

**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:**

**JOHN A. CANO and**

**PLEASANT VALLEY STATE PRISON, CALIFORNIA  
DEPARTMENT OF CORRECTIONS AND REHABILITATION,  
Respondents**

**Agency Case No. 2020-1168**

**OAH No. 2021020647**

**PROPOSED DECISION**

Jessica Wall, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on September 7, 2022, from Sacramento, California.

Charles H. Glauberman, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Zachary W. Tomlinson, Attorney at Adams, Ferrone & Ferrone, represented John A. Cano (respondent), who was present throughout the hearing.

There was no appearance by or on behalf of respondent Pleasant Valley State Prison, California Department of Corrections and Rehabilitation (CDCR). The matter proceeded as a default against CDCR pursuant to California Government Code section 11520, subdivision (a).

Oral and documentary evidence was received, the record closed, and the matter submitted for decision on September 7, 2022.

## **ISSUE**

At the time of his application for industrial disability retirement, was respondent permanently disabled or substantially incapacitated from the performance of his usual and customary job duties as a Correctional Counselor I (CCI) for CDCR based on his orthopedic (left and right arm) conditions?

## **FACTUAL FINDINGS**

### **Procedural History**

1. On April 2, 2020, respondent signed and thereafter submitted an application for industrial disability retirement (application) with CalPERS. Prior to retiring for service on December 6, 2019, respondent was employed as a CCI at CDCR. By virtue of his employment, respondent is a safety member of CalPERS subject to Government Code section 21151.

2. In filing the application, respondent wrote that his specific disabilities were "(Left arm) Complete triceps tendon tear" and "(Right arm) Complete triceps tendon tear." He wrote that his limitations were "[n]o heavy lifting, pushing, pulling, or carrying" and he was "unable to fully perform full extension/flexion activities with weight resistance" and should "avoid strenuous activity." He wrote that the disability occurred on December 6, 2019, as follows:

My injury has occurred due to cumulative trauma resulting from the labor intensive and repetitive motion nature of my job over a sustained period. In addition, I am required to maintain an adequate level of physical fitness, which requires me to exercise in order to keep fit enough to perform my job duties as a Correctional Counselor I (CCI).

3. CalPERS obtained medical records and reports prepared by Samuel Leon, M.D., Peter T. Simonian, M.D., and Don Williams, M.D., the latter of whom conducted an Independent Medical Evaluation (IME) of respondent regarding his orthopedic condition. After reviewing the reports, CalPERS determined that respondent's orthopedic condition was not disabling. As a result, he was not substantially incapacitated from the performance of his job duties as a CCI for CDCR. By letter dated September 4, 2020, CalPERS notified respondent that his application for industrial disability retirement was denied. Respondent filed an appeal and requested a hearing with CalPERS on October 5, 2020.

4. On January 21, 2021, Keith Riddle, in his official capacity as Chief, Disability and Survivor Benefits Division, CalPERS, signed and thereafter filed the Statement of Issues.

## **Respondent's Employment History and Duties as a CCI**

5. Respondent worked as a CCI at CDCR's Pleasant Valley State Prison facility for two and a half years before he retired. He submitted an Essential Functions statement for a CCI, which set forth the role's essential duties and examples of the work involved. According to the statement, a CCI is a sworn peace officer who is responsible for classifying inmates and assigning programs. A CCI's essential functions include performing peace officer duties during adverse, stressful, or unpleasant situations; wearing departmentally approved personal protective equipment; qualifying on the firing range; defending self and others by disarming, subduing, and applying inmate restraints; and swinging an arm with force. A CCI must frequently lift and carry 20 to 50 pounds throughout the workday; occasionally lift over 100 pounds; occasionally to frequently push, pull, and press; and occasionally to frequently reach.

6. On April 2, 2020, respondent signed a Physical Requirements of Position/Occupational Title form and submitted the form to CalPERS. According to the Physical Requirements form, when working as a CCI, respondent frequently (three to six hours) sat, stood, walked, crawled, climbed, squatted, bent and twisted at the neck and back, reached above and below his shoulders, pushed and pulled, used fine manipulation and simple grasping, used his hands repetitively, and lifted and carried up to 50 pounds. He occasionally (up to three hours) ran, knelt, power grasped, used a keyboard and mouse, and lifted more than 50 pounds.

