

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Reinstatement from Industrial Disability

Retirement of:

SHANE E. GRIFFETH, Respondent

and

**DEPARTMENT OF SUBSTANCE ABUSE TREATMENT FACILITY,
CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION, Respondent**

Agency Case No. 2019-0483

OAH No. 2019080652

PROPOSED DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on March 10, 2020, in San Diego, California.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED April 7 20 20
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Helen L. Louie, Attorney, represented complainant, Kevin Riddle, Chief, Disability and Survival Benefits Division, California Public Employees' Retirement System (CalPERS), State of California.

Shane E. Griffeth, respondent, represented himself.

There was no appearance on behalf of respondent Department of Substance Abuse Treatment Facility, California Department of Corrections and Rehabilitation (CDCR).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on March 10, 2020.

ISSUE

Is respondent¹ still substantially incapacitated from performing the usual and customary duties of a correctional officer at CDCR due to orthopedic (right shoulder and back) conditions such that he cannot be reinstated to his former position?

¹ Respondent refers solely to Shane E. Griffeth throughout this decision, and respondent Department of Substance Abuse Treatment Facility, California Department of Corrections and Rehabilitation will be referred to as CDCR.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent worked for CDCR as a correctional officer. By virtue of his employment, respondent is a state safety member of CalPERS.
2. On September 7, 2013, respondent injured his right shoulder and back while defending himself from an inmate, who attacked him. On or about February 14, 2017, respondent was re-injured at work while attending baton training. Respondent never returned to work following this incident on February 14, 2017.
3. On September 18, 2017, respondent submitted an application for an industrial disability retirement on the basis of orthopedic injuries (right shoulder and back). On November 3, 2017, CalPERS notified respondent that CalPERS approved respondent's application for an industrial disability retirement based on his claim of orthopedic injuries. Consequently, respondent retired effective October 7, 2017.
4. On December 26, 2018, CalPERS sent a letter to respondent advising him of its intent, in accordance with applicable law, to conduct a review and reevaluation to ensure that he was still eligible for an industrial disability retirement. CalPERS also requested documentation from respondent, including completion of a Retiree Questionnaire for CalPERS Disability Re-evaluation, and documents from each of respondent's treating physicians. Respondent submitted additional documentation, and CalPERS reviewed his submissions. Thereafter, CalPERS required respondent to undergo a re-evaluation examination from an Independent Medical Examiner (IME).

5. On February 28, 2019, respondent underwent a re-evaluation examination by William Curran, Jr., M.D., an IME retained by CalPERS. Dr. Curran submitted a report of his re-evaluation examination of respondent to CalPERS.

6. On April 10, 2019, CalPERS notified respondent that it had reviewed all medical reports, including the re-evaluation examination report completed by Dr. Curran, and determined as follows:

Based on the evidence in those reports, it is our determination that you are no longer substantially incapacitated from the performance of your job duties as a Correctional Officer with the Department of Corrections Substance Abuse Treatment Facility due to your orthopedic (right shoulder and back) condition.

7. By letter dated May 2, 2019, respondent appealed the denial and this hearing followed. CDCR did not appeal CalPERS's determination that respondent should be reinstated to his former position.

8. On August 12, 2019, complainant filed the Accusation in his official capacity, seeking to reinstate respondent to his former position with CDCR based on the determination that he is no longer substantially incapacitated from performing the usual and customary duties of a correctional officer due to the orthopedic conditions of right shoulder and back injuries.

Job Duties of a Correctional Officer

9. A document entitled, "Physical Requirements of Position/Occupational Title" was submitted as evidence. The document identifies those job duties for a

