ATTACHMENT A

THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Industrial Disability Retirement of: EDWARD ARAGON, Respondent, and DEPARTMENT OF CALIFORNIA HIGHWAY PATROL. Respondent.	Case No. 2015-0265 OAH No. 2016031406

PROPOSED DECISION

Irina Tentser, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California, on June 30, 2016.

Christopher C. Phillips, Senior Staff Attorney, represented complainant Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Respondent Edward Aragon (Respondent) represented himself and was present at the hearing.

Respondent California Highway Patrol (Respondent CHP) was not represented or present at the hearing.

Evidence was received and the matter was submitted on June 30, 2016.

CalPERS denied Respondent's industrial disability retirement application after determining that he was not permanently disabled or incapacitated from performance of his duties as a California Highway Patrol (CHP) officer at the time the application for industrial disability retirement was filed. Respondent contends he was permanently disabled and substantially incapacitated for the performance of his usual duties as a CHP officer at the time he filed his application for industrial disability retirement.

FACTUAL FINDINGS

1. Complainant Anthony Suine filed the Statement of Issues solely in his official capacity as Chief of the CalPERS Benefits Services Division.

2. Respondent was employed by Respondent CHP as a California Highway Patrol Officer. By virtue of his employment, Respondent is a state safety (patrol) member of CalPERS, pursuant to Government Code section 20390.[1]

3. On August 1, 2014, Respondent submitted an application for service pending industrial disability retirement. Respondent claimed disability on the basis of an orthopedic (lower back) and cardiovascular (hypertension)[2] condition.

4. Respondent retired from service effective November 29, 2014. He has been receiving a service retirement allowance since that date.

5. CalPERS obtained medical reports concerning Respondent's orthopedic condition from competent medical professionals. After review of the reports, CalPERS determined that Respondent was not permanently and substantially incapacitated for the performance of his duties as a CHP officer at the time that he filed his application for industrial disability retirement. CalPERS also determined that Respondent did not sustain a "serious bodily injury" as defined by section 21428.1.

6. Respondent was notified of CalPERS's determination and was advised of his appeal rights by letter dated November 25, 2014.

7. Respondent filed a timely appeal by letters dated January 3, 2014, and February 12, 2015, and requested an administrative hearing.

Usual Duties of a California Highway Patrol Officer

8. Two documents describing the usual duties required of a CHP officer were received in evidence. The first document was entitled "CALIFORNIA HIGHWAY PATROL OFFICER 14 CRITICAL PHYSICAL ACTIVITIES," revised in April of 2010. The second document was a CalPERS' document entitled "Physical Requirements of Position/ Occupational Title" jointly completed and signed on August 4, 2014, by a CHP supervisor and Respondent.

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[1] All further section references are to the Government Code unless otherwise indicated.

[2] Respondent submitted no evidence establishing that his hypertension caused him to be permanently and substantially disabled.

9. As explained in the Legal Conclusions below, CHP officers must be able to perform all of the 14 critical physical tasks. The required tasks relevant to this matter, based on testimony and reports of medical experts, are lifting and carrying moderately heavy to heavy objects, pushing and pulling moderately heavy to heavy objects, and dealing with uncooperative persons. The specific tasks identified by health professionals are discussed below in the description of the competent medical evidence.

Respondent's Injuries Leading to His Claimed Industrial Disability

10. Respondent testified at the administrative hearing and related the multiple dates of injury, including cumulative trauma work injury in the period August 1990 through November 21, 2014, that he felt led to his current physical condition. He also described the symptoms he experiences and the manner in which his physical problems negatively impact his activities.

11. Respondent's disability application cited December 29, 2009 as the date the injury occurred that led to his disability claim. Specifically, Respondent described how, while entering a patrol vehicle, his duty belt caught on the door frame, twisting his back and resulting in a loss of mobility. Respondent indicated that as a result of the injury he was unable to wear safety equipment due to severe pain and that his loss of mobility placed himself and members of the public at risk in the field. While Respondent's disability application also cited "high blood pressure" as a basis of his disability, he did not indicate how that condition caused him to be disabled.

12. Respondent felt he could no perform CHP officer job duties due to his physical limitations. His biggest concern was his inability to successfully capture suspects. Respondent described how his physical limitations caused him to be unable to apprehend suspects.

Competent Medical Opinion

Neil J. Haldbridge, M.D.

