

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:

PAUL A. NEGRON

and

**CALIFORNIA HEALTH CARE FACILITY, STOCKTON,
CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION,**

Respondents.

Agency Case No. 2020-0788

OAH No. 2020110243

PROPOSED DECISION

Administrative Law Judge Holly M. Baldwin, State of California, Office of Administrative Hearings, heard this matter on March 2, 2021, by videoconference and telephone.

Senior Attorney Austa Wakily represented the California Public Employees' Retirement System.

Respondent Paul A. Negrón represented himself. There was no appearance on behalf of respondent California Health Care Facility, Stockton, California Department of Corrections and Rehabilitation.

The record closed and the matter was submitted for decision on March 2, 2021.

FACTUAL FINDINGS

Introduction and Procedural History

1. Respondent Paul A. Negrón (respondent) was employed as a correctional officer at California Health Care Facility, Stockton, for the California Department of Corrections and Rehabilitation. By virtue of his employment, respondent is a state safety member of the California Public Employees' Retirement System (CalPERS) subject to Government Code section 21151.

2. On September 23, 2019, respondent signed an application for industrial disability retirement, stating that his application was based on injuries to his right shoulder and left knee. Respondent stated that his last date on the payroll was October 12, 2017. Respondent was 35 years old at the time of his application.

3. Respondent was evaluated by orthopedic surgeon Don T. Williams, M.D., at the request of CalPERS. As discussed in more detail below, Dr. Williams concluded that respondent is not substantially incapacitated from performing his usual duties as a correctional officer.

4. On June 17, 2020, CalPERS sent a letter to respondent, denying his application for industrial disability retirement. Respondent appealed the denial on June 25, 2020. A statement of issues was issued by CalPERS on October 20, 2020. This hearing followed.

Job Duties

5. In his position as a correctional officer, respondent was responsible for safety and security of the institution, including running to alarms, responding to violent incidents, and performing security checks and searches in designated areas. His job duties included frequent walking, standing, sitting, and climbing stairs; occasional running; frequent light carrying and occasional heavy lifting.

Orthopedic Conditions

6. Respondent injured his right shoulder at work on April 29, 2015. Respondent was removing handcuffs from an inmate through the feeding port on a cell door, when the inmate jerked away, pulling respondent's right arm.

7. Respondent suffered a partially torn biceps tendon. He had surgery on his right shoulder in October 2015. He had physical therapy after his surgery.

8. Respondent was off work for a year due to this injury and then returned to full duty.

9. Respondent injured his left knee on January 24, 2017, during a takedown of an inmate who was assaulting a psychologist.

10. Respondent received medical treatment for his left knee, including physical therapy and a steroid injection.

11. The record did not establish the last day that respondent worked as a correctional officer.

Investigation by CalPERS

12. Pravneel Sharma is an investigator employed by CalPERS, who performed an investigation in connection with respondent's disability retirement application. Sharma reviewed the application and related documents, and conducted online research including searching the CalPERS and Department of Motor Vehicles databases and social media. Sharma also conducted surveillance of applicant on five days in November and December 2019. Sharma wrote an investigative report summarizing his surveillance, and testified at hearing. Discs containing portions of the video surveillance were also admitted into evidence.

13. Sharma conducted surveillance of respondent at locations in Lodi and Seaside. Sharma did not enter respondent's home or any gated or non-public area. Sharma filmed respondent while respondent was in public view in areas such as sidewalks, parking lots, business establishments, and in the open garage and front area outside of respondent's residence in Lodi.

Medical Evaluation and Opinion of Dr. Williams

14. Dr. Williams performed an independent medical evaluation of respondent in connection with the disability retirement application. Dr. Williams is board-certified in orthopedic surgery. He wrote a report on May 15, 2020, after examining respondent and reviewing respondent's medical records, job description, and Sharma's investigative report and surveillance videos of respondent. Dr. Williams testified credibly at hearing, providing opinions consistent with his written report.

Respondent reported to Dr. Williams at the time of the evaluation that his current symptoms were as follows. Respondent's left knee bothered him on occasion, and he had pain with walking and problems walking a couple of blocks. Respondent had pain in the right shoulder, with pain down to the right elbow and wrist; this was a constant pain present with activities. Respondent stated he had shoulder pain with reaching, rotations, and lifting.

Dr. Williams performed a physical examination. Respondent is left-handed. Respondent's right shoulder had a range of motion within normal limits. He also had good range of motion in his right elbow, with some discomfort in the medial cubital tunnel region. The examination of respondent's right wrist was normal and he could make a fist. Respondent was able to walk on his heels or tip-toes, with complaints of pain. The examination of his lumbar spine and reflexes was normal. Respondent was able to do a full squat, with some pain in the medial left knee. Respondent reported that sometimes he hears "a graveling sound" with squatting. Respondent also had slight patellofemoral tenderness.

