

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Reinstatement from

Industrial Disability Retirement of:

ANDRES E. FLOREZ, Respondent.

Agency Case No. 2021-0226

OAH No. 2021050917

PROPOSED DECISION

Administrative Law Judge (ALJ) Chantal M. Sampogna, Office of Administrative Hearings, State of California, heard this matter by videoconference on October 20, 2021.

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

Andres E. Florez (respondent Florez) appeared by videoconference and represented himself.

Roxanne Gonzalez, Personnel Manager of the California State Prison, Los Angeles County, California Department of Corrections and Rehabilitation (respondent CDCR), appeared by telephone and represented respondent CDCR. During testimony of the first witness, Ms. Gonzalez notified the ALJ she was voluntarily leaving the

hearing because respondent CDCR did not have evidence or argument to submit for consideration.

Testimony and documents were received in evidence. The record was closed, and the matter was submitted for decision on October 20, 2021.

STATEMENT OF THE CASE

Effective July 25, 2018, CalPERS approved respondent Florez's application for industrial disability retirement (IDR). At the time of the IDR approval respondent Florez was under the minimum age for voluntary service retirement applicable to his classification as a correctional officer. On August 4, 2020, CalPERS directed respondent Florez to complete a medical reevaluation. On January 21, 2021, CalPERS notified respondent Florez and respondent CDCR (collectively respondents) it had determined respondent Florez was no longer disabled or incapacitated from performance of his duties as a correctional officer. Respondent Florez timely appealed.

ISSUE

Whether respondent Florez is disabled or substantially incapacitated from performance of his duties as a correctional officer.

SUMMARY

Respondent Florez testified he continues to experience knee pain when, for instance, he stands, climbs stairs, squats, or runs, and which prevents him from performing the duties of a correctional officer. CalPERS presented evidence of the

physical requirements and essential functions of a correctional officer employed by respondent CDCR, as well as the reports prepared by and testimony of John D. Kaufman, M.D, the doctor assigned to conduct a reevaluation of respondent Florez.

Dr. Kaufman's medical assessment of respondent Florez revealed no objective indicators, such as muscle atrophy or swelling, that corroborate respondent Florez's testimony or tend to establish respondent Florez continues to be disabled. CalPERS established by a preponderance of the evidence respondent Florez is no longer disabled or substantially incapacitated from performance of his duties as a correctional officer based on an orthopedic (left knee) condition. Respondent Florez's appeal is denied.

FACTUAL FINDINGS

Jurisdiction

1. Respondent Florez was employed by CDCR as a correctional officer between January 2007 and July 2018. By virtue of his employment, respondent Florez is a state safety member of CalPERS.
2. On May 25, 2018, respondent Florez submitted an application for IDR. CalPERS approved the application effective July 25, 2018 based on an orthopedic (left knee) condition. At the time of the approval, respondent Florez was 37 years old.
3. On January 21, 2021, CalPERS notified respondents that respondent Florez is no longer disabled or incapacitated from performance of his duties as a correctional officer. Respondent Florez timely appealed.

Respondent Florez's Eligibility for IDR

4. On December 6, 2015, in the course of his duties as a correctional officer, respondent Florez suffered a left-knee injury while running at the California State Prison Los Angeles County in response to an alarm. While slowing down, respondent Florez felt his left knee pop, and then felt immediate pain in the left knee and had difficulty walking. Other staff members assisted respondent Florez, provided him a wheelchair, and transported respondent Florez to the infirmary for evaluation.

5. Respondent Florez was later evaluated at Urgent Care and placed off work. Physical therapy and pain medication did not help respondent Florez's pain. Domenick Sisto, M.D, conducted an MRI and found one tear in respondent Florez's knee. On November 21, 2016, Dr. Sisto performed surgery on respondent Florez's left knee, during which he found a second tear. Dr. Sisto repaired respondent Florez's left knee. However, post-operation respondent Florez continued to experience numerous difficulties which prevented him from returning to work.

6. Effective July 25, 2018, CalPERS approved respondent Florez's IDR application having found he was substantially incapacitated from the performance of his usual duties as a correctional officer with respondent CDCR based upon his orthopedic (left knee) condition. The notice informed respondent Florez, "If you are under the minimum age for service retirement, you may be reexamined periodically to verify your continued eligibility for disability." (Exh. 4, p. PERS034.)

