

ATTACHMENT A

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:**

**NICHOLAS J. SCARLETT AND SALINAS VALLEY STATE
PRISON, CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION, Respondents**

Agency Case No. 2020-0654

OAH No. 2020100404

PROPOSED DECISION

Marcie Larson, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by telephone and videoconference on April 13, 2021, from Sacramento, California.

Dustin Ingraham, Attorney, appeared on behalf of the California Public Employees' Retirement System (CalPERS).

Nicholas Dilles, Attorney at Law, represented respondent Nicholas Scarlett, who was present.

There was no appearance by or on behalf Salinas Valley State Prison (Salinas), California Department of Corrections and Rehabilitation (Department). The Department was duly served with a Notice of Hearing. The matter proceeded as a default against the Department pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on April 13, 2021.

BACKGROUND AND ISSUE

Respondent was employed as a Correctional Sergeant (CS) for the Department at Salinas. On April 20, 2018, respondent applied for industrial disability retirement, on the basis of right arm, hand and wrist conditions (orthopedic conditions). Respondent's application was approved. Because respondent was under the minimum age for voluntary service retirement, pursuant to Government Code section 21192, on March 17, 2020, CalPERS sent respondent to an Independent Medical Evaluation (IME). CalPERS reviewed medical reports concerning respondent's orthopedic conditions and determined that respondent was no longer substantially incapacitated from performing the duties of a CS with the Department. Respondent appealed from CalPERS's determination.

The issue for Board determination is whether CalPERS established that respondent is no longer substantially incapacitated from performing the usual duties of a CS on the basis of his orthopedic conditions.

FACTUAL FINDINGS

1. On April 20, 2018, respondent submitted an application for industrial disability retirement (application) with CalPERS. At the time, respondent was employed as a CS by the Department at Salinas. By virtue of his employment, respondent is a state safety member of CalPERS.

2. In filing the application, respondent claimed that his specific disability was "pain in right arm effecting [*sic*] grasping." Respondent wrote that he injured his right arm "restraining an inmate." Respondent also wrote that his limitations and preclusions included "no repetitive grasping right hand, limited use of [right] hand, no forceful grasping of [right] hand." Respondent also wrote that his disability prevents him from pulling to open doors, restraining inmates, and using a "c-clamp grip."

3. On September 12, 2018, CalPERS notified respondent that his application for industrial disability retirement was approved, effective July 17, 2018. The letter stated that respondent was found to be substantially incapacitated from the performance of his usual duties as a CS for the Department, based upon his orthopedic conditions. Respondent was informed that he may be reexamined periodically to determine his qualification for reinstatement if he was under the minimum age for service retirement. Respondent was 36 years old at the time of his retirement. He was under the minimum age for service retirement.

4. On September 16, 2019, CalPERS notified respondent that it would reexamine his disability retirement. The reexamination included an IME performed by Robert Henrichsen, M.D., on March 17, 2020.

5. On April 15, 2020, CalPERS notified respondent that based upon a review of medical evidence and reports, CalPERS determined that respondent was no longer substantially incapacitated from performing the job duties of a CS for the Department. Respondent was informed that he would be reinstated to his former position. Respondent was advised of his appeal rights. Respondent filed an appeal and request for hearing by letter CalPERS received on April 27, 2020.

6. On September 28, 2020, Keith Riddle, Chief, Disability and Survivor Benefits Division, for CalPERS, signed and filed the Accusation. Thereafter, the matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Respondent's Employment History and Work Injury

7. The Department hired respondent in approximately 2005. He worked as a Correctional Officer at Salinas. In July 2008, he was promoted to CS. On January 14, 2017, respondent was injured at work when he and another officer were inspecting a cell. An inmate inside the cell was acting "strange." Respondent told the inmate he was going to "pat him down." The inmate lunged between him and the other officer. Respondent reached with his right arm to grab the inmate and wrapped his arms around the inmate. Respondent, the inmate, and the officer fell onto the concrete floor. Respondent fell on his right arm. Respondent suffered a contusion to his right forearm.

Respondent immediately sought medical attention and filed a workers' compensation claim. He was taken off work for a couple of days and told to ice and evaluate his right arm. In May 2017, respondent was released to return to work.

However, after working two weeks, he started having pain and swelling in his right arm. His was taken off work again and did not return. His last day of work was approximately June 19, 2017.

Duties of a Correctional Sergeant

8. As set forth in the Essential Functions statement, a CS must be able to perform the following relevant functions:

- Must be able to perform the duties of all the various posts;
- Must be able to work overtime. Overtime is mandatory and could be 8 hours at one time and on very rare occasions up to 16 hours in situations such as a riot;
- Must be able to wear personal protective equipment (stab proof vest), and clothing and breathing apparatus to prevent injuries and exposure to blood borne pathogens;
- Must range qualify with departmentally approved weapons, keep firearm in good condition, [and] fire weapon in combat/emergency situation;
- Must be able to swing a baton with force to strike an inmate;
- Disarm, subdue and apply restraints to an inmate;
- Defend self and/or others against an inmate(s);

- Inspect inmates for contraband [and] conduct body searches;
- Climb occasionally to frequently, ascent/descent or climb a series of steep stairs, several tiers of stairs or ladders as well as climb onto bunks/beds while involved in cell searches, [and] must be able to carry items while climbing stairs;
- Crawl and crouch occasionally, crawl or crouch under an inmate's bed or restroom facility while involved in cell searches, crouch while firing a weapon or while involved in property search;
- Stoop and bend occasionally to frequently, stoop and bend while inspecting cells [or] physically searching inmates from head to toe and while performing janitorial work including mopping and cleaning;
- Lift and carry continuously to frequently. lift and carry in the light (20 pound maximum) to medium (50 pound maximum) range frequently throughout the workday and in the very heavy lifting range (over 100 pounds) occasionally; lift and carry an inmate and physically restrain the inmate including wrestling an inmate to the floor; drag/carry an inmate out of a cell; perform lifting/carrying activities while working in very cramped spaces; and pushing and pulling occasionally to frequently while opening and closing locked

gates and cell doors throughout the work day; pushing and pulling may also occur during an altercation or the restraint of the inmate.

9. On May 27, 2018, Shiho Spencer, a Return-to-Work Coordinator for the Department, signed a "Physical Requirements of Position/Occupational Title" form (Physical Requirements form). Respondent signed the Physical Requirements form on December 27, 2018. The Physical Requirements form was submitted to CalPERS. According to the Physical Requirements form, when working as a CS, respondent: (1) constantly (over 6 hours) sat, stood, walked, bent and twisted his neck, twisted at his waist, engaged in fine manipulation, power and simple grasped, repetitively used his hands, carried up to 25 pounds for up to 12 miles, drove and was exposed to extreme temperature, humidity, and wetness; (2) frequently (three to six hours a day) climbed, bent at his waist, reached below the shoulders, pushed and pulled up to 25 miles, lifted from 25 to 50 pounds up to 200 yards, walked on uneven ground, was exposed to dust, gas, fumes, or chemicals and worked at heights; (3) occasionally (up to three hours), ran, crawled, kneeled, squatted, reached above his shoulders, used a keyboard and mouse, lifted between 51 and over 100 pounds up to 200 yards, was exposed to excessive noise, operated foot controls or repetitive movement, used special visual or auditory protective equipment and worked with biohazards; and (4) never worked with heavy equipment.

Independent Medical Evaluation by Robert Henrichsen, M.D.

10. On March 17, 2020, at CalPERS's request, Robert Henrichsen, M.D., conducted an IME of respondent. Dr. Henrichsen prepared a report and testified at the hearing consistent with the report. Dr. Henrichsen is a board-certified orthopedic surgeon. He obtained his medical degree from the Loma Linda University in 1967.

Between 1970 and 1973, he completed an orthopedic residency at the Los Angeles Orthopaedic Hospital, Los Angeles County General Hospital. Dr. Henrichsen has practiced orthopedic medicine for approximately 50 years. He operated a private practice for 38 years, treating patients and performing surgeries related to orthopedic conditions. Dr. Henrichsen has served as a Qualified Medical Evaluator (QME) for workers' compensation matters for 28 years. He has served as an Independent Medical Examiner for CalPERS for 18 years.

11. As part of the IME, Dr. Henrichsen interviewed respondent, obtained a medical history, and conducted a physical examination. He also reviewed the Physical Requirements form and essential functions for respondent's position. Dr. Henrichsen reviewed respondent's medical records and reports related to his orthopedic conditions, including imaging reports.

