

**ATTACHMENT A**

**THE PROPOSED DECISION**

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

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

**Retirement of:**

**RUDY OROZCO, Respondent**

**v.**

**CALIFORNIA INSTITUTION FOR MEN, CALIFORNIA  
DEPARTMENT OF CORRECTIONS AND REHABILITATION,**

**Respondent**

**Agency Case No. 2018-1160**

**OAH No. 2019011081**

**PROPOSED DECISION**

Eileen Cohn, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on August 15, 2019, in Los Angeles, California.

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

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED 10/22 20 19  
[Signature]

Andrew M. Wyatt, Attorney at Law, represented Rudy Orozco (respondent), who was present.

Oral and documentary evidence was received. The record remained open until September 23, 2019, for the submission of the hearing transcript and written closing arguments, which were timely received. The transcript of the proceedings is marked and admitted as Exhibit 11; CalPERS's written closing argument is marked for identification only as Exhibit 12, and respondent's written closing argument is marked for identification only as Exhibit G. The record was closed and the matter was submitted for decision on September 23, 2019.

## **SUMMARY**

This dispute is limited to the issue of whether respondent is substantially incapacitated from the performance of his usual and customary duties as a registered nurse (RN) for the California Institution of Men, Department of Corrections and Rehabilitation (CDCR), based on a cardiovascular condition.<sup>1</sup>

Respondent claims that he is substantially incapacitated from performing his usual duties as an RN for the CDCR. Respondent contends his usual duties consists of his obligations as a first responder during medical emergencies involving inmates. As a

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<sup>1</sup> This decision does not address whether the disability is industrial or nonindustrial. If a disability is found to exist that determination will be resolved pursuant to Government Code section 21166. (Ex. 1; Parties' stipulation, Transcript, Ex. 11, at pp. 90-91.)

first responder he typically would be required to climb two to three flights of stairs, pull medically-impaired inmates from their cells, lift and move inmates (weighing upwards of 300 pounds) onto stretchers, while carrying a trauma bag, packed with essential equipment, weighing approximately 50 pounds and, as one of a two-person team, carry them down the stairs. Respondent presented the medical opinion and testimony of Anthony Hilliard, M.D. (Dr. Hilliard), including his reference to the notes of Anees Jacob Razzouk, M.D. (Dr. Razzouk), respondent's operating surgeon and, in addition to his own testimony, the testimony of his co-workers, Christine Jacinto and Cara Callahan.

CalPERS contends that appellant is not substantially incapacitated within the meaning of the Public Employees Retirement Law for performance of the usual physical activities of an RN at the CDCR due to his cardiovascular condition. CalPERS acknowledges respondent's medical condition, but maintains respondent has not provided sufficient evidence that his medical condition has resulted in his inability to substantially perform his usual job duties. CalPERS maintains respondent's claim consists of concerns of potential, not actual, risks of aggravating his medical condition. CalPERS relied upon the independent medical examination (IME) and testimony of Robert Bernard Weber, M.D. (Dr. Weber).

After consideration of the evidence and the parties' written closing arguments, the Administrative Law Judge, for the following reasons, has determined respondent is substantially incapacitated from the performance of his usual duties as an RN with the CDCR.

## **Jurisdictional Matters and Background**

1. Respondent has worked for the CDCR as an RN since 2009. He is considered a state safety member of CalPERS under Government Code section 21151.

2. Respondent's last day of work was January 5, 2016, the day he was admitted to the hospital for emergency surgery for a stress-induced aortic aneurysm and dissection. (Ex. A.)

3. On July 18, 2017, respondent submitted an application for industrial disability retirement (IDR). Respondent claimed he was disabled due to a cardiovascular condition, specifically, "stress induced hypertension related to work." (Ex. 3.)<sup>2</sup>

4. CalPERS rejected respondent's application for IDR. CalPERS concluded, from its review of the medical evidence, that respondent's "cardiology (cardio-vascular) condition is not disabling." (Ex. 4.) Respondent timely appealed, and this matter proceeded to hearing.<sup>3</sup>

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<sup>2</sup> Respondent has other medical conditions and circumstances, including obesity and bariatric surgery, which were referenced in the medical evaluations and reports, but were not the basis of his claim for IDR.

