

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:

**CRAIG M. CULP and CALIFORNIA HIGHWAY PATROL,
Respondents**

Agency Case No. 2021-0428

OAH No. 2021080366

PROPOSED DECISION

Marcie Larson, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on May 12, 2022, from Sacramento, California.

Austa Wakily, Attorney, appeared on behalf of the California Public Employees' Retirement System (CalPERS).

Respondent Craig Culp appeared at the hearing and represented himself.

There was no appearance by or on behalf the California Highway Patrol (CHP). The CHP was duly served with a Notice of Hearing. The matter proceeded as a default

against the CHP pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on May 12, 2022.

BACKGROUND AND ISSUE

Respondent was employed as a Public Safety Dispatcher II (Dispatcher) for the CHP. On April 6, 2017, respondent applied for industrial disability retirement, on the basis of his left elbow, left wrist, and neck conditions (orthopedic conditions). On April 17, 2017, CHP also submitted an application for industrial disability retirement on behalf of respondent. Respondent's application was approved. He was 37 years old.

Because respondent was under the minimum age for voluntary service retirement, pursuant to Government Code section 21192, on March 2, 2021, CalPERS sent respondent to an Independent Medical Evaluation (IME). CalPERS reviewed medical reports concerning respondent's orthopedic conditions and determined that respondent was no longer substantially incapacitated from performing the duties of a Dispatcher with CHP. Respondent appealed from CalPERS's determination.

The issue for Board determination is whether CalPERS established that respondent is no longer disabled or substantially incapacitated from performing the usual duties of a Dispatcher on the basis of his orthopedic conditions.

FACTUAL FINDINGS

1. On April 6, 2017, respondent submitted an application for industrial disability retirement (application) with CalPERS. At the time, respondent was employed as a Dispatcher with the CHP. By virtue of his employment, respondent is a state safety member of CalPERS.

2. In filing the application, respondent claimed that his specific disability was his left arm, neck, carpal tunnel syndrome, cubital tunnel syndrome, and tendonitis. Respondent wrote that his disability occurred due to "repetitive use." Respondent also wrote that his limitations and preclusions included "no use of [his] left arm" and that his disability prevented him from performing his job duties.

3. On April 17, 2017, CHP submitted an application for industrial disability retirement on behalf of respondent, with CalPERS. CHP claimed that respondent's specific disability was his "left wrist, neck, left carpal tunnel syndrome, hypertension, left elbow, cervical spine, left upper extremity pain and weakness."

4. On September 19, 2017, CalPERS notified respondent that his application for industrial disability retirement was approved, effective immediately. The letter stated that respondent was found to be substantially incapacitated from the performance of his usual duties as a Dispatcher for CHP, based upon his orthopedic conditions. CalPERS advised respondent that he may be reexamined periodically to determine his qualification for reinstatement if he was under the minimum age for service retirement. Respondent was 37 years old at the time of his retirement. He was under the minimum age for service retirement.

5. On December 30, 2020, CalPERS notified respondent that it would reexamine his disability retirement. The reexamination included an IME performed by Robert Henrichsen, M.D., on March 2, 2021.

6. On April 19, 2021, CalPERS notified respondent that based upon a review of medical evidence and reports, CalPERS determined that respondent was no longer substantially incapacitated from performing the job duties of a Dispatcher for the CHP, based on his orthopedic conditions. CalPERS informed respondent that he would be reinstated to his former position and advised him of his appeal rights. Respondent timely filed an appeal and requested a hearing.

7. On July 21, 2021, Keith Riddle, Chief, Disability and Survivor Benefits Division, for CalPERS, signed and filed the Accusation. Thereafter, the matter was set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Respondent's Employment History and Work Injuries

8. In 2008, respondent began working as a Dispatcher for the CHP. Overtime, the long work hours, and repetitive movements required as part of his job, including typing, and holding a telephone receiver to his ear, began causing him pain and discomfort. Respondent eventually sought treatment and filed a Workers Compensation claim for his injuries.

Duties of a Dispatcher

9. As set forth in the Duty Statement respondent signed on May 17, 2017, a Dispatcher must be able to perform the following essential and non-essential functions:

40% Operates voice radio in accordance with rules and regulations promulgated by FCC [Federal Communications Commission] and the California Highway Patrol Relays All Points Bulletins to all mobile units. Receives and documents verbal messages/requests from field units and takes appropriate action to fulfill those requests. Coordinates pursuits and high risk incidents with allied agencies. Documents all essential travel into the Computer Aided Dispatch (CAD) or on radio cards and takes appropriate action.

