

**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:

JERRY D. JONES,

Respondent,

and

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

Respondent.

Case No. 2015-0085

OAH No. 2015070019

**PROPOSED DECISION**

This matter was heard before Karen J. Brandt, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on May 24, 2016, in Fresno, California.

Terri Popkes, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Jerry D. Jones (respondent) represented himself.

There was no appearance by or on behalf of the California Department of Corrections and Rehabilitation, Pleasant Valley State Prison (CDCR).

Evidence was received, the record was closed, and the matter was submitted for decision on May 24, 2016.

## ISSUE

On the basis of an orthopedic (right knee and foot) condition, is respondent permanently disabled or substantially incapacitated from performing his usual and customary duties as a Correctional Officer for CDCR?

## FACTUAL FINDINGS

1. Respondent was born in 1961. He worked as a Correctional Officer for CDCR. On February 28, 2014, respondent signed a Disability Retirement Election Application (application), seeking service retirement pending industrial disability retirement. Respondent retired for service effective April 2, 2014, and has been receiving his service retirement allowance from that date.

### *Respondent's Application*

2. In his application, respondent described his disabilities as "(Right foot) Plantar fasciitis" and "(Right knee) Torn meniscus with degenerative joint disease." He stated that his disability occurred on September 20, 2012, as follows:

Due to cumulative trauma over the course of my career I developed my right foot and knee injuries. This has resulted due to prolonged standing and walking as well as repetitive motion activity when performing my duties.

He described his limitations/preclusions as, "No running, kneeling and prolonged walking." He stated that, "Due to my physical condition and physicians' restrictions I am no longer able to perform the essential functions of my job." He provided the following other information:

Currently I continue to experience pain & swelling in my right foot which is causing me to experience problems with my right knee. The difficulties with my knee are swelling, pain & instability. It should be noted that I had surgery to my right foot on 10/03/13 & to my right knee on 02/22/13. I have also been advised that I will require a total knee replacement sometime in the future. In addition, my physicians have advised me that I should consider alternative employment.

3. On October 27, 2014, CalPERS notified respondent that his application had been denied. Respondent timely appealed from the denial.

### *Duties of Correctional Officer*

4. CalPERS submitted two exhibits that described the duties of a Correctional Officer: (1) a document entitled "Essential Functions"; and (2) a "Physical Requirements of Position/Occupational Title" (Physical Requirements).

5. The essential functions of a Correctional Officer relevant to this matter include: (1) disarming, subduing and applying restraints to an inmate; (2) defending against an inmate armed with a weapon; (3) running up to 400 yards in an all-out effort while responding to alarms or serious incidents, over uneven ground and up and down stairs; (4) lifting, carrying and physically restraining an inmate; (5) walking, standing, climbing, crawling, crouching, stooping and bending; and (6) continuously wearing an equipment belt weighing 15 pounds.

6. As set forth in the Physical Requirements, a Correctional Officer frequently (from three to six hours a day) sits, stands, walks, bends and twists at the neck and waist, reaches below his shoulder, pushes and pulls, engages in fine manipulation, performs simple grasping, repetitively uses his hands, lifts up to 50 pounds, walks on uneven ground, is exposed to excessive noise, extreme temperatures, humidity, and wetness, and works with bio-hazards. A Correctional Officer occasionally (up to three hours a day) runs, crawls, kneels, climbs, squats, reaches above his shoulder, power grasps, uses a keyboard and mouse, lifts up to 100 pounds or more, drives, works with heavy equipment, works at heights, operates foot controls and engages in repetitive movements, and uses special visual and auditory protective equipment.

### *Expert Opinion*

7. CalPERS retained Ghol B. Ha'Eri, M.D., to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Ha'Eri is a diplomate of the American Board of Orthopedic Surgery and American Academy of Neurological and Orthopedic Surgery. He examined respondent on September 16, 2014, reviewed respondent's medical history and records, and issued an IME report. During the IME, respondent told Dr. Ha'Eri that he had been a Correctional Officer for approximately 13 years. Respondent identified his injury as cumulative trauma from November 8, 2001, to September 20, 2012. Respondent told Dr. Ha'Eri that his last day of work was September 15, 2013.

