

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:

RICHARD BRAZIL, Respondent

and

**CALIFORNIA SUBSTANCE ABUSE TREATMENT FACILITY AND
STATE PRISON – CORCORAN, CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, Respondent**

Agency Case No. 2020-0913

OAH No. 2021010278

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter by videoconference on May 27 and June 9, 2021, from Sacramento, California.

Preet Kaur, Senior Attorney, represented California Public Employees' Retirement System (CalPERS).

Respondent Richard Brazil represented himself.

No one appeared for or on behalf of respondent California Substance Abuse Treatment Facility and State Prison – Corcoran, California Department of Corrections and Rehabilitation (CDCR), its default was entered, and this matter proceeded against CDCR as a default proceeding pursuant to Government Code section 11520.

Evidence was received, the record closed, and the matter submitted for written decision on June 9, 2021.

SUMMARY

Mr. Brazil was granted an industrial disability retirement. Upon reevaluation, CalPERS determined he is no longer substantially incapacitated and should be reinstated to his former position. Mr. Brazil appealed that determination. CalPERS presented persuasive and competent medical evidence in support of its determination, which Mr. Brazil did not rebut. Therefore, his appeal should be denied.

FACTUAL FINDINGS

Jurisdictional Matters

1. Mr. Brazil was employed by CDCR as a Correctional Officer. He is a state safety member of CalPERS by virtue of his former employment.
2. Mr. Brazil signed a Disability Retirement Election Application seeking an industrial disability retirement based on orthopedic (left thumb, hand, and wrist)

conditions on March 31, 2017. On January 16, 2018, CalPERS approved the application, and Mr. Brazil retired due to industrial disabilities, retroactive to October 3, 2017.

3. On March 19, 2020, CalPERS sent Mr. Brazil correspondence advising him that his disability retirement benefits were under review to confirm he continued to qualify for such benefits. He was provided a Retiree Questionnaire for CalPERS Disability Re-evaluation to complete, sign, and return to CalPERS, as well as a Treating Physician Packet to provide his current treating physician to complete and return to CalPERS.

4. CalPERS reviewed reports prepared by Donald Pompan, M.D., Robert M. Ruth, M.D., Dabi Gurmu, M.D., and Don T. Williams, M.D., and concluded Mr. Brazil was no longer substantially incapacitated from the performance of his usual job duties as a Correctional Officer with CDCR due to his orthopedic (left thumb, hand, and wrist) conditions. CalPERS notified him that he will be reinstated to his former position pursuant to Government Code section 21193.

5. Mr. Brazil appealed CalPERS's decision to reinstate him. On December 14, 2020, Keith Riddle, Chief of CalPERS's Disability and Survivor Benefits Division, signed the Accusation solely in his official capacity.

History of Injuries

6. On January 18, 2016, Mr. Brazil was opening a heavy metal sally port gate at work when the metal post that locks the gate fell unexpectedly and crushed his left thumb. He injured his wrist when moving his hand out from under the post.

7. Mr. Brazil sought treatment from James Dunn, M.D., through the workers' compensation system on the day of the injury. An x-ray showed a nondisplaced left

thumb distal phalanx closed fracture.¹ Dr. Dunn referred Mr. Brazil to Regional Hand Surgery Associates for treatment.

8. Anisa Yalom, M.D., a general surgeon, treated Mr. Brazil at Regional Hand Surgery. She initially provided conservative treatment, including splinting and corticosteroid injections.

9. Mr. Brazil continued to complain of pain in his left wrist and thumb after three months of conservative treatment, so Dr. Yalom ordered an MRI. An April 15, 2016 MRI of Mr. Brazil's left hand and wrist showed a sprain to the ulnar collateral ligament in the metacarpal phalangeal joint of the thumb.² It also showed a tear in the triangular fibrocartilage complex of the wrist, tough fibrous tissue and cartilage that supports and stabilizes the joints between the ends of the radius and ulna. Dr. Yalom performed surgery on Mr. Brazil's left thumb and wrist on November 14, 2016.