40% Answers incoming telephone calls and takes appropriate action on calls from the following:

- a. 911 cellular/landline transfer telephone calls
- b. Allied agency calls
- c. Call Box calls
- d. Media calls
- e. Calls from the public
- f. Calls from CHP personnel

10% Documents pertinent information accurately and quickly into the CAD system or Complaint Dispatch Cards as calls are received or made. Make entries and updates in various law enforcement computer systems.

5% When assigned may assume lead responsibility for an entire shift as the Public Safety Dispatcher in Charge (PSDIC) in the absence of the PSDIC. An essential function of the classification is overtime, the procedure for overtime assignment is listed in the Sacramento Communication Center Standard Operating Procedure manual.

Non-Essential Functions

5% Other job related duties as assigned.

10. On March 20, 2017, respondent and a Public Safety Dispatcher II Supervisor for CHP signed a "Physical Requirements of Position/Occupational Title" form (Physical Requirements form). The Physical Requirements form was submitted to CalPERS. According to the Physical Requirements form, when working as a Dispatcher, respondent: (1) constantly (over six hours) sat, bent and twisted his neck, engaged in fine manipulation, simple grasped, repetitively used his hands, used a keyboard and mouse, and was exposed to excessive noise; (2) frequently (three to six hours a day) bent and twisted at his waist, reached above and below the shoulders, pushed and pulled and operative foot controls or repetitive moment; (3) occasionally (up to three hours), stood, walked, and carried up to 10 pounds; and (4) never ran, crawled, kneeled, squatted, power grasped, lifted or carried more than 10 pounds, walked on uneven ground, drove, worked with heavy equipment, was exposed to extreme temperatures, humidity, wetness, dust, gas, fumes, or chemicals, worked at heights, used special visual or auditory protective equipment or worked with biohazards.

Independent Medical Evaluation by Robert Henrichsen, M.D.

11. On March 2, 2021, at CalPERS's request, Robert Henrichsen, M.D., conducted an IME of respondent. Dr. Henrichsen prepared a report and testified at the hearing consistent with the report. Dr. Henrichsen is a board-certified orthopedic surgeon. He obtained his medical degree from the Loma Linda University in 1967. Between 1970 and 1973, he completed an orthopedic residency at the Los Angeles Orthopaedic Hospital, Los Angeles County General Hospital. Dr. Henrichsen practiced orthopedic medicine for approximately 50 years. He operated a private practice for approximately 38 years, treating patients and performing surgeries related to orthopedic conditions. He has served as a Qualified Medical Evaluator (QME) for workers' compensation matters. He has served as an Independent Medical Examiner for CalPERS for 19 years.

12. As part of the IME, Dr. Henrichsen interviewed respondent, obtained a medical history, and conducted a physical examination. He also reviewed the Physical Requirements form and essential functions for respondent's position. Additionally, Dr. Henrichsen reviewed respondent's medical records and reports related to his orthopedic conditions.

RESPONDENT'S COMPLAINTS AND HISTORY OF TREATMENT

13. Dr. Henrichsen obtained a history of respondent's occupational duties, orthopedic conditions, treatment, and complaints. Respondent informed Dr. Henrichsen that he last worked as a Dispatcher for CHP in 2016. He stopped working due to his orthopedic conditions. Respondent explained he had to work 10 to 14 hours a day, five to seven days per week. When taking calls, he often had to cradle the phone receiver in the side of his neck, which caused him pain. When he used a

headset, he did not have the same issues. Respondent constantly sat and performed detailed handwork including typing.

14. Respondent reported his current symptoms were loss of sensation in his left arm. He is not able to grip or pickup items at times. He will also lose his grip on an item he is holding. He reported tingling and a warm feeling in his elbow area. Respondent also reported feeling an "itching in the proximal medial forearm muscle ward and there is a burning pain coming in the forearm, mostly on the dorsum." Once a day his hand sticks in one position. His hand also feels fatigued. Respondent reported his pain level was high as 9 out of 10 at times.