Physical Requirements and Essential Function of a Correctional Officer

7. Respondent Florez began working for CDCR as a correctional officer on January 2, 2007 and worked at least 40 hours per week. Respondent Florez testified as

to the job duties he performed as a correctional officer. His job duties included responding to running alarms, searching inmates and cells, climbing up and down stairs, restraining inmates, escorting inmates to various areas of the facility, transporting inmates to medical appointments, opening and closing heavy cell doors and gates, and lifting inmates in case of emergency. These duties required him to sit, stand, walk, push, pull, bend, twist, turn, grip, grasp, kneel, climb, squat, stoop, reach at or above shoulder level and lift up to 100 pounds. During the course of his duties, respondent Florez was required to wear a vest and utility belt weighing 30 to 40 pounds and special work boots, and occasionally riot gear.

8. CalPERS submitted the CalPERS "Physical Requirements of Position/Occupational Title" provides the physical requirements of a correctional officer. (Exh. 18.) The requirements include constantly standing for over six hours, bending at the neck and waist, using fine manipulation and grasping, and lifting and carrying zero to 25 pounds. Between over three to six hours a correctional officer frequently sits, walks, climbs up to 150 steps, and lifts or carries 26 to 50 pounds. Occasionally over three hours a correctional officer runs, crawls, kneels, squats, or carries or lifts up to 51 to over 100 pounds.

9. CalPERS also submitted respondent CDCR's "Correctional Officer Essential Functions" (Exh. 19) which provides that a correctional officer's essential functions include the following:

- Performs peace officer duties during adverse, stressful, or unpleasant situations; prevents escapes and injury by inmates to themselves, employees, and to property; incurs possible exposure to injury or death of inmates or staff by assault, inmates by suicide, or throwing bodily fluids.

- Standing (occasionally to continuously): stands watch on an armed post; stands continuously during an emergency situation depending on the assignment.
- Walking (occasionally to continuously): performs foot patrols (institutions constitute approximately 380 acres).
- Running (occasionally): in an all-out effort, while responding to alarms or serious incidents, distances varying from a few yards to 500 yards; running may take place over varying surfaces, including uneven grass, pavement, or cement, up or down stairs, for several flights of stairs.
- Climbing (occasionally to frequently): ascends, descends, a series of steps and stairs, and several tiers of stairs or ladders, and climbs onto bunks beds while involved in cell searches, during a pursuit on and off rooftops, and over fences.
- Lifting and carrying: (frequently) light (20 pound maximum) to medium (50 pound maximum) range throughout the workday; (occasionally) very heavy lifting range (over 125 pounds); physically restrain, or wrestle an inmate to the floor, lift and carry an inmate out of a cell, and perform lifting or carrying activities while working in very cramped space.
- Stooping, crawling, and crouching (occasionally to frequently): inspects under an inmate's bed or restroom facility while involved in cell searches or inspections; while physically searching inmates from head to toe; crouches while firing a weapon.

Respondent Florez's Re-evaluation

10. On August 4, 2020, CalPERS notified respondent Florez his IDR benefits were under review to determine if respondent Florez continued to meet the qualifications to receive IDR pursuant to Government Code¹ section 21192.

11. On September 3, 2020, respondent Florez completed the Retiree Questionnaire for CalPERS Disability Re-evaluation (questionnaire). The questionnaire asked whether, since his retirement, his condition had improved. Respondent Florez answered "no," and wrote, "Chronic pain, stiffness, unable to fully extend." (Exh. 6, p. PERS037.) The questionnaire also asked whether respondent Florez felt he could return to his prior position. Respondent Florez answered "no," and wrote "Cannot perform essential functions, running, stairs, etc." (*Ibid.*)

12. On November 3, 2020, CalPERS sent a Notice of Reevaluation Examination Appointment to Dr. Kaufman, notifying him he was scheduled to perform a reevaluation of respondent Florez on November 19, 2020, at 1:00 p.m. The two primary questions CalPERS directed Dr. Kaufman to answer were 1) does respondent Florez have an actual and present orthopedic (left knee) impairment that arises to the level of substantial incapacity to perform his usual job duties; and 2) considering respondent Florez's subjective complaints and the objective findings (or lack thereof) on exam, what findings lead you to conclude respondent Florez is or is not substantially incapacitated?

¹ Undesignated statutory references are to the Government Code.

13. A. On November 19, 2020, Dr. Kaufman conducted a reevaluation examination of respondent Florez, and documented his findings and conclusions in his Initial Independent Medical Evaluation (IIME). In conducting the IIME, Dr. Kaufman asked questions of respondent Florez regarding his work and medical and social history; reviewed respondent Florez's job duties and essential functions; measured and reviewed current x-rays of respondent Florez's lower extremities; and conducted a physical examination which included an assessment of respondent Florez's lower extremity range of motion and stability of his lower extremity ligaments.