correctional officer that are considered occasional (up to 3 hours), frequent (3 to 6 hours), constant (over 6 hours), and never. Both respondent and a representative for his employer signed the document agreeing with its contents on August 24, 2017. The document identifies activities that are occasionally required to be performed as sitting, standing, running, walking, crawling, kneeling, climbing, squatting, bending at the waist, reaching above the shoulder, reaching below the shoulder, pushing & pulling, keyboard use, mouse use, lifting and carrying from 51 pounds to over 100 pounds, walking on uneven ground, driving, working with heavy equipment, exposure to excessive noise, exposure to extreme temperature, humidity, wetness, exposure to dust, gas, fumes or chemicals, working at heights, operations of foot controls or repetitive movements, use of special visual or auditory protective equipment, and working with bio hazards (blood borne pathogens, sewage, hospital waste, etc.). The document identifies frequent activities as sitting, standing, walking, climbing, bending at the neck, bending at the waist, twisting at the neck, twisting at the waist, reaching below the shoulder, pushing & pulling, fine manipulation, power grasping, simple grasping, repetitive use of hands, keyboard use, mouse use, lifting 25 to 50 pounds, walking on uneven ground, driving, working with heavy equipment, exposure to extreme temperature, humidity, wetness, exposure to dust, gas, fumes or chemicals, working at heights, and operation of foot controls or repetitive movement. The document identified activities that are constantly required to be performed as sitting, standing, walking, bending at the neck, twisting at the neck, pushing & pulling, fine manipulation, power grasping, simple grasping, repetitive use of hands, keyboard use, lifting and carrying up to 25 pounds, and exposure to extreme temperature, humidity, wetness.

10. A document entitled, "Department of Corrections and Rehabilitation, Division of Adult Institutions, Correctional Officer, Essential Functions" was also

submitted as evidence. That document generally describes the duties of a correctional officer as a sworn peace officer who is responsible and accountable for carrying out the primary duty of public protection and works in all posts in any adult institution/camp, for the supervisor to whom he is assigned in minimum/maximum security facilities that house male or female offenders. The essential functions of the correctional officer include: perform peace officer duties during adverse, stressful, or unpleasant situations (such as preventing escape and injury by inmates to themselves, employees, and to property, can be exposed to injury/death of inmates or staff by assault, inmates by suicide, or throwing bodily fluids); work a minimum of 40 hours per week to accomplish specific work plus overtime; wear departmentally approved personal protective equipment (includes protective stab proof vests, protective clothing, and breathing apparatus used to prevent injuries and exposures to blood/airborne pathogens, and continuously wear an equipment belt weighing up to 15 pounds); qualify on firing range with department approved weapons; defend yourself and others, disarm, subdue, and apply inmate restraints, swing arm with force (during incidents and against inmates armed with weapons, must be able to utilize a baton with effective force to subdue an offender during an incident, and ability to physically retain departmental weapons from unauthorized persons or use); remain functional during gas/chemical exposure; inspect inmates from head to toe for contraband; and engage in a variety of other duties as required.

Independent Medical Re-Evaluation Examination

11. Dr. Curran is a board-certified orthopedic surgeon since September of 1974. He has been licensed to practice medicine in California since 1966. He obtained his undergraduate degree at the University of Wisconsin. He also obtained his Doctor of Medicine degree from Medical College of Wisconsin in 1966. Dr. Curran completed

his internship at Mercy Hospital in San Diego, California in 1967. Dr. Curran was a General Medical Officer in the United States Air Force from 1967 to 1969. He completed his residency in Orthopedics at Medical College of Wisconsin in 1973.

Dr. Curran currently operates a private practice in San Diego. Dr. Curran specializes in orthopedic surgery with a focus on sports medicine and forensic orthopedics. He no longer performs orthopedic surgeries because of his own orthopedic condition that precludes him from doing so. However, he still treats orthopedic patients. Throughout the years, Dr. Curran has served in a variety of capacities, including as orthopedic surgeon for the University of California, San Diego athletic teams, the San Diego Chargers in the National Football League, San Diego Clippers in the National Basketball Association, Cathedral High School, and Imperial Valley Junior College Athletic Teams. Dr. Curran is a current member of the Credential Committee at Sharp Memorial Hospital and a current member of the Committee on Interdisciplinary Practice of Sharp Memorial Hospital. He is currently affiliated with the Sharp Memorial Hospital and Outpatient Surgical Center. Dr. Curran has also given several presentations in the field of orthopedics, and has published articles in peer-reviewed medical journals in the field of orthopedics. Dr. Curran is an expert in the field of orthopedics.

