

**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:**

**KIMBERLEE A. DICKS, Respondent**

**and**

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

**Agency Case No. 2019-0200**

**OAH No. 2019041070**

**PROPOSED DECISION**

John E. DeCure, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on August 26, 2019, in Fresno, California.

Helen L. Louie, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Kimberlee A. Dicks (respondent) was present and represented herself.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED September 26 2019  
JEN

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

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on August 26, 2019.

## **ISSUE**

On the basis of an orthopedic (left shoulder, left elbow, left knee and bilateral hand/wrist) condition, is respondent permanently incapacitated from the performance of her usual duties as a Correctional Lieutenant (CL) for CDCR?

## **FACTUAL FINDINGS**

### **Summary of Dispute**

1. Respondent applied for service pending industrial disability retirement in August 2018, claiming that she became disabled in approximately May and June of 2016, and August of 2017, due to a slip-and-fall accident in August 2017, repetitive and labor-intensive work over the course of her career, and a May 2016 hand injury due to mandatory firearm training she underwent, all of which occurred while she was a correctional lieutenant at CDCR. She underwent surgeries for her left shoulder and right hand, but continued to experience difficulties and concluded she was no longer fit to perform the usual duties of a correctional lieutenant. In October 2018, Don

Williams, M.D., M.S., performed an Independent Medical Examination (IME) upon respondent on behalf of CalPERS. Dr. Williams concluded respondent is not substantially incapacitated from performing the essential functions of her position.

## **Disability Application and Jurisdiction**

2. On October 30, 2014, respondent submitted a Disability Retirement Election Application (Application) to CalPERS. The Application identified the application type as "Service Pending Industrial Disability Retirement." In the Application, respondent's disability was described as:

[left] shoulder 3 tears to rotator cuff and bone spur ([left] knee) degenerative joint disease ([left] elbow no diagnosis to date (bilateral hand/wrists torn soft tissue [left] wrist hand repetitive motion injury [right] wrist along [with] trigger finger [right] fourth finger, trigger thumb [right] thumb, trigger thumb [left] thumb, trigger finger [right] third finger, and [left]wrist TPCC.

Respondent identified the dates her disability occurred as August 13, 2017, June 1, 2016, and May 1, 2016. In response to the question asking how the disability occurred, respondent stated:

On 8/13/17 tripped over 9 [inch]<sup>1</sup> ledge falling on [left] side of body 06/01/16 CT this occurred due to the repetitive and labor intensive nature of my job over the course of my career 05/01/16 while attending annual mandatory training on the Glock model 22 I was required to repetitively fire approximately 600 rounds which resulted in my hand injury.

She described her limitations or preclusions due to her injury or illness as: "no inmate contact, lifting over 15 [pounds], climbing ladders and overhead work."

Respondent further stated:

As a result of my injuries I have undergone surgery to my [left] shoulder and [right] hand/fingers. At this point I continue to experience significant difficulties due to these injuries. Furthermore my other injuries also cause me difficulties. As a result of all these injuries I am no longer fit to perform my usual and customary duties as a correctional lieutenant.

Respondent indicated that she was not working in any capacity at the time of the filing of the Application.

3. On September 1, 2018, respondent retired for service. She has been receiving her retirement allowance since that date. On November 21, 2018, CalPERS

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<sup>1</sup> In the Application, respondent incorrectly denoted the ledge to be nine feet by using an apostrophe (i.e., 9'), rather than a double prime (i.e., 9") to indicate inches. However, during her IME history she reported the ledge to be nine inches high.

notified respondent in writing that her Application had been denied, and informed her of her right to appeal. Respondent timely appealed from CalPERS' denial. All jurisdictional requirements have been met.