10. Mr. Brazil continued to receive treatment for his left wrist and thumb through the workers' compensation system as of the date of hearing. On January 13, 2021, the interphalangeal joint in his left thumb was fused together. He never returned to work after suffering his initial injuries on January 18, 2016.

¹ He fractured the top third of the thumb, the fractured bone remained aligned, and the bone did not break through the skin.

² The thumb has three joints, from the tip to its base: the interphalangeal joint, the metacarpophalangeal joint, and the carpometacarpal joint. The metacarpophalangeal joint has two ligaments: the ulnar collateral ligament on the pinky side, and the radial collateral ligament on the other. The two ligaments are essential for the stability of the thumb and for pinch and grip activities.

Physical Duties of a Correctional Officer

11. A Correctional Officer with CDCR performs the following physical duties with the following frequencies: constantly (more than six hours) sitting, standing, walking, bending (neck), twisting (neck), pushing and pulling, fine manipulation, power grasping, simple grasping, repetitive use of hand(s), keyboard use, and lifting or carrying up to 25 pounds; frequently (three to six hours) climbing, bending (waist), twisting (waist), reaching below shoulder, mouse use, lifting or carrying 26 to 50 pounds, walking on uneven ground, driving, working with heavy equipment, working at heights, and operating foot controls or repetitive movement; and occasionally (up to three hours) running, crawling, kneeling, squatting, reaching above shoulder, and lifting or carrying greater than 50 pounds.

Additionally, a Correctional Officer must be able to perform peace officer duties in adverse, stressful, and unpleasant situations; qualify with CDCR-approved weapons on a firing range; defend himself and others; subdue and apply inmate restraints; and swing his arm with force.

CalPERS's Sub Rosa Investigation

12. Heather Salvo is an Investigator with CalPERS. Her duties include conducting video surveillance of CalPERS's members who have been granted disability retirement to see if they engage in activities inconsistent with their disability. Ms. Salvo was asked to investigate Mr. Brazil. She surreptitiously videoed his activities on December 16 through 18, 2019, January 8 through 10, 2020, and February 18 through 20, 2020, for a total of nine days.

13. On four occasions, Mr. Brazil was seen driving two children from his home to school and sometimes picking them up later that day and driving them home.

On one of those occasions, he drove to a shopping center after dropping the children off at home. He parked, exited his car, and entered "Sal's Tobacco" by grabbing the door handle with his left hand, wrapping his fingers and thumb around the horizontal handle, and pulling the door open. Later, he exited the store, got into his car by opening the driver's side door with his left index, middle, and pointer fingers (his thumb was flexed), and drove home.

14. On another occasion, Mr. Brazil leaned into his car through an open driver's side door and grabbed a cup, held it in his left hand between his thumb and pointer, middle, and index fingers (his thumb was flexed), and brought it inside his home before bringing the children to school. On the third occasion, he drove to various errands after dropping the children off at school.

15. On two of the days Mr. Brazil was not seen driving the children to school, he drove to other errands. He was not seen leaving his home on any of the three other days.

Medical Evidence

MR. BRAZIL'S EVIDENCE

16. Mr. Brazil introduced Donald C. Pompan, M.D.'s, IME report, James C. Dunn, M.D.'s, Physician's Report on Disability, Dr. Gurmu's Physician's Re-evaluation of Current Disability, and records of the treatment he has received through the workers' compensation system. No medical experts testified at hearing on his behalf.

Dr. Pompan's and Dr. Dunn's Reports

17. CalPERS relied on Dr. Pompan's IME report and Dr. Dunn's Physician's Report on Disability when initially granting Mr. Brazil an industrial disability retirement.

Neither report contains the author's opinion about whether Mr. Brazil remains substantially incapacitated as of March 19, 2020.

Dr. Gurmu's Records

18. Dr. Gurmu completed a Physician's Re-evaluation of Current Disability on April 6, 2020, in which he opined Mr. Brazil remains substantially incapacitated due to his limited use of his left hand. Dr. Gurmu opined that Mr. Brazil's disability renders him incapable of "holding a firearm properly" or "restraining inmates." He did not explain how Mr. Brazil's limited use of his left hand makes him unable to perform either duty.