## **Medical Evidence**

### **IME REPORT BY DON WILLIAMS, M.D.**

7. On August 20, 2020, at CalPERS's request, Dr. Williams conducted an IME of respondent and issued a report of his findings. Dr. Williams testified at hearing

consistent with his report. Dr. Williams obtained his medical degree from Case Western Reserve Medical School in 1977. Thereafter, he completed a general surgery internship and orthopedic residency. Dr. Williams is a Diplomate of the American Board of Orthopedic Surgery and a Fellow of the American Academy of Orthopedic Surgeons. Since 1986, Dr. Williams has operated an orthopedic surgery private practice treating patients with orthopedic conditions, specializing in treatment of the shoulder, hand, and knee. Dr. Williams has performed IMEs for CalPERS since 2014.

8. As part of respondent's IME, Dr. Williams asked respondent to complete a questionnaire, interviewed respondent, obtained a personal and medical history, conducted a physical examination, and reviewed respondent's medical records and reports related to his orthopedic condition. Dr. Williams also reviewed respondent's essential functions as a CCI and the physical requirements of his position.

### **Respondent's Injury History and Complaints**

9. Respondent was 50 years old when Dr. Williams conducted the IME. Other than the application injury, respondent's prior medical history had no industrial or non-industrial injuries, major illnesses, or operations, though respondent reported some tendonitis in his biceps that began in 2001. In taking notes on respondent's employment history, Dr. Williams determined that 95 to 98 percent of respondent's work was at his desk, with periodic responses to alarms. He was aware that respondent's job required the defense of himself and others, swinging his arm, and pushing objects.

10. Respondent informed Dr. Williams that his injury took place on November 23, 2019, rather than the date he listed on his application. On that date, respondent injured himself while weightlifting at a gym in Hanford, California. During

an incline press with 120-pound dumbbells (a total of 240 pounds), he felt a “pop” in both shoulders and triceps and the weights crashed down on his chest. He went to the emergency room that day and was referred to Dr. Simonian, an orthopedic surgeon. Despite his injuries, respondent continued working until December 2, 2019. On December 12, 2019, respondent underwent the first surgery to repair the damage. Dr. Simonian reattached the left triceps tendon with screws/anchors in the olecranon, the bony tip of the elbow. Dr. Simonian reattached the right triceps tendon in a second surgery on January 2, 2020.

11. During the examination, respondent reported severe pain in his left elbow and tenderness in his olecranon. His right elbow functioned better and caused less pain. Nothing eased respondent’s left elbow pain. The pain worsened when he extended his elbow, extended against gravity, or lifted more than five pounds. Based on this pain, he struggled with activities of daily living, such as washing, dressing, and performing housework. Respondent said he no longer did any pushing or pulling. He reported difficulty with grasping and overhead activities, and that the pain made it difficult to sleep.

### **Physical Examination and Review of Medical Records**

12. Dr. Williams conducted a physical examination of respondent, including his cervical spine, upper extremities, and elbows. Respondent was able to rise from a chair and walk with a normal gait. Dr. Williams requested that respondent use his arms to assist him in rising and observed that he was able to push off the chair with his arms. Respondent’s cervical spine was normal. He was able to achieve a full range of motion with his shoulders. Respondent’s left elbow had full range of motion (0 to 140 degrees) and his right elbow had nearly full range of motion (3 to 140 degrees). He could extend both arms against gravity but complained of elbow pain when extending.

Dr. Williams testified that respondent's right elbow strength was 5/5 and his left was 4+/5.

