

**ATTACHMENT A**

**THE PROPOSED DECISION**

**BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA**

**In the Matter of the Statement of Issues Against:**

**DANIEL L. TERCERO and AVENAL STATE PRISON,  
CALIFORNIA DEPARTMENT OF CORRECTIONS AND  
REHABILITATION, Respondents**

**Agency Case No. 2020-1301**

**OAH No. 2021020761**

**PROPOSED DECISION**

Heather M. Rowan, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter via telephone and video conference on August 9, 2021, from Sacramento, California.

Helen Louie, Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Daniel L. Tercero (respondent) represented himself.

There was no appearance by or on behalf of Avenal State Prison (Avenal), or California Department of Corrections and Rehabilitation (Department). CalPERS established that it served Avenal and the Department with a Notice of Hearing.

Consequently, this matter proceeded as a default hearing against Avenal and the Department pursuant to Government Code section 11520, subdivision (a).

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

## **ISSUE**

Based on his heart condition, is respondent permanently and substantially incapacitated from performing his usual and customary duties as a Correctional Officer for the Department?

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. Respondent was employed with the Department as a Correctional Officer. On November 19, 2019, he signed an application for service pending industrial disability retirement (application), which CalPERS received on November 21, 2019.

2. Respondent service retired on December 31, 2019. He has been receiving his service retirement allowance since January 2020. Respondent described his disability in his application as involving the heart (myocardial infarction, hypertension, and hyperglycemia), neck (several diagnoses), right elbow and arm, and back. He stated he is unable to push or pull over 10 pounds or perform excessive physical activity. The cause of respondent's heart condition is: "cumulative trauma over a sustained period," caused by "ongoing stress/strain" of being a correctional officer. He

suffered a myocardial infarction (heart attack) on May 21, 2019. His orthopedic injuries are due to his repetitive and labor-intensive job over a sustained period.

3. Respondent provided CalPERS with medical information related to his cardiological conditions. Despite CalPERS's several attempts to obtain information regarding the orthopedic conditions, respondent did not submit any supporting documentation. Consequently, his application is only considered as to his heart conditions.

4. By letter dated August 17, 2020, CalPERS denied respondent's application. CalPERS informed respondent that it based the denial on "reports prepared by David T. Tenn, M.D., Mark Lensky, M.D., Chris J. Rodarte, M.D., and Robert B. Weber, M.D." CalPERS determined respondent was not substantially incapacitated from performing the usual job duties of a Correctional Officer with the Department. The letter notified respondent he had 30 days to file a written appeal. Respondent filed a timely appeal. This hearing followed.

### **Job Duties of a Correctional Officer**

5. CalPERS submitted two documents to list and explain respondent's job duties. The first is a "Correctional Officers Essential Functions" form that applies to adult correctional facilities. The second is a "Physical Requirements of Position/Occupational Title" that respondent and a "Return to Work Coordinator" signed on November 20, 2019.

6. The essential functions of a Correctional Officer include:

Work in all posts, including minimum and maximum security;

Perform peace officer duties during adverse, stressful, or unpleasant situations, including preventing escapes and injury, being exposed to injury/death of inmates or staff by assault, inmates by suicide, or thrown bodily fluids;

Work a minimum of 40 hours per week, plus mandatory overtime;

Wear approved personal protective equipment, which includes protective stab-proof vests, protective clothing or breathing apparatus, and an equipment belt;

Qualify on firing range with Department-approved weapons;

Defend self and others, disarm, subdue, and apply inmate restraints during incidents and against armed inmates, including using a baton with effective force;

Remain functional during gas or chemical exposure;

Inspect inmates for contraband; and

Run in all-out effort on uneven surface.

7. The Physical Requirements of Position/Occupational Title form describes the correctional officer position at Avenal:

Occasionally (up to three hours): running lifting or carrying 76 to over 100 pounds; driving, working with heaving

equipment, working at heights, operation foot controls, using protective equipment, and working with biohazards.

Frequently (three to six hours): using mouse and lifting or carrying zero to 75 pounds.

- The following requirements are expressed as a range:

Occasionally to Constantly (up to three and over six hours):

Sitting, standing, walking, reaching above and below shoulders, repetitive use of hand(s), walking on uneven ground, exposure to excessive noise, exposure to extreme temperature and humidity, and exposure to dust, gas fumes, or chemicals.

Frequently to Constantly: Squatting, bending at the neck or waist, twisting at the neck or waist, fine manipulations, power grasping, simple grasping, and keyboard use.

### **Expert Opinion, Robert B. Weber, M.D., F.A.C.C.<sup>1</sup>**

8. On July 28, 2020, at CalPERS's request, Robert B. Weber, M.D., F.A.C.C., conducted an Independent Medical Evaluation (IME) of respondent. Dr. Weber prepared a report and testified at hearing. Dr. Weber earned his Bachelor of Arts degree from the University of California, Los Angeles, in 1970. He earned his medical degree from the Medical College of Wisconsin in 1974. He completed a residency in

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<sup>1</sup> Fellow of the American College of Cardiology.

internal medicine from 1974 to 1978. Following the completion of a clinical fellowship in cardiology, Dr. Weber began practicing cardiology, and has been doing so since 1982. Dr. Weber is board-certified in cardiovascular disease and internal medicine.