RESPONDENT'S COMPLAINTS AND HISTORY OF TREATMENT

12. Dr. Henrichsen obtained a history of respondent's occupational duties, orthopedic conditions, treatment, and complaints. Respondent explained how he was injured at work in January 2017. Respondent explained that as a result of the inmate altercation, he suffered redness, swelling, and a contusion to his right forearm. Respondent was taken off work until May 2017. During that time, he underwent physical therapy. He returned to work for two weeks but suffered "a bad flare-up." He was again taken off work in June 2017, and never returned. He has not worked in any capacity since June 2017.

13. Respondent reported tenderness in his right forearm with tingling and pain in his wrist and fingers, including his thumb. He also reported difficulty "scooping items out of a jar." Respondent reported difficulty with bathing, typing, using his right

hand, and driving. He reported his pain level averages four to five on a 10-point scale. However, his pain can be six to seven at its worst. Respondent reported that he treated his orthopedic conditions with acupuncture, chiropractic, massage, physical therapy, occupational therapy, and medication. He also had three to four injections in the "flexor medial muscle," which provided some relief. Respondent reported that he still has pain in his right forearm. He also has tingling in the fingers of his right hand. He wakes two to three times per night due to pain.

PHYSICAL EXAMINATION AND REVIEW OF MEDICAL RECORDS

14. Dr. Henrichsen conducted a physical examination of respondent, including a review of systems. The physical examination was limited to respondent's neck and upper extremities. The range of motion in his neck was normal and did not reproduce any upper extremity symptoms. His shoulder and elbow range of motion were also normal. Respondent's wrist flexion was normal. There was no swelling or effusion of the wrists. Dr. Henrichsen also tested respondent's grip strength, which was between 80 and 95 pounds, which Dr. Henrichsen opined was normal. Dr. Henrichsen explained that average grip strength on a dominant side is 120 pounds and on a non-dominant side 110 pounds. However, it can be as low as 76 pounds on the dominant side and 64 pounds on the non-dominant side, and still be considered normal.

Respondent's bicep reflexes were normal. There was no atrophy in the upper arms or forearms. Respondent reported pain with elbow extension and resistance wrist flexion. On palpation of the right forearm there was tenderness in the "proximal part of the forearm in the area of the maximum muscle wad." Dr. Henrichsen also noted that there was "some subcutaneous irregularity in that area and also a little more distal consistent with previous contusion and/or swelling issue." Dr. Henrichsen did not perform any testing to determine respondent's ability to lift.

15. Dr. Henrichsen noted that respondent had an MRI of his right elbow and forearm which were normal. He also had two Electromyography (EMG) and nerve conduction velocity (NCV) studies. The first was normal, but the second "demonstrated some sensory reduction of the distal superficial radial nerve of the right upper extremity, sensory ulnar nerve transmission of the right, but the motor nerve transmission was normal." Dr. Henrichsen also listed in his report numerous medical records he reviewed concerning respondent's orthopedic conditions from the date of his injury until October 2019. The records included the initial IME report prepared by Mark Howard, M.D., on August 3, 2018, and a Functional Capacity Evaluation performed on September 25, 2018. Dr. Howard found respondent was substantially incapacitated from the performance of his duties as a CS.

16. Dr. Henrichsen stated that he disagreed with Dr. Howard's opinions and conclusions. However, Dr. Henrichsen did not explain the basis for his disagreement. Dr. Henrichsen also opined the Functional Capacity Evaluation was incomplete because the testing was stopped due to dizziness respondent experienced.

DIAGNOSIS AND OPINION

17. Dr. Henrichsen diagnosed respondent with a "[r]ight forearm contusion at work" and a "[n]ew onset of abductor tendinitis" in his right wrist. He opined that respondent's symptoms were not substantiated by examination findings. He also opined that there is an "[u]nknown cause" for respondent's right forearm pain.

18. Dr. Henrichsen opined that respondent's objective examination does not support his symptoms. He further explained that respondent has "reasonable grip strength" and "no significant atrophy." The "tone and bulk of his muscles are intact." Dr. Henrichsen found that the diagnostic studies performed on respondent were

"generally unremarkable" and his "MRI scans were normal." He opined that other physicians who evaluated respondent recommended prophylactic preclusions because of his pain. Dr. Henrichsen opined that "prophylactic restrictions are not a basis for disability retirement" under the CalPERS criteria.