13. Next, Dr. Williams reviewed medical records and reports related to respondent's orthopedic condition. He started with the December 2019 magnetic resonance imaging (MRI) results, which determined that respondent had a complete tear in his triceps tendon, consistent with bilateral distal triceps tendon ruptures. Respondent saw an orthopedist on December 5, 2019, and complained of pain and weakness on extension, which an examination supported. After his two surgeries, respondent visited Dr. Simonian again on March 18, 2020. At that time, Dr. Simonian reported that respondent was doing relatively well three months after his last surgery. His range of motion was slightly limited (0 to 130 degrees) in his left elbow, but he had full range of motion (0 to 140 degrees) in his right elbow. Dr. Simonian noted a six-month recovery process. At another visit four months later, Dr. Simonian described respondent as incapacitated and thought recovery could take more than a year. The final medical record Dr. Williams received was from respondent's appointment with Dr. Simonian on August 3, 2020. Dr. Simonian noted that the recovery process was long and arduous for respondent. However, at this point, respondent's muscles were in continuity. He was able to flex his triceps with weakness and had difficulty extending with five pounds of weight. Dr. Simonian concluded that it was a complex situation because both arms were involved, and respondent was just beginning physical therapy.

### **Diagnosis and Opinion**

14. Dr. Williams diagnosed respondent with "Post repair of bilateral Triceps Tendon Ruptures of olecranon." Since his surgeries, Dr. Williams concluded that respondent had improved from his temporary incapacity and would continue to

improve. Dr. Williams's opinions were based on his experience treating athletes and military members with injuries like respondent's. He has performed the same surgeries that respondent underwent. Tenderness in the surgical area is common after such surgeries. Dr. Williams believed it should have taken respondent six to eight months to heal from the surgeries. He determined the muscle was in continuity and respondent had good strength in the repair, which was intact. Additionally, based on his knowledge of physiology, Dr. Williams explained that repaired injuries like respondent's should not cause lifting limitations. This is because the biceps and shoulder muscles, rather than the triceps, are used to lift and carry. Carrying and pulling are not affected by the olecranon. Pushing is the activity most impacted by respondent's injuries; however, based on respondent's age and the physical examination, Dr. Williams did not believe his ability to push was limited. Given the full range of motion in respondent's elbows, Dr. Williams determined that he was able to defend himself and engage in altercations in the workplace, although he may experience pain in the process.

15. In response to the questions posed by CalPERS. Dr. Williams answered that respondent "does not have substantial incapacity," and he could continue doing casework and performing his job duties. Dr. Williams found that respondent was afraid of returning to work, but he "could certainly push and he can defend himself." Dr. Williams explained the objective findings were the MRI records of the bilateral triceps tendon tears, the current continuity of respondent's triceps tendons, respondent's full range of elbow motion, and his ability to push up from a chair.

16. Respondent had subjective reports of pain, but Dr. Williams explained that respondent tended to exaggerate. Respondent denied an ability to extend his elbows during the examination, but Dr. Williams observed that respondent was able to

fully extend, as well as push off a chair during his physical examination. Additionally, respondent returned to Dr. Williams's office the day after his appointment and demanded to be seen so he could further explain his feelings that he was incapacitated and afraid of being reinjured.

### **RECORD REVIEW REPORT BY CHRISTOPHER H. FLEMING, M.D.**

17. At respondent's request, Christopher H. Fleming, M.D., performed a record review of respondent's medical files and drafted a report dated August 17, 2022. Dr. Fleming testified at hearing consistent with his report. Dr. Fleming obtained his medical degree from Wayne State University in 1980. Following medical school, he completed a surgery internship and an orthopedic residency. Dr. Fleming was previously a board-certified orthopedic surgeon. He has been practicing in the field of orthopedic surgery since 1985 but stopped treating patients five years ago. Dr. Fleming has conducted numerous IME evaluations for CalPERS.

18. Dr. Fleming did not meet with or perform a physical examination on respondent. Instead, he reviewed respondent's medical records. Respondent provided Dr. Fleming with more records than Dr. Williams, and his record review spanned from November 23, 2019, to March 30, 2022. These records included those from the date of injury (November 23, 2019), but also records for injuries unrelated to respondent's industrial disability retirement application.<sup>1</sup>

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<sup>1</sup> Respondent's complaints of carpal and cubital tunnel syndromes and lumbar spine pain all arose at least a year after respondent submitted his industrial disability

## Medical Record Review

19. Respondent visited an emergency room the day he injured himself weightlifting. Two days later, respondent saw his family medicine doctor, Dr. Leon. He complained of 10/10 pain at the time of injury, but no pain as of November 25, 2019. Instead, he felt discomfort with movement and soreness in his distal triceps. After the MRIs confirmed complete tears in each triceps tendon, he underwent two surgeries with Dr. Simonian to repair each tendon.