9. Prior to examining respondent, Dr. Weber reviewed the essential functions and the physical requirements expected of a Correctional Officer. He also reviewed the CalPERS disability retirement standard, which was set forth in a letter to him from CalPERS dated July 7, 2020. Also before the examination, Dr. Weber reviewed the medical records CalPERS provided.

10. Dr. Weber's IME consisted of gathering an oral history from respondent and performing a physical examination. Respondent told Dr. Weber that he was on his way to work on May 21, 2019, he became nauseated and was suddenly sweaty. He had no chest pain or pressure and no shortness of breath. Respondent presented to the emergency department and was diagnosed with "an acute myocardial infarction." He underwent "prompt coronary angiography" and was found to have an occluded coronary artery and had a stent implanted. Respondent reported that he has had no symptoms of chest pressure or shortness of breath since his stent was implanted.

11. Respondent's doctors told him being overweight was an aggravating factor for heart disease. Between the time of his heart attack in May 2019 and Dr. Weber's IME in July 2020, respondent lost 40 pounds. He developed an active lifestyle, including walking, hiking, and biking. Two weeks prior to his IME, respondent had a treadmill stress echocardiogram. His cardiologist reported: "everything is moving better." The test result showed positive improvement since his heart attack.

12. Respondent has high blood pressure and high cholesterol, both of which are controlled with medication. Dr. Weber found respondent's blood pressure to be in

an "acceptable range," and noted respondent may have "white coat hypertension," which refers to an elevated blood pressure in a doctor's office.

13. Dr. Weber did not find anything in the medical records that rendered respondent substantially incapacitated from performing the usual and customary job duties of a Correctional Officer. Based on the physical examination and medical records, Dr. Weber found respondent was "left with little damage from his heart attack, so he had minimal impact on his functional capacity." He opined respondent did not have an actual and present cardiologic impairment that leaves him substantially incapacitated from performing his usual job duties.

### **Dr. Weber's Supplemental Report**

14. On September 30, 2020, Dr. Weber issued a supplemental report. CalPERS provided him with progress reports from respondent's cardiologist, Aditya Verma, M.D., dated May 29, 2019 through June 26, 2020. CalPERS requested Dr. Weber review the reports and submit any updates to his opinion of respondent's substantial incapacity.

15. On reviewing the additional records, Dr. Weber determined respondent's recounting of his medical history was accurate. That is, following his heart attack and treatment, his condition continued to improve. Dr. Weber opined respondent "had an excellent clinical course and [remains] free of physical limitations that might impact his ability to perform his duties as a Correctional Officer."

### **Respondent's Evidence**

16. Respondent testified at hearing. He stated he continues to have side effects from his heart condition and medications. He becomes dizzy and has to stop

and be still until it passes. He continues to struggle with dizziness and pain. Primarily, however, respondent emphasized the stressful conditions of being a correctional officer. The stress "from the time you wake up to the time you get home" took a toll on respondent. He has lived with this stress for 25 years and it has created and exacerbated his physical conditions.

## PRINCIPLES OF LAW

17. By virtue of respondent's employment as a Corrections Officer at Avenal, he is a state safety member of CalPERS subject to Government Code section 21151.

18. Respondent has the burden of proving his eligibility for disability retirement benefits by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) To be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

19. To qualify for industrial disability retirement, respondent had to prove by competent medical opinion that, at the time he applied, he was "incapacitated physically or mentally for the performance of his or her duties." (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 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.

20. 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 original.) It is not necessary that the person be able to perform any and all duties since public policy supports employment and utilization of the disabled. (*Schrier v. San Mateo County Employees' Retirement Association* (1983) 142 Cal.App.3d 957, 961.) Instead, the frequency with which the duties he cannot perform are usually performed, as well as the general composition of duties he can perform, must be considered. (*Mansperger v. Public Employees' Retirement System, supra*, 6 Cal.App.3d at pp. 876-877 [while applicant was unable to lift or carry heavy objects due to his disability, "the necessity that a fish and game warden carry a heavy object alone is a remote occurrence"].)

## ANALYSIS

21. The competent medical evidence did not establish duties respondent is unable to perform based on his cardiological condition. Dr. Weber persuasively testified that respondent's condition had improved since his heart attack in May 2019. His treadmill stress test showed positive results and significant improvement. Respondent lost a significant amount of weight, which increased his overall health and decreased the negative cardiological impact. Dr. Weber's are supported by the medical records he reviewed in addition to his physical examination.

22. Respondent continues to suffer from "side effects," including dizziness, which puts him at risk in his position of protecting himself, staff, and inmates. Respondent did not present competent medical evidence, however, to establish he is permanently disabled from performing the duties of a correctional officer. His application must be denied.

### **LEGAL CONCLUSION**

Respondent failed to establish by a preponderance of the evidence that he is substantially incapacitated from performing the usual duties of a Correctional Officer at Avenal State Prison.

### **ORDER**

Daniel L. Tercero's appeal of CalPERS's denial of his application for industrial disability retirement is DENIED.

DATE: August 18, 2021

Heather M. Rowan  
Heather M. Rowan (Aug 18, 2021 15:26 PDT)

HEATHER M. ROWAN

Administrative Law Judge

Office of Administrative Hearings