19. Mr. Brazil also produced several work status reports Dr. Gurmu issued between January 18, 2018, and May 12, 2021. According to the reports, Dr. Gurmu returned Mr. Brazil to work with modified duties and various limitations, including limited use of his left hand; no pushing, pulling, or lifting more than 15 pounds; and no repetitive grasping or pulling. Dr. Gurmu did not describe the factual basis for his conclusion that Mr. Brazil remains substantially incapacitated in any of the reports.

Ricardo Avena, M.D.

20. Dr. Avena is a board-certified general surgeon at Regional Hand Center who took over Mr. Brazil's treatment from Dr. Yalom. Mr. Brazil provided Dr. Avena's work status reports dated January 13 and April 23, 2021. Although Dr. Avena recommended that Mr. Brazil return to work on modified duty, he did not opine that Mr. Brazil is substantially incapacitated in either report.

Robert M. Ruth, M.D.

21. Dr. Ruth is a hand surgeon who performed a Qualified Medical Evaluation (QME) of Mr. Brazil's injuries in his workers' compensation matter. Mr. Brazil produced the September 1, 2020 QME report. After physical examination, Dr. Ruth opined that Mr. Brazil's injuries require permanent work restrictions against heavy, forceful, repetitive twisting with his left hand and pinching with his left thumb. Dr. Ruth did not identify any Correctional Officer duties that Mr. Brazil was physically incapable of performing. Nor did he opine that Mr. Brazil was substantially incapacitated from performing any of his former duties.

CALPERS'S EVIDENCE

22. Don T. Williams, M.D., is a board-certified orthopedic surgeon who performed an Independent Medical Evaluation (IME) of Mr. Brazil on June 12, 2020, at CalPERS's request. His IME consisted of reviewing a patient questionnaire Mr. Brazil completed at the beginning of the appointment, physically examining Mr. Brazil, and reviewing medical records, a description of Mr. Brazil's former job duties, and a video of Ms. Salvo's surveillance CalPERS provided. Dr. Williams documented his IME in a written report, and prepared a supplemental report addressing additional medical records CalPERS provided after receiving his initial report. Dr. Williams testified at hearing.

23. At the time of the IME, Mr. Brazil reported experiencing constant pain in his left hand that radiated into the base of his thumb. He had a limited range of motion in his hand and experienced a lack of sensation when grasping things. The top of his hand would turn red and swell. He took nonprescription acetaminophen for pain.

24. Mr. Brazil's activities at the time of the IME included staying home with his two teenage children. He was able to dress himself, walk, climb, and type on a computer, including use his thumb on the space bar. He experienced pain when vacuuming, cooking, or cleaning. He could not grasp, lift, or reach for things. He was unable to perform yardwork, carry groceries, drive, or participate in any sports.

25. Dr. Williams's objective findings upon examination did not correlate with Mr. Brazil's subjective complaints. Although Mr. Brazil had a reduced range of motion in his left wrist upon flexion, it was still within normal limits. He had some tenderness upon palpation of the left ulna on the side closest to his hand.

26. Mr. Brazil was able to flex his left thumb to 60 degrees at the metacarpal joint. He held his interphalangeal joint in an extended position, and could not actively flex his thumb at that joint. When Dr. Williams attempted passive flexion, he felt Mr. Brazil tighten his extensor muscle and could not move Mr. Brazil's thumb more than 10 degrees, even with distraction. Dr. Williams described this finding as "odd" and one "I do not understand." He also wrote that Mr. Brazil "hyper-reacts" when Dr. Williams palpated a cyst at the base of the thumb and touched the palm-side of the metacarpal joint or attempted to bend it.

27. Dr. Williams reviewed Dr. Yalom's and Dabi Gurmu, M.D.'s, medical records. On April 11, 2017, Dr. Yalom noted that Mr. Brazil would not actively flex his left thumb, but she was able to passively flex his thumb at the interphalangeal joint to 90 degrees. The following month, Dr. Yalom noted that a recent MRI was inconsistent with Mr. Brazil's inability to actively flex his left thumb, opined that there was no objective reason for his inability to do so, and released him from treatment.