8. Respondent related to Dr. Ha'Eri that, starting in January 2012, he experienced right foot pain due to the prolonged standing and walking required in his job. In October 2012, respondent tripped over his right foot and sustained a twisting injury to his right knee, which became painful. In February 2013, an orthopedic surgeon performed arthroscopic surgery on respondent's right knee, including a medial meniscectomy and joint debridement. A podiatrist diagnosed respondent with a right foot Taylor's bunion and hammertoes. On October 3, 2013, the podiatrist performed a right Taylor's bunion correction, arthroplasty of the right second and fifth toes, with a right second metatarsal shortening osteotomy and

extensor tendon lengthening to the fifth toe. On March 5, 2014, respondent was placed on temporary disability for one to two years.

9. Respondent complained to Dr. Ha'Eri about: (1) off-and-on right knee catching sensation, pain and swelling; and (2) numbness in the outer border of his right foot. During the examination, Dr. Ha'Eri found that respondent walked with a normal gait. His right knee showed no swelling or joint effusion. Respondent's right knee range of motion was from five to 125 degrees, with normal range being from zero to 135 degrees. Respondent complained of mild medial joint tenderness. There was no crepitus or ligamentous laxity in the right knee. With regard to respondent's right foot, Dr. Ha'Eri found no tenderness or callosities. The range of motion of respondent's right ankle and foot was within normal limits, and his right ankle was stable to manipulation. The neurological examination of respondent's right foot revealed decreased sensation along its lateral border. Dr. Ha'Eri found that there was no motor weakness in the right ankle and foot.

10. After examining respondent, Dr. Ha'Eri diagnosed him as follows:

1. Right foot Taylor's bunions, hammertoes, and matatarsalgia, for which surgical corrective procedures have been carried out.
2. Right knee sprain, status post arthroscopic partial medial meniscectomy and joint debridement.
3. Right knee mild osteoarthritis and chondrocalcinosis per x-ray study.
4. Status post right knee arthroscopic partial medial meniscectomy and joint debridement, as per history given by [respondent].

11. Dr. Ha'Eri opined that respondent was not substantially incapacitated from performing the duties of a Correctional Officer, and that there were no specific job duties that respondent was unable to perform because of his right knee and foot conditions.

#### *Respondent's Testimony and Medical Records*

12. Respondent testified at hearing. He did not call an expert witness to testify on his behalf.

13. Respondent testified that, due to the plantar fasciitis in his right foot, he could not run, jump or climb stairs.<sup>1</sup> He also could not run because his right knee locks and catches, and his knee and foot are not stable. Instead of climbing stairs, he uses a ramp. He service retired due to "safety concerns." He believed that his foot and knee were not stable enough to ensure that he could protect his fellow officers.

14. Respondent asserted that Dr. Ha'Eri did not conduct a thorough examination during the IME. Respondent also asserted that: (1) Dr. Ha'Eri did not evaluate respondent's plantar fasciitis that was diagnosed by respondent's doctors; and (2) Dr. Ha'Eri did not have all of respondent's medical records from his knee and foot surgeries at the time of the IME. Respondent requested that he be sent to another IME physician for a more thorough and complete evaluation.

15. Respondent offered two Injury Status Reports dated September 16, 2013, and April 16, 2014, respectively, and an Agreed Medical Evaluation (AME) report, dated February 24, 2014, written by James L. Strait, M.D., in respondent's workers' compensation case. These reports were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).<sup>2</sup>

16. Pursuant to the September 16, 2013 Injury Status Report, respondent was: (1) diagnosed with plantar fasciitis; (2) restricted from responding to alarms; and (3) placed on modified work duty for three weeks. Pursuant to the April 16, 2014 Injury Status Report, respondent was: (1) diagnosed with plantar fasciitis; (2) restricted from climbing stairs and ladders, jumping and running; (3) limited to occasional standing and walking (less than four hours a day with a 10-minute break hourly); (4) allowed to return to modified work; and (5) placed on full temporary disability.

