

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:

**STEPHEN O. SANTIAGO, AND PLEASANT VALLEY STATE
PRISON, CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION, Respondents**

Agency Case No. 2020-0140

OAH No. 2020070747

PROPOSED DECISION

Dena Coggins, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on February 18, 2021, by video conference from Sacramento, California.

Dustin Ingraham, Staff Attorney, represented California Public Employees' Retirement System (CalPERS).

Respondent Stephen Santiago (respondent) was self-represented.

No one appeared for or on behalf of respondent Pleasant Valley State Prison, California Department of Corrections and Rehabilitation (CDCR), its default was

entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to respondent CDCR only.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on February 18, 2021.

BACKGROUND AND ISSUE

Respondent was employed as a Correctional Officer for CDCR at Pleasant Valley State Prison. On March 21, 2014, respondent applied for industrial disability retirement, on the basis of an orthopedic (back) condition. Respondent's application was approved on September 17, 2014, and he retired for disability thereafter. Because respondent was under the minimum age for voluntary service retirement, pursuant to Government Code section 21192, CalPERS reviewed medical reports concerning respondent's orthopedic (back) condition and determined that respondent was no longer substantially incapacitated from performing the duties of a Correctional Officer with CDCR. Respondent appealed from CalPERS' determination.

The issue for Board determination is whether CalPERS established that respondent is no longer substantially incapacitated from performing the usual duties of a Correctional Officer on the basis of his orthopedic (back) condition.

FACTUAL FINDINGS

Prior Employment and Disability Retirement Election Application

1. Respondent worked as a Correctional Officer at CDCR for five years. His last day of work was in January 2012. He is a state safety member by virtue of his employment.

2. On March 21, 2014, respondent applied for industrial disability retirement by submitting a signed Disability Retirement Election Application (application). The specific disabilities he identified on his application were "(Back) Bulges at the T5 T7 levels with radiating pain outwards to my ribs and into my lower back. Additionally[,] I experience pain in my lower back region that can be very debilitating." He stated his disability precludes him from lifting over 40 pounds, forceful pushing or twisting of his body, and an inability to swing a baton. Also, he stated he was to avoid prolonged sitting and standing.

3. On September 17, 2014, CalPERS sent respondent a letter approving his application on the basis of his orthopedic (low back) condition.

Reevaluation of Disabled Status

4. On October 24, 2019, CalPERS sent respondent a letter explaining that his industrial disability retirement benefits were under review to determine if he continued to meet the qualifications to receive industrial disability retirement benefits. On January 9, 2020, CalPERS sent respondent a letter explaining it had completed a reevaluation of respondent's qualifications for industrial disability retirement. Based upon the medical evidence reviewed, CalPERS concluded he was no longer substantially incapacitated from the performance of his job duties as a Correctional

Officer with CDCR. CalPERS informed respondent he was being reinstated to his former position, and he needed to arrange his return to CDCR.

5. Respondent timely appealed CalPERS' decision to reinstate him to his former position. On July 9, 2020, Keith Riddle, Chief of CalPERS's Disability and Survivor Benefits Division, signed the Accusation in his official capacity. The sole issue raised by the Accusation is whether respondent is disabled or substantially incapacitated from performance of the duties of a Correctional Officer based on an orthopedic (back) condition.

Usual Duties of a Correctional Officer

6. CDCR completed a Physical Requirements of Position/Occupational Title form relating to respondent's Correctional Officer position at CDCR that provides the physical requirements of the job. A Correctional Officer must frequently perform the following activities:¹ sitting, standing, crawling, bending, twisting, reaching (below shoulder), pushing and pulling, fine manipulation, simple grasping, repetitive use of hand(s), lifting (zero to 50 pounds), and walking on uneven ground. In addition, a Correctional Officer must occasionally perform the following activities:² running, kneeling, climbing, squatting, reaching (above shoulder), power grasping, and lifting over 51 pounds, among other activities.

¹ Frequently means three to six hours a day.

² Occasionally means up to three hours a day.

7. The essential functions of a Correctional Officer include the following, in part:

- [M]ust be able to swing baton with force to strike an inmate
- Disarm, subdue and apply restraints to an inmate
- Defend self against an inmate armed with a weapon

[¶] . . . [¶]

- Walk occasionally to continuously
- Run occasionally[,] run in an all out effort while responding to alarms or serious incidents[,] distances vary from a few yards up to 400 yards[,] running may take place over varying surfaces including uneven grass[,] dirt areas[,] pavement[,] cement[,] etc.[,] running can include stairs or several flights of stairs maneuvering up or down
- Climb occasionally to frequently . . .
- Crawl and crouch occasionally . . .
- Stand occasionally to continuously . . .
- Sit occasionally to continuously . . .