## **Duties of a Correctional Lieutenant**

4. As set forth in CDCR's description of Correctional Lieutenant Essential Functions, the CL position involves working long hours in minimum and maximum security institutions with male and female inmates, range qualifying with a handgun, rifle and shotgun, and firing a weapon in combat or emergency situations. The CL must disarm, subdue, and apply restraints to inmates and defend herself against armed inmate attacks, search for contraband and conduct body searches. The CL walks occasionally to continuously, runs occasionally, and runs with effort while responding to alarms of serious incidents. The CL occasionally to frequently climbs, using stairs while carrying items, crouches while firing a weapon, and stands and sits occasionally to continuously. The CL's report-writing, record-keeping, and driving duties involve sitting. The CL occasionally to frequently bends during inspections and searches. The CL occasionally to frequently lifts and carries light (20 pounds) to medium (50 pounds) items throughout the workday, and occasionally lifts heavy (100 pounds) items. The CL may lift and carry an inmate, wrestle an inmate to the floor, or drag an inmate out of a cell. Pushing and pulling is occasional to frequent, including working locked gates and engaging in altercations with inmates. Reaching and arm movement is occasional to continuous; and head and neck movement is frequent to continuous. The CL grasps and squeezes with hand and wrist movements, and finger dexterity is required. Bracing and pressing motions are occasional. Twisting is frequent to continuous. Vision and hearing must be normal, as is outdoor duty involving exposure to weather. Work

surfaces vary but may become slippery. The CL also performs a host of supervisory and report-writing duties.

5. Respondent's employer completed a Physical Requirements of Position/Occupational Title reporting form, detailing specific physical requirements of the CL position and their corresponding duration. The CL occasionally (up to three hours): runs, crawls, kneels, squats, reaches (below shoulder), lifts and carries 51 to 100-plus pounds, drives, works at heights, operates foot controls, uses special visual or auditory equipment, and works with biohazards. The CL frequently (three to six hours): climbs, pushes and pulls, power-grasps, simple-grasps, and lifts and carries up to 50 pounds. The CL constantly (over six hours): sits, stands, walks, bends and twists the neck and waist, reaches above the shoulder, uses fine manipulation, repetitively uses hands, operates a keyboard and mouse, walks on uneven ground, and is exposed to extreme temperatures, humidity, wetness, dust, gas, fumes or chemicals.

### **Expert Opinion**

6. CalPERS relied upon Don T. Williams, M.D., as its expert witness. Dr. Williams is board-certified in orthopedic surgery and has been in private practice in Monterey, California, since 1986. He specializes in treating patients with a variety of orthopedic problems involving the shoulders, elbows, knees, hands, and fingers. He has performed evaluations as a qualified/agreed medical evaluator certified by the Division of Workers' Compensation, and has performed IMEs for CalPERS for approximately three years. Dr. Williams examined respondent on October 19, 2018, took a history, reviewed her medical records and job duties, and issued an IME report. Dr. Williams also testified regarding his observations and findings.

7. In his IME report, Dr. Williams reviewed the history of respondent's problems that led to her filing a disability claim. Respondent, who was 53 at the time, described working for CDCR for 19 years. On August 13, 2017, she was working in CDCR's Corcoran facility when she tripped over a nine-inch ledge, fell and landed on her left elbow, injuring her left shoulder and left knee. She was treated by David Tenn, M.D., who put her on light duty, but her CL position did not accommodate light duty. She has not worked since September 2017. In April 2018, Peter Simonian, M.D., performed surgery on respondent's left shoulder, which alleviated the "catching" issue respondent experienced in her shoulder movement since her injury. Respondent also had surgery on her right hand which was performed by Ricardo Avena, M.D., in December 2016. However, following that surgery she developed flexion contracture in her index finger. Before her employment with CDCR, respondent was in the United States Navy for 11 years. During her naval service she sustained a back injury, a knee disability, and tinnitus (noise or ringing in the ears).

8. Respondent's present complaints included problems with the right hand, the ring finger, and left shoulder. Respondent did not report any knee problems. She was concerned that her physical condition left her unable to adequately perform takedowns, use the baton, engage in physical contact with inmates, and use firearms as a CL.