19. Dr. Henrichsen explained respondent would have difficulty performing job duties that involve gripping, such as controlling an inmate, slinging a baton, or firing a weapon with his right hand. He may have some pain at times. Although Dr. Henrichsen did not perform any testing to determine respondent's ability to lift, he opined that respondent would be able to frequently lift between 70 to 75 pounds. He could frequently carry up to 65 pounds for over one mile. Respondent could also lift 100 pounds from floor up and could carry a 100 pounds for three to five feet. Dr. Henrichsen opined that respondent is not substantially incapacitated from the performance of his duties and has no work preclusions.

Respondent's Evidence

20. Respondent submitted numerous medical records and reports, including Qualified Medical Evaluation (QME) reports from Ronald Fujimoto, D.O., reports from Dhanu Panchal, M.D., and several physician assistants and nurse practitioners. Respondent also submitted a Functional Capacity Evaluation Report and an IME report issued by Dr. Howard. The author of the QME reports do not opine as to whether respondent is substantially incapacitated from the performance of his duties as a CS for the Department. Additionally, the records from respondent's treating providers do not offer any opinions as to whether respondent is substantially incapacitated from performance of his duties as a CS. The reports were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).

INDEPENDENT MEDICAL EVALUATION BY MARK W. HOWARD, M.D.

21. On August 3, 2018, at CalPERS's request, Dr. Howard conducted an IME of respondent. The purpose of the IME was to evaluate respondent's orthopedic conditions. Dr. Howard issued a report concerning the evaluation and his findings. He conducted a physical examination of respondent, reviewed the physical requirements of respondent's job, and reviewed his medical records. Respondent reported "continuous throbbing, pins-and-needles, and burning pain in the right forearm, with recurrent pain radiating to his wrist."

22. Dr. Howard diagnosed respondent with "post right forearm contusion with apparent chronic residual flexor more than extensor carpi ulnaris tenosynovitis, plus or minus subclinical peripheral ulnar neuropathy." Dr. Howard opined that respondent is substantially incapacitated from the performance of his duties as a CS. He opined that because respondent is a right-handed firearm shooter, he would "have difficulty with range qualifications and normal range use of a firearm." Respondent would also have "difficulty disarming, subduing, and applying restraints to an inmate and would have difficulty defending himself and/or others." Dr. Howard also opined respondent is limited to "lifting, carrying, gripping, grasping and pinching" no more than "five to ten pounds if he has to do so with an open or partially open [right] palm." He also opined that respondent's right-sided keyboarding is severely limited because of his right extremity fatigue. Dr. Howard opined that respondent's incapacity is permanent.

FUNCTIONAL CAPACITY EVALUATION REPORT

23. On September 25, 2018, respondent had a Functional Capacity Evaluation performed by RehabOne, related to respondent's workers' compensation claim. A

report outlining the findings was prepared. Respondent's physical abilities were tested, including his grip strength, range of motion, and lifting capacity. Respondent's grip strength was below average. Respondent's ability to carry loads was "assessed through the use of a structured task simulation." Respondent was instructed to carry a crate with various weight loads. He then walked on a "flat/unobstructed surface at 100 feet." Respondent was able to carry a maximum of 15 pounds 100 feet. Respondent's ability to climb while carrying weight was also tested. He was able to carry up to 25 pounds "on an occasional basis (1/3 of a normal workday)." He was able to push and pull a maximum of 20 pounds. It was noted the respondent experienced some dizziness during the evaluation. However, he was able to complete the strength testing.

24. Based on respondent's performance on the Functional Capacity Evaluation, the determination was made that he was not able to perform his usual and customary job duties as a CS. He can perform work that requires lifting up to 25 pounds.

RESPONDENT'S TESTIMONY

25. Respondent explained that he has not worked in any capacity since June 2017. Respondent's orthopedic conditions have not improved since his IME with Dr. Howard in 2018. In fact, his condition has declined since he stopped working. Respondent explained that he cannot safely use a firearm or pass a range qualification because he is not able to manipulate a firearm due to his orthopedic conditions. Respondent has weakness and pain in his right forearm and wrist, which prevents him from grasping or pulling objects. His pain is usually four out of 10. He was recently approved for a nerve block to address his chronic pain syndrome.

26. Respondent also explained that as a CS, he is required to lift unresponsive inmates, who often weigh over 100 pounds. Respondent is also required to lift heavy boxes that weigh on average 70 pounds. Respondent explained that he does not have the strength in his right arm to lift and carry the weight that is required as part of his duties as a CS. Respondent explained that he can carry and lift with his left hand, if required.