17. In the February 24, 2014 AME report, Dr. Strait described the findings of his physical examination of respondent. Dr. Strait's findings were similar to those of Dr. Ha'Eri. Dr. Strait diagnosed respondent as follows:

Degenerative arthritis, right.  
Status post right knee surgery.  
Status post right foot surgery.

---

<sup>1</sup> The MedlinePlus online medical dictionary defines "plantar fasciitis" to be "inflammation involving the plantar fascia especially in the area of its attachment to the calcaneus and causing pain under the heel in walking and running."

<sup>2</sup> Government Code section 11513, subdivision (d), in relevant part, provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Dr. Strait found that respondent was permanent and stationary. Dr. Strait recommended the following medical treatment for respondent: (1) periodic physician follow-up; (2) treatment with anti-inflammatory and pain medications; and (3) orthotics for his right foot condition. Dr. Strait stated that it was "possible that [respondent] will require additional knee surgery in the future."

Dr. Strait characterized respondent's subjective complaints as "intermittent and minimal to moderate." Dr. Strait described his objective findings as the surgeries respondent had undergone. Dr. Strait opined that respondent "could not return to his usual and customary occupation as a correctional officer because of his right knee and right foot." Dr. Strait opined further that respondent was "precluded from very prolonged walking and from running and jumping."

### *Discussion*

18. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, at the time he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Correctional Officer for CDCR. Dr. Ha'Eri's opinion that respondent was not substantially incapacitated from performing his usual job duties was persuasive. Although respondent criticized Dr. Ha'Eri's examination as inadequate, Dr. Ha'Eri's IME report was detailed and thorough, and his testimony at hearing was clear and comprehensive. The results of his physical examination and his review of respondent's medical records supported his opinion.

19. Respondent's request that he should be sent for another IME is beyond the scope of this proceeding. The burden was on respondent to offer sufficient competent medical evidence at hearing to support his disability retirement application. He failed to do so. He did not call an expert witness to testify. There was no indication in respondent's medical reports that the doctors evaluated respondent according to the standards applicable to a CalPERS disability retirement proceeding. To the extent the doctors who authored those reports applied evaluation standards applicable in workers' compensation cases, their opinions can be given little weight. The standards in CalPERS disability retirement cases are different from those in workers' compensation. (*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].) The objective findings in Dr. Strait's February 24, 2014 AME report summarized above were insufficient to support that respondent is substantially and permanently incapacitated from performing the usual duties of a Correctional Officer.

20. In sum, because respondent failed to offer sufficient competent medical evidence at hearing to establish that, at the time he applied for disability retirement, he was substantially and permanently incapacitated from performing the usual duties of a Correctional Officer for CDCR, his disability retirement application must be denied.



## LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Correctional Officer for CDCR, respondent is a state safety member of CalPERS subject to Government Code section 21151.<sup>3</sup>

2. To qualify for disability retirement, respondent had to prove that, at the time he applied, he was "incapacitated physically or mentally for the performance of [his] duties in the state service." (Gov. Code, § 21156.) 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 and uncertain duration, as determined by the board ... on the basis of competent medical opinion.

3. 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.) The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, 863, explained that prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature.

4. When all the evidence in this matter is considered in light of the courts' holdings in *Mansperger* and *Hosford*, respondent did not establish that his disability retirement application should be granted. He failed to submit sufficient evidence based upon competent medical opinion that, at the time he applied for disability retirement, he was permanently and substantially incapacitated from performing the usual duties of a Correctional Officer for CDCR. Consequently, his disability retirement application must be denied.

//

---

<sup>3</sup> Government Code section 21151, in relevant part, provides:

(a) 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.



**ORDER**

**The application of respondent Jerry D. Jones for disability retirement is DENIED.**

**DATED: June 14, 2016**

DocuSigned by:  
*Karen Brandt*  
5D48770E830B4DC...

---

**KAREN J. BRANDT**  
**Administrative Law Judge**  
**Office of Administrative Hearings**