This is a specific test to diagnose lateral epicondylitis where a patient extends his wrist and fingers to the maximum extent and holds that position while Dr. Stearns pulls down on the patient's fingers and thumb to see if it causes any pain. With lateral epicondylitis, this maneuver is painful because it stresses the origin of the common extensor tendons at the elbow. Kamfirouzi would have experienced pain with this maneuver and associated pain on the lateral side of his elbow; instead he tested negative with this maneuver.

19. Dr. Stearns agreed with Dr. Bagwat that there was evidence in 2017, that Kamfirouzi was substantially incapacitated from performing his job duties, because at that time Kamfirouzi suffered from chronic lateral epicondylitis. However, by April 2018, the chronic lateral epicondylitis had resolved. Dr. Stearns opined that the mild arthritis in his radiocapitellar joint accounted for his pain, swelling, atrophy, and the effects on his range of motion and flexing strength because arthritis does not heal. Also, further treatment of the asymptomatic lateral epicondylitis was not indicated. According to Dr. Stearns most people with lateral epicondylitis do not require surgery

and get better on their own or with treatment. He has never had a patient become permanently disabled because of lateral epicondylitis.

20. Dr. Stearns agreed that an updated MRI of Kamfirouzi's right elbow might reveal a tear. However, based on his findings, he did not believe that an updated MRI was necessary. Furthermore, an updated MRI would not change the result that the lateral epicondylitis is asymptomatic.

21. Dr. Stearns also compared the requirement for impairment in the workers' compensation system which differs from a CalPERS's disability determination. In particular, workers' compensation considers the risk for aggravating an injury. According to Dr. Stearns, Dr. Bagwat focused on the impairment as a reduced ability to Kamfirouzi's norm. However, a disability determination depends on whether or not that impairment prevents the patient from doing his regular job duties.

#### **DR. BAGWAT'S TESTIMONY**

22. Dr. Bagwat graduated from Stanford University's School of Medicine in 1974, and completed a residency in Plastic and Reconstructive Surgery. He has a private practice with a focus on orthopedics, primarily in hand surgery. Dr. Bagwat is an independent contractor for U.S. Healthworks, Concentra, and provides care to injured workers in the workers' compensation system. Dr. Bagwat has been caring for police officers with injuries for over 20 years.

23. At hearing, Dr. Bagwat testified that based on his review of Dr. Stearns's report, Kamfirouzi was still injured and not asymptomatic for lateral epicondylitis. Dr. Bagwat noted Dr. Stearns's finding regarding Kamfirouzi's different grip strength measurements and diminished grip strength on the left side (which was not his injured side) because the difference between the right and the left should be in the range of

10-15 percent, and in this case the difference was 50 percent. Dr. Bagwat believed that this was either a transposition in the report or the values were not valid. Also, Dr. Bagwat noted Dr. Stearns's finding regarding Kamfirouzi's biceps circumferences on the left being greater than on the right, but the grip strength was more than 50 percent less. This did not make sense to Dr. Bagwat, especially since Kamfirouzi was cooperative and not malingering during the physical examination. Dr. Bagwat also opined that Dr. Stearns's report showed 25 percent flexion weakness and 30 percent extension weakness of the right elbow which supports the conclusion that Kamfirouzi could not perform combative duties.

24. Dr. Bagwat concluded that Kamfirouzi's lateral epicondylitis is not resolved because of the elbow flexion and extension deficit, the difference in his biceps circumferences, and the evidence of atrophy, according to Dr. Stearns's report, which suggests that there is persistent pathology. Dr. Bagwat believed that Dr. Stearns should have had Kamfirouzi undergo another MRI to definitively determine if the high grade tear still existed which would preclude him from performing his full duties as a police officer, including combative duties and neutralizing suspects. Dr. Bagwat acknowledged that Kamfirouzi can lift items up from off the floor with his right arm that weigh up to 59 pounds and Dr. Bagwat did not preclude over-the-head lifting.

25. The District contends that Dr. Stearns's testimony was not credible. Also, the District contends that his testimony was insufficient to rebut Dr. Bagwat's testimony because Dr. Stearns had no independent recollection of Kamfirouzi's physical examination. Also, Dr. Stearns had to review his report at hearing, which had several errors. These contentions are not persuasive.

26. At hearing, Dr. Stearns made the corrections to his IME report, including that there was evidence of atrophy, and confirmed his findings. Dr. Stearns and Dr.

Bagwat agree that Kamfirouzi has an impairment. However, they disagree on the cause of the impairment and whether that impairment disables him from performing his regular work as a police officer. Dr. Stearns's testimony was credible and consistent with the medical evidence. Dr. Stearns's opinion that Kamfirouzi is not substantially incapacitated from the performance of his usual duties as a police officer with the District is more persuasive than Dr. Bagwat's opinion. Dr. Stearns based his conclusions on the history provided by Kamfirouzi, the most recent physical examination of Kamfirouzi, his job description, and his medical records including the MRI of the right elbow taken on September 26, 2016. Most importantly, Dr. Stearns was credible and convincing in his unrebutted testimony that Kamfirouzi failed the specific test to confirm a diagnosis of lateral epicondylitis.