B. Dr. Kaufman documented respondent Florez's account of his pain level and mobility. At the time of the reevaluation, respondent Florez was 40 years old. He felt persistent pain in his left knee, which radiated to his left shin, with a pain rating scale of 6. When respondent Florez moved his left knee, he experienced a popping and grinding sensation, and his left knee generally felt weak and unstable, occasionally giving way. Respondent Florez denied swelling of his left knee and did not wear a knee brace. Prolonged walking aggravated his pain, but the pain was alleviated by sitting and resting. Respondent Florez did not report taking medication to treat his pain. Finally, respondent Florez had difficulty with activities of daily living including grocery shopping, kneeling, climbing stairs and squatting, and he described himself as unable to run or walk at a fast pace.

C. Dr. Kaufman also conducted a physical examination of respondent Florez's left knee. Respondent Florez had slight tenderness along the medial and lateral joint lines and full range of motion. Respondent Florez's medial collateral ligament was stable and without stress pain; his anterior cruciate ligament was stable; his posterior cruciate ligament was stable; and respondent Florez had no patellofemoral crepitus, or air seeping into the knee joint which can cause a popping

or crunching sound. Dr. Kaufman measured respondent Florez's lower extremities and both right and left had the same measurements: respondent Florez's thighs, three-inches above the superior pole of the patella, measured 17-inches, respondent Florez's leg circumferences measured 14 and three-quarters inches, and respondent Florez's knee at mid-patella measured 15 and three-quarters inches. Dr. Kaufman x-rayed respondent Florez's knees and found no abnormalities in either knee.

14. Based on Dr. Kaufman's reevaluation of respondent Florez, he concluded his IIME by answering 1) he did not find any substantial impairment with respondent Florez regarding his left knee that would impair his ability to perform a correctional officer's usual job duties, and 2) there were no objective findings to substantiate respondent Florez's subjective complaints, i.e., there was no atrophy in the left lower extremity compared to the right on circumferential measurements and there was no swelling or deformity of the left knee. Further, in response to the question, "Is the retiree cooperating with the examination and putting forth their best effort, or do you feel there is exaggeration of complaints?" Dr. Kaufman concluded "During [respondent Florez's] exam there were numerous grunts and groans when asked to perform certain range of motion exercises with which in my opinion were compatible with an exaggeration of complaints." (Exh. 11, PERS060.)

15. On December 8 and 22, 2020 and January 12, 2021, CalPERS requested Dr. Kaufman address points of clarification and review additional information concerning respondent Florez's left knee. Most notably of the supplemental documents he reviewed, Dr. Kaufman reviewed Dr. Sisto's August 28, 2020, office visit note and reevaluation results of respondent Florez. Dr. Sisto documented respondent Florez felt something growing around his knee, had developed gout, and walks with a limp and has tenderness medially. Dr. Sisto diagnosed respondent Florez with a medial

meniscus tear and tendinitis. Dr. Sisto concluded respondent Florez was incapacitated and restricted from kneeling, squatting, climbing, or heavy lifting. Dr. Sisto did not testify at hearing.

16. As Dr. Kaufman provided in his January 4 and 13, 2021, supplementary reports, and as he explained in his testimony at hearing, the additional information did not change his conclusion that respondent Florez is not disabled or substantially incapacitated from performance of his duties as a correctional officer. Dr. Kaufman maintained his conclusion because the objective evidence he obtained through physical examination of respondent Florez demonstrated respondent Florez's left knee had full range of motion and no swelling or muscle atrophy. Were respondent Florez experiencing significant pain or discomfort in his left knee, examination of his left knee would have revealed at least one-half-inch of atrophy in his left thigh or lower leg. However, Dr. Kaufman's physical examination of respondent Florez and review of respondent Florez's x-rays did not indicate atrophy, swelling, or limited range of motion.

17. On January 21, 2021, CalPERS notified respondent Florez it had completed a reevaluation of his qualifications for IDR, which included a review of reports prepared by Drs. Sisto and Kaufman. Based on the reports, CalPERS determined respondent Florez was no longer substantially incapacitated from the performance of his job duties as a correctional officer and that he will be reinstated to his former position pursuant to section 21193.

Respondent Florez's Evidence

18. Respondent Florez testified at hearing. He believes he is unable to perform the essential functions of his job duties, such as running, standing for long

periods of time, squatting, pulling, and lifting heavy objects. Respondent Florez also believes Dr. Kaufman's evaluation was unfair because Dr. Kaufman asked respondent Florez only a few questions, but none about respondent Florez's knee, because he required respondent Florez to extend his left leg which caused respondent Florez pain, and because Dr. Kaufman based his conclusion on measurements of respondent Florez's legs. Respondent Florez takes ibuprofen to treat his knee pain but is not certain he reported this to Dr. Kaufman.