12. Dr. Curran has contracted with CalPERS for the past three to four years to provide independent medical examinations. During that time span, Dr. Curran has only provided two such examinations for CalPERS. Dr. Curran was retained by CalPERS to provide a re-evaluation examination of respondent for a determination of whether he is substantially incapacitated from performing the usual and customary duties of a correctional officer at CDCR. Dr. Curran examined respondent on February 28, 2019, and summarized his findings in a report of the same date, which he provided to

CalPERS and which was received into evidence. Additionally, Dr. Curran provided a supplemental report dated February 15, 2020, wherein he reviewed additional medical records received from respondent's caretakers and summarized his findings. Dr. Curran also testified at the hearing regarding his examination of respondent and review of records. The following is a summary of Dr. Curran's testimony and his reports.

13. Dr. Curran testified at the hearing that he only recalled his examination of respondent from his reports and has no independent recollection of the examination or of meeting respondent. Prior to his examination, Dr. Curran reviewed the job descriptions and requirements of a correctional officer summarized above. Additionally, he is familiar with the CalPERS standards for disability retirement. Dr. Curran stated that in order to qualify for industrial disability retirement, there must be objective evidence to show that respondent is substantially incapacitated to perform the usual and customary duties of his job as a correctional officer. Dr. Curran explained that in order to substantiate a diagnosis, there must be objective evidence to corroborate a patient's subjective complaints.

Upon arrival at Dr. Curran's office, respondent filled out a patient information form providing a history of his complaints, which Dr. Curran reviewed prior to his physical examination. Thereafter, Dr. Curran completed his physical examination of respondent. After the physical examination, Dr. Curran then reviewed all the medical records provided to him from CalPERS regarding respondent. After his review of that information, Dr. Curran drafted his report of his independent medical examination of respondent dated February 28, 2019. Thereafter, Dr. Curran received additional medical records regarding respondent from CalPERS on January 30, 2020. Those medical records were from Dr. Bahk and Dr. Molnar. After receiving and reviewing these records, Dr. Curran drafted a "Supplement to Independent Medical Examination"

report and provided that document to CalPERS. The Supplement to Independent Medical Examination report was also received into evidence.

During his physical examination of respondent, Dr. Curran noted that respondent walked without a limp on both feet without difficulty and was able to squat in the baseball catcher's position and alternately stand on each leg with no difficulty or balance issues and no back pain. Dr. Curran noted that respondent had no abnormalities of his lower extremity or lumbar spine and no curvature of the spine. Respondent had no palpable tenderness or spasms in the cervical spine, and Dr. Curran had no findings in his cervical spine. Respondent had a full range of motion in his neck and back. Dr. Curran noted that respondent did have tenderness in his shoulder blades, but had no "winging" of either shoulder blade. Dr. Curran explained that "winging" is the result of an abnormal nerve that governs the muscles around the shoulder blade such that if the patient does a push-up or other shoulder movement the shoulder blade will move away from the midline of the spine, which is called winging. Dr. Curran stated that respondent had good shoulder motion and full range of motion in his elbows and wrists. Respondent's reflexes were normal and his power and sensory examination of both upper extremities was normal. Respondent did have a slight weakness of his grip strength on the right side and left forearm atrophy. Dr. Curran summarized that respondent's physical examination was within normal limits and Dr. Curran found no objective evidence to corroborate respondent's subjective complaints.

Dr. Curran's review of medical records provided to him and listed in his February 28, 2019, report provided him with "nothing significant" regarding subjective evidence that respondent is substantially incapacitated to perform his duties as a correctional officer. Dr. Curran noted that the medical records dated April 17, 2017,

from Dr. Lewis showed that respondent had a second injury to his right shoulder on February 14, 2017, a fact that Dr. Curran claimed respondent failed to tell him about during his visit. Those records also showed that respondent had a "drop in his right shoulder," which Dr. Curran stated he had "no idea what that means orthopedically." Dr. Lewis's records show that respondent also "had a possible rotator cuff pathology" but Dr. Curran stated that Dr. Lewis's comment was based on "all subjective tests with no objective evidence." Dr. Curran noted that Dr. Lewis reported no winging of respondent's right shoulder blade. Medical records from Dr. Scheinberg, an orthopedic surgeon, dated May 18, 2017, and June 22, 2017, showed that respondent's power examination of upper and lower extremities were within normal limits and respondent had no winging of the scapula. Medical records from Dr. Scheinberg dated September 11, 2017, show that there was no mention of any right shoulder diagnosis, but there was a diagnosis that respondent had an intervertebral disc disorder in his spine. However, there was no documentation or diagnostic study to demonstrate how that diagnosis was made.

