

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Application for Industrial Disability
Retirement of:**

**JOHN B. VICE and CALIFORNIA MEDICAL FACILITY,
CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION, Respondents**

Agency Case No. 2024-0431

OAH No. 2024120429

PROPOSED DECISION

Matthew S. Block, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on May 29, 2025, by videoconference from Sacramento, California.

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

There was no appearance by or on behalf of John B. Vice (respondent). A notice of hearing was properly served on respondent. Consequently, this matter proceeded

as a default against respondent under Government Code section 11520, subdivision (a).

There was no appearance by or on behalf of California Medical Facility (CMF), California Department of Corrections and Rehabilitation (CDCR). A notice of hearing was properly served on CDCR. Consequently, this matter proceeded as a default against CDCR under Government Code section 11520, subdivision (a).

Evidence was received, the record closed, and the matter submitted for decision on May 29, 2025.

ISSUE

Whether respondent was substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer at the time of his application for Industrial Disability Retirement (IDR).

FACTUAL FINDINGS

Jurisdictional Matters

1. CalPERS is the state agency responsible for administering retirement benefits to eligible employees. (Gov. Code, § 20000 et seq.) At the time respondent filed his application for IDR, he was employed by CDCR as a Correctional Officer at CMF. By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code sections 21151, 21154, and 21156.

2. On July 20, 2023, respondent submitted an application for IDR. The application claimed disability on the basis of an orthopedic condition (right foot) and a cardiovascular condition (blood clot).

3. CalPERS obtained medical reports concerning respondent's orthopedic and cardiovascular conditions. After reviewing the reports, in a letter dated March 28, 2024, CalPERS denied respondent's application for IDR. The letter stated that after a review of the medical evidence submitted, CalPERS found respondent's orthopedic condition did not render him substantially incapacitated from performing his usual duties as a Correctional Officer. The letter also stated that the medical evidence received of respondent's cardiovascular condition was insufficient to determine if it rendered him substantially incapacitated.

4. On May 6, 2024, respondent appealed CalPERS's denial of his IDR application. On July 25, 2024, Sharon Hobbs, in her official capacity as Chief of CalPERS's Disability and Survivor Benefits Division, signed and thereafter filed the Statement of Issues for purposes of the appeal. The matter was set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Duties of a Correctional Officer

5. CalPERS submitted two documents explaining respondent's job duties: a "Physical Requirements of Position/Occupational Title" (Physical Requirements) and a "Job Duty Statement" (Duty Statement). The Physical Requirements describe the frequency of a Correctional Officer's tasks. A Correctional Officer is physically required to complete activities of movement, including: standing, walking, and bending at the

neck and waist (constantly); climbing, squatting, and running (infrequently) and crawling or kneeling (never/rarely).

6. The Job Description describes the duties a Correctional Officer's job is expected to perform. Specifically, a Correctional Officer: (1) supervises inmate conduct; (2) escorts inmates outside facility grounds and escorts visitors through the facility; (3) inspects cells for contraband and orderliness; (4) conducts inmate body inspections; (5) prevents inmate escape; and (6) prevents inmates from harming employees and damaging property.

Respondent's Injury

7. On August 24, 2021, respondent injured his right foot while running up a flight of stairs responding to an emergency alarm. He reported feeling a "pop" followed by pain and sought medical attention. X-rays were normal, and respondent was initially diagnosed with a right foot contusion.

CalPERS Evidence

TREATMENT AND SURGERY

8. The pain in respondent's foot continued to worsen for several weeks, so he was referred to Kevin Kirby, D.P.M., for assessment. Dr. Kirby examined respondent and determined the right fourth metatarsal base was slightly dislocated in a superior position. Dr. Kirby administered local anesthesia and a steroid and was able to manipulate the base back into position. However, when respondent returned to Dr. Kirby for a follow-up appointment, the base had shifted up again and the pain had returned.

9. Dr. Kirby referred respondent to Masoud Ghalambor, M.D., who performed surgery and placed a temporary plate in respondent's foot to put the metatarsal base back into position and stabilize the joint. The surgery was uneventful, and respondent was scheduled to have the plate removed after several months, but he developed deep vein thrombosis and a pulmonary embolism, which delayed removing the plate.