Weight of the Evidence

19. Though respondent Florez's testimony that he experiences pain in his left knee is credited, respondent Florez's testimony does not overcome CalPERS evidence that respondent Florez is no longer disabled or substantially incapacitated from performing the duties of a correctional officer based on an orthopedic (left knee) condition.

20. Dr. Kaufman conducted a comprehensive assessment of respondent Florez, including a social and medical history, a review of job duties and essential functions, and a physical examination which demonstrated no level of left knee disability. Further, Dr. Kaufman's evaluation directly disproves some of respondent Florez's assertions, e.g., respondent Florez's left knee demonstrated full range of motion and all aspects of his left knee were stable upon examination, and, in contrast to respondent Florez's account of the evaluation, Dr. Kaufman's IIME report establishes he asked respondent Florez multiple questions and conducted a thorough evaluation of respondent Florez's left knee.

21. Finally, Dr. Kaufman's IIME report and testimony are given greater weight than Dr. Sisto's August 2020 notes and evaluation because Dr. Sisto was not subject to

cross-examination and Dr. Sisto did not address the questions CalPERS presented to Dr. Kaufman, i.e., whether respondent Florez is disabled or substantially incapacitated from performing the job duties of a correctional officer.

LEGAL CONCLUSIONS

Authority

1. The purpose of the Public Employees' Retirement Law (CalPERS retirement system or system) (§§ 20000 et seq.) is to effect economy and efficiency in the public service by providing employees who retire or who become incapacitated a retirement system consisting of retirement compensation and death benefits while replacing the retired members with more capable employees, without hardship or prejudice. (§ 20001.)

2. The management and control of the CalPERS retirement system is vested in the in the Board and Administration (Board) of the system. (§ 20120.)

Burden and Standard of Proof

3. CalPERS has the burden of proving by a preponderance of the evidence that respondent Florez is no longer substantially incapacitated for the performance of his usual job duties as a correctional officer and should therefore be reinstated in his former position. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (January 22, 2000) CalPERS Precedential Dec. 99-03, Legal Conclusion 3.)

Industrial Disability Retirement

4. As a basis of retirement, "disability" and "incapacity for performance of duty," mean disability of permanent or extended duration, expected to last at least 12 consecutive months, or will result in death, as determined by the Board. (§ 20026.)

5. A CalPERS member is retired for service upon his or her written application to the Board if he or she had attained 50 years of age and is credited with five years of state service, except as provided in sections 7522.20, 21061, 21062, and 21074 (exceptions not relevant to this matter). (§ 21060.)

6. Government Code, section 21151, subdivision (a), provides:

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.

7. 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. (§ 21156, subd. (a)(1).)

Reinstatement

8. An individual who has been retired under the CalPERS retirement system for industrial disability must be reinstated from retirement upon his or her application

to the Board if, upon reinstatement, he or she will be employed by the state or any contracting agency as a state or local miscellaneous member. (§ 21191.)

9. The Board 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. The examination must be made by a physician or surgeon, appointed by the Board. Upon the basis of the examination, the Board must determine whether the recipient of a disability retirement allowance is still incapacitated, physically or mentally, for duty in the state 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. (§ 21192.)

“[W]hile termination of an unwilling employee for cause results in a complete severance of the employer-employee relationship [citation], disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. Until an employee on disability retirement reaches the age of voluntary retirement, an employer may require the employee to undergo a medical examination to determine whether the disability continues.”

(Haywood v. American River Fire Protection Dist. (1998) 67 Cal.App.4th 1292, 1305.)

10. If the Board determines pursuant to section 21192 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 and his or her employer offers to reinstate that employee, he or she shall be reinstated. (§ 21193.)

Analysis

11. CalPERS established by a preponderance of the evidence that respondent Florez is no longer substantially incapacitated from the performance of his usual duties as a correctional officer with respondent CDCR due to an orthopedic (left knee) condition. (Factual Findings 4 – 21.) Respondent Florez’s subjective evidence of his continued knee pain and the case notes and evaluation from Dr. Sisto did not overcome CalPERS objective evidence that respondent Florez’s left knee does not exhibit any signs of significant pain or indicators of continuing disability. Respondent Florez’s appeal is denied.

ORDER

Respondent Andres E. Florez’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 (left knee) condition is denied.

DATE: 11/17/2021


Chantal Sampogna (Nov 17, 2021 15:22 PST)

CHANTAL M. SAMPOGNA
Administrative Law Judge
Office of Administrative Hearings