9. Dr. Williams performed a review of systems and noted respondent had high blood pressure and "some hyperthyroid issues." Her current medications included Lipitor, thyroid medications, and Losartan. She reported that she does not drink alcohol. She smokes less than a pack of cigarettes per day.

10. Dr. Williams performed a physical examination and noted respondent's neck to have flexion of 50 degrees, extension of 50 degrees, and rotation of 90

degrees to the right and 80 degrees to the left. Respondent's shoulders had "good motion" with flexion of 180 degrees bilaterally, abduction of 180 degrees bilaterally, external rotation of 90 degrees bilaterally, internal rotation slightly diminished to 80 degrees, abduction of 180 degrees, extension of 50 degrees, and adduction of 40 degrees. Her elbow motion was good, from zero to 140 degrees, with supination of 80 degrees and pronation of 80 degrees, and no tenderness noted. Dr. Williams opined that all of these findings regarding the neck, shoulder, and elbow were essentially within normal limits. He further noted that respondent's wrist motion was good, with full motion of the left wrist. The left ulnar styloid had some cystic swelling surrounding it. The right-hand ring finger had a 30 degree fixed flexion contracture consistent with Dupuytren's contracture (thickening and tightening of tissue under the skin).<sup>2</sup> The right thumb had tenderness along the flexor tendon with a nodule noted there. Respondent's knee motion was good, her gait was normal, and she had no lower-back complaints.

11. Dr. Williams reviewed medical records related to respondent's care and treatment from approximately September 2017 through July 2018. He noted that the April 17, 2018 left shoulder surgery Dr. Simonian performed had a good result, and that a December 2017 MRI on respondent's knee showed minimal age appropriate degenerative changes but was "[o]therwise unremarkable" and did not reveal any meniscal tears. Dr. Williams also reviewed a January 3, 2018 supplemental report from Michael Klassen, M.D., an Agreed Medical Evaluator who assessed respondent

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<sup>2</sup> Dr. Williams did not have respondent perform grip-testing because, in his judgment, such testing is too subjective – i.e., controlled by the patient's effort – to yield reliable results.

pursuant to California Workers' Compensation law. He noted that several of the injuries evaluated in the report went back many years, in one instance as far back as 2006, and that some of the injuries used percentage ratings to indicate the injuries were industrially caused to various extents. Dr. Williams also noted that an Agreed Medical Evaluation (AME) does not apply the same standards that a CalPERS IME applies, so he did not rely on the AME's findings in drawing his ultimate conclusions.

12. After examining respondent, Dr. Williams diagnosed her as follows:

- a. Good result of left shoulder, partial distal clavicle, subacromial decompression and debridement of partial tear, left shoulder.
- b. Resolved left elbow contusion.
- c. Resolved left knee contusion.
- d. History of prior right finger Dupuytren's contracture.
- e. History of prior right trigger thumb.

13. In conclusion, Dr. Williams found respondent to have cooperated with the IME process and put forth her best effort, not exaggerating her complaints. Although she had concerns about performing inmate takedowns, swinging a baton, using a firearm, and re-injuring herself on the job, Dr. Williams opined that respondent "could do these activities." He went on to state: "There is always a risk of an injury, but she is physically capable of doing her job." Her prior right thumb injury was resolved to allow her to return to work. Her trip-and-fall injury resulted in left shoulder, left elbow, and left knee injuries, but since then the knee and elbow injuries had resolved and her shoulder surgery was successful. The IME examination revealed that since her

injuries, respondent has regained sufficient range of motion. For these reasons, and based on his review of the available medical records, Dr. Williams found that there were no occupational functions respondent was incapable of performing as a CL, and she has no restrictions linked to her stated symptoms. Thus, respondent was not incapacitated for the performance of her usual duties.