13. Respondent did not present medical opinion testimony in support of his disability claim. Rather, Respondent submitted two medical evaluation reports dated December 23, 2015, and May 16, 2016, respectively, prepared by Dr. Neil J. Haldbridge, an orthopedic surgeon. The reports were admitted as administrative hearsay evidence corroborating Respondent's testimony regarding his disability.

14. However, Dr. Haldbridge's reports, as described in factual finding 13, were not applicable to his appeal because they were based primarily on Respondent's complaints about his neck and right shoulder. The reports did not address Respondent's claimed disability, as described in factual finding 3, of an orthopedic (lower back) condition and did not indicate how Respondent's hypertension affected his ability to perform his duties, which was the subject of this hearing.

Pierre Hendricks, M.D.

15. On October 8, 2014, Respondent underwent an Independent Medical Evaluation (IME) at the request of CalPERS performed by Dr. Hendricks, a board-certified orthopedic surgeon. After Dr. Hendricks' examination, he prepared a report that was received in evidence. Dr. Hendricks also testified at the hearing.

16. Dr. Hendricks reviewed medical records and conducted a physical examination of Respondent. Respondent was 53 years old at the time and described his last job with Respondent CHP as inspecting commercial vehicles. In November of 2014, he retired because he was unable to perform his full duty.

A. Respondent's History of Present Illness

17. Respondent reported to Dr. Hendricks that he had no problems with his lower back until a motor vehicle accident in approximately 1993, when, while driving his patrol vehicle on the freeway, he inadvertently ran into a center divider. He recalled the onset of low back pain the day after the accident. Respondent's symptoms were treated on an industrial basis with oral medication and physical therapy. Respondent reported that he was treated for approximately three months. Respondent did not recall taking time off work due to his injury. At the conclusion of treatment, Respondent had some residual lower back pain, but was allowed to return to work with no restrictions.

18. In 1994, Respondent reinjured his back when he was struck by a vehicle while directing traffic. He took no time off work due to this injury. Respondent was treated with oral medication and physical therapy for approximately one month, but still suffered residual symptoms of lower back pain. However, he returned to work without restrictions.

19. In 1996 or 1997, Respondent re-injured his back in a motor vehicle accident. His patrol vehicle spun out and struck a guardrail while driving in the rain. Respondent recalled being treated one or two occasions following this accident. He did not take time off work and he continued working without restrictions.

20. In 1997, Respondent re-injured his back during a vehicle training course when his car spun out on sand. This was treated for 2-3 weeks. He reported that he took no time off work for this injury and returned to work with no restrictions.

21. Sometime between 2001 and 2003, Respondent re-injured his back when he attempted to lift a downed light pole blocking traffic on a freeway. Respondent reported that he experienced sudden severe lower back pain and was unable to move for several minutes. He reported this incident but did not seek medical treatment for it. Respondent's lower back pain returned to baseline and he continued working without restrictions.

22. In 2006 or 2007, Respondent re-injured his back while subduing a combative individual. He had one medical visit related to the injury and was treated with oral

medication. Respondent did not miss any time off work and continued to work without restrictions. His lower back pain returned to baseline.

23. In 2007 or 2008, Respondent re-injured his back during a high-speed chase. Respondent had increased back pain and was off work for two or three days. He was evaluated in the emergency department at Antelope Valley Hospital. He was treated with oral medication but required no follow-up. Respondent's back pain returned to baseline and he continued to work with no restrictions.

24. On December 20, 2009, as described in factual finding 11, Respondent sustained his work related injury that led to his disability claim. After issuing a ticket on a freeway, Respondent hurriedly climbed into the driver's seat of his patrol vehicle. Respondent stated that his duty belt got caught in the door, resulting in the acute onset of lower back pain without radiation. Consequently, he was unable to exit his vehicle.

25. As a result of the injury described in factual finding 24, Respondent was referred to the Pro Active Work Health Center where he was treated on an industrial basis with oral medication and physical therapy. Despite this treatment, his symptoms persisted and he was evaluated with an MRI of the lumbar spine on February 25, 2010. This study revealed milk posterior central disc bulges (3 mm) at L4-5 and L5-S1 with focal annular tears minimal posterior disc bulge at L3-4, no evidence of lumbar spinal stenosis, and no report of any neural foraminal stenosis or nerve root impingement.