20. A February 2020 progress note from physician assistant Jonathan Crosby stated that respondent's right elbow was recovering well compared to his left. A March 2020 progress note from Dr. Simonian similarly reported that respondent was recovering relatively well. On June 19, 2020, physician assistant Nathan Miller noted that respondent was doing well and making improvements. At that time, respondent had been lifting light weights with no complaints and no pain. Yet the following month, Dr. Simonian reported that respondent may take more than a year to recover because he works as a CCI, without listing any specific job duties respondent was unable to perform. Dr. Simonian's August, September, and October 2020 notes track respondent's progressive recovery towards maximum medical improvement. By December 2020, respondent was able to ride a bicycle, after which he reported numbness in his hands.

21. Respondent's first Qualified Medical Examination (QME), performed by David M. Broderick, M.D., took place on December 4, 2020. Respondent was able to

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retirement application, and accordingly are not listed as the disabling conditions at the time of the application's filing.

fully extend both elbows, but only able to perform 130 degrees flexion in his right elbow and 125 degrees in his left elbow. Dr. Broderick found no permanent impairment and concluded respondent was able to perform his normal work activities because he had regained full function of his elbows and only had subjective complaints of elbow pain with minimal intensity. A January 2021 MRI confirmed that respondent's left triceps tendon had not experienced a recurrent tear. A March 2021 consultation with Toby Johnson, M.D., again showed that respondent had full range of motion in his right and left elbow. In April 2021, Dr. Simonian reported that respondent was able to push 40 pounds without pain and that his condition was permanent and stationary.

22. Most of respondent's medical records after this date concern unrelated conditions. Respondent underwent a second QME in 2022, performed by Payam Moazzaz, M.D. In that QME, Dr. Moazzaz considered the residual symptoms from respondent's triceps surgeries, combined with cubital and carpal tunnel syndromes and a lumbar sprain. In the January 2022 examination, respondent had full range of motion in both elbows. Dr. Moazzaz determined that respondent could return to work with restrictions on lifting and carrying (up to 40 pounds occasionally and 20 pounds frequently) based on the combination of symptoms attributable to his multiple medical conditions.

### **Opinion and Substantial Incapacity Determination**

23. Dr. Fleming found respondent's case to be "difficult," because respondent's triceps were repaired. The records showed his right, dominant arm was doing well, while some pain remained on the left. Nevertheless, Dr. Fleming credited Dr. Moazzaz's QME report, finding that Dr. Moazzaz's limitation on respondent lifting 40 pounds was consistent with Dr. Simonian's finding that respondent could push 40

pounds. Dr. Fleming opined that Dr. Williams must not have considered the essential functions of respondent's job because respondent reported severe pain when lifting one to five pounds.

24. Dr. Fleming concluded that respondent was substantially incapacitated from his usual duties as a CCI based on his reports of ongoing pain and weakness in the triceps. His objective findings were: respondent reported tenderness; respondent could push 40 pounds without pain in April 2021; the January 2022 QME limited respondent "to frequent pushing of 20 pounds and occasional pushing of 40 pounds";<sup>2</sup> and respondent continued to have some limited range of motion in the left elbow. Dr. Fleming believed that respondent could not be involved in altercations based on his reported pain and claims that he could not do strenuous pushing. He also felt respondent could not disarm, subdue, apply restraints, swing his arms with force, frequently lift and carry up to 50 pounds, occasionally lift over 100 pounds, open heavy doors, and push a cart of files. Dr. Fleming's finding also relied on respondent's March 2021 diagnosis of carpal tunnel syndrome. Although Dr. Fleming never met or spoke with respondent, he found respondent was not exaggerating his complaints. At hearing, Dr. Fleming admitted he did not know which of respondent's complaints were true because he never examined him.