10. After the plate was removed, respondent continued to feel pain in his foot. Dr. Ghalambor felt that respondent should not have the type of pain reported following the surgery. He suspected respondent was having some sort of pain syndrome and sent him for pain management. Respondent returned to work on modified duty in the CMF medical unit in September 2023.

CALPERS INVESTIGATION

11. Pravneel Sharma is a CalPERS Investigator. He was assigned to investigate respondent's disability claim and testified at hearing. Mr. Sharma and his colleagues surveilled respondent on 10 different occasions in October and November 2023. They observed and filmed respondent walking around outside his home wearing flip flop sandals and climbing up on a stepstool to take down Halloween decorations with no apparent difficulty. They also observed respondent walking through a grocery store wearing flip flop sandals with no apparent difficulty.

INDEPENDENT MEDICAL EVALUATION

12. CalPERS retained Lance C. Zimmerman, D.P.M., to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Zimmerman earned a bachelor's degree in chemistry at the University of the Pacific. He then earned his Doctorate of Podiatric Medicine at the Illinois College of Podiatric Medicine. He

practiced for 45 years before recently retiring. He has been performing IMEs for CalPERS for "probably over 10 years." He estimates that in 90 percent of the evaluations he has conducted, he has concluded that the individual being evaluated is substantially incapacitated from performing their usual and customary duties.

13. Dr. Zimmerman performed respondent's IME at his office in Sacramento, California, on January 8, 2024, using the CalPERS substantial incapacity standard. He obtained respondent's history and symptomology, reviewed his medical records, and physically examined respondent. He issued an IME report dated January 8, 2024, and testified at hearing about his findings, consistent with his IME report.

14. Dr. Zimmerman found respondent to be cooperative during the IME. However, he believes that respondent was not putting forth his best effort. Respondent told Dr. Zimmerman that on evenings after he has worked his right foot is "throbbing in pain." He must ice and elevate the foot for one to two hours to experience relief adequate to fall asleep. When he steps out of bed in the morning, his right foot has a "pins and needles type of pain." On a scale of 1 to 10, with 1 representing no pain and 10 representing the worst pain he has ever been in, respondent typically experiences pain at a 4 during a typical shift.

15. Dr. Zimmerman reviewed the surveillance videos taken by Mr. Sharma and his colleagues, as well as over two years of medical records pertaining to respondent's treatment history for his injury. He learned that both before and after surgery, respondent reported being in constant pain that did not respond to therapy, medication, or duty modification.

16. During the IME, respondent had some pain when pressure was applied to the surgical site but no recoil response. Dr. Zimmerman found no evidence of edema

at the surgical site, so he concluded there was no evidence of an ongoing inflammatory process that would indicate the joint was partially or fully dislocated.

17. After observing the surveillance videos taken by Mr. Sharma and his colleagues, Dr. Zimmerman noted, in part:

In my review of the video, the examinee was seen on 10 different days standing and walking without any sign of a gait disturbance that would indicate he was in pain or discomfort, or that he was limited in any way from standing or ambulating. He was also wearing sandals, not supportive shoes, that should aggravate his claimed symptoms but there was no sign of this. From this video, along with my exam and records, I do not see evidence to support his claim that he cannot do his job that, in fact, he is currently doing.

18. Ultimately, Dr. Zimmerman concluded that respondent sustained what appears to have been a rupture of ligament fibers that hold the base of the right third metatarsal base to the cuboid bone with which it articulates. Dr. Zimmerman concluded that the evidence presented to him did not support a finding that respondent is substantially disabled from his work as a Correctional Officer. He reasoned, in part:

Dr. Ghalambor took the examinee to surgery and placed a plate at the joint to hold the two bones in the correct anatomical alignment temporarily, so the soft tissues could heal keeping the joint in its normal position. The surgery

went well, but he did have blood clots and a pulmonary embolism. After that resolved, the plate was removed[,] and [Dr.] Ghalambor made no note of the surgery being a failure. The examinee continued to have pain after he healed up[,] but [Dr.]Ghalambor feels the injury and surgery were not the cause of the pain[,][] suspected a pain syndrome[,] and sent him to pain management.