26. In March 2010, Respondent was referred to orthopedic surgeon, Dr. Thomas Fell. Dr. Fell recommended conservative treatment with exercises and anti-inflammatory medication.

27. In the summer of 2010, Respondent was in a non-industrial front end motor vehicle accident. He was subsequently treated with chiropractic therapy for two months. From July through August 2010, he was placed on temporary total disability.

28. In 2010, Respondent was transferred to pain management specialist Francis Riegler. Dr. Riegler treated Respondent with narcotic pain medication in addition to Neurontin, anti-inflammatory medication and muscle relaxants. In January 2011, a lower extremity EMG/NCV (Electromyogram and Nerve Conduction) test was performed. This test revealed no evidence of lumbar radiculopathy or peripheral neuropathy. Respondent was returned to part-time restricted work in October.

29. Dr. Riegler recommended a lumbar epidural steroid injection, but this was not authorized. In April 2011, Respondent was placed on temporary total disability.

30. On June 27, 2011, Respondent was involved in a nonindustrial T-bone type motor vehicle accident. X-rays apparently revealed a fractured right rib. Respondent's injuries were treated through his Kaiser health insurance with physical therapy for approximately two months.

31. In August 2011, Respondent had a neurology Qualified Medical Evaluator (QME) performed by Norman Namerow. Dr. Namerow recommended a single trial of a lumbar epidural steroid injection. On April 9, 2012, Respondent was referred to interventional pain management specialist, Dr. Joshua Prager, for the injection. Dr. Prager concluded that a lumbar epidural steroid was not indicated and therefore did not perform the injection.

32. In August or September 2011, Respondent was returned to part-time restricted work. In October 2012, Respondent was released back to full duty as a patrol officer. In February 2013, Respondent was transferred to the commercial vehicle inspection department where he continued to work without restrictions.

33. Respondent continued to follow up on a regular basis with his primary treating physician, Dr. Riegler, and treatment with Norco (pain management), Tramadol (pain management), and Flexeril (muscle relaxant) continued.

34. On February 23, 2013, Respondent underwent an orthopedic Agreed Medical Evaluation (AME) performed by Dr. Neil Haldbridge. Dr. Haldbridge reported objective findings of asymmetric limitation of motion in the frontal plane muscle guarding on extension and left lateral bending and positive nerve root tension signs. He concluded that Respondent was permanent and stationary as of February 12, 2013, and that Respondent should have work restrictions precluding lifting more than 30 pounds. The neurology QME opined that Respondent had no permanent disability based on the lack of objective findings.

35. In July 2013, Dr. Riegler referred Respondent for acupuncture therapy which continued until September 2013. Respondent was also continued on oral medications and was felt by his treating physician to have preservation of functional capacity that allowed him to work with no restrictions.

36. On December 10, 2013, Respondent re-injured his back when he sat on pneumatic chair that malfunctioned, suddenly dropping Respondent. However, he did not fall to the ground due to the chair malfunction. Respondent was referred for additional acupuncture treatment. From December 13 through 31, 2013, Respondent was placed on total temporary disability. He was subsequently released to full duty.

37. As of January 2014, Respondent's symptoms improved and his pain level was reported to be at a 2 out of 10. In March 2014, Respondent's acupuncture treatment concluded. In July 2014, Dr. Reigler reported that Respondent required medications infrequently upon re-examination. At that time, Respondent informed Dr. Reigler that he was applying for an early retirement and requested that work restrictions be imposed. He also provided Dr. Reigler with a Physician's Report on Disability form.

38. On August 4, 2014, Dr. Reigler opined on the form described in factual finding 37 that Respondent was permanently substantially incapacitated from the performance of his usual duties. On August 8, 2014, Dr. Reigler reported that Respondent

could continue activities as tolerated while avoiding exacerbating factors. On August 15, 2014, Dr. Riegler placed Respondent on total temporary disability for two weeks. In September 2014, Respondent returned to modified work and continued to work in that capacity until his October 8, 2014 examination by Dr. Hendricks.

