

**ATTACHMENT A**

**THE PROPOSED DECISION**

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

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

**Retirement of:**

**DAVID E. JAFFE, Respondent**

**and**

**R.J. DONOVAN CORRECTIONAL FACILITY, CALIFORNIA  
DEPARTMENT OF CORRECTIONS AND REHABILITATION,  
Respondent**

**Agency Case No. 2019-0324**

**OAH No. 2019070359**

**PROPOSED DECISION**

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings,  
State of California, heard this matter on December 12, 2019, in San Diego, California.

John Shipley, Senior Attorney, represented complainant, Keith Riddle, Chief,  
Benefit Services Division, California Public Employees' Retirement System (CalPERS).

David E. Jaffe, respondent, represented himself.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED January 10 20 10

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There was no appearance by or on behalf of respondent R.J. Donovan Correctional Facility (Donovan), California Department of Corrections and Rehabilitation (CDCR).<sup>1</sup>

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on December 12, 2019.

## **ISSUE**

Is respondent<sup>2</sup> substantially incapacitated from performing the usual and customary duties of a Clinical Psychologist (psychologist)?

## **FACTUAL FINDINGS**

### **Background**

1. Respondent is employed by CDCR at Donovan as a psychologist. By virtue of such employment, respondent is a state safety member of CalPERS.

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<sup>1</sup> On proof of compliance with Government Code sections 11505 and 11509, this matter proceeded as a default against respondent CDCR pursuant to Section 11520.

<sup>2</sup> All future references to "respondent" are to Dr. Jaffe.

2. On August 3, 2018, CalPERS received respondent's application for industrial disability retirement based on orthopedic (bilateral elbows, hands, and wrists) conditions.

3. On January 23, 2019, respondent underwent an Independent Medical Examination (IME) conducted by orthopedic surgeon Jon P. Kelly, M.D. By letter dated February 21, 2019, CalPERS notified respondent that based on a review of his medical records and report by Dr. Kelly, CalPERS determined that his orthopedic condition was not disabling, and it denied his application for industrial disability retirement.

4. Respondent timely appealed the decision. This hearing ensued.

### **Duties of a Psychologist**

5. A psychologist at CDCR is responsible for performing indirect and direct psychological care. The list of essential functions for a psychologist with CDCR include: maintaining clinical records of treatment of patients using word processor, spreadsheets, and database programs; responding quickly and appropriately in an emergency situation; accessing all floors of facilities with multiple levels; maintaining sufficient strength, agility, and endurance to perform during stressful situations; maintaining security and ability to recognize threatening situations; wearing personal protective equipment; sitting and standing occasionally to frequently; lifting and carrying items (less than 20 pounds) occasionally to frequently; bending, stooping, kneeling, reaching, squatting, climbing, crawling, twisting, and stretching occasionally to frequently; and using and operating common office machines.

6. The CalPERS Physical Requirements of Position/Occupational title worksheet also identifies physical activities that a psychologist must perform, and classifies the frequency of the activities as constantly, frequently, occasionally, and

never. Constant activities are those that occur over six hours per day. Frequent activities are identified as activities that occur between three and six hours a day. Occasional activities are those that occur up to three hours a day. Constant physical activities that a psychologist must perform are identified as sitting, fine manipulation, repetitive use of hands, keyboard use, and mouse use. Frequent activities are identified as simple grasping. Occasional activities are identified as standing, walking, kneeling, squatting, bending (neck and waist), twisting (neck and waist), reaching (above and below the shoulder), pushing and pulling, power grasping, lifting and carrying (up to 25 pounds), walking on uneven ground, exposure to excessive noise, exposure to extreme temperatures, exposure to dust, gas or fumes, and working with biohazards.

### **CalPERS Surveillance**

7. Natasha Cook is a sworn investigator for CalPERS who testified at the hearing and prepared an investigation report. Her testimony and report are summarized as follows:<sup>3</sup> Investigator Cook conducts investigations of disability retirement applicants in order to validate their claim of disability. This can include researching an applicant's social media posts and conducting surveillance. Investigator Cook does not evaluate the evidence; she merely reports her findings. She and her partner conducted surveillance of respondent for five days in November 2018. Through researching social media, she determined that respondent was working in private practice as a psychologist. She observed respondent travel to and from his work. Some of the activity that was recorded included the following: respondent walked his dog, held the leash, and used his cell phone; pushed trash containers and

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<sup>3</sup> CalPERS also submitted the surveillance video footage detailed in the investigation report.

placed objects into the containers; went on shopping trips, pushed a shopping cart, and placed items in the trunk of his car; and went to a gym twice where he was observed working out on a leg press and elliptical machine, which has handles for one to grasp.