## **Respondent's Evidence**

25. Gonzalo De Ochoa testified as a witness for respondent. Mr. De Ochoa began working for CDCR in 1985 and became a CCI in 1996. He retired as a

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<sup>2</sup> Dr. Fleming incorrectly identifies Dr. Moazzaz's finding as a limitation on pushing or pulling, rather than lifting or carrying.

Correctional Counselor III in 2006. He opined that a CCI's primary duties are to record information about inmate classification, perform annual inmate reviews, and respond to emergencies throughout the prison. A CCI is a peace officer, which means that a CCI must complete range and chemical agent training. Mr. De Ochoa said it may be necessary for a CCI to restrain inmates, use pepper spray, and perform a takedown maneuver. CCIs also must be able to push, pull, and twist to lock restraints. He believes a prison's classification level correlates with violence, where Level I (lowest security) prisons have fewer incidents than Level IV (highest security) prisons. A CCI may need to push a cart filled with inmate files, which contain critical and confidential information, and secure that cart if an alarm goes off. If a CCI does not respond to an alarm, he or she could be disciplined. CCIs are rarely involved in altercations.

26. Respondent testified in support of his application. He began his employment at CDCR as a Correctional Officer in April 1991. In August 2016, he became a CCI at Pleasant Valley State Prison, which he described as a Level III (medium security) facility. As a CCI, respondent recalled his primary duties were reviewing documents, taking inmates to hearings, and evaluating inmate mental health. He was required to defend himself and others, wear protective equipment like a "heavy vest," and carry an expandable baton, pepper spray, and a personal alarm. If inmates began to fight in front of him, he first issued verbal commands, then could choose to use either his baton or pepper spray. If an incident involved a weapon, he had to prevent death, even if no one else was present to assist him. He identified 75 percent of his job as being spent at his desk and five to 10 percent spent responding to incidents. He spent the remaining 15 to 20 percent walking around, talking to inmates, and going to hearings. He recalled that alarms were a daily occurrence and there were weekly gang fights.

27. Respondent injured himself while lifting weights at the gym. He experienced a loss of strength when pushing after his injury. Nevertheless, respondent returned to work and continued to work another six days. During those days, respondent chose not to respond to alarms and stayed in his office when they went off. He thought it was a mistake to return to work, but he "only had two days of sick time." On those days, he performed the clerical tasks required of his position.

28. After his surgeries, respondent testified he was unable to feed himself, shower, or brush his teeth for four months. He could only lift five pounds in April 2020. Four months later, at his IME appointment, respondent said he "literally had almost no strength" and "severe weakness." He recalled using the strength from his legs to help him stand when Dr. Williams asked him to use his arms to push up. On a 1–10 scale of arm power, respondent thought he used only about "a one" when he pushed up. He asserted this was the best he could do.

29. As of the day of the hearing, respondent testified that he was unable to push 40 pounds. If he tried to lift anything, his arms would collapse. He complained of constant pain in his left elbow and occasional pain in his right elbow.

30. Respondent believed he can no longer defend himself and others, subdue an inmate, apply restraints, or carry inmates. He recalled that doors at the prison were heavy, and he guessed they weighed 50 pounds. He did not think he could push open and pull them shut. There were two specific instances he recalled in which he had to move very heavy weights at work. In one, he remembered lifting a 230-pound inmate. In another, he recalled pushing a 500-pound cart of inmate meals. When questioned in further detail, respondent admitted that he had help when lifting the heavy inmate and was speculating as to the weight of the meal cart, of which pushing was not part of his usual duties. He clarified that in his two and a half years as

a CCI, he never had to subdue an inmate, apply restraints, or engage in an altercation. Similarly, he has never had to perform a takedown maneuver, use his baton, or use his pepper spray. None of his clerical duties are impacted by his triceps injuries and he was not required to push a cart containing inmate files.

## **Analysis**

31. When all the evidence is considered, respondent failed to carry his burden of proving by competent medical evidence that, at the time he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual and customary duties of a CCI. Respondent tore both of his triceps in a weightlifting accident on November 23, 2019. By January 2, 2020, both triceps were surgically repaired, and he began to heal. While respondent encountered more difficulty during recovery with his left elbow than his right, both surgeries were successful. No additional surgeries were required, and the tendons remained attached. The only remaining issues are respondent's complaints of pain, tenderness, and weakness.

32. Dr. Fleming's opinion received less weight than Dr. Williams's opinion. Dr. Fleming never met with or examined respondent. Moreover, Dr. Fleming's opinion relied on complaints of pain and weakness as objective findings. His medical opinion also relied on a new medical diagnosis, not listed on respondent's application, as a basis for his opinion. There were also inconsistencies between Dr. Fleming's findings and the medical records. For instance, March 2021 and January 2022 records note that respondent had full range of motion in both elbows. Yet Dr. Fleming concluded that respondent continued to have a limited range of motion in the left elbow.

33. In contrast, Dr. Williams applied the applicable standards for an industrial disability retirement application. His opinion that respondent's subjective complaints of pain and weakness were not adequately supported by objective medical evidence was persuasive. Dr. Williams's experience performing this type of surgery and knowledge of the typical recovery time was convincing. While both Drs. Fleming and Williams offered varying opinions about what job duties respondent could perform based on his condition, Dr. Williams provided evidence from his examination that supported his conclusions. Finally, Dr. Williams was in a better position to determine whether respondent was exaggerating because he personally interacted with him. Based on the medical records and testimony, Dr. Williams's findings are more credible.

34. Respondent argued that Dr. Williams did not prove his ability to lift the weights listed in the physical requirements forms. However, CalPERS does not bear the burden in this proceeding. Rather, respondent carries the burden of proving he was substantially and permanently incapacitated from performing his usual and customary job duties at the time of his application, by virtue of the disability he listed on that application. The competent medical evidence respondent provided was not persuasive. Consequently, his industrial disability retirement application must be denied.

## **LEGAL CONCLUSIONS**

1. Respondent seeks industrial disability retirement pursuant to Government Code section 21151, subdivision (a), which provides in pertinent part, that "[a]ny 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."

2. As defined in Government Code section 20026:

'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, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

3. Government Code section 21152, subdivision (d), provides that an application for disability retirement may be made by the member.

4. Government Code section 21154 provides in relevant part that:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for disability retirement of a member, [...] the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to

determine whether the member is incapacitated for the performance of duty. [...]

5. Government Code section 21156, subdivision (a)(1), provides in relevant part that:

If the medical examination and other available information show to the satisfaction of the board, [...], 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. Incapacity for the performance of duty "means the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Substantial inability to perform usual duties must be measured by considering applicant's abilities. Discomfort or pain, which makes it difficult to perform one's duties, is insufficient to establish permanent incapacity from performance of one's position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Bd. of Administration of the Public Employees'*

*Retirement System* (1978) 77 Cal.App.3d 854, 862; *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.)

7. A condition or injury that may increase the likelihood of further injury does not establish a present "substantial inability" for the purpose of receiving disability retirement. (*Hosford v. Bd. of Administration, supra*, 77 Cal. App. 3d at pp. 863.) Similarly, a fear of further injury does not constitute a disability. (*Id.*, at p. 864.)

8. The burden of proof is on respondent to demonstrate that he is permanently and substantially unable to perform his usual duties such that he is entitled to disability retirement. (*Harmon v. Bd. of Retirement of San Mateo County* (1976) 62 Cal. App. 3d 689; *Glover v. Bd. of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) To meet this burden, respondent must submit competent, objective medical evidence to establish that, at the time of his application, he was permanently disabled or substantially incapacitated from performing the usual duties of his position. (*Harmon v. Bd. of Retirement, supra*, 62 Cal. App. 3d at p. 697.)

9. Respondent's competent medical evidence did not establish by a preponderance of the evidence that he was permanently disabled or substantially incapacitated from performance of his duties as a CCI for CDCR at the time he filed his industrial disability retirement application. Therefore, based on the Factual Findings and Legal Conclusions, respondent is not entitled to retire for disability pursuant to Government Code section 21151, subdivision (a).

## ORDER

Respondent John A. Cano's application for industrial disability retirement is DENIED.

DATE: September 29, 2022

*Jessica Wall*

Jessica Wall (Sep 29, 2022 11:15 PDT)

JESSICA WALL

Administrative Law Judge

Office of Administrative Hearings