<sup>3</sup> As set forth in the Statement of Issues, CalPERS initially disputed respondent's right to file an application for IDR on July 18, 2017. CalPERS withdrew its objection, and respondent's appeal rights were restored and are no longer disputed. CalPERS's

## **Respondent's Career and Job Duties**

5. Respondent has worked in the medical field for most of his career, starting as a medical technical assistant and advancing to an RN. In the early part of his career respondent worked at the Loma Linda University cardiac intensive care unit (ICU) and for a registry network as a traveling nurse (1998-2000). Before he worked at CDCR he worked in the emergency room (ER) or ICU, at several institutions: Arrowhead Regional Medical Center (2000-2003), Ironwood State Prison (2003-2005), and the California Youth Authority (CYA) (2005-2009).

6. Respondent worked as an RN at CDCR from 2009 through the date of his emergency surgery, January 5, 2016.

7. During most of his tenure at the CDCR respondent worked on the night shift and as an RN stationed in the "B Yard." Respondent's position required him to be an emergency responder, also referred to as a "man-down" responder. In 2013 respondent was placed on leave for seven months at the direction of a psychiatrist, after an incident involving a work emergency where he had to respond to a "man-down" situation which turned into "three men down." (Respondent's testimony.)

8. Respondent's "administrative functions" and "essential functions" as a man-down responder are included in the general job description for RN posted under the heading "California Correctional Health Care Services." (Ex. 10.) Respondent's administrative functions are acknowledged to require him to "(f)unction professionally

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letter dated March 3, 2017 sets forth its reasons for denying the IDR application. (Exs. 1 and 4.)

under highly stressful circumstances," and to "work any post or assignment as directed." (*Ibid.*) The essential "physical functions" of an RN working with CDCR include, in relevant part:

- Ability to respond quickly and appropriately during an emergency situation. Ability to maneuver or respond quickly over varying surfaces including uneven grass, dirt areas, pavement, cement, etc. sometimes in inclement weather conditions. Respondent/maneuvering can also include stairs or several flights of stairs [m]aneuvering up or down
  - Access all floors of facilities with multiple levels separated by flights of stairs
  - Have and maintain sufficient strength, agility, and endurance in order to respond during stressful or emergency (physical, mental, and emotional) situations without compromising the health and well[-]being of self or others
- ¶ . . . ¶
- Lift and carry occasionally to frequently, in the light (up to 20 pound[s] maximum) to medium (up to 50 pound[s] maximum) range
  - Push, pull, and grip occasionally to frequently

- Sit and stand occasionally to frequently  
¶. . .¶
- Walk occasionally to continuously on a wide range of surfaces for varying distances, indoors or outdoors, in various weather conditions, which may become slippery due to the weather or spillage of liquids or which may be uneven or rough  
¶. . .¶
- Manipulate patient utilized equipment (e.g. durable medical equipment) in a safe manner
- Work under a variety of adverse weather conditions such as extreme heat, cold, rain, wind, and dust, possibly for extended periods of time.  
¶. . .¶

(Ex. 10.)

9. Respondent's relevant physical and functional duties were further established by respondent's report to CalPERS of the physical requirements of his job in a form he executed on July 17, 2017, (Exhibit 9), as including, in relevant part, the following activities "occasionally up to three hours" daily: sitting, standing, walking, climbing, and lifting/carrying 51-75, 76-100, and over 100 pounds. He listed the physical requirements, as including, in relevant part, the following activities "frequently

up to three to six hours": walking, and lifting/carrying 0-10 pounds, 11-25 pounds and 25-50 pounds.

10. Respondent was assigned to Yard B, the most "difficult" yard. When respondent worked Yard B he was required to respond to emergencies between two and three times a night. Yard B was especially physically challenging because in order to access prisoners during their medical emergencies, respondent, on average, two times each shift, climbed several flights of stairs with a "trauma bag" filled with heavy emergency equipment, manually pulled prisoners from their cells onto a canoe-shaped flat gurney, referred to by the responders as a Stokes litter gurney, or Stokes, and manually carried the gurney down flights of stairs. Respondent was assisted by another RN or officer, only after the prisoner was placed on the Stokes. At some point, respondent and other RNs working at CDCR weighed the trauma bag. When the oxygen tank, defibrillator, and other necessities for traumas, including the "ambu" bag (artificial manual breathing unit), diabetic pouches for checking blood sugar, were included, the trauma bag weighed between 47 and 48 pounds. Respondent was required to carry a full trauma bag because the substance of the emergency was unknown, he was the lone responder, and he needed to be prepared for a range of emergencies. Respondent also had to be prepared to manually pull the prisoner away from water, whatever the prisoner's size or weight, in order to ensure the safety of the prisoner in the event respondent needed to use a defibrillator. Respondent performed the medical procedures unassisted. (Respondent's testimony, Ex. 11, at pp. 120-126.)

11. The stressful and physical aspects of the job were confirmed by respondent's coworkers who provided straightforward and candid testimony about their job duties. Any personal relationship they developed over the years with respondent did not affect the veracity of their testimony.

A. Christine Jacinto worked as an RN on the night shift at CDCR performing similar duties as an emergency or man-down responder. She described the "A" Yard, the west facility, where she worked, as the place where you loaded a golf cart with the duffle bag of equipment, which she estimated to weigh 20 pounds, before heading to the emergency. Ms. Jacinto explained responders in the "B" Yard were required to run with the equipment. She explained that certain locations had three floors of outside stairs. Ms. Jacinto described the emergency responder job as stressful and demanding both mentally and physically because it required the responder to be physically fit. She worked from time-to-time with respondent because they were both man-down responders but did not specifically recall observing him. (Jacinto Testimony, Ex. 11, at pp. 106-112.)

B. Cara Callahan worked as a licensed vocational nurse (LVN) and correctional officer, who started with the CDCR as a medical technical assistant. Ms. Callahan estimated the duffle bag containing the medical equipment weighed upwards of 25 pounds, the Stokes weighed 10 pounds, and the inmates weighed between 100 to 350 pounds. Staff tried as much as possible to avoid carrying inmates, but it was not always possible. She explained the job was stressful for a variety of reasons, including the environment, the emergency calls, "because you don't know what you are getting into, paperwork, just everything." (Callahan Testimony, Ex. 11., at pp. 115-119.)

12. When respondent returned from his leave in 2013, the CDCR placed him in the infirmary where he worked for three years until January 5, 2016. Respondent worked the night shift at the prison infirmary where he cared for inmate-patients. His duties at the infirmary consisted of assessing, evaluating, and feeding inmates as well as distributing their medication.

13. Just prior to January 5, 2016, the CDCR notified respondent he would be returning to the B Yard that night and would no longer be working in the infirmary. Respondent was home at the time he was admitted for emergency surgery. Respondent never returned to work after his surgery. Respondent was diagnosed with hypertension after his surgery.

### **Medical Evidence**

14. Respondent survived his surgery, but initially Dr. Razzouk considered his prognosis guarded. (Ex. B.) After his surgery, the doctor assisting Dr. Razzouk advised respondent he had to be revived twice during the operation. (Respondent's testimony, Ex. 11, at pp. 126-127.) Respondent was informed about two months after his surgery that his descending aorta was also disconnected. Dr. Razzouk advised him to avoid any physical activity that required him to lift, push or pull anything over 20 to 30 pounds to avoid causing a dissection of the remaining aorta.<sup>4</sup> (*Id.*, at p.128.)

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<sup>4</sup> Respondent has also been designated as disabled by the Social Security Administration (SSA) as of January 5, 2016. (Ex. D.) However, the SSA's designation, by itself, is given little weight. Respondent did not provide any legal analysis which would show the CalPERS standards for awarding IDR are comparable to the SSA's standards for designating respondent as disabled. Respondent was awarded total disability primarily due to the SSA's reliance on respondent's self-report of his inability to perform his job duties, including lifting, pushing or pulling anything over 20 to 30 pounds, climbing stairs, or responding to inmates, which are in dispute here. (Respondent's Testimony, Ex. 11, at p. 132.)

15. CalPERS relied upon the IME of Dr. Weber and his expert testimony during the hearing. (Exs. 8 and 11.) Dr. Weber is a well-qualified doctor who is Board certified in internal medicine and cardiology. (Ex. 6.) In performing an IME for CalPERS, (Exhibit 7), Dr. Weber was required to determine whether respondent was unable to perform one or more of the essential functions of his job; respondent's risk of injury was not a consideration. (Ex. 11, at pp.19-10.) Dr. Weber reviewed respondent's job duties, the physical requirements of the job, his disability retirement election application, disability information (May 7, 2013 through June 3, 2013) his worker's compensation records (July 10, 2016 through August 18, 2016). Dr. Weber also reviewed respondent's medical records including his January 5, 2016 through August 4, 2016 and October 2, 2014 through November 20, 2014 cardiology records. Dr. Weber also interviewed and examined respondent for a total of 45 to 60 minutes.

16. Dr. Weber's evaluation was limited to respondent's cardiovascular condition. Dr. Weber did not find any material relationship between respondent's cardiovascular surgery and respondent's ability to physically perform his job. Dr. Weber understood he had a dissection of the aorta, meaning that various layers of the aorta wall separate instead of remaining fused. As a result, blood, under high pressure, travels through a false channel to the aorta, rather than through the normal channel. Over time the normal channel narrows and interferes with the blood supply to the organs. Dr. Weber also understood that respondent had a dissection of the right coronary artery which put him at risk for a heart attack. Based upon his knowledge of the surgery and condition following the surgery, Dr. Weber did not find any "intrinsic reason" why respondent would be substantially incapacitated. Dr. Weber distinguished between respondent's ability due to his obesity, and any impaired ability due to his condition following his surgery. Dr. Weber found "pertinent" respondent's report to

him that he did not have a history of hypertension prior to surgery. (Weber Testimony, Ex. 11, at p. 24.)

17. Dr. Weber found "significant" respondent's profile of "obesity and 'mixed hyperlipidemia,' meaning that both cholesterol and triglycerides are elevated." (Weber Testimony, Ex. 11, at p. 24.) However, by history there is no evidence respondent had any issues meeting the physical demands of his job due to these medical conditions, and, as such, Dr. Weber's observation is irrelevant to an IDR determination. Similarly, Dr. Weber's speculation that respondent's prior history as a cigarette smoker might explain his physical limitations, has no merit because there is no evidence that he could not perform his required duties prior to the surgery, and, as Dr. Weber conceded, his prior history as a smoker was not within the scope of his retention as an IME evaluator. (*Id.*, at p. 81.)

18. Respondent reported to Dr. Weber his post-surgery exercise routine of walking on a treadmill 30 minutes, three to five times per week, and the absence, at the time of his examination with Dr. Weber, of chest pain, lightheadedness or palpitations. According to Dr. Weber, the surgery was successful, and since respondent had no prior history of heart failure, Dr. Weber concluded that, from a cardiovascular perspective, respondent was not substantially incapacitated. Accordingly, Dr. Weber did not find respondent to have an impaired ability to perform any of the physical demands of his job based upon his cardiovascular condition.

19. During cross-examination, Dr. Weber conceded that if respondent could not perform certain physical activities of his job for more than the estimated time, or for "only two hours of whatever activity," and his performance was related to respondent's cardiovascular condition, he could be considered substantially disabled.

Dr. Weber conceded if respondent was unable to pick up more than 20 or 30 pounds and carry the equipment up the three flights of stairs to save the life of a patient (due to his cardiovascular condition) respondent would be incapacitated from the performance of his duties. (Weber Testimony, Ex. 11, at p. 81-82.) Dr. Weber attempted to establish that the amount of time respondent could perform a task should be confirmed by a "functional capacity evaluator." However, Dr. Weber was charged with performing the IME and forming an opinion consistent with the law governing IDR for CalPERS, on the basis of his cardiovascular condition, and if he needed more information before rendering an opinion, it was not apparent from his report.