[¶] . . . [¶]

- Stoop and bend occasionally to frequently . . .
- Lift and carry continuously to frequently . . .

- Continuously wear equipment belt weighing 15 pounds . . .
- Pushing and pulling occasionally to frequently . . .
- Reaching occasionally to continuously . . .

[¶] . . . [¶]

- Press occasionally . . .
- Twisting of the body frequently to continuously . . .

Medical Evidence

CALPERS' EVIDENCE

8. Troy Shinpaugh testified at the hearing. Mr. Shinpaugh has been an investigator at CalPERS for 10 years. His duties include conducting surveillance of CalPERS members who apply for disability retirement benefits. Mr. Shinpaugh's supervisor assigned him to conduct video surveillance of respondent. He reviewed respondent's application for industrial disability retirement and other CalPERS information relating to respondent, and researched respondent on the internet, social media, and respondent's Department of Motor Vehicles records.

9. Mr. Shinpaugh and two others from CalPERS conducted video surveillance of respondent in August 2019 and October 2019. He then compiled the surveillance recordings onto a DVD disc, which was admitted into evidence. On the video, respondent is seen cleaning a car, carrying items in plastic bags from a store to a vehicle, and exercising at a gym.

10. CalPERS referred respondent to Don Williams, M.D., for an Independent Medical Examination (IME) to determine whether he was still substantially incapacitated for the performance of his usual duties as a Correctional Officer. Dr. Williams is a board-certified orthopedic surgeon. He has been in private practice in orthopedic surgery since 1986. He received a bachelor's degree in engineering science from Trinity University; master's degree in biomedical from Case Western Reserve Graduate School; and a medical degree from Case Western Reserve Medical School in 1977.

11. Dr. Williams performed an IME on respondent on December 7, 2019. He wrote a report documenting his IME, dated December 7, 2019, which was entered into evidence. Dr. Williams testified at the hearing consistent with his report.

12. At the time of the IME, respondent was 37 years old. He complained of shooting pain in the interscapular area, mostly at nighttime, continuous stiffness in the upper back, and discomfort. Respondent complained of pain with lifting a case of soda, and pain when dressing, climbing, vacuuming, cooking, cleaning, doing yard work, washing the car, and driving. He was not taking any medications for the pain, and has not sought medical care for the last four years.

13. Dr. Williams reviewed respondent's medical records and summarized them as follows:

He sustained an injury in September 2011 lifting building supplies and cleaning supplies and felt a pop in his back. Initial medical care was with Dr. Miller. Treatments with Dr. Miller were from 2011 to 2014. . . .

14. Through examination, Dr. Williams found respondent had good motion of his cervical spine. His upper extremities, which included his shoulders, elbows, wrists, and hands, had a full range of motion. He had good strength in his lower extremities, which included his hips, knees, ankles and feet. Dr. Williams examined respondent's lumbar spine, and he was able to do a full squat and walk on his tip toes. He had normal motion in his hips, and good motion of the knee. He could rotate 90 degrees to the right or left with his feet planted showing thoracic spine rotation. However, he could only bend 50 degrees at the waist.

15. As part of respondent's IME, Dr. Williams reviewed the surveillance video of respondent taken on August 9, 2019, August 20, 2019, and October 3, 2019. In the surveillance videos, respondent was power washing cars, which required respondent to bend at the waist, perform a full squat, lean over to his side, frequent bending, and perform wrist and hand activities. In addition, respondent was seen exercising at a gym, which included running on a gliding machine.

16. Based on his IME of respondent, including his physical examination of respondent and review of medical records, essential job functions, and video surveillance, Dr. Williams concluded that respondent was not substantially incapacitated and is able to perform his job duties. Specifically, he wrote in his IME report, in part:

[E]xamination shows good range of motion. Normal reflexes. No muscle weaknesses. No muscle spasms. He had two MRIs of the thoracic spine and they did show improvement on the second one. Neurosurgery did not recommend surgery. Typically with time, the fluid disc

protrusions will shrink and not cause continued pain and problems.....I feel he is not substantially incapacitated.

