

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:

ANDREW R. JOHNSON,

Respondent,

and

**CALIFORNIA INSTITUTION FOR WOMEN, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,**

Respondent.

Agency Case No. 2023-0832

OAH No. 2024010727

PROPOSED DECISION

Irina Tentser, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on May 6, 2024.

Bryan Delgado, Attorney, represented California Public Employees' Retirement System (CalPERS).

No appearance was made by or on behalf of Andrew R. Johnson (Respondent) despite Respondent receiving timely and appropriate notice of hearing.

Respondent California Institution For Women, California Department Of Corrections And Rehabilitation (CDCR) did not file a notice of participation to the Statement of Issues, which was timely and appropriately served by CalPERS.

The hearing proceeded in default.

CalPERS presented testimonial and documentary evidence and gave a closing argument. The record was closed and the matter was submitted for decision on May 6, 2024.

Concurrent with the issuance of this decision, the ALJ issued a protective order, on her own motion, placing exhibits 7 and 13 under seal because they contain Respondent's medical information

FACTUAL FINDINGS

Jurisdictional Matters

1. CalPERS is a defined benefit plan administered under the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.; undesignated statutory references are to the Government Code.) CalPERS is governed by its Board of Administration (Board). (Ex. 1.)

2. Respondent was employed by the CDCR as a Corrections Officer at the time CalPERS received Respondent's signed application for disability retirement (or

application) on November 28, 2022. (Exh. 3.) By virtue of his employment, Respondent is a state safety member of CalPERS. (Exhs. 1, 3.)

3. Respondent's last day of actual service to the CDCR was on January 6, 2022. At that time, Respondent was employed by the Department in the position of Corrections Officer. (Exh. 3.) On January 6, 2022, Respondent was injured while performing his duties as a Corrections Officer. Respondent did not return to work after his injury and exhausted his leave benefits on October 24, 2022. Effective October 25, 2022, Respondent retired from his employment as a Corrections Officer with the CDCR.

4. According to Respondent's application, his disability was the result of a fall from a ladder while performing his duties as a Correctional Officer, causing back, left shoulder and bilateral knee injuries. (Exh. 3.) Respondent's specific disability was described as follows:

(Back) Mild levoscoliosis near L2/3, mild disc degeneration at L4/5, moderate left and mild moderate right foraminal stenosis at L4/5, mild left foraminal stenosis at L5/S1 and an interspinous ligament sprain is mild to moderate from L3/4-L5/S1. (Continued) (Left Shoulder) Posterior labral tear with a multilobulated para labral cyst at the posterior inferior joint line. Moderate supraspinatus, infraspinatus and subscapularis tendinosis. Moderate subacromial subdeltoid bursitis. Mild tendinosis of the intra-articular portion of the long biceps tendon (Bilateral knees) Chronic oblique tear at the posterior horn of medial meniscus extending to the inferior articular surface with a lobulated para meniscal cyst

at the posterior medial joint line-bilaterally. A tiny popliteal cyst-left knee.

(Exh. 3, p. A33.)

5. According to the application, Respondent's limitations and preclusions due to his injury included, "[n]o lifting over thirty five (35) lbs. and no pushing or pulling using over thirty five (35) lbs. of force." (Exh. 3, p. A33.) Respondent's application further stated that "[D]ue to [Respondent's] physical condition and physicians restrictions, [Respondent is] no longer able to perform the essential functions of [his] job." (*Id.*) Respondent's application identified Dr. Kamran Aflatoon as his treating physician.

6. After reviewing medical information received from various sources, and after considering the applicable provisions of PERL, CalPERS determined that Respondent was not permanently disabled or substantially incapacitated to perform his usual work duties as a Corrections Officer with the CDCR at the time he filed the application for industrial retirement. (Exh. 4.)

7. By letter dated July 12, 2023, CalPERS notified Respondent of its determination to deny his application. (Exh. 4.) By letter dated August 3, 2023, Respondent filed a timely appeal of CalPERS determination, and requested an administrative hearing. (Ex. 5.) The CDCR did not file an appeal or request an administrative hearing. (Ex. 1.)

8. A Statement of Issues was signed by Sharon Hobbs in her official capacity as Chief of CalPERS' Disability and Survivor Benefits Division, seeking to affirm CalPERS' determinations described above. (Ex. 1.)

9. As alleged in the Statement of Issues, the issues on appeal in this case is:

[]imited to whether at the time of the application, on the basis of orthopedic (back, left shoulder, and bilateral knees) conditions, [Respondent] was substantially incapacitated from the performance of his usual and customary duties as a Corrections Officer for [CDCR]. If disability is found to exist, any dispute as to whether the disability is industrial or nonindustrial will be resolved pursuant to Government Code section 21166.

(Ex. 1, pp. A5.)

10. All jurisdictional requirements have been met.

Respondent's Work History with the CDCR and Injuries

11. Respondent began his employment as a Corrections Officer with the CDCR in 2006. (Ex. 7, p. A60.) The CDCR is a correctional facility with a 2400 female inmate population. (*Id.*)

12. On January 6, 2022, Respondent was performing his usual and customary duties, and was in a warehouse of supplies, on a A-frame ladder, shifting some small 24-inch television monitors on a shelf, which weighed about 10 pounds each, about four feet off the ground, when the ladder shifted and he fell to the ground. Respondent landed on "all fours," on his hands and knees. Respondent reported the injury to his supervisor and was referred for care. Respondent ultimately went on an extended medical leave due to his injuries. On October 24, 2022, Dr. Aflatoon declared Respondent "permanent and stationary" by his Dr. Aflatoon, with a "(Diagnosis-Related

Estimate) DRE II 5 % WPI for his lumbar spine with a 35 lbs. lifting restriction," which Respondent reported could not be accommodated by the CDCR. (Exh. 7, p.A61.)

13. Beginning on January 6, 2022, Respondent received Workers' Compensation benefits until October 24, 2022, when Dr. Aflatoon determined his injuries rendered Respondent "permanent and stationary." Respondent took vacation and sick time from October 24, 2022, retiring on October 25, 2022, and underwent a Qualified Medical Evaluation (QME) on January 23, 2023. (Exh. 7, p. A61.) The medical records indicate Respondent reported receiving permanent disability of 33 percent for his back, shoulder and knees from the State Compensation Insurance Fund (SCIF). (*Id.*)

14. According to the California Department of Human Resources, State Personnel Board Specification, Duty Statement (Duty Statement) for the position of Correctional Officer, Respondent was required to supervise the conduct of inmates including, but not limited to: disarming, subduing and applying restraint to an inmate; running to the scene of a disturbance or emergency; supervising the conduct of inmates or parolees in housing units, during meals and bathing, at recreation, in classrooms, and on work and other assignments, and escorting them to and from activities; standing watch on an armed post or patrol grounds, quarters, perimeter security walls and fences; walking or standing for long periods of time; running up and down stairs; and maintaining visual surveillance of institutional grounds from observation tower or central security area. (Exhs. 8, 9.)

15. According to the Duty Statement, the physical requirements of the Corrections Officer position are: being in good physical health; being free from any physical condition that would interfere with full performance of the duties of a Correctional Officer; climbing ladders and stairwells on a routine and emergency basis, seeing in dim and bright light situations, operating departmental vehicles and

equipment including firearms and mobile radio, and physically perform a variety of tasks including carrying accident victims and subduing combative inmates. (Exhs. 7, p. A63, 8, 9.)

16. According to Respondent's application, the position of Corrections Officer required him to perform the following tasks: continuously exerting up to 25 pounds of force and up to and over 50 pounds of force frequently to lift and carry objects; frequent periods of standing and walking; occasional sitting, kneeling, walking, and squatting; no running, crawling, or climbing; constant bending, twisting, and reaching; frequent pushing, pulling, power grasping, fine fingering (pinching and picking), computer use (keyboard and mouse), exposure to excessive noise, extreme temperature, and to dust, gas, fumes, or chemicals, and working at heights; and continuous handling (holding and light grasping), walking on uneven ground and operating hazardous machinery. (Exhs. 8, 9.)

17. In 2016, Respondent reported his right shoulder was injured when he was trying to open a large metal door at waist height, which was locked inside by an inmate. Respondent was initially placed on light duty after the incident and was referred for a Magnetic Resonance Imaging (MRI) of his right shoulder. He went on medical leave and underwent a right shoulder arthroscopy with possible labral repair. Respondent was deemed to be permanently partially disabled (16 to 20 percent) in his right shoulder. Respondent was off work for about eight month and returned to performing his usual and customary duties near the end of 2017 or early 2018, until the date of his specific injury on January 6, 2022. (Ex. 7, p. A60.) (Factual Finding 12-13.)