20. Dr. Weber insisted that due to the success of the surgical intervention, there could not be a finding that respondent's inability to perform his duties for a certain length of time, and under conditions which require him to lift much weight, especially up stairs, was related to his current cardiovascular condition, and not otherwise speculative. "[I]f [respondent] had not undergone the aortic dissection surgery and he would have established a coronary diagnosis of hypertensive heart disease or congestive heart failure and then he would have filed an application with CalPERS for a medical disability retirement, and then if I would have chosen to be the cardiologist doing the evaluation, then it would be a different situation entirely." (Weber Testimony, Ex. 11, at p. 83)

21. Respondent relied upon the expert and percipient witness testimony of Dr. Hilliard, respondent's cardiologist, who was also familiar with Dr. Razzouk's medical records. (Exhibit B). Dr. Hilliard is a well-qualified medical doctor trained in the practice areas of internal medicine, general cardiology and interventional cardiology. He is currently Chief of Cardiology, Associate Professor of Medicine and Chief Operating Officer of the Loma Linda University School of Medicine Faculty Medical Group, and

the Senior Vice President of Loma Linda University Health Care. Dr. Hilliard has been respondent's treating cardiologist since November 4, 2016. (Hilliard Testimony, Ex. 11, at pp. 94-103.) Dr. Hilliard has never administered an IME and was not familiar with the standards for determining whether an individual is disabled under the law governing the propriety of IDR. Nevertheless, based upon Dr. Hilliard knowledge of respondent's condition, his treatment of him over time, and his understanding and explanation of Dr. Razzouk's surgery, his testimony was given great weight.

22. Respondent's condition is undisputed. Dr. Hilliard described it in technical and layperson's terms as follows:

So he had, in January 2015, underwent emergency surgery for a type A acute aortic dissection, underwent resection of the ascending aorta and proximal arch with reconstruction with a tubular graft to that area and underwent repair of a dissection of the right coronary artery and dissection of the right innominate artery.

During this period of time, he required retrograde cerebral perfusion for 40 minutes with hypothermic low-flow at 18 degrees' core temperature...

So his aorta, which is the major blood or major artery of the body, from the heart all the way up across the carotid artery, down through the spinal arteries, kidney arteries to the iliac arteries which is where the leg arteries begin.

As per standard protocol, he underwent repair of the ascending aorta up to the neck, from the heart to the neck, basically, and a remainder of the [ ] aorta, to this day, remains unrepaired with flow through the false lumen or the torn lumen.

(Hilliard Testimony, Ex. 11, at pp. 96-97.)

23. Respondent's descending portion of his aorta is still torn. (Hilliard Testimony, Ex. 11, at p. 97.) Dr. Hilliard prescribed medical treatment for respondent's coronary condition which consists of "medical management of the remaining part of the dissection which includes multidrug therapy for blood pressure control as per standard practice." (*Ibid.*)

24. Respondent's torn descending portion of his aorta presents additional challenges to respondent's ability to perform his job duties which were noted in Dr. Razzouk's postsurgical note, "to avoid any situation that would lead to a rapid rise in his blood pressure, so that we don't have further propagation or expansion of the descending dissection flap." Dr. Hilliard reported his ascending aortic dissection as "stress-induced." (Ex. B; Hilliard Testimony, Ex. 11, at p. 98.)

25. After reviewing respondent's job duties, and the frequency with which he had to perform these duties, Dr. Hilliard concluded that respondent was not able to continue to perform his required duties without risking a rapid rise in his blood pressure and adverse medical consequences due to any impairment in the "integrity" of the wrap placed in the ascending aorta and the progression of the "flap" in size or diameter to the descending aorta. Respondent's blood pressure is generally under control but it does occasionally rise higher than the recommended blood pressure. Dr.