B. Respondent's Subjective Complaints

39. On October 8, 2014, Respondent complained to Dr. Hendricks that he had back pain that was sometimes sharp and stabbing. The pain was located centrally and extended to the left and right paraspinal muscle regions. Intermittently, the pain radiated to the bilateral buttocks and bilateral lateral pelvis. Respondent reported that the pain radiated to the right thigh and was associated with a feeling of weakness on standing for more than 10 minutes. Respondent did not have lower extremity numbness. He reported some occasional difficulties with bowel and bladder function although his description, Dr. Hendricks opined, was not consistent with a neurologic incontinence suggestive of cauda equine syndrome.[3] Respondent further indicated that his back pain was aggravated by wearing a duty belt, lifting, pushing and pulling, standing, stopping, and bending.

Dr. Hendricks did not note any complaints related to Respondent's neck and/or shoulder.

C. Respondent's Past Medical History and Medications

40. Dr. Hendricks noted that Respondent's medical history was significant for right knee surgery in 2005 (running down an embankment) and 2008 (slip and fall). Respondent reported minor residual anterior right knee pain, which was aggravated by prolonged sitting. In 2005, Respondent had some physical therapy for his knee but had not sought treatment since then as of the date of Dr. Hendrick's evaluation.

Dr. Hendricks further noted Respondent's history of hypertension, dyslipidemia, and sleep apnea.

At the time of his October 8, 2014 evaluation, Respondent reported that he was taking Norco (10 mg), Tramadol (pain management), Flexeril, Gabapentin (treat nerve pain), and an anti-hypertension medication, the name of which Respondent could not recall..

D. Dr. Hendricks' Physical Examination of Respondent.

41. As part of the physical examination, Dr. Hendricks conducted range of motion tests. The cervical spine range of motion was normal. Similarly, shoulder, elbow, and

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[3] Cauda equina syndrome (CES) is a neurologic condition in which damage to the cauda equina causes loss of function of the lumbar plexus (nerve roots) of the spinal canal below the termination (conus medullaris) of the spinal cord. CES is a lower motor neuron lesion.

wrists/hands extension was normal. In regard to Respondent's lumbar spine motion, forward flexion was 115, 55, and 60 degrees. The expected is 60 degrees. Extension was 30, 10, and 20. The expected is 25 degrees. The left lateral flexion was 30, 5, and 25. The expected is 25 degrees. The left lateral flexion was 30, 5, and 25 degrees. The expected is 25 degrees. The right lateral flexion was 30, 5, and 25 degrees. The expected is 25 degrees. In Dr. Hendricks' opinion, Respondent's lumbar motion results were within reasonable limits based on Respondent's age. Respondent reported some pain with motion in all planes and increased back pain with torso rotation to the left. He also indicated that there was tenderness on palpation of the subcutaneous tissues of the left lateral pelvis (over the lateral crest region).

42. Dr. Hendricks viewed Respondent's MRI results, as described in factual finding 25. Overall, Dr. Hendricks felt the condition of Respondent's lumbar spine was generally age-appropriate.

43. Dr. Hendricks' diagnoses were multiple lumbar strains, with residual lumbago and mild lumbar spondylosis. He opined that Respondent was able to perform all specific job duties of a CHP officer and that Respondent was not substantially incapacitated from the performance of his usual duties. Dr. Hendricks' opinion was based on the following findings:

a. Respondent's physical examination revealed no objective deficit. He had full lumbar range of motion, normal lower extremity strength, normal lower extremity sensation, and no positive nerve root tension signs. In addition, Respondent's lumbar spine MRI revealed normal minor age related degenerative changes with no evidence of spinal stenosis, neural foraminal stenosis, and no nerve root impingement. The lower extremity neurodiagnostic testing was also completely normal.

b. Dr. Hendricks noted that while Respondent reported multiple injuries to the lumbar spine, he was able to return to full duty after each injury and worked full duty with no restrictions from October 2012 until December 10, 2013, when he sustained a new lumbar injury. Respondent reported to full duty on December 31, 2013 and continued to work without restrictions until he applied for a disability retirement.

c. Dr. Hendricks noted that while orthopedic AME, Dr. Halbridge, concluded Respondent should have a work restriction of no lifting more than 30 pounds (which would meet the criteria for substantial incapacity), this was based on objective findings on his examination consisting of "asymetric limitation of motion in the frontal plane, muscle guarding in extension and left lateral bending (and) positive nerve root tension signs on the left." (Exh. 8 at pg. 18.) In contrast, Dr. Hendricks described that while Respondent did display apparent lumbar muscle guarding, the lumbar range of motion was normal and the nerve root tension sings were negative. Further, it was noted that Respondent continued to work full duty without restriction subsequent to Dr. Haldbridge's examination.