Based on his physical examination of respondent and review of records, Dr. Curran diagnosed respondent with a sprain/strain of his right shoulder that had been resolved and was no longer present. Dr. Curran stated this diagnosis was based primarily on his physical examination, which was within normal limits, for Dr. Curran's evaluation of the right shoulder, right scapula, mid-thoracic spine, and lumbar spine. Accordingly, Dr. Curran concluded respondent was not substantially incapacitated from performing the usual and customary duties of his job.

14. After his February 28, 2019, evaluation of respondent, Dr. Curran reviewed additional medical records provided to him by CalPERS related to respondent. Those additional records included an April 5, 2019, report from Dr. Bahk,

an orthopedic surgeon; a June 4, 2019, report and electrical analysis from Dr. Molnar, a neurologist; and a June 10, 2019 report of an MRI scan performed on respondent's right scapula. Dr. Curran reviewed these records and summarized his findings in the February 15, 2020, Supplement to Independent Medical Reevaluation report. Dr. Curran also testified that his review of these additional medical records changed his opinion only slightly. Specifically, Dr. Curran opined that respondent did not sustain a medically treatable injury to his lumbar spine because from September 9, 2013, to April 9, 2019, no diagnostic studies were obtained on respondent's lumbar spine. Dr. Curran opined that respondent had sustained a cervical strain/sprain and temporary aggravation of his preexisting asymptomatic cervical spine degenerative disc, facet osteoarthritis, and stenotic pathology. However, Dr. Curran noted that respondent's cervical spine complaints had resolved on March 10 and April 1, 2014, and January 22, 2017. Dr. Curran also noted an inconsistency with the additional medical records because Dr. Bahk reported winging of respondent's right scapula and a weakness of the right upper extremity, but Dr. Molnar reported the electrical analysis showed injury to the long nerve with no weakness in the right upper extremity. Dr. Molnar's examination showed a nerve injury but normal power examination on the right shoulder. Based on this information, on February 15, 2020, Dr. Curran concluded that respondent is not substantially incapacitated from his normal duties as a correctional officer with no restrictions.

15. After Dr. Curran had testified at the hearing as described above and during the lunch hour, Dr. Curran reviewed additional medical records provided by respondent the day of the hearing. Specifically, Dr. Curran reviewed a "Physical Performance Evaluation" report from North Texas Rehabilitation Center summarizing a physical performance evaluation of respondent conducted on December 23, 2019, by Christy Hobby, Occupational Therapist, on the orders of Jose Fuentes, M.D. Dr. Curran

testified after the lunch break that this document is a comprehensive evaluation typically conducted and relied on by orthopedic surgeons to evaluate a person for work capabilities. Dr. Curran used the lunch break to closely review this document and also compare it to the documents discussed above describing the normal duties of a correctional officer.

Dr. Curran testified that based on his review and the information in this new report, he concluded that respondent is not able to return to his duties as a correctional officer. Dr. Curran changed his opinion because this functional capacity evaluation shows that respondent has significant limitations of his cervical and lumbar spine motion and significant weakness of his right upper extremity limiting his ability to lift, reach and carry weight, which are requirements of a correctional officer. Dr. Curran stated that this document demonstrates that respondent has significant impairments in his right shoulder and back preventing him from performing the job duties of a correctional officer. The job duties respondent would not be able to perform as a result of these impairments are sitting for three to six hours, standing for three to six hours, climbing for three to six hours, bending at the neck and waist, twisting at the neck and waist, pushing or pulling, power grasping, lifting or carrying over 50 pounds, working at heights, and working with heavy equipment. Dr. Curran testified that the Physical Performance Evaluation report from North Texas Rehabilitation Center is "very reliable."

