

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:

KRISTOFFER L. BARTON, and

**CORRECTIONAL TRAINING FACILITY, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,**

Respondents.

Case No. 2019-0325

OAH No. 2019070236

PROPOSED DECISION

Administrative Law Judge Regina Brown, State of California, Office of Administrative Hearings, heard this matter on October 29, 2019, in San Jose, and by telephone on December 3, 2019, in Oakland, California.

Kevin Kreutz, Senior Attorney, represented complainant California Public Employees' Retirement System (CalPERS).

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED December 26 20 19

Chavez

Kristoffer L. Barton appeared telephonically and represented himself at hearing on October 29, 2019; however, he did not appear on December 3, 2019, for the telephonic closing argument.

Respondent Correctional Training Facility, California Department of Corrections and Rehabilitation, was not represented at hearing.

The record closed and the matter was submitted for decision on December 3, 2019.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent Kristoffer L. Barton (respondent) began working for Correctional Training Facility, California Department of Corrections and Rehabilitation (CDCR), as a correctional officer in 2001. By virtue of his employment, he is a safety member of CalPERS subject to Government Code section 21151.

2. On April 25, 2018, respondent filed an industrial disability retirement application with CalPERS based on a "neurological (right hand) condition." On December 7, 2018, CalPERS denied the application because it had determined that respondent was not permanently disabled or incapacitated from performance of his duties as a correctional officer with CDCR at the time the application was filed.

3. Respondent filed a timely appeal 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.

Job Duties

5. Respondent's job duties as a correctional officer with CDCR included, among other things: performing peace officer duties in an adult institution during adverse, stressful and unpleasant situations; wearing personal protective equipment; qualifying with weapons on the firing range; defending, disarming, and applying restraints; inspecting inmates; and securing the institution. Physical requirements of the position required him: occasionally to continuously stand, sit, walk, move arms, and reach; occasionally to run and brace; occasionally to frequently climb, stoop, crawl, crouch, push, pull, and press; and frequently to occasionally lift, carry, move his hands and wrists independently of each other, have finger dexterity, twist his body, and move his hand and neck.

Work-related injury

6. On September 20, 2015, respondent was turning a large key to open a lock for a gate and he sustained significant pain in his right hand. He sought medical treatment at the prison medical office and later at an occupational medical clinic. For three months, his radial three digits remained extended, were painful, and he was not able to bend them. He was referred for physical therapy. He temporarily used a wrist and hand brace which he stopped when it increased the pain. Use of a transcutaneous nerve stimulator improved his hand mobility and allowed him to eventually extend his three digits. An MRI of his right hand, taken on December 21, 2015, was noted to be normal. However, respondent still experienced pain in his right hand.

7. Respondent came under the care of Victor Li, M.D., for one year. Dr. Li prescribed pain medications and recommended a surgical consultation and home exercises. Dr. Li placed respondent on work restrictions, including no forceful grasping.

8. On August 19, 2016, Nader Achackzad, M.D., performed a qualified medical evaluation (QME). Dr. Achackzad diagnosed respondent with right wrist sprain and strain; right carpal tunnel syndrome; right thumb and index trigger finger; and right hand chronic pain. Respondent had not yet reached permanent and stationary status. Dr. Achackzad recommended future medical treatment with work restrictions.

9. On November 2, 2016, Melinda Brown, M.D., performed an EMG/nerve conduction study of respondent. Dr. Brown diagnosed respondent with "right radial neuropathy at or above elbow with conduction blocking. Mild right median nerve compromise at or near the wrist/carpal tunnel, affecting the sensory and motor components. This is indicative of a demyelinating process. Borderline-mild right ulnar nerve compromise at or near elbow, affecting the motor components with evidence of focal demyelination process. Ulnar cutaneous neuropathy at the wrist-severity difficult to assess as there is motor unit response overlying SNAP. No evidence of cervical radiculopathy."

10. On March 6, 2017, respondent came under the care of Dhanu Panchal, M.D., who diagnosed respondent with "pain in right forearm. Paresthesia. Pain in right hand. Complex regional pain syndrome (CRPS). Median neuropathy." Initially, Dr. Panchal prescribed Tramadol, and later Gabapentin and Ibuprofen. Dr. Panchal placed respondent on work restrictions, including no repetitive grasping of the right hand, limited use of the right hand, and no responding to alarms.