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CalPERS' Evaluation of Respondent's Application

18. After receipt of Respondent's application, CalPERS requested medical records and documentation concerning the conditions he described in his application, (i.e., back, left shoulder, and bilateral knee injuries). CalPERS reviewed the medical records received, including the reports prepared by Jackson Alparce, Jr., M.D., Elham Siman, M.D., Jennifer Lin, M.D., B. Sam Tabibian, M.D., Tracey Didingler, M.D., Kamran Aflatoon, D.O., Aaron Coppelson, M.D., and Osep Armagan, M.D. Based on the evidence in those reports, CalPERS found that the submitted documentation indicated that Respondent's orthopedic (back, left shoulder, and bilateral knees) conditions are not disabling. As result, CalPERS found Respondent was not substantially incapacitated from the performance of his job duties as a Correctional Officer with the CDCR, denying Respondent's application. (Ex. 4.)

INDEPENDENT MEDICAL EXAMINATION (IME)

May 22, 2022 Examination and Report

19. On May 22, 2022, CalPERS directed Respondent to submit to an IME by board-certified orthopedic surgeon Osep E. Armagan, M.D. (Ex. 7.)

20. As part of the IME, Dr. Armagan interviewed Respondent, examined his body (including his back, left shoulder, and knees), and reviewed relevant medical records. Dr. Armagan prepared a report of his examination and findings. (Ex. 7.) He also credibly and convincingly testified during the hearing.

21. Dr. Armagan found Respondent "Permanent and Stationary" and reached "Maximum Medical Improvement" as of October 24, 2022. (Exh. 7, p. A84.) Dr. Armagan's diagnoses of Respondent included: lumbar spine sprain and strain (L4-5

disc disease); left shoulder sprain and strain (mild impingement); left knee sprain and strain (infra-patellar bursitis); and right knee sprain and strain (infra-patellar bursitis). He apportioned 100 percent of Respondent's lower back disability, left shoulder disability, and bilateral knee disability to his January 6, 2022 injury sustained while performing his duties as a Corrections Officer, when Respondent fell of the ladder from a height of about four feet, landing on his hands and knees.

22. Dr. Armagan concluded, however, Respondent does not have a substantial incapacity to perform his usual and customary work duties as a Corrections Officer for the CDCR. Dr. Armagan suggested Respondent could perform his usual and customary work duties with work restrictions, such as not lifting more than 75 pounds, not engaging in prolonged work above his shoulder height, in a squatting and kneeling position, and possibly using a modified unloader vest to take some of the weight off of his back. (Exh. 7, p. A84.)

23. Based on Respondent's specific job duties and physical requirements of the Corrections Officer position with the CDCR, Dr. Armagan concluded Respondent was not substantially incapacitated for each of his conditions, as follows. (Exh. 7, p. A89.) For Respondent's bilateral knee injuries, Dr. Armagan's suggested limitation from prolonged work in a kneeling or squatting position was consistent with Respondent's physical requirement of occasional kneeling and squatting (i.e., 31 min to two-and-a-half hours per eight-hour day), which Dr. Armagan opined does not qualify as prolonged work in a kneeling or squatting position. Therefore, the work restriction does not render Respondent substantially incapacitated related to his bilateral knees. (*Ibid.*)

24. For Respondent's left shoulder, Dr. Armagan expressed some concerns as to the validity of Respondent's loss of motion based on inconsistencies between the

subjective loss of motion complaints and objective measurements. For example, Respondent provided no MRI evidence to suggest any structural or physiologic limitation of motion or strength. Further, his objective strength rating during the exam was 4.5 to 5 out of 10, limited only by pain. Even if Respondent's subjective sense of loss of left shoulder motion was credited, Dr. Armagan suggested limitation of limiting prolonged work above Respondent's shoulder height was consistent with the physical requirements of his position which does not correlate to a constant five hours but is limited to frequent pushing and pulling of two-and-a-half to five hours a day. Therefore, the work restriction does not render Respondent substantially incapacitated related to his left shoulder. (*Ibid.*)

25. For Respondent's lumbar spine, Dr. Armagan found Respondent has asymmetric loss of motion with intact sensory and motor function with non-verifiable occasional radicular complaints. Reviewing Respondent's history of treatment and objective data and applying relevant medical guidelines, Dr. Armagan concluded Respondent's lumbar spine limitations correspond to limiting Respondent's lifting to 75 pounds. (Exh. 7, p. A89.) Applying the physical requirements of Respondent's job position, Dr. Armagan found the work restriction limitation of no very heavy lifting greater than 75 pounds appeared to fall within the physical requirements of Respondent's job position. Therefore, the work restriction does not render Respondent substantially incapacitated related to his lumbar spine. (*Ibid.*)

Supplemental Report

26. On August 29, 2023, CalPERS requested Dr. Armagan review an additional report from Steven B. Silbart, M.D., and provide a Supplemental Report. (Exh. 13.) In his report, Dr. Silbart opined that Respondent was 6 percent (Upper Extremity) impaired in his left shoulder use based on decreased muscle strength.

However, Dr. Armagan noted that Respondent's MRI never showed rotator cuff tear, and subjective weakness secondary to pain with loss of motion is not ratable. For Respondent's bilateral knee injury, Dr. Silbart opined Respondent's was 5 percent impaired in his knees with weakness of quads. Dr. Armagan noted that, contrary to Dr. Silbart's conclusion, the results of Respondent's test results were normal, with no atrophy on the exam. Therefore, the objective measure was inconsistent with the subjective measure to pain with loss of motion, which is not ratable.

27. After reviewing the report, Dr. Armagan rejected Dr. Silbart's conclusion Respondent is considered incapable of performing his usual and customary work duties, citing Dr. Silbart's lack of rationale, explanation, and correlation to Respondent's specific job requirements in reaching his conclusion. Dr. Armagan concluded that the Dr. Silbart's report did not alter his prior opinion from his June 5, 2023 IME report that Respondent was not substantially incapacitated to perform his usual and customary duties as a Corrections Officer with the CDCR.

CalPERS' Determination of Respondent's Application

28. After review of all the medical reports received, including Dr. Armagan's, CalPERS determined that Respondent was not permanently disabled or substantially incapacitated from the performance of his duties as a Corrections Officer with the CDCR due to his orthopedic (back, left shoulder and bilateral knees) conditions. (Exh. 4.)

29. In its determination letter, CalPERS advised Respondent he had the following options due to the denial of his application:

1. Continue/Resume working as a Corrections Officer with the Department of Corrections Institution for Women.

2. Seek employment in a different job with the same agency or with another CalPERS covered employer.

3. Discontinue CalPERS employment and advise your last employer to notify CalPERS that you wish to have your accumulated contributions remain in the Retirement Fund. At a future date, you may request service retirement (if you have attained age 50) or a refund of your accumulated contributions.

4. Terminate CalPERS employment and submit a written request for a refund of your accumulated contributions. Once the refund is mailed, your membership and eligibility for health insurance with CalPERS terminates, and no retirement benefits can be paid.

(Exh. 4, pp. A44-A45.)

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LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he is entitled to it absent a statutory presumption. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.)

2. In this matter, the preponderance of the evidence standard requires Respondent to present evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Disability Retirement

3. Disability retirement requires a "disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the [B]oard . . . on the basis of competent medical opinion." (§ 20026.)

4. The Board shall immediately retire a member for disability, "[I]f the medical examination and other available information show to the satisfaction of the [B]oard that the member . . . is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, . . ." (§ 21156, subd. (a)(1).)

5. An applicant does not qualify for a disability retirement when he can perform customary duties, even though doing so may sometimes be difficult or painful. (*Mansperger, supra*, 6 Cal.App.3d 873; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) The term "incapacitated for performance of duty" has been

defined to mean "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876–877 [*Mansperger*].)

Respondent Did Not Establish He Is Substantially Incapacitated

6. Here, the weight of the convincing medical opinion of Dr. Armagan establish Respondent is not incapacitated for performance of his duties as a Corrections Officer with the CDCR. Because this hearing proceeded by default, no competing evidence was presented by Respondent from any of his treating physicians who may have presented varying opinions. (Factual Findings 19-29.)

7. The medical records submitted to CalPERS confirm Respondent has medical conditions affective his back, left shoulder, and bilateral knees. Those conditions do limit Respondent from some of his duties as a Correctional Officer with the CDCR. Dr. Armagan, however, was able to convincingly describe why Respondent's limitations, individually and cumulatively, do not substantially incapacitate Respondent from performing his duties. Because Respondent provided no challenging medical information, there is no evidence that Dr. Armagan's opinion is incorrect. (Factual Findings 19-29.)

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Disposition

8. Respondent failed to meet his burden of establishing by a preponderance of the evidence that he is substantially incapacitated for the performance of his duties as a Corrections Officer. CalPERS' denial of his disability retirement application is affirmed. (Factual Findings 1-29; Legal Conclusions 1-7.)

ORDER

CalPERS' denial of respondent Andrew R. Johnson's application for disability retirement is affirmed.

DATE: **05/31/2024**

Irina Tentser

IRINA TENTSER

Administrative Law Judge

Office of Administrative Hearings