The report of Dr. Williams included notes about his review of medical records, including prior evaluations (those medical records are not in evidence):

- As of June 9, 2017, Aboaba Afilaka, M.D., found respondent's left knee had reached permanent and stationary status, and diagnosed mild chondromalacia (damage to cartilage under the kneecap). Dr. Afilaka found respondent could return to work but could not run due to pain.
- On July 12, 2018, Manijeh Ryan, M.D., wrote a qualified medical evaluation report. Dr. Ryan found respondent's left knee had low-grade chondrosis, a popliteal cyst, and patellofemoral dysfunction. Dr. Ryan estimated

permanent and stationary work restrictions of no running, no squatting, and no kneeling after walking 30 minutes.

- On July 19, 2019, James M. Fait, M.D., wrote an independent medical evaluation report. Respondent's left knee motion was slightly diminished, with a trace of patellofemoral crepitus. Dr. Fait diagnosed left knee chondromalacia and a popliteal cyst in the left knee. He found respondent had full range of motion in his right shoulder. Dr. Fait found respondent's left knee precluded constant standing, walking, squatting, and forceful use. He found respondent would be unable to defend himself, run to alarms, or squat, and was substantially incapacitated.

At hearing, Dr. Williams explained that he reviewed three MRI scans of respondent's left knee. The MRI from December 7, 2017 showed normal findings for the meniscus, anterior and posterior cruciate ligaments, and collateral ligaments. There was questionable chondrosis of the trochlear notch, but no high grade chondrosis. Dr. Williams found the second and third MRIs showed slight fissuring of the patella and trochlea, but were otherwise normal.

Dr. Williams diagnosed a left knee sprain and popliteal cyst, and right shoulder impingement post biceps repair.

Dr. Williams reviewed video footage provided by CalPERS. In the videos, respondent walked smoothly without limping. Dr. Williams also observed:

- Videos taken on November 18, 2019, showed respondent playing pool at a billiards hall, bending over frequently. Dr. Williams noted in his report: "During this playing pool, he is seen using both arms and with the right arm, he is seen reaching forward such that his arm is at 160 degrees and to 180

degrees flexion, shoots the series of pool shots and is able to move his arm freely, touch his back, reach across the table. At certain points, his arm will go into full extension supported on the table as he shoots the pool.”

- Videos taken on November 22, 2019, showed respondent lifting and carrying items in his garage, and loading boxes and items into a U-Haul van and his Grand Cherokee. Respondent was able to step up on a stepladder while moving objects in his garage. He was able to get in and out of the vehicles without difficulty.

Dr. Williams disagreed with restrictions that were imposed by other doctors. He found respondent needed no restrictions, and could return to his usual work duties.

Dr. Williams opined that respondent is not substantially incapacitated for the performance of his usual job duties as a correctional officer due to either his left knee or right shoulder conditions. Dr. Williams found that the objective evidence, including his examination, the mostly normal imaging studies, and the video evidence, did not correlate with respondent’s complaints and statement that he cannot do his regular job duties including running. Dr. Williams opined that while respondent might experience some pain with activities such as running, climbing stairs, or engaging with inmates, he was able to do the job without restrictions.

Respondent’s Testimony

15. Respondent did not present any medical evidence to refute the opinions of Dr. Williams. Respondent reiterated that prior doctors had given him permanent work restrictions. Those restrictions were not accommodated by his employer and so he applied for industrial disability retirement.

16. Respondent stated that the videos had been edited to omit times when he may have been sitting or resting. Respondent also objected to the admission of the surveillance videos, contending that they were illegally obtained and that Sharma was trespassing outside his residence in Seaside.¹ That contention was not supported by the evidence, and respondent's objection was overruled at hearing.

LEGAL CONCLUSIONS

1. Pursuant to Government Code section 21151, subdivision (a), a state safety member who becomes incapacitated for the performance of his usual duties as the result of an industrial disability shall be retired for disability. The burden of proof is on the employee to establish that he is incapacitated, by a preponderance of the evidence. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691; *Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.2d 234, 238; *Lindsay v. County of San Diego Retirement Board* (1964) 231 Cal.App.2d 156, 160-162; Evid. Code, § 115.)

2. The terms "disability" and "incapacitated for the performance of duty" mean "disability of permanent or extended and uncertain duration . . . on the basis of competent medical opinion." (Gov. Code, § 20026.) An applicant is "incapacitated for performance of duty" if he is substantially unable to perform the usual duties of his

¹ It is noted that none of the video footage admitted into evidence was filmed outside respondent's Seaside residence. The videos show respondent in public locations at a pool hall in Stockton, a U-Haul facility in Lodi, outside his Lodi residence, and in and around several businesses in a Seaside retail center.

position. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876; accord *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.) Mere discomfort or difficulty is not sufficient to meet the standard of substantial incapacity for performance of duty. (*Hosford, supra*, 77 Cal.App.3d at p. 862.)

3. Dr. Williams testified credibly as to his medical opinion that respondent was not substantially incapacitated for performance of duty, and as to the bases for his opinion. (Factual Finding 14.) Respondent did not present any medical evidence in support of his application or in opposition to the opinions of Dr. Williams. (Factual Finding 15.) Respondent has not met his burden of establishing that he was substantially incapacitated for the performance of his usual duties as a correctional officer. Accordingly, his application must be denied.

ORDER

The application of Paul A. Negron for industrial disability retirement is denied.

DATE: 03/26/2021



HOLLY M. BALDWIN

Administrative Law Judge

Office of Administrative Hearings