27. Respondent explained that he enjoyed his job as a CS. He planned to promote before he was injured. Respondent would like to return to work, but the Department informed him that they cannot accommodate any of his physical limitations and restrictions. As a result, he has not returned to work.

Analysis

28. CalPERS failed to establish that respondent is no longer substantially incapacitated from performing the usual duties of a CS for the Department. Respondent's application was approved effective July 17, 2018. The determination to approve respondent's application was based in part on the IME conducted by Dr. Howard on August 3, 2018. Dr. Howard opined respondent was permanently substantially incapacitated based on his orthopedic conditions. Dr. Howard opined respondent was not capable of normal range use of a firearm. He would also have difficulty restraining an inmate and defending himself and/or others, which are essential duties for a CS. Respondent was also limited to "lifting, carrying, gripping, grasping and pinching" no more than "five to ten pounds" with an open or partially open palm. These weights are significantly below the essential duties of a CS.

29. Dr. Howard's opinions were supported by the comprehensive Functional Capacity Evaluation performed in September 2018. During the evaluation,

respondent's grip, lifting, and carrying capacity were tested. The objective findings of the testing demonstrated respondent is limited to carrying a maximum of 15 pounds while walking 100 feet. Respondent is able to climb while carrying up to 25 pounds. He was able to push and pull a maximum of 20 pounds.

30. In contrast, Dr. Henrichsen's opinion that respondent has no restrictions on his ability to perform his duties as a CS and is not substantially incapacitated from the performance of his duties is not persuasive. Dr. Henrichsen's opinions are not supported by testing of respondent's lifting and carrying strength. Dr. Henrichsen disregarded Dr. Howard's opinions without explanation. He also disregarded the objective findings of the Functional Capacity Evaluation, based on his opinion that the testing was not completed. However, a review of the findings clearly outline the results of the strength testing, and respondent's objective physical limitations.

31. When all the evidence is considered, CalPERS failed to submit sufficient evidence to meet its burden. As a result, CalPERS' request that respondent be involuntarily reinstated from industrial disability retirement is denied.

LEGAL CONCLUSIONS

Burden of Proof

1. CalPERS had the burden of proving by a preponderance of the evidence that respondent is no longer substantially incapacitated for the performance of his usual job duties as a CS with the Department and should be reinstated to his former position. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (January 22, 2000, Precedential Decision 99-03). 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.)

Applicable Law

2. Respondent is a state safety member of CalPERS by virtue of his former employment as a CS for the Department. He was granted disability retirement based on his orthopedic conditions pursuant to Government Code section 21151, subdivision (a), which provides the following:

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.

3. In accordance with Government Code section 21192, CalPERS reevaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examinationThe examination shall be made by a physician or surgeon, appointed by the board.....Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the

state agency . . . where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

4. Government Code section 21193 governs the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty and, in relevant part, provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

5. Government Code section 20026 defines "disability" and "incapacity for performance of duty," and, in relevant part, provides:

"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, . . ., on the basis of competent medical opinion.

6. 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 in original.) In *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 862, the court held that a disability or incapacity must currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient.

7. The standards in CalPERS disability retirement cases are different from those in workers' compensation cases. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Kimbrough v. Police & Fire Retirement System* (1984) 161 Cal.App.3d 1143, 1152-1153; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132 [a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different].) Thus, any determination of disability that may have been made in respondent's workers' compensation case cannot be given any weight in this proceeding.

8. To involuntarily reinstate respondent from industrial disability retirement, CalPERS has to establish that respondent is no longer substantially incapacitated from performing the usual duties of a CS for the Department. As set forth in Findings 28 through 31, CalPERS did not offer sufficient competent medical evidence to meet its burden of proof. Consequently, when all the evidence is considered, CalPERS' request that respondent be involuntarily reinstated from disability retirement must be denied.

ORDER

The appeal of respondent Nicholas J. Scarlett is GRANTED. The request of California Public Employees' Retirement System to involuntarily reinstate respondent Nicholas J. Scarlett from industrial disability retirement is DENIED.

DATE: May 12, 2021

Marcie Larson
Marcie Larson (May12, 2021 09:21 PDT)

MARCIE LARSON

Administrative Law Judge

Office of Administrative Hearings