### **Respondent's Evidence**

14. Respondent was first injured in 1999 when she tore a ligament in her left wrist while removing leg irons from an inmate. A cyst developed, but it was discovered too late and her wrist never healed properly. In 2016, she had surgery on her right trigger finger, but when it healed, the finger remained in a "pulled down" (hooked forward approximately one inch) position. Her entire hand is affected, and her finger "locks" when she tries to grasp items. Respondent was previously capable of lifting heavy items, but her present lifting limit is now approximately 20 pounds. When she pushes a lawnmower at home, her right hand aches and she has to keep her palm open. She also feels pain in her right wrist and forearm from gripping. Because she is right-handed, she is concerned she cannot perform key CL functions such as protecting herself and her coworkers during inmate attacks or other emergencies.

15. Respondent has not worked since she retired on September 1, 2018. She had arthroscopic surgery on her left knee to repair a torn meniscus in June 2019. Another surgery on her right hand is "possible," but is not yet scheduled. Her Workers' Compensation case resulted in a 38 percent disability rating and has since been closed. Respondent does not intend to ever return to her CL position because the work has become more dangerous in recent years, with a higher incidence of inmate assaults, and respondent wants to avoid re-injury.

16. No physicians or medical practitioners testified on respondent's behalf. Respondent did not submit any medical documentation or reports in support of the Application.

## **Discussion**

17. Respondent testified candidly and sincerely about the injuries she has sustained over the course of her career and the resulting pain and discomfort she still experiences. Dr. Williams also found respondent to be a credible reporter. However, respondent failed to offer sufficient, competent medical evidence to establish that, at the time she applied for industrial disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a CL. Respondent presented no medical evidence, records, or expert testimony to support the Application.

18. The medical evidence CalPERS presented established that respondent's orthopedic condition did not render her incapable of performing her usual CL functions and duties. Dr. Williams was thorough, capable, and persuasive in reaching his opinion that respondent was not substantially and permanently incapacitated from performing the usual duties of a CL, and he employed the standards applicable in these types of disability retirement proceedings. His opinion that respondent's orthopedic condition was not adequately supported by objective medical evidence was persuasive and consistent with the medical records he reviewed.

19. In sum, when all the evidence is considered, respondent failed to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a CDCR

Correctional Lieutenant. Consequently, her industrial disability retirement application must be denied.

## **LEGAL CONCLUSIONS**

1. By virtue of her employment, respondent is a state safety member of CalPERS, pursuant to Government Code section 21151.

2. To qualify for disability retirement, respondent had to prove that, at the time she applied, she was "incapacitated physically or mentally for the performance of [her] duties in the state service." (Gov. Code, § 21156.) As defined in Government Code section 20026:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

3. Evidence Code section 500 provides:

Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

4. Evidence Code section 115 provides in relevant part, that "burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The party assuming the affirmative at an administrative hearing has the burden of proof, including 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.)

Respondent has not met her burden.

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

6. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.)

7. The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855 (*Hosford*), reached a similar conclusion with respect to a state traffic sergeant employed by the CHP. In *Hosford*, the sergeant argued that his condition increased his chances for further injury. The court rejected this argument, explaining that "this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently existing." (*Hosford, supra*, 77 Cal.App.3d at p. 863.) As the court explained, prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (*Ibid.*)

8. When all the evidence in this matter is considered in light of the courts' holdings in *Resendez*, *Mansperger*, and *Hosford*, respondent did not establish that her disability retirement application should be granted. Despite her credibly-stated claims, there was not sufficient evidence based upon competent medical opinion that she is permanently and substantially incapacitated from performing the usual duties of a Correctional Lieutenant due to an orthopedic condition. Consequently, her disability retirement application must be denied.

### ORDER

The application of respondent Kimberlee A. Dicks for Service Pending Industrial Disability Retirement is DENIED.

DATE: September 24, 2019

DocuSigned by:  
*John DeCure*  
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JOHN E. DeCURE

Administrative Law Judge

Office of Administrative Hearings