Dr. Curran further found after his review of the Physical Performance Evaluation report from North Texas Rehabilitation Center that respondent is substantially incapacitated from his usual duties as a correctional officer, and that based on this report, it is likely that respondent's incapacitation is permanent.

Respondent's Testimony

16. Respondent is 47 years of age and not currently employed. His last employment was as a correctional officer with his last day of work on February 14, 2017, the date of his second injury. Respondent testified at the hearing and the following factual findings are based on his testimony and supporting documents he provided.

17. Respondent was first injured on September 7, 2013, when he was attacked by an inmate and sustained injuries to his facial bones, neck, right shoulder, and psyche. After he sustained this injury respondent was out of work on "work restriction disability" until September 15, 2014, which is the date he returned to work after he received clearance by his psychologist. Respondent sought treatment for his physical injuries from his physician who recommended he undergo a functional comprehensive evaluation (FCE) to determine his ability to continue working as shown in a report from Dr. Lewis dated December 2, 2014. Respondent stated that he continued to work despite his injury. Respondent underwent his first functional comprehensive evaluations on October 21, 2015, a report of which was received into evidence. The report showed that respondent was allowed to return to work with modifications that he engage in "no repeated bending or lifting greater than 72 pounds." Respondent continued to work as a correctional officer until his next injury.

18. On February 14, 2017, respondent sustained his second injury while working as a correctional officer. Specifically, during baton training respondent was swinging the baton from side to side with his right arm when he felt a pain in the right upper arm, his right upper arm went numb for five to ten minutes, and he could not lift or move the arm. After sustaining his injury on February 14, 2017, respondent never returned to work as a corrections officer. After this injury respondent was treated by

Dr. Lewis, Dr. Bahk and Dr. Fuentes. He has undergone numerous tests and treatments as a result of this second injury as demonstrated by the numerous medical records provided by respondent to CalPERS and at this hearing. However, respondent failed to provide the Physical Performance Evaluation report from North Texas Rehabilitation Center and other medical records to CalPERS until the hearing date.

19. Respondent filed for industrial disability retirement on September 18, 2017, which was approved by CalPERS by letter dated November 3, 2017, with an effective retirement date of October 7, 2017. Since his retirement respondent has moved to Texas and his current treating physician is Dr. Jose Fuentes. Respondent currently receives treatment for his right shoulder condition, including 10 sessions of a functional restoration program of which he has completed five sessions so far. Respondent also has completed 20 sessions of chronic pain management because respondent does not want to take medication for his right shoulder pain. Respondent is also undergoing a functional restoration program with weight resistance and stretching for his lower back pain with the assistance of chiropractic care. Respondent also takes no medication for back pain. Respondent stated that the orthopedic surgeon has not recommended surgery for either his right shoulder or back.

20. Respondent testified that his right shoulder injury prevents him from doing any lifting above his shoulder and any repetitive use of his shoulder, both of which cause him excruciating pain. His back injury prevents him from sitting for long periods of time as well.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. CalPERS had the burden of proving by a preponderance of the evidence that respondent is no longer substantially incapacitated from performing the usual and customary duties of a correctional officer based on orthopedic conditions (right shoulder and back). (Evid. Code, §§ 115, 500.)

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, as determined by the board . . . on the basis of competent medical opinion.

3. Government Code section 21060, subdivision (a), provides in part:

A member shall be retired for service upon his or her written application to the board if he or she has attained age 50 and is credited with five years of state service, except as provided in Sections 7522.20, 21061, 21062, and 21074.

4. Government Code section 21151, subdivision (a), provides in part:

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 21156, subdivision (a)(1) provides:

If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, 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, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.