15. Respondent's treating physicians did not recommend surgery for an of his orthopedic conditions. Respondent had several injections in his shoulder and elbow, which increased his symptoms. He also underwent physical therapy. His treaters recommended he use a grip ball, ice, and wrist orthosis to treat his carpal tunnel symptoms.

PHYSICAL EXAMINATION AND REVIEW OF MEDICAL RECORDS

16. Dr. Henrichsen conducted a physical examination of respondent, including a review of systems. The physical examination was limited to respondent's neck and upper extremities. Respondent's range of motion in his neck was reduced when looking up toward the ceiling, but otherwise his neck motion was appropriate. Respondent did not have radicular symptoms with neck motion. Respondent reported feeling a "snapping feeling" when he tilts his head to the left with lateral bending. Dr. Henrichsen palpated the area and did not feel any snapping.

17. Respondent's shoulder muscle functions were examined. Respondent was able to shrug his shoulders, adduct his scapulae, and he did not have scapular

instability to scapular muscle loading. His scapula was stable. Respondent had reduced shoulder motion when standing, but full range of motion when laying down.

Dr. Henrichsen opined that respondent may have perceived he would have pain with the standing range of motion testing and was guarding. Dr. Henrichsen opined respondent's shoulder function was normal.

18. Respondent reported lateral deltoid pain, but "not pain suggestive of biceps abnormality or labral abnormality." Testing of respondent's wrists with both "resistance and wrist supination and pronation produced some pain on the volar radial aspect of the left wrist." Dr. Henrichsen opined that respondent had "minor" tendonitis, which is inflammation around the tendons. His wrist joints were normal. The sensation in his fingers and hands was intact.

19. Respondent's elbow range of motion was normal. Respondent reported tenderness on his left elbow at the Olecranon which is the bony point of the elbow. Dr. Henrichsen did not feel any "residual bursal nodules that were obvious." Respondent also complained of tenderness at the cubital tunnel, which is the nerve that passes through the inside of the elbow, and also in the proximal medial forearm on the volar side on the left, but not the right forearm. Dr. Henrichsen found no evidence of active tendonitis in respondent's left elbow.

20. Dr. Henrichsen listed and summarized in his IME report medical records and reports he reviewed concerning respondent's orthopedic conditions. These records included an evaluation performed by Vinay Reddy, M.D. on March 29, 2017, an IME report prepared by Anthony Bellomo, M.D. on August 3, 2017, and a re-evaluation IME performed by Arthur Auerbach, M.D. on December 17, 2018. Dr. Henrichsen also reviewed reports referencing electrical and radial studies, including Electromyography (EMG) studies, performed on respondent's left arm and wrist which did not reveal any

abnormality. The reports also indicated MRI studies performed on respondent's cervical spine and elbow were also normal, other than some fluid on respondent's left elbow.

DIAGNOSIS AND OPINIONS

21. Dr. Henrichsen diagnosed respondent with "symptoms of cubital tunnel syndrome," "reduced neck motion" and left wrist "subjective abductor tendinitis." He further opined that respondent's subjective "symptoms [were] greater than findings." Dr. Henrichsen explained in part:

[M]y assessment is that there is something wrong with this picture. There are a very large amount of symptoms. The findings that prior physicians and I have identified are not objective and these findings are pain related in that certain pains are present, so [respondent] either cannot or does not fully accomplish certain motions. There is no evidence of radiculopathy, that has been suggested by some prior evaluators, but that is not present.

22. Dr. Henrichsen opined that respondent does not have an "actual and present orthopedic impairment that rises to the level of substantial incapacity." Respondent's reported symptoms were "much greater than findings and actually his symptoms are not supported by objective findings." He further opined that "the objective imaging and electrical studies based on the records do not support a substantial amount of impairment." Dr. Henrichsen concluded that his "assessment is that he does not have substantial incapacity because he does not have a reasonable amount of supportive objective abnormal findings."

Supplemental Report

23. On March 23, 2021, CalPERS sent Dr. Henrichsen additional medical records to review, including an x-ray report of respondent's left elbow, radiology summaries of interpretations of respondent's left elbow MRI scan, and three EMG nerve studies of respondent's left upper extremity. CalPERS requested Dr. Henrichsen to provide his final recommendations and conclusions based on the additional medical information.