11. On July 19, 2017, orthopedic surgeon K. Reynolds, M.D., diagnosed respondent with "right hand injury, possible median nerve versus extensor tendon rupture and complex regional pain syndrome." Dr. Reynolds recommended possible surgical intervention. However, respondent elected not to have surgery because of potential complications. He continued with conservative treatment with Dr. Panchal.

12. On September 14, 2017, Dr. Achackzad conducted a QME re-evaluation and diagnosed respondent with: 1) right upper extremity CRPS; 2) right carpal tunnel syndrome, and 3) right radial and ulnar neuropathy confirmed by the EMG/nerve conduction study. Dr. Achackzad considered respondent to be permanent and stationary. Dr. Achackzad opined that respondent would not be able to return to his usual and customary duty at his preinjury level as a correctional officer. Dr. Achackzad instructed respondent to avoid lifting, carrying, pushing, and pulling greater than five pounds; and respondent was precluded from repetitive activities with the right upper extremity.

13. Respondent underwent a second EMG/nerve conduction study on October 21, 2017, that revealed "electrophysiological evidence for median nerve compression, neuropathy consistent with carpal tunnel syndrome at the wrist without evidence of axonal loss. Given both sensory and motor branches are involved, [] consider this moderate severity carpal tunnel syndrome."

14. On May 7, 2018, in a supplemental QME report, Dr. Achackzad opined that respondent's CRPS, which may cause stress in the body and raise one's blood pressure, may have played a role in respondent's hypertension. According to Dr. Achackzad, respondent suffered from insomnia, anxiety, adjustment disorder with depressive mood secondary to his medical condition as a result of his September 20, 2015 injury. Dr. Achackzad concluded that respondent may benefit from psychiatric

treatment in the form of psychotherapy and psych-pharmacotherapy and recommended a psychiatric QME, as this was outside Dr. Achackzad's specialty.

15. On July 31, 2018, Board-certified psychiatrist and neurologist Perry Segal, M.D., performed a psychiatric AME and reviewed respondent's medical records. Dr. Segal diagnosed respondent with a chronic adjustment disorder with mixed anxiety and depressed mood and a sleep disorder, insomnia type. Dr. Segal had previously evaluated respondent in 2014. Dr. Segal determined that with the additional pain, restrictions and stress from the September 20, 2015 injury, respondent's psychiatric impairment had increased since 2014. Dr. Segal gave respondent a 14 percent whole person impairment. Dr. Segal did not believe that there was much to gain from providing respondent with formal psychological or psychiatric treatment until more could be done for his physical discomfort and restrictions.

IME conducted by orthopedic surgeon Donald C. Pompan, M.D.

16. On August 21, 2018, orthopedic surgeon Donald C. Pompan, M.D., conducted an independent medical examination (IME) of respondent, at the request of CalPERS, and after reviewing the medical records, he submitted a report on September 21, 2018. Dr. Pompan also testified at hearing.

17. During the physical examination performed by Dr. Pompan, which lasted approximately two hours, respondent demonstrated an inability to grasp with his right hand and he was unable to use his right index finger. He told Dr. Pompan that he experienced a burning sensation from his mid-forearm to the tips of his five fingers; numbness; and his hand would turn icy cold. Respondent's symptoms would vary daily including alternating between a burning and cold sensation, or his hand would swell and change colors. Respondent gave an example that if he worked in the garden one

day, then he might not be able to use his right hand on the next day. Respondent mostly uses his left hand. Respondent told Dr. Pompan that he cannot hold a baton or perform repetitive grasping, as is required of a correctional officer. Dr. Pompan also reviewed a surveillance video, purportedly of respondent, where respondent was observed using his right hand for activities such as wrapping a hose, pumping gas, and handling his wallet and keys.

18. Dr. Pompan diagnosed respondent with: (1) right hand pain; (2) possible CRPS; (3) concern for symptom magnification; and (4) EMG evidence of carpal tunnel syndrome. Dr. Pompan opined that respondent did not have the symptoms of classic carpal tunnel syndrome and his situation would likely not be improved with surgical intervention. Dr. Pompan concluded that there are three possibilities for respondent's condition, all of which are out of his scope of specialty of orthopedics, including: "No. 1 – [respondent] has some type of neurologically based pain syndrome, such as complex regional pain syndrome, that waxes and wanes such that he can use his hand normally one day (as in the video), but then the hand becomes essentially functionless on other days (as during my evaluation). No. 2 – [respondent] is consciously embellishing his symptoms. No. 3 – [respondent] has some type of psychological disorder and there is somatization of symptoms." Dr. Pompan recommended a referral to a physician with an expertise in CRPS to evaluate respondent.