### **Dr. Kelly's Independent Medical Examination**

8. Dr. Kelly completed a report on January 23, 2019. The following is a summary of his testimony and report: Dr. Kelly completed a general surgery internship and residency in orthopedic surgery at the Naval Hospital San Diego, after which he completed a hand and microvascular surgery fellowship at the University of New Mexico Medical Center. After completing his residency in 1991, he continued to serve as an orthopedic surgeon in the U.S. Navy. He currently maintains an orthopedic practice and is affiliated with multiple hospitals. He is a Diplomat of the American Board of Orthopaedic Surgery and is associated with multiple medical societies, where he has held multiple leadership positions. Based on his training and experience, Dr. Kelly was well qualified to render an expert opinion in this matter.

9. Dr. Kelly performed an IME of respondent for CalPERS on January 23, 2019. Dr. Kelly's evaluation of respondent's condition was based on a review of medical records, consideration of the occupation description, a physical exam, and an interview of respondent. He concluded that respondent was not substantially incapacitated from the performance of his usual and customary work duties of a psychologist.

10. Respondent, who at the time was 44 years old, reported he began experiencing pain in July 2016. Respondent believed his symptoms were related to repetitive typing on a computer keyboard for data entry while working as a

psychologist. He was required to input his psychological assessment into the electronic medical record system (EMR system). He went on medical leave because his employer could not accommodate his permanent work restrictions.

11. Respondent reported his condition has not improved despite conservative care. He complained of diminished strength, numbness and tingling in his left hand, and adverse ability to participate in activities of daily living. He reported he was unable to perform computer work for more than 10 minutes at a maximum in a 24-hour period without excruciating pain. He no longer participates in hobbies such as golf and ice hockey. He is unable to walk his dog or engage in any activities that require grasping and repetitive flexion/extension of the elbow.

12. Dr. Kelly conducted a full physical examination of the upper extremities. Grip strength was measured at 80 pounds (right) and 84 pounds (left) which was within normal range. Respondent noted pain in both wrists. Both elbows had full range of motion. Radiographs revealed mild flattening of the thumb metacarpal consistent with mild thumb metacarpophalangeal joint osteoarthritis, but were otherwise normal.

13. Dr. Kelly reviewed respondent's extensive medical records from multiple physicians beginning in September 2016. Respondent began having symptoms on the left side and subsequently on the right upper extremity. The symptoms were primarily consistent with lateral epicondylitis, but the diagnosis of radial tunnel syndrome was also considered. Respondent has undergone several injections that had limited benefit. Respondent has been treated with methotrexate for the diagnosis of a rheumatologic condition, and was taking Stelara as prescribed by a rheumatologist. In June 2018, Dr. Cage issued a permanent and stationary report. Dr. Cage recommended permanent work restrictions limiting keyboarding to no more than five minutes per hour.

14. Dr. Kelly also reviewed the surveillance video of respondent's activities. He noted that respondent was able to walk his dog, including holding a leash. Respondent was also able to exercise on an elliptical trainer. From the surveillance, Dr. Kelly did not observe any evidence of impairment.

15. Based on his exam, review of medical records, and review of the physical requirements of a psychologist, Dr. Kelly determined that there were no specific duties of a psychologist at Donovan that respondent could not perform and that respondent was not substantially incapacitated from performing the usual and customary duties of a psychologist at Donovan. No abnormalities were noted on the EMG/NCV and no severe abnormalities were noted on the MRI. Dr. Kelly believed that respondent's symptoms would improve over time. Dr. Kelly noted respondent's symptoms were primarily subjective, and he noted no substantial incapacity based on objective findings. Dr. Kelly agreed that limiting respondent's computer usage was reasonable, but he believed respondent's contention that he could only type 10 minutes in a day was excessive. This differed from Dr. Cage's recommendation, that respondent limit keyboarding to no more than five minutes per hour.

### **Respondent's Testimony**

16. Respondent's testimony is summarized as follows: This has been one of the biggest life challenges respondent has encountered. Because of the nature of his injury, he has encountered a lot of bias by medical professionals, especially related to the workers' compensation claim. Most providers hurried him back to work, misdiagnosed his condition and put him in harm's way. Respondent can no longer participate in things such as playing hockey, golf, and weight-lifting. The pain impacts his day-to-day activities. Although he does not experience daily pain like he used to, he experiences pain on a weekly basis and it is task dependent. Respondent has

documented atrophy, loss of strength, and nerve damage. He attempted to go through the accommodation process, but what was put in place was not sufficient to prevent further harm and increasing pain. Returning to work will cause more pain and disability. He has attempted to look for work in other settings such as at state hospitals. However, they use the same EMR system used in the prison setting. He attempted to make it work, but ultimately, he has been unable to return to work.