24. On April 1, 2021, Dr. Henrichsen issued a supplemental report. Dr. Henrichsen opined that the additional information reinforced his prior opinions and conclusions. He opined that:

[A] variety of different providers have reviewed [respondent] and not found any pathology on the specific studies nor have they demonstrated from an objective evaluation standpoint [respondent] is incapable of accomplishing his duties. I realize that some of the previous evaluated physicians considered [respondent] was incapacitated, but those conclusions were based upon symptoms and tenderness and not supported by objective findings.

25. Dr. Henrichsen further opined that respondent "does not have objective abnormality to support the CalPERS definition of substantial incapacity for performance of his occupational duty as a dispatcher."

Respondent's Evidence

26. Respondent explained that when he worked as a Dispatcher, he had to be able to timely answer calls and relay information in life and death situations. Respondent does not believe he can perform the job if he has any limitations. His orthopedic conditions cause his limitations. The repetitive motions and typing requirements caused respondent pain which increased over time. Holding a telephone receiver with his neck and shoulder while he was typing also caused him shooting pain. Respondent's pain increased to the point that he felt he could no longer perform his duties.

27. Respondent has received occupation and physical therapy. He was given an injection in his shoulder four years ago, which did not help. Respondent is treated by a chiropractor two times per month. He is also waiting to receive approval for another MRI.

28. When respondent retired, he sold cars for a few months. For the last several years, he has worked for his family's pest control business. His duties include traveling to customers' homes and generating service estimates. He works 20 to 30 hours per week depending on the workload.

Analysis

29. CalPERS established that respondent is no longer disabled or substantially incapacitated from performing the usual duties of a Dispatcher for the CHP. Dr. Henrichsen persuasively testified that there is no objective medical evidence that respondent is unable to perform the duties of a Dispatcher for the CHP. Respondent's range of motion limitations in his neck and subjective complaints of pain

do not rise to the level of substantial incapacity for performance of his duties as Dispatcher.

30. When all the evidence is considered, CalPERS submitted sufficient evidence to meet its burden. As a result, CalPERS's request that respondent be reinstated from industrial disability retirement is granted.

LEGAL CONCLUSIONS

Burden of Proof

1. CalPERS had the burden of proving by a preponderance of the evidence that respondent is no longer substantially incapacitated for the performance of his usual job duties as a Dispatcher for the CHP and should be reinstated to his former position. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (January 22, 2000, Precedential Decision 99-03). Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) To be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

Applicable Law

2. Government Code section 20026 defines "disability" and "incapacity for performance of duty," and, in relevant part, provides:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean 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.

3. Respondent is a state safety member of CalPERS by virtue of his former employment as a Dispatcher for CHP. He was granted industrial disability retirement based on his orthopedic conditions pursuant to Government Code section 21151, subdivision (a), which provides the following:

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.

4. In accordance with Government Code section 21192, CalPERS reevaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

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 shall be made by a physician or surgeon, appointed by the board. . . . 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 . . . 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.

5. Government Code section 21193 governs the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty and, in relevant part, provides:

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.

6. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the substantial inability of the applicant to perform his usual duties." (Italics in original.) In *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 862, the court held that a disability or incapacity must currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient.

7. The standards in CalPERS disability retirement cases are different from those in workers' compensation cases. (*Bianchi v. City of San Diego* (1989) 214

Cal.App.3d 563, 567; *Kimbrough v. Police & Fire Retirement System* (1984) 161 Cal.App.3d 1143, 1152-1153; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132 [a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different].) Thus, any determination of disability that may have been made in respondent's workers' compensation case cannot be given any weight in this proceeding.

8. To involuntarily reinstate respondent from industrial disability retirement, CalPERS must establish that respondent is no longer disabled or substantially incapacitated from performing the usual duties of a Dispatcher for the CHP. As set forth in Factual Findings as a whole, CalPERS established by a preponderance of the evidence that respondent is no longer disabled or substantially incapacitated from performing the usual duties of a Dispatcher with CHP. Consequently, when all the evidence is considered, CalPERS' request that respondent be involuntarily reinstated from disability retirement must be granted.

ORDER

The appeal of respondent Craig Culp is DENIED. The request of California Public Employees' Retirement System to involuntarily reinstate respondent Craig Culp from industrial disability retirement is GRANTED.

DATE: June 3, 2022

Marcie Larson

Marcie Larson (Jun 3, 2022 13:46 PDT)

MARCIE LARSON

Administrative Law Judge

Office of Administrative Hearings