Hilliard acknowledged that respondent is "capable" of lifting 20, 30, or even 50 pounds, and walking up two flights of stairs but, especially in a high stress environment, doing these activities, could lead to uncontrolled blood pressure. As part of respondent's medical maintenance regime he is limited to lifting under "ten pounds of isometric exercise." (Ex. A.; Hilliard Testimony, Ex. 11, at pp. 98-103.)

26. Dr. Hilliard reviewed Dr. Weber's IME. Absent from Dr. Weber's report was any reference to the descending thoracic aortic chronic dissection which is being monitored for signs of an increase in its size or diameter, which would require a high-risk surgical intervention. There is no plan to repair the lower descending aorta because the operation is very risky, can result in paralysis and/or dialysis, and respondent's current therapy regime has been "successful," although his blood pressure remains "too high." (Hilliard Testimony, Ex. 11, at pp. 98-100.)

## **LEGAL CONCLUSIONS**

### **Burden and Standard of Proof**

1. Respondent has the burden of proving entitlement to disability retirement. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691; *Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.3d 234, 238.) In state administrative hearings, unless indicated otherwise, the standard of proof is "persuasion by a preponderance of the evidence." (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051; Evid. Code, § 115.)

2. "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that one

is unable to say that the evidence on either side of an issue preponderates, the finding on that issue must be against the party who had the burden of proving it. (*People v. Mabini* (2000) 92 Cal.App.4th 654, 663.) To meet the burden of proof by a preponderance of the evidence, the party with the burden of proof "must produce substantial evidence, contradicted or uncontradicted which supports the finding." (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 329.)

3. When applying pension laws, *Dillard v. City of Los Angeles* (1942) 20 Cal.2d 599, 602, the court stated:

Pension laws should be liberally construed and applied to the end that the beneficent policy thereby established may be accorded proper recognition. (Citations.)

### **Incapacity for Performance of Duty**

4. 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.

Government Code section 21151, subdivision (a) provides:

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.

5. Government Code section 21154 provides, in pertinent part:

On receipt of an application for disability retirement of a member, . . . the board shall, or of its own motion may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty.

6. Government Code section 21156 states, subdivision (a)(1), 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 . . . .

7. To establish entitlement to disability retirement, employees must show that they are "incapacitated for the performance of duty," which courts have interpreted as the "substantial inability of the applicant to perform his usual duties," as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873 (*Mansperger*), 866-877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854 (*Hosford*).) "Substantial inability" requires more than only difficulty in performing the tasks common to one's profession; it

requires incapacitation. (*Mansperger, supra*, at p. 866-877.) Discomfort or difficulty in performing duties is insufficient to establish a permanent incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 2017.) An increased risk of further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future injury are insufficient to support a finding of present disability. (*Hosford, supra*, at pp. 862-863.)

8. CalPERS maintains that respondent's circumstances are similar to the game warden in *Mansperger* or the highway patrol officer in *Hosford*. *Mansperger* concerned claims brought by a fish and game warden who injured his right arm apprehending a suspect, but was able to perform a number of job duties, including removal of large animals from the road due to a restriction from heavy lifting. (*Mansperger, supra*, at pp. 874-876.) The court concluded the game warden, who testified he was able to perform all his required duties except lifting a deer or lobster trap, was not permanently incapacitated because carrying off a heavy object alone was a "remote occurrence" for fish and game wardens since their usual duties involve supervising hunting and fishing by ordinary citizens. (*Id.*, at p. 876-977.)