### **Additional Documentation**

17. Respondent submitted a report dated April 25, 2019, by Larry H. Woodcox, DPM, DC, a qualified medical evaluator for respondent's workers' compensation claim. Dr. Woodcox diagnosed respondent with status post repetitive strain injury, left wrist, forearm, and elbow; chronic lateral epicondylitis with exterior tendinitis and medial epicondylitis; and cubital tunnel syndrome left elbow. He assessed a 12 percent whole person impairment for the left elbow as permanent and stationary. Based on a job description by respondent that indicated eight hours of typing, using a mouse, and gripping and grasping, he recommended permanent work restrictions of twisting of the left forearm, heavy lifting, and pushing/pulling over 50 pounds. Dr. Woodcox also indicated respondent could continue at his usual and customary occupation without restriction. He recommended ongoing physician visits for exacerbations of pain, physical medicine, anti-inflammatories, therapeutic injections, and bracing.

### **LEGAL CONCLUSIONS**

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving that he or she is entitled to it by a preponderance of the

evidence. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332; Evid. Code, § 115.) In this matter, respondent is seeking a disability retirement. For that reason, respondent has the burden of establishing that he is substantially incapacitated from performing the usual and customary duties of a psychologist at CDCR.

## **Applicable Statutes**

2. Government Code section 20026 provides in part:

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of competent medical opinion.

3. On receipt of an application for disability retirement of a member, the board must 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. (Gov. Code, § 21152.)

4. Government Code section 21156, subdivision (a), provides in part:

(1) 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 . . .

(2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process. . . .

## **Appellate Authority**

5. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his customary duties, even though doing so may be difficult or painful, the employee is not incapacitated and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887.)<sup>4</sup> Mere

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<sup>4</sup> The applicant in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations and to apprehend violators; issuing warnings and serving citations; and serving warrants and making arrests. He suffered injury to his right arm while arresting a suspect. There was evidence that Mr. Mansperger could shoot a gun, drive a car, swim, row a boat (but with some difficulty), pick up a bucket of clams, pilot a boat, and apprehend a prisoner (with some difficulty). He could not lift heavy weights or carry the prisoner away. The court noted that although the need for physical arrests did occur in Mr. Mansperger's job, they were not common occurrences for a fish and game warden. (*Id.* at p. 877.) Similarly, the need for him to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding the applicant was not incapacitated for the performance of his duties, the court noted the activities he was unable to perform were not

difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854.)<sup>5</sup> Further, respondent must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Id.* at p. 863.)

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common occurrences and he could otherwise "substantially carry out the normal duties of a fish and game warden." (*Id.* at p. 876.)

<sup>5</sup> In *Hosford*, the court held that in determining whether an individual was substantially incapacitated from his usual duties, the courts must look to the duties actually performed by the individual, and not exclusively at job descriptions. *Hosford*, a California Highway Patrol Officer, suffered a back injury lifting an unconscious victim. In determining eligibility for a disability retirement, the court evaluated *Hosford's* injuries according to the job duties required of his position as a sergeant, as well as the degree to which any physical problem might impair the performance of his duties. Thus, the actual and usual duties of the applicant must be the criteria upon which any impairment is judged. Generalized job descriptions and physical standards are not controlling, nor are actual but infrequently performed duties to be considered. The *Hosford* court found that although *Hosford* suffered some physical impairment, he could still substantially perform his usual duties. The court also rejected *Hosford's* contention that he was substantially incapacitated from performing his usual and customary duties because his medical conditions created an increased risk of future injury.

## Evaluation

6. Respondent had the burden of proving he is substantially incapacitated from performing the usual and customary duties of a psychologist at CDCR. Respondent did not meet his burden. CalPERS presented competent medical evidence showing respondent was not substantially incapacitated from performing the usual and customary duties of a psychologist at CDCR. It is well established that, when an applicant can perform his or her customary duties even though doing so may be difficult or painful, the employee is not incapacitated and does not qualify for a disability retirement. (*Mansperger, supra*, at pp. 886-887.) Moreover, respondent presented no competent medical evidence establishing that he was disabled. Dr. Kelly conducted a thorough review of medical records and physical examination; his opinion that respondent is not disabled went unchallenged by competent medical opinion. (Gov. Code, § 21156, subd. (a)(2).) Accordingly, CalPERS's denial of respondent's application for an industrial disability retirement was appropriate.

## ORDER

The application for industrial disability retirement filed by respondent David Jaffe is denied.

DATE: January 10, 2020

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ADAM L. BERG

Administrative Law Judge

Office of Administrative Hearings