6. Government Code section 21192 provides in part:

The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service

applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, shall also cause the examination to be made upon application for reinstatement to the position held at retirement or any position in the same class, of a person who was incapacitated for performance of duty in the position at the time of a prior reinstatement to another position. The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

7. Government Code section 21193 provides in part:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position. However, in that case, acceptance of any other position shall immediately terminate any right to reinstatement. A recipient who is found to continue to be incapacitated for duty in his or her former position and class, but not incapacitated for duty in another position for which he or she has applied for reinstatement and who accepts employment in the other position, shall upon subsequent discontinuance of incapacity for service in his or her former position or a position in the same class, as determined by the board under Section 21192, be reinstated at his or her option to that position. . . .

Appellate Authority

8. "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.) Mere 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.) 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 863.)

9. Retirement benefits and reinstatement rights are fundamental vested rights. (*California Department of Justice v. Board of Administration of California Public Employees' Retirement System and Angelita Resendez*, 242 Cal.App.4th 133, 138.) A disability retirement is considered a temporary separation from state service. (Gov. Code § 19143; Cal. Code Regs., tit. 2, section 446.) As a temporary separation from state service, disability retirement does not result in the loss of permanent civil service status. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes*, December 15, 1999, CalPERS Precedential Decision 99-03, at p. 10.) A state civil service member is therefore entitled to reinstatement once the disability ends. (Gov. Code § 21193; *Resendez, supra*, 242 Cal.App.4th, at p. 142.) An employer is also prohibited from placing any conditions upon the employee's return to work. (*Resendez, supra*, 242 Cal.App.4th, at p. 142.)

Evaluation

10. A public employee has a fundamental vested right to a disability pension if he or she is, in fact, disabled. (*Beckley v. Bd. of Administration* (2013) 222 Cal.App.4th 691, 697, citing *Quintana v. Bd. of Administration* (1976) 54 Cal.App.3d 1018, 1023.) Government Code section 20026 defines disability as "disability of permanent or extended and uncertain duration. . . on the basis of competent medical opinion." The courts have typically relied on medical expert opinion in determining whether a respondent should be granted disability retirement. (See, e.g., *Hosford, supra*, 77Cal.App.3d at p. 864; *Haywood v. American River Fire Protection District* (1998) 61 Cal.App.4th, 1292,1299.) A respondent's opinion of his or her physical condition does not constitute competent medical evidence within the meaning of Government Code section 20026.

In this case, CalPERS had the burden of proving the respondent was no longer substantially incapacitated from performing the usual and customary duties of a correctional officer. Dr. Curran credibly testified that his physical examination and review of medical records as of February 15, 2020, showed that respondent was not substantially incapacitated to perform his usual duties of a correctional officer. However, Dr. Curran changed his testimony and opinion after reviewing the Physical Performance Evaluation report from North Texas Rehabilitation Center during the lunch break on the day of this hearing. Dr. Curran credibly testified that this report was very reliable and provided substantial objective evidence that respondent continues to be substantially incapacitated from performing his usual functions as a correctional officer because of incapacities of his right shoulder and back. These incapacities would prevent him from performing his required job duties. Accordingly, complainant provided competent medical evidence in the form of Dr. Curran's testimony and expert

opinion to demonstrate that respondent remains substantially incapacitated. Complainant argued that Dr. Curran's opinion prior to his review of the Physical Performance Evaluation report from North Texas Rehabilitation Center should establish that respondent should be reinstated to his former position as a correctional officer. However, complainant's argument fails in light of Dr. Curran's testimony at the hearing that respondent continues to be substantially incapacitated and likely will permanently remain that way. Accordingly, complainant failed to meet its burden of proof and respondent is entitled to remain on industrial disability retirement.

Accordingly, the competent medical evidence established that respondent is not physically capable of performing the duties of a correctional officer and respondent is entitled to continue his industrial disability retirement.

ORDER

Respondent Shane E. Griffeth's appeal of the determination by CalPERS that he is no longer substantially incapacitated from the performance of the usual and customary duties of a correctional officer with CDCR is granted. Respondent Shane E. Griffeth shall continue to receive industrial disability retirement benefits.

DATE: April 7, 2020

DocuSigned by:
Debra Nye-Perkins
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DEBRA D. NYE-PERKINS

Administrative Law Judge

Office of Administrative Hearings