9. Likewise, *Hosford* involved a disability retirement claim made by a state traffic officer with the California Highway Patrol, who held the rank of Sergeant. The Sergeant established that he could run, but inadequately, and that his back would probably hurt if he sat for long periods of time, or apprehended a subject escaping on foot over rough terrain or over and around obstacles. The court rejected reliance upon the document listing typical demands of officers and determined that as Sergeant he would be subject to fewer demands than a line officer; as for his sitting, he would have the opportunity to stop and exercise; and as to more strenuous demands like apprehending criminals, the need to perform these duties, would be "rare." (*Id.*, 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. (*Id.*)

10. The court in *Hosford*, also addressed prophylactic work-related interventions, or restrictions imposed to prevent possible future injuries, and found that such restrictions are insufficient to support a finding of disability. (*Id.*, at p. 862-863.) The claimed disability may not be prospective and speculative and must be currently in existence. (*Hosford, supra*, at p. 863.) The court rejected the applicant's attempt to add his fear of future injury to his claim of a disabling condition because there was no testimony which established his fear was related to a disabling "mental problem." "It is nonsense to state that a 'mature man' who exercises caution because he believes (quite rationally...) that he is susceptible to spinal injury, is mentally disabled. Indeed the opposite is true – one who does not behave cautiously has a mental problem." (*Id.*, at pp. 864-865.)

11. Government Code section 21156 requires the agency to consider the medical examination it can order (under Government Code section 21154) "and other available information."

12. The medical reports and notes prepared by respondent's treating physicians, Dr. Hilliard and Dr. Razzouk, constitute "other available information." Therefore, the question is raised as to the weight to be given to these medical reports and notes and Dr. Hilliard's testimony. The doctors' diagnoses and opinions are as good as the information upon which they rely. (*White v. State of California* (1971) 21 Cal.App.3d 738; *Kennemur v. State of California* (1982) 133 Cal.App.3d 907.)

13. CalPERS maintains respondent's claim is based upon prophylactic or prospective considerations which do not, as a matter of law, support a claim for IDR.

Dr. Weber's conclusion that respondent is not substantially incapacitated is based on his finding that respondent's emergency operation and repair of his ascending aorta was successful, and not an ongoing medical condition, that compromises his ability to perform his job duties. Further, following Dr. Weber's logic, Dr. Hilliard's recommendations that respondent avoid the lifting required of his job, is solely preventative because due to the success of respondent's surgery, he does not have an ongoing medical condition that can be considered substantially incapacitating.

14. Dr. Hilliard's analysis of respondent's medical condition was more persuasive, particularly, his report of respondent's unrepaired descending aorta, which was intentionally left unrepaired due to the risk of the procedure. Respondent's ongoing condition fits squarely in the distinction presented by Dr. Weber between a condition resolved by successful surgery, and a condition which has not been resolved, such as the descending aorta. In contrast to *Mansperger* and *Hosberg*, appellant's disabilities are not remote or prophylactic; appellant's disabilities directly affect his ability to effectively perform his responsibilities as an emergency responder, particularly his ability to nightly climb up stairs with approximately 50 pounds of equipment, and pull, lift, and carry prisoners who may weigh upwards of 300 pounds. Unlike lifting heavy objects on rare occasions, as discussed in *Mansperger*, respondent's core duties as a man-down responder require him to respond to emergencies on each shift. Notably, the job requirements do not provide for a limited assignment away from Yard B; the job requirements specifically require RNs to be available for any assignment. Respondent was expected to return to Yard B at the time of his emergency surgery. Regardless of respondent's rational fear of climbing and descending stairs given his medical condition and emergency surgery, he has a medical condition, caused by and exacerbated by stress. Respondent is substantially

incapacitated from the performance of his duties by reason of the condition of the present and real relationship between the core activities of lifting and climbing under the stressful circumstances of his position as a man-down responder and the exacerbation of the condition of his descending aorta.

15. Respondent was disabled, or substantially incapacitated from the performance of his usual job duties, and was eligible for an industrial disability retirement on the date of his retirement.

16. Respondent has sustained his burden of establishing that he is substantially incapacitated from the performance of his usual and customary duties of an RN for the CDCR based on a cardiovascular condition, as required under Government Code sections 20026, 21151, and 21156.

## **ORDER**

Respondent Rudy Orozco is substantially incapacitated from the performance of his usual and customary duties as an RN for the CDCR based on a cardiovascular condition.

DATE: October 22, 2019

DocuSigned by:  
  
EILEEN COHN

Administrative Law Judge  
Office of Administrative Hearings