d. Dr. Hendricks further noted that while Dr. Riegler reported Respondent was substantially incapacitated in his August 4, 2014 physician's statement of disability, there was no objective change in Respondent's condition (as reported in Dr. Riegler's interval reports) that would explain why he was able to work full duty in July 2014, but was substantially incapacitated in August. Dr. Hendricks therefore concluded that based on the available information, it appeared that Dr. Riegler determined Respondent to be substantially incapacitated at Respondent's request, as opposed to Respondent being substantially incapacitated in reality.

e. Dr. Hendricks indicated that his opinion was supported by Dr. Namerow's report that Respondent "has no permanent disability as there was never any objective evidence of his reported injury." (Exh. 8 at pg. 18.)

44. Dr. Hendricks also expressed his skepticism of functional evaluations because the findings depend on the effort put forth by the person evaluated. As he noted in his report, during his physical examination of Respondent, there was some evidence of "submaximal effort and symptom embellishment that diminishes to some degree the credibility of his subjective complaints." (Exh. 8 at pg. 19.)

45. Dr. Hendricks concluded that Respondent was not incapacitated from performing his usual duties. More specifically, he concluded that Respondent could do all of 14 critical tasks listed for CHP officers. This was confirmed by the diagnostic studies and range of motion testing. Dr. Hendricks could not find any orthopedic or neurological impairment that prevented Respondent from performing his usual duties as a CHP officer.

Resolution of Conflicts Between Medical Evidence

46. Dr. Hendricks was the only expert witness who testified at hearing on the question of Respondent's substantial capacity to perform his usual duties. As previously noted in factual findings 13 and 14, Respondent's hearing testimony that he was disabled was uncorroborated by direct and/or relevant medical evidence. Accordingly, Dr. Hendricks' opinion regarding Respondent's ability to perform his job duties was more persuasive.

LEGAL CONCLUSIONS

1. An applicant for retirement benefits has the burden of proof to establish a right to the entitlement absent a statutory provision to the contrary. (*Greatorex v. Board of Administration* (1979) 91 Cal. App.3d 57.)

2. Section 20026 states:

"'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, 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. Incapacity for performance of duty means the substantial inability to perform usual duties. (*Mansperger v Public Employees' Retirement System* (1970) 6 Cal. App.3d 873, 876.) The ability to substantially perform the usual job duties, though painful or difficult, does not constitute permanent incapacity. (*Hosford, supra*, 77 Cal. App.3d 854, at p. 862.)

4. Section 21151, subdivision (a) states:

"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."

5. Section 21152 states, in part:

"Application to the board for retirement of a member for disability may be made by:

(a) The head of the department in which the member is or was last employed, if the member is a state member other than a university member.

[¶] . . . [¶]

(d) the member of any person in his or her behalf."

6. Section 21154 states:

"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, other than a local safety member with the exception of a school safety 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. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination."

7. Section 21156, subdivision (a)(1) states:

"If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, 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."

8. Section 21166 states, in part:

"If a member is entitled to a different disability retirement allowance according to whether the disability is industrial or nonindustrial and the member claims that the disability as found by the board, or in the case of a local safety member by the governing body of his or her employer, is industrial and the claim is disputed by the board, or in case of a local safety member by the governing body, the Workers' Compensation Appeals Board, using the same procedure as in workers' compensation hearings, shall determine whether the disability is industrial."

9. Section 21406 states:

"Upon retirement of a patrol member for industrial disability he or she shall receive a disability retirement allowance of 50 per cent of his or her final compensation plus an annuity purchased with his or her accumulated additional contributions, if any, or, if qualified for service retirement, he or she shall receive his or her service retirement allowance if the allowance, after deducting the annuity, is greater."

10. Section 21428.1 states:

"a) Upon retirement of a patrol member for industrial disability as the result of a single event that results in serious bodily injury, the member shall receive the higher of the allowance provided by Section 21406, or, the disability allowance otherwise provided pursuant to this section equal to 3 percent of his or her final compensation multiplied by the number of years of patrol service credited to him or her plus an annuity purchased with his or her accumulated additional contributions, if any. This section shall not apply to a disability that manifests more than six months after the effective date for the industrial disability retirement. This section does not entitle the member to an industrial disability retirement if the member would not otherwise be eligible for an industrial disability retirement.