Analysis

19. Respondent bears the burden of proving, by competent medical evidence, that he was substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer at the time of his application for IDR. Respondent failed to appear at hearing or produce any evidence to meet his burden. Moreover, the persuasive medical evidence introduced at hearing established that respondent was not substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer for CDCR at the time of his application for IDR. As such, respondent's application must be denied.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant seeking service-connected disability retirement has the burden of proving his eligibility for such benefits. (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) Although pension legislation must be liberally construed in favor of the applicant, this liberal construction "does not relieve a party of meeting the burden of proof by a preponderance of the evidence." (*Glover v. Bd. of*

Retirement (1989) 214 Cal.App.3d 1327, 1332.) A preponderance of the evidence means "the evidence on one side outweighs, preponderates over, or is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed." (*People v. Miller* (1916) 171 Cal. 649, 652.)

Applicable Laws

2. Any state safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability. (Gov. Code, § 21151, subd. (a).) Disability as a basis of retirement means "disability of permanent or extended uncertain 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 employees the member, on the basis of competent medical opinion." (Gov. Code, § 20026.)

3. Government Code section 21154 provides in part:

The application shall be made only (a) when a member is in state service, . . . On receipt of an application for disability retirement of a 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. . . .

4. According to Government Code section 21156, subdivision (a)(1), "[i]f the medical examination and other available information show to the satisfaction of the board . . . 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.”

USUAL AND CUSTOMARY DUTIES

5. An applicant must show a substantial inability to perform their usual duties based on competent medical evidence. (Gov. Code, § 20026; *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876.) “Usual Duties” are based on the duties of the last job classification held and applicable law. (*Beckley v. Bd. of Administration* (2013) 222 Cal.App.4th 691, 699-700 [California Highway Patrol (CHP) officer assigned to public affairs role had to be capable of carrying out complete range of tasks required of CHP officers under Vehicle Code section 2268].)

6. The inability to perform a rarely performed, albeit necessary, duty of a position does not automatically render an applicant disabled. (*Mansperger v. Public Employees’ Retirement System, supra*, 6 Cal.App.3d at pp. 876-877 [fish and game warden was not incapacitated where he was able to do all normal activities except lift and carry heavy objects, tasks which rarely occurred]; *Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854 [CHP sergeant with physical limitations was not incapacitated where the physically demanding activities of his job were performed much less often by someone in his supervisory role].) However, in certain public safety positions, an uncommon activity can be a “usual duty” if the employee “must be capable of and prepared for the worst every day.” (*Thelander v. City of El Monte* (1983) 147 Cal.App.3d 736, 742; *Beckley v. Bd. of Administration, supra*, 222 Cal.App.4th at pp. 600-700.)

SUBSTANTIAL INCAPACITY

7. An applicant’s disability must be presently existing and cause an inability to perform, rather than an increased risk of future injury or aggravation. (*In the Matter*

of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes (Precedential Decision 99-03); *Wolfman v. Bd. of Trustees* (1983) 148 Cal.App.3d 787, 791 [applicant's disability "was not merely a prospective probability, but a medical certainty"].) Additionally, mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Bd. of Administration, supra*, 77 Cal.App.3d at p. 863; *Mansperger v. Public Employees' Retirement System, supra*, 6 Cal.App.3d at pp. 876-877.) And discomfort, which may make it difficult to perform one's duties, is insufficient to show permanent incapacity from performance of one's position. (*Smith v. City of Napa* (2004) 120 CalApp.4th 194, 207, citing *Hosford v. Bd. of Administration, supra*, 77 Cal.App.3d at p. 862.)

Determination

8. Based on the Factual Findings and Legal Conclusions as a whole, respondent failed to prove by competent medical evidence that he was substantially incapacitated from the performance of his duties as a Correctional Officer with CDCR at the time he filed his application for IDR. Consequently, his appeal is denied.

ORDER

The appeal of respondent John B. Vice is DENIED.

DATE: June 18, 2025

Matthew Block

MATTHEW S. BLOCK

Administrative Law Judge

Office of Administrative Hearings