28. Dr. Gurmu's January 18, 2018 examination showed Mr. Brazil had a full range of motion in both hands with no joint abnormality, weakness, numbness, or other significant abnormal findings. Dr. Gurmu released him to return to full duty without any restrictions. An examination two weeks later revealed the same findings.

29. Dr. Gurmu noted that Mr. Brazil continued to have a full range of motion in both wrists and hands from February 15, 2018, through March 31, 2020. Mr. Brazil was able to flex his left thumb at the metacarpal joint to 60 degrees and extend it to five degrees. However, Dr. Gurmu imposed various work restrictions, including no pinching or grasping and no repetitive hand motions with the left hand.

30. Dr. Williams watched Ms. Salvo's video surveillance and noted that Mr. Brazil was seen using his left hand for gripping, driving, pulling, and holding objects, contrary to his claim at the IME that he could not, or had difficulty, performing some of those activities. Based on his physical examination and review of medical records and the video surveillance, Dr. Williams concluded Mr. Brazil is not substantially incapacitated due to orthopedic (left thumb, hand, and wrist) conditions. He opined that Mr. Brazil exaggerated his complaints.

31. CalPERS provided Dr. Williams additional records after he completed his initial IME. On July 20, 2020, Dr. Williams wrote a supplemental report explaining "the additional medical records did not change my opinion."

32. Dr. Williams testified at hearing consistently with his IME report and supplemental report. Additionally, he accurately described CalPERS's standard for granting disability retirement.

33. Dr. Williams disagreed with Dr. Gurmu's current work restrictions because they were inconsistent with Dr. Williams's objective findings during physical

examination. In fact, Dr. Gurmu's repeated findings that Mr. Brazil was able to flex the left metacarpal joint to 60 degrees and extend it to five degrees were consistent with Dr. Williams's findings, and were within normal limits. Dr. Williams found Mr. Brazil yelling out in pain when the cyst at the base of his wrist was palpated to be an overreaction, because Dr. Williams found no objective symptoms to support the subjective complaint.

34. Lastly, Dr. Williams explained that although the recent fusion surgery left Mr. Brazil unable to bend his left thumb at the interphalangeal joint, it should give him greater grip strength and more power in his hand. Additionally, Mr. Brazil is still able to bend his thumb at the other two joints, and his inability to bend at the top joint should not affect his ability to hold a firearm properly.

Analysis

35. CalPERS produced persuasive, competent medical evidence that Mr. Brazil is no longer substantially incapacitated from performing his usual duties as a Correctional Officer with CDCR due to orthopedic (left thumb, hand, and wrist) conditions. Dr. Williams is a board-certified orthopedic surgeon familiar with the proper standard for determining whether a CalPERS member qualifies for disability retirement. He testified credibly and persuasively at hearing. His conclusion that Mr. Brazil is not substantially incapacitated was well-reasoned and supported by his physical examination and review of prior medical records.

Mr. Brazil's attempt to impeach Dr. Williams's credibility by disputing the amount of time they spent face-to-face during the IME and disagreeing with the way Dr. Williams conducted the examination was not persuasive. Mr. Brazil's symptom magnification during examination made him a less reliable reporter of facts.

Additionally, his claim that he can no longer drive or grasp things due to his injuries was belied by video evidence of him repeatedly performing both tasks.

36. Mr. Brazil did not produce competent medical evidence. All his medical evidence was admitted solely as administrative hearsay.³ And though some of his evidence supplemented or explained the nonhearsay evidence of CalPERS's initial determination that he was substantially incapacitated, the sole issue on appeal is whether he remains substantially incapacitated. Mr. Brazil produced no evidence that Dr. Avena or Dr. Ruth holds the opinion that he remains substantially incapacitated.