"(b) This section shall apply only to serious bodily injuries, and shall not be applied to disabilities that are the result of any of the following:

"(1) Cumulative trauma.

"(2) Cumulative injuries, including, but not limited to, heart conditions, stroke, stress, anxiety, or diabetes.

"(3) Presumptive injuries or illnesses as described in Chapter 1 (commencing with Section 3200) of Part 1 of Division 4 of the Labor Code.

"(4) Stress-related disabilities.

"(5) Physical disability having mental origin.

"(c) If a patrol member has other service credit as a state peace officer/firefighter member, state safety member, local safety member, state miscellaneous, state industrial, or local miscellaneous member under this system, the cumulative benefit pursuant to this section, including an annuity purchased with his or her accumulated contributions, shall not exceed 90 percent of final compensation.

"(d) For purposes of this section, "serious bodily injury" includes any of the following:

"(1) Total loss of sight in one or both eyes.

"(2) Total loss of hearing in both ears.

"(3) Amputation or total loss of function in a hand, arm, foot, or leg.

"(4) A spinal cord injury resulting in paralysis which causes the complete loss of function in a hand, arm, foot, or leg.

"(5) Physical injury to the brain resulting in serious cognitive disorders or paralysis which causes the complete loss of function in a hand, arm, foot, or leg.

"(6) Injury to a major internal organ which substantially limits one or more "major life activities." Major life activities are functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning, and performing substantial gainful employment.

"(7) Any other serious physical injury that results in the inability to perform substantial gainful employment.

"(e) This section applies only to those patrol members who are described by at least one of the following:

"(1) Employed in a state bargaining unit for which a memorandum of understanding has been agreed to by the state employer and the recognized employee organization to become subject to this section.

"(2) Excluded from the definition of state employee in subdivision (c) of Section 3513.

"(3) Employed by the executive branch of government and not a member of the civil service.

"(f) In the event of a dispute regarding the applicability of this section, the board shall proceed with retirement pursuant to any other section that may apply and with the payment of any benefits that are payable pursuant to any other section when this section is not applicable. If the board subsequently determines that this section is applicable, an amount equal to the benefits paid shall be deducted from the benefits payable pursuant to this section because of the determination."

10. Vehicle Code section 2268 states:

"a) Any member of the Department of the California Highway Patrol, as specified in Sections 2250 and 2250.1, shall be capable of fulfilling the complete range of official duties administered by the commissioner pursuant to Section 2400 and other critical duties that may be necessary for the preservation of life and property. Members of the California Highway Patrol shall not be assigned to permanent limited duty positions which do not require the ability to perform these duties.

"(b) Subdivision (a) does not apply to any member of the California Highway Patrol who, after sustaining serious job-related physical injuries, returned to duty with the California Highway Patrol and who received a written commitment from the appointing power allowing his or her continued employment as a member of the California Highway Patrol. This subdivision applies only to commitments made prior to January 1, 1984.

"(c) Nothing in subdivision (a) entitles a member of the California Highway Patrol to, or precludes a member from receiving, an industrial disability retirement."

11. A California Highway Patrol officer must be able to perform all of the 14 critical tasks for the classification irrespective of the particular duty assignment of the officer claiming disability (*Beckley v. Board of Administration* (2013) 222 Cal. App.4th 691, 699)

12. Here, the evidence showed Respondent was physically capable of performing all of the usual duties associated with his position as a CHP Patrol officer, including the 14 critical tasks identified by the CHP, as established through the credible testimony of Dr. Hendricks, and as described in factual findings 8 through 46. Respondent therefore failed to establish on the basis of competent medical opinion that he has a physical disability of permanent or extended and uncertain

duration that incapacitates him for the performance of his required duties as a CHP Patrol officer, as described in factual findings 8 through 46 and legal conclusions 1 through 11.

ORDER

Respondent Edward Aragon's appeal from CalPERS' determination that he is not permanently disabled or incapacitated for the performance of his duties as a California Highway Patrol Officer with the California Highway Patrol is denied.

Dated: July 13, 2016

DocuSigned by:
Irina Tentser
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IRINA TENTSER
Administrative Law Judge
Office of Administrative Hearings