17. Dr. Williams suggested respondent use proper lifting techniques as a prophylactic restriction.

RESPONDENT SANTIAGO'S EVIDENCE

18. Respondent testified at the hearing. He is 38 years old. He explained the numerous physical activities required of a Correctional Officer. Those activities include physically fighting, cell extractions, tackling others, and running from yard to yard. He was adamant that he cannot perform those activities with his back injury and is afraid he may be assaulted from behind or hesitate when put in a situation requiring him to assist his partner because of his back injury. He also worked long shifts as a Correctional Officer, ranging from 16 to 21 hours, and expressed concern that Dr. Williams had only examined him for 30 minutes and not after one of his long work shifts.

19. Respondent did not deny that he performed the activities shown on the video surveillance, but explained that he exercises to keep his back "strong" and washes cars to financially support himself. Respondent did not seek medical treatment for his back because they "only want to put you on pills." He has learned to live with pain, believing the pain will be present for the remainder of his life.

Discussion

20. Dr. Williams' opinion that respondent is no longer substantially incapacitated for the performance of his usual duties as a Correctional Officer due to his orthopedic (back) condition was uncontroverted and persuasive. Dr. Williams

prepared a detailed IME report that documented a thorough physical examination. His report sufficiently explained the factual bases for his opinions and conclusions. At hearing, Dr. Williams' testimony was consistent with his report.

21. Although respondent testified that he remained in pain daily from his back injury and he questioned Dr. Williams' physical examination, he offered no medical evidence to rebut Dr. Williams' opinions and conclusions.

22. The persuasive medical evidence established that respondent is no longer substantially incapacitated for the performance of his usual job duties as a Correctional Officer due to an orthopedic (back) condition.

LEGAL CONCLUSIONS

1. Any state safety member incapacitated for the performance of duty as a result of an industrial disability must be retired for disability, regardless of age or amount of service. (Gov. Code, § 21151, subd. (a).) "Disability" and "incapacity for performance of duty" means "disability of permanent or extended 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." (Gov. Code, § 20026.)

2. Government Code section 21156, 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

3. Once respondent retired from industrial disability, CalPERS' Board of Administration had authority to require him to undergo medical evaluation at any time prior to him reaching the minimum age for voluntary retirement for service. (Gov. Code, § 21192.) "If the determination pursuant to Section 21192 is that [he] is not so incapacitated for duty in the position held when retired for disability . . . and his . . . employer offers to reinstate [him], . . . his . . . disability retirement allowance shall be canceled immediately" (Gov. Code, § 21193.) The minimum age for voluntary retirement for service applicable to respondent is 50, and he has not reached that age. (Gov. Code, § 21060, subd. (a).)

4. The analysis of whether a recipient of an industrial disability retirement is "still incapacitated" for the performance of his usual job duties under Government Code section 21192 "is limited to determining whether the conditions for which disability retirement was granted continue to exist." (*CA Department of Justice v. Board of Administration of CA Public Employees' Retirement System* (2015) 242 Cal.App.4th 133, 141 [the analysis of "still incapacitated" is limited to consideration of the disability for which disability retirement was originally granted, and any substantial incapacity due to a different disability is irrelevant].) And the outcome of that analysis must be based on competent medical evidence. (Gov. Code, § 21192.)

5. The courts have interpreted the phrase "incapacitated for the performance of duty" to mean "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) It is not necessary that the person be able to perform any and all duties since public policy supports employment and utilization of the disabled. (*Schrier*

v. San Mateo County Employees' Retirement Association (1983) 142 Cal.App.3d 957, 961.) Instead, the frequency with which the duties he cannot perform are usually performed as well as the general composition of duties he can perform must be considered. (*Mansperger v. Public Employees' Retirement System, supra*, 6 Cal.App.3d at pp. 876-877 [while applicant was unable to lift or carry heavy objects due to his disability, "the necessity that a fish and game warden carry a heavy object alone is a remote occurrence".])

6. Discomfort, which may make it difficult for one to perform his duties, is insufficient to establish permanent incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207 [mere discomfort which makes it difficult to perform one's job does not constitute a permanent incapacity]; citing, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury or fear of future injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability retirement. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863-864.)

7. The persuasive medical evidence established respondent is no longer substantially incapacitated for the performance of his usual job duties as a Correctional Officer due to an orthopedic (back) condition. Therefore, his appeal of CalPERS' determination that he is no longer substantially incapacitated for the performance of his usual job duties as a Correctional Officer should be denied.

ORDER

Respondent Stephen O. Santiago's appeal from CalPERS' determination that he is no longer substantially incapacitated from the performance of his usual job duties as

Correctional Officer with respondent CDCR due to an orthopedic (back) condition is DENIED.

DATE: March 17, 2021


Dena Coggins (Mar 17, 2021 10:54 PDT)

DENA COGGINS

Administrative Law Judge

Office of Administrative Hearings