19. At hearing, Dr. Pompan stated that he was not sure if the person in the surveillance video was respondent. Dr. Pompan reiterated his opinion that, although there is no orthopedic basis to make a finding of substantial incapacity regarding respondent's right hand condition, respondent's condition does impair the use of his right hand.

IME conducted by neurosurgeon/neurologist Stephen Dell, M.D.

20. On November 6, 2018, neurosurgeon/neurologist Stephen Dell, M.D., conducted an IME of respondent, at the request of CalPERS, and submitted a report after reviewing the medical records.

21. Dr. Dell opined that he was unable to specifically diagnose any neurological syndrome involving respondent's right upper extremity whether on a radicular, peripheral nerve, sympathetic or peripheral neuromuscular basis. Dr. Dell did not detect carpal tunnel syndrome or CRPS. Dr. Dell opined that respondent was not substantially incapacitated for the performance of his duties and he could not specify any job duties that respondent would not be able to perform as a correctional officer on the basis of a neurological condition.

22. At hearing, Dr. Dell acknowledged that he was "stymied" by respondent's condition, but he did not believe that respondent was "faking" his symptoms. Dr. Dell opined that respondent likely suffers from some form of a deep psychological problem or somatization illness or disorder, which can be limiting to the use of his right hand. According to Dr. Dell, somatization is not a diagnosis that a neurologist can make and it is treated by a psychiatrist. Furthermore, in respondent's current state, Dr. Dell believes that "something is going on and impairs respondent from performing his job duties." Moreover, Dr. Dell opined that respondent has a "real problem and issue" that requires medical attention and urges that respondent receive medical care to address the issue which was likely triggered by the incident on September 20, 2015.

Respondent's additional evidence

23. On March 23, 2019, Dr. Segal, after reviewing additional medical records, issued a supplemental report regarding respondent's need of psychological

restrictions and his loss of capacities since the September 20, 2015 injury. Dr. Segal opined that respondent is substantially incapacitated from the performance of his duties as a correctional officer. Dr. Segal noted that respondent is "struggling just keeping up with household and even self-care functioning due to a combination of his physical and psychiatric impairments" due to his sleep pattern, emotional distress, distraction by pain [in his right hand] and his taking of Gabapentin which "takes a toll on his cognitive functioning, energy level, and frustration tolerance."

24. Respondent never returned to full duty after the injury. Although he experiences varying degrees of pain, respondent still uses his right hand to avoid cramping and loss of strength. He tries to hold things with his ring and pinky fingers against the palm of his hand. Sometimes simple tasks, like opening a door, brushing his teeth, or turning the ignition switch in a vehicle, can trigger excruciating pain. The pain will build up over a few days and then he cannot use his hand at all and he will have to rest his hand.

25. Respondent is not employed. He has moved to Colorado to live with his parents. He opened a business, Barton's Quality Cleaning, to clean carpets and wash windows, but he has not had any clients yet.

Ultimate Factual Finding

26. Respondent's treating physicians and the other medical/psychiatric evaluators agree that respondent suffers from a condition that has impacted his ability to use his right hand. Although respondent's condition does not appear to be orthopedic or neurological, the medical evidence was persuasive that the pain in his hand is debilitating and likely has a psychiatric component. Therefore, respondent has provided persuasive medical opinion to establish that his right hand condition

substantially incapacitated him from the performance of his usual and customary duties as a correctional officer with CDCR, and his disability is expected to last at least 12 consecutive months.

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 respondent sustained an injury to his right hand while working as a correctional officer. Furthermore, competent medical opinion established that applicant's right hand condition substantially incapacitated him from the performance of his usual and customary duties as a correctional officer with CDCR

within the meaning of Government Code section 20026, and the condition has lasted at least 12 consecutive months since respondent filed his application for industrial disability retirement.

3. Cause exists to reverse CalPERS's denial of respondent's industrial disability retirement application, as set forth in Factual Findings 5 through 23, and 26.

ORDER

The application of Kristoffer L. Barton for CalPERS industrial disability retirement is granted.

DATE: December 24, 2019

DocuSigned by:
Jill Schlichtmann
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For

REGINA BROWN

Administrative Law Judge

Office of Administrative Hearings