### **Kamfirouzi's Additional Evidence**

27. Kamfirouzi questioned Dr. Stearns's IME because, according to Kamfirouzi, Dr. Stearns did not review the MRI report or Dr. Bagwat's report prior to his examination. Also, Dr. Stearns did not ask him about the 60-pound lifting, pulling and pushing restriction or his job duties and responsibilities. However, Kamfirouzi acknowledged that Dr. Stearns understood that he was a police officer.

28. Kamfirouzi never returned to full duty after the injury. Since September 2017, he has experienced intermittent pain and uses Advil or Aleve to manage the pain and performs simple exercises with an elastic band. He also limits his activities when he begins to experience pain. Within the past several months, Kamfirouzi has experienced more pain in his right elbow.

29. Kamfirouzi had no medical treatment between October 2017 and approximately March 2019, when he started treatment with Jamie Nuwer, M.D. Dr.

Nuwer specializes in sports medicine and "tears," and platelet-rich plasma injections. According to Kamfirouzi, Dr. Nuwer used a special ultrasound to evaluate his existing condition and found a small tear in the same general area of the original tear in his right elbow. According to Kamfirouzi, Dr. Nuwer said that the tear is in such a unique location that surgery would be detrimental. However, Kamfirouzi's testimony is not competent medical opinion and he did not provide any medical records or testimony from Dr. Nuwer.

### **OTHER WITNESSES**

30. Since early 2012, Edward Flosi has been the president of Justitia Consulting which provides training and consulting to law enforcement agencies. Flosi started Justitia Consulting upon retirement after serving 27.1 years as a police officer and sergeant with the San Jose Police Department. He is also a POST-certified defensive tactics instructor and teaches at the basic academy level including training on the three basic take-down maneuvers. He also worked for the District as an adjunct instructor for four years and taught workshops in the Administration of Justice program.

Flosi was retained to evaluate Kamfirouzi's effectiveness to be a full-time peace officer in the field with his right elbow condition. Kamfirouzi reviewed the job description and Dr. Bagwat's and Dr. Stearns's reports. Flosi concluded that an officer with Kamfirouzi's limitations would not be able to perform basic take-down maneuvers.

31. Dalton Rolen is a lieutenant and the second-in-command of the District's police department. Rolen has worked for the District for 34 years, and has served as a lieutenant for 18 years. He described the types of physical encounters Kamfirouzi

might experience on the job. Rolan confirmed that the police department has no permanent modified duty positions because it is a small department.

32. Rolan and Flosi testified about how the inability to effect an arrest or engage in physical confrontations may prevent Kamfirouzi from performing the duties of a police officer. Also, they described situations where an officer is required to lift a heavy object with only his right arm. This testimony is relevant. However, the question of industrial disability is a matter for expert medical opinion on whether an applicant can perform the duties.

### **Ultimate Factual Finding**

33. Respondent contends that Kamfirouzi's lateral epicondylitis was not asymptomatic because of the atrophy, pain during Dr. Stearns's examination and significant weakness in his right arm grip strength.

34. Dr. Stearns was persuasive in his testimony that Kamfirouzi's lateral epicondylitis was asymptomatic and had resolved and any pain and symptoms that Kamfirouzi continues to experience are consistent with the arthritis in his right elbow. Contrary to the District's argument in its closing brief, CalPERS does not have the burden to establish that Kamfirouzi is substantially able to perform the duties of his position. It is Kamfirouzi's burden to prove substantial incapacity to perform his job duties which was not established.

35. Respondents failed to provide persuasive medical opinion to establish that Kamfirouzi's right elbow condition substantially incapacitated him from the performance of his usual and customary duties as a police officer with the District.

## LEGAL CONCLUSIONS

1. "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 regardless of age or amount of service." (Gov. Code, § 21151, subd. (a).) The terms "disability and incapacitated for performance of duty" as a basis of retirement under the Public Employees' Retirement Law means "disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death . . . on the basis of competent medical opinion." (Gov. Code, § 20026.) To determine whether an applicant is "incapacitated for performance of duty," the courts look to whether the applicant is disabled from performing the substantial range of his or her usual duties. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.) The member has the burden of proving incapacity. Also, an employee's permanent disability rating under the workers' compensation system is a different issue than whether the employee is capable of performing his usual duties. (*Winn v. Bd. of Pension Commissioners* (1983) 149 Cal.App.3d 532, 539-540.)

2. It is undisputed that Kamfirouzi sustained an injury to his right elbow while working as a police officer. However, his incapacitating lateral epicondylitis has resolved. He does continue to suffer from pain and other maladies because of the arthritis in his right elbow. Kamfirouzi has failed to carry his burden to prove that his right elbow condition has substantially disabled him from the performance of his duties as a police officer to entitle him to disability retirement from CalPERS.

3. Competent medical opinion established that applicant's right elbow condition did not substantially incapacitate him from the performance of his usual and customary duties as a police officer with the District within the meaning of Government Code section 20026.

4. Cause exists to sustain CalPERS's denial of Kamfirouzi's disability retirement application, as set forth in Factual Findings 6 through 26, 33, and 34.

5. All other contentions made by CalPERS and respondents not specifically addressed herein were considered and are found to be without merit.

### **ORDER**

The application of Kambiz N. Kamfirouzi for CalPERS disability retirement is denied.

DATE: August 14, 2019

DocuSigned by:  
*Regina Brown*  
0031ABA88CDE4C1...

REGINA BROWN

Administrative Law Judge

Office of Administrative Hearings