37. Additionally, Mr. Brazil's evidence was less persuasive than CalPERS's. There was no evidence that any of Mr. Brazil's treatment providers are board-certified in orthopedic surgery. Their treatment was provided through the workers' compensation system, which has a different standard for qualifying for benefits than CalPERS's standard for qualifying for disability retirement. (Compare *Coca-Cola Bottling Co. v. Superior Court* (1991) 233 Cal.App.3d 1273, 1284 [standard for qualifying for workers' compensation benefits is whether employee suffered work-related injury "which causes disability or need for medical treatments"] with *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877 [standard for qualifying for disability retirement is whether disability renders member "substantially incapacitated from the performance of duty"].) There was no evidence that Mr. Brazil's providers were aware of the different standards when treating him or that they applied the proper standard when rendering their opinions.

³ Administrative hearsay may be used to supplement or explain other nonhearsay evidence, but it cannot be the sole evidentiary support for a factual finding. (Gov. Code, § 11513, subd. (d).)

38. Finally, Dr. Gurmu did not explain the factual basis for his conclusion that Mr. Brazil remains substantially incapacitated. (*Cates v. California Gambling Control Commission* (2007) 154 Cal.App.4th 1302, 1309 ["It is well settled that the value of opinion evidence rests in the factors considered and the reasoning employed," and one not supported by any factual explanation "establishes nothing"].)

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. CalPERS has the burden of proving by a preponderance of the evidence that Mr. Brazil is no longer substantially incapacitated. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (January 22, 2000, Precedential Decision 99-03) <<http://www.calpers.ca.gov/eip-docs/about/leg-reg-statutes/board-decisions/past/99-03-starnes.pdf>>.) This evidentiary standard requires CalPERS to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, CalPERS needs to prove only that it is more likely than not that Mr. Brazil is no longer substantially incapacitated. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

Applicable Law

2. Mr. Brazil is a state safety member of CalPERS by virtue of his former employment with CDCR. (Gov. Code, § 20403.) He was granted an industrial disability retirement on January 16, 2018, pursuant to Government Code section 21151, subdivision (a), due to orthopedic (left thumb, hand, and wrist) conditions. That statute provides: "Any . . . state safety . . . member incapacitated for the performance of duty

as a result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.”

3. Government Code section 20026 defines “disability” and “incapacity for performance of duty” as a “disability of permanent or extended duration . . . as determined by the board . . . on the basis of competent medical opinion.” (See *Mansperger v. Public Employees’ Retirement System, supra*, 6 Cal.App.3d 873, 876 [“We hold that to be ‘incapacitated for the performance of duty’ within section 21022 means the *substantial* inability of the applicant to perform his usual duties”], italics original.)

4. CalPERS’s Board of Administration may require a member who retired for disability and is under the minimum age for service retirement to undergo a medical examination to determine if he remains substantially incapacitated from his former position. (Gov. Code, § 21192.) If the determination after medical examination is that the member is no longer substantially incapacitated, he shall be reinstated to his former position. (Gov. Code, § 21193.)

5. Discomfort, which may make it difficult for one to perform his duties, is insufficient to establish permanent incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207 [mere discomfort which makes it difficult to perform one’s job does not constitute a permanent incapacity]; citing *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability retirement. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

6. The minimum age for service retirement is 50 years old. (Gov. Code, § 21060, subd. (a).) Mr. Brazil had not yet reached age 50 when CalPERS notified him that his disabled status was under review on March 19, 2020.

Conclusion

7. The competent medical evidence established that Mr. Brazil is no longer substantially incapacitated from the performance of his usual duties as a Correctional Officer with CDCR due to orthopedic (left thumb, hand, and wrist) conditions for the reasons explained in Factual Findings 35 through 38. Therefore, his appeal from CalPERS's determination that he is no longer substantially incapacitated and should be reinstated to his former position should be denied.

ORDER

Respondent Richard Brazil's appeal from CalPERS's determination that he is no longer substantially incapacitated from the performance of his usual job duties as a Correctional Officer with respondent California Substance Abuse Treatment Facility and State Prison – Corcoran, California Department of Corrections and Rehabilitation due to orthopedic (left thumb, hand, and wrist) conditions and should be reinstated to his former position is DENIED.

DATE: June 21, 2021


Coren D. Wong (Jun 21, 2021 12:36 PDT)

COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings