

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Appeal of Reinstatement from Industrial

Disability Retirement of:

MATTHEW M. SCOTT,

and

SAN QUENTIN STATE PRISON, CALIFORNIA DEPARTMENT

OF CORRECTIONS AND REHABILITATION,

Respondents.

Agency Case No. 2021-0134

OAH No. 2021060534

PROPOSED DECISION

Administrative Law Judge Sarah Sandford-Smith, State of California, Office of Administrative Hearings, heard this matter on April 11-12, 2022, by videoconference.

Senior Attorney Austa Wakily represented the California Public Employees' Retirement System.

Craig Dykman, Attorney at Law, represented respondent Matthew M. Scott, who was present throughout the hearing. There was no appearance on behalf of

respondent San Quentin State Prison, California Department of Corrections and Rehabilitation.

The record closed and the matter was submitted on April 12, 2022.

FACTUAL FINDINGS

1. Respondent Matthew M. Scott (respondent) was employed as a Correctional Officer at San Quentin State Prison (San Quentin), California Department of Corrections and Rehabilitation (CDCR) between 2003 and 2005. By virtue of his employment, respondent was a state safety member of the California Public Employees' Retirement System (CalPERS) subject to Government Code section 21151.

Industrial Injury and Industrial Disability Retirement

2. On February 16, 2004, respondent slipped and fell on a wet floor while at San Quentin. Respondent fell onto his handcuffs, which were attached to his duty belt. The fall injured respondent's lumbar spine. Respondent was transported to a local hospital, where he was evaluated.

3. After respondent's February 16, 2004, injury, respondent was placed on temporary total disability for approximately six and a half weeks. During that time, respondent took pain medication and engaged in a course of physical therapy. A magnetic resonance imaging (MRI) scan was requested but not authorized at that time.

4. Respondent was released back to work in April 2004. At the time, respondent was working as a "permanent intermittent employee" (PIE) and had some ability to select his job assignments, although he needed to maintain a specific

number of hours and shifts. Respondent tried to select the job assignments that had the least risk of injury. At some point, respondent's position shifted to a "permanent full-time employee," and he was not able to select his job assignments.

Sometime in 2005, respondent had an issue with his lower back while he was in the "Administrative Segregation" (AD/SEG) Unit, performing a lock up with another correctional officer. Respondent was walking down internal stairs from the fifth tier to a supervisor's office when he suddenly could not feel his legs. Respondent had to grab the bars on the stairs and traction himself to get to the bottom and walk to the sergeant's desk. Respondent was unable to finish performing the lock up with his partner, and CDCR placed respondent off work and sent him for further medical evaluation.

Respondent attempted to return to work a couple months after he was sent home in 2005, but he was not able to restrain inmates or travel up or down stairs, so he did not get a job assignment. Respondent again tried to return to work after approximately a year and a half, but CDCR would not let him return, because respondent could not perform the physical duties of a correctional officer.

5. Respondent was referred to Brian Knapp, M.D., in 2005, who ordered a lumbar spine MRI for respondent. The MRI scan showed disc protrusions and degenerative disc disease at both L4-5 and L5-S1 levels. There was also mild facet arthropathy with mild central canal stenosis at the L4-L5 level. Dr. Knapp recommended, and respondent subsequently underwent, a lumbar epidural steroid injection. The steroid injection did not ease respondent's symptoms. On February 6, 2006, Dr. Knapp declared respondent permanent and stationary, and unable to return to his usual and customary occupation as a correctional officer. Respondent subsequently underwent a Qualified Medical Evaluation (QME) from John Champlin,

M.D. Dr. Champlin also believed respondent would not be able to return to his usual and customary occupation as a correctional officer. Respondent applied for industrial disability retirement on October 16, 2006, based on his orthopedic (back, lower right extremity) conditions. CalPERS approved respondent's application effective February 28, 2007.¹

Job Duties

6. As a correctional officer, respondent worked in all parts of San Quentin, including in the AD/SEG, Ranch and East Block units. Respondent, along with the other correctional officers, was charged with maintaining the safety and security of San Quentin. At all times, respondent was required to wear a duty belt in the performance of his duties. Respondent's duties frequently included responding to alarms, where he was required to run as fast as possible to get to serious incidents; performing cell extractions, which sometimes involved lifting inmates up to 400 pounds; and breaking up fights and performing crowd control. The CDCR job analysis also notes that correctional officers must work mandatory overtime when required, run up to 400 yards in an all-out effort over uneven surfaces or up and down stairs, and that correctional officers must have overall body flexibility in the performance of their regular duties. Regarding body flexibility, the CDCR job analysis specifically states:

¹ In its Accusation, complainant notes an effective approval date of January 1, 2007. However, the industrial disability retirement approval letter, sent to respondent by CalPERS, is dated February 28, 2007, and notes that the disability retirement will be effective immediately.

Correctional Officers must have overall body flexibility as well as be able to twist their body in all directions while performing their regular duties. Twisting may take place with the body in an upright position while either standing or walking. Twisting the body in awkward positions while bending over to conduct an inmate body search or cell search in a cramped space. Twisting of the body in different directions may occur during altercations or while restraining an inmate. Twisting of the body may take place very rapidly and without warning.

Respondent testified credibly that he did not believe when he retired, and does not believe now, that he can engage in the physical duties of a correctional officer, including running to cell blocks, running up and down stairs, responding to alarms and performing cell extractions. Respondent also believes that his inability to run and restrain other adults would make him, his colleagues, and the inmate population unsafe if he were to return to duty.

7. Respondent enjoyed serving as a correctional officer and thought of it as the "family business." Respondent's mother, sister and ex-brother-in-law all worked for the CDCR, and his sister and ex-brother-in-law were assigned to San Quentin. Respondent took joy in the rehabilitation aspect of his work. Respondent did not want to retire, and did so only because no permanent correctional officer assignment was available to him that would accommodate the restriction on restraining inmates that his treating physician recommended.

Activities Since Retirement

8. Respondent obtained his contracting license in 2006 and started working as a general contractor. Respondent was self-employed as a general contractor from 2006 to 2018. From 2018 to 2019, respondent worked as a project superintendent for Centric Company. Respondent returned to work as a general contractor in 2019, and has continued to work in that capacity through the hearing date.

As a general contractor, respondent's duties have been, and continue to be, primarily supervisory in nature. Respondent explained that working as a general contractor is one of the least strenuous jobs he has had, and that he spends half the time sitting in a chair. Respondent noted that he needs to walk and go up a few stairs as a general contractor, but that such activity is generally beneficial to him, as previous physicians informed him that he should try to exercise. As a general contractor, respondent directs the work of subcontractors, and can modify his work to accommodate his physical needs or restrictions.

9. Since retirement, respondent has attempted to maintain some level of activity, based on the advice of his physicians. Respondent walks a few blocks around his home in Napa, and prior to the COVID pandemic, respondent had a gym membership and used the pool to engage in low-impact water exercises. Approximately five years ago, respondent attempted to participate in a five-kilometer race with his children, although he was not able to run the entire race. Respondent explained that excessive heat, walking or sitting can all cause his back to flare up. If respondent twists and pulls his body in the wrong way, that movement can cause a "back attack."

Respondent described his most recent back attack, which occurred in February 2021. Respondent had been walking for approximately six hours, then bent down to pick up a foam block. Respondent felt an immediate twinge in his back as he shifted his body to a standing position, and had to go sit in his truck. Respondent then spent the following day in bed, to relieve the pain and stretch his back. Respondent worked from home for the following two to three days. Respondent stated that it took approximately a week and a half to get back to "normal."

Sub Rosa Investigation

10. CalPERS retained Yolanda Clive, Investigator, to conduct a sub rosa investigation of respondent. Clive conducted surveillance of respondent for approximately 51.5 hours between August and October 22, 2019. Clive's surveillance included video surveillance as well as a review of Employment Development Department records for respondent and a Department of Consumer Affairs Contractor's License check. At the completion of Clive's surveillance, she drafted a report for CalPERS.

Clive's video surveillance was edited to slightly over 35 minutes of footage of respondent. Of the nine days that Clive surveilled respondent, the only notable activity occurred on October 10, 2019. On that date, Clive observed respondent carry a roll of construction material and then carry a bathtub with another adult male. At one point, Clive observed respondent and another adult male lift the bathtub to shoulder level and carry it up some steps. Clive also filmed respondent while he carried what appeared to Clive to be a piece of plywood, and then placed the material in the bed of his truck. Clive subsequently captured respondent carrying a Walmart bag and another carton, and at various times, filmed respondent while he was unloading and loading items from his truck.

11. As a result of the sub rosa investigation, CalPERS requested that respondent undergo a medical re-examination. At the time, respondent was under the minimum age for voluntary service retirement applicable to members of his classification.

Medical Evaluation and Opinion of Dr. Henrichsen

12. On July 14, 2020, Robert Henrichsen, M.D., performed an independent medical evaluation of respondent in connection with CalPERS's request for a re-examination of respondent. Dr. Henrichsen wrote initial and supplemental reports after examining respondent and reviewing his medical records and job description. Dr. Henrichsen testified at hearing, providing opinions consistent with his written report.

Dr. Henrichsen is board-certified in orthopedic surgery. He was engaged in private practice in orthopedic surgery beginning in 1973, through 2011. Prior to that time, he completed his orthopedic residency and orthopedic fellowship, and served in the United States Army.

Dr. Henrichsen performed a physical examination of respondent, focused on respondent's lumbar spine and lower extremities. Dr. Henrichsen observed that respondent did not have difficulties walking or standing on his toes and heels. Dr. Henrichsen found that respondent had good functional motion in his low back and good mobility in his trunk. Dr. Henrichsen noted that respondent displayed symptoms when bending to the right, which were consistent with wear and tear in his lower back. Dr. Henrichsen wrote that respondent explained his pain on that day as a six out of ten, but that Dr. Henrichsen's medical evaluation would place respondent's pain on that day as a two or two and a half. Dr. Henrichsen acknowledged that respondent complained to him that he has general pain on a daily basis, pain radiating down his

right leg, and will suffer a “back attack” approximately two times each year. Dr. Henrichsen found respondent to be credible, and noted in his supplemental report, dated November 10, 2020, that he did not believe respondent was exaggerating his symptoms. Dr. Henrichsen recommended standing x-rays to evaluate respondent’s disc space height and disc degeneration.

13. Dr. Henrichsen reviewed MRI scans of respondent’s lumbar spine from June 2010 and November 2015. Dr. Henrichsen observed that the June 2010 MRI showed degenerative disc disease at the L4-5 and L5-S1 levels, with some mild loss of height at L5-S1. Dr. Henrichsen further noted that there was mild broad-based disc protrusion and mild central stenosis at the L4-5 and L5-S1 levels. Dr. Henrichsen wrote that the November 2015 MRI was similar to the June 2010 MRI in that it reflected degenerative disease at L4-5 and L5-S1, but also reflected a high intensity zone in L4-5 and L5-S1. Dr. Henrichsen observed that the November 2015 MRI appeared to indicate broad-based disc bulge at the L3-4 level, which was not present, previously.

14. Dr. Henrichsen also reviewed the sub rosa video of respondent. Dr. Henrichsen opined that it did not appear that respondent had physical difficulties with his activities in the video. Dr. Henrichsen testified that he believes there are inconsistencies in respondent stating that he can perform as a general contractor but not as a correctional officer.

15. Dr. Henrichsen concluded his July 14, 2020, report by stating that he does not believe respondent is substantially incapacitated for the performance of his duties as a correctional officer. Dr. Henrichsen reiterated that belief in his November 10, 2020, supplemental report, after having viewed a radiology summary completed by Christopher Lee, M.D., on October 29, 2020. Dr. Henrichsen noted that even though

respondent's most recent MRI scan was abnormal, the abnormalities or segmental instability had not progressed such that there were imaging findings of instability.

Dr. Henrichsen testified regarding his understanding of the duties of a correctional officer. Dr. Henrichsen stated that he understands that a correctional officer at San Quentin must navigate stairs, and that the position requires "some running." Dr. Henrichsen stated that he "suspects [respondent] could say he can't respond to an alarm because his back is bad," but admitted that he did not know how that would be taken by respondent's supervising officers. Dr. Henrichsen also noted that his understanding is that there are two alarms per day to three alarms per month, and that knowing the frequency of the alarms is important. Dr. Henrichsen testified that it is possible that respondent would have to respond to preserve life and limb, and that he assumes that is part of the job, but that he had not seen that in writing. Dr. Henrichsen asserted that when correctional officers must break up fights, a "variety of correctional officers will arrive, so more correctional officers than inmates are there, so it is a controlled situation." Dr. Henrichsen did not provide a basis for this assertion. Dr. Henrichsen opined that he would anticipate respondent could subdue a violent inmate, but that it, "depends on the circumstances," and that respondent "might have some pain."

16. Dr. Henrichsen reviewed the reports of Steven S. Isono, M.D., who evaluated respondent and offered testimony at hearing. Dr. Henrichsen stated that his medical evaluation and the medical evaluation conducted by Dr. Isono are essentially the same. Dr. Henrichsen acknowledged that Dr. Isono concluded that respondent is substantially incapacitated for the performance of his duties as a correctional officer, but asserted that Dr. Isono made that determination as a prophylactic measure. Dr. Henrichsen further posited that the reason respondent was initially found to be

substantially incapacitated for the performance of his duties had to do with nerve pain, and that there is no current evidence of nerve impingement.

Medical Evaluation and Opinion of Dr. Isono

17. Dr. Isono conducted a medical evaluation of respondent on January 8, 2016, and again on April 15, 2021. Dr. Isono wrote initial and supplemental reports in 2016 and in 2021, after reviewing respondent's medical records, including MRI and x-ray images. Dr. Isono also reviewed the sub rosa video of respondent, the correctional officer job analysis and essential functions, and information from CalPERS regarding the physical requirements of a correctional officer in San Quentin. Dr. Isono testified at hearing and provided opinions consistent with his written reports.

Dr. Isono is board-certified in orthopedic surgery. Currently, Dr. Isono works as a clinical professor in orthopedic surgery at Stanford University and is a practicing orthopedic surgeon. Dr. Isono is also certified as a specialist in orthopedic sports medicine. Dr. Isono's practice has included treating first responders, including police officers, sheriffs, correctional officers, probation officers, California Highway Patrol officers and firefighters.

Dr. Isono's physical examination of respondent on April 15, 2021, was consistent with Dr. Henrichsen's physical examination of respondent on July 14, 2020. Dr. Isono additionally noted that respondent experienced persistent mild to moderate pain at the base of his lumbar spine at the extremes of the lumbar spine motion and right-over-left lateral bending motion. Dr. Isono stated that respondent suffered persistent mild tenderness at the base of his lumbar spine, and tenderness in the right and left sciatic notches. Dr. Isono requested to review lumbar spine x-rays that had been obtained on October 29, 2020, and recommended that another lumbar spine

MRI be obtained. Dr. Isono diagnosed respondent with L4-5 and L5-S1 disc protrusions with degenerative disc disease and facet arthropathy and clinical segmental instability.

18. Dr. Isono's supplemental report, dated October 14, 2021, included his further impressions after reviewing additional medical records. Dr. Isono noted that respondent's MRI scan, dated June 9, 2021, and the x-rays, dated October 29, 2020, showed abnormalities, but did not demonstrate segmental instability. Dr. Isono explained in his report that respondent's activities in the sub rosa video do not indicate that respondent is capable of performing the duties of a correctional officer.

Dr. Isono testified regarding the meaning of respondent's recent radiological studies. Dr. Isono described segmental instability, and explained that once the ligaments become lax, they remain lax, absent fusion surgery, for which respondent is not currently a candidate. Dr. Isono stated that when someone has segmental instability, back spasms occur to protect the ligaments, which can lock up the person's back. Dr. Isono explained that segmental instability affects a person's daily life, because a person could have good days or months, without spasms, but then could get an acute spasm doing something trivial. Dr. Isono noted that although respondent's recent x-rays did not show segmental instability, the problem with flexion/extension x-rays is that they do not rule in or rule out segmental instability. Dr. Isono reiterated that, based on the pathology of respondent's lumbar spine and his clinical symptoms, it is his opinion that respondent suffers from segmental instability, in addition to respondent's disc protrusions at the L4-5 and L5-S1 levels.

During his testimony, Dr. Isono explained the differences between the controlled activity depicted in the sub rosa video and the duties of a correctional officer. Dr. Isono noted that respondent's activities reflected in the sub rosa video are

controlled, and not inconsistent with respondent's diagnoses. Dr. Isono stated that, as a general contractor, respondent can determine the extent of his physical activities, and not engage in activity that would be too difficult. Dr. Isono explained that respondent could carry up to 60 pounds in a controlled fashion, if he had the opportunity to prepare by stabilizing his core and spine. Dr. Isono indicated that respondent could likely walk a mile in a controlled environment, so long as respondent could take breaks. Dr. Isono stated that respondent could bend forward, walk up and down stairs, and sit and stand in a controlled environment. Dr. Isono noted that he does not believe respondent could run without hurting his back or lift any weight over 75 pounds. Dr. Isono contrasted respondent's controlled activities as a general contractor with the duties required of a correctional officer. Dr. Isono indicated that correctional officers are often required to run at full sprints to respond to alarms, and that they are required to make this run while wearing a duty belt. Dr. Isono noted that correctional officers frequently engage in physical altercations with inmates, and occasionally with inmates who weigh over 400 pounds. Dr. Isono also referenced the job analysis of a correctional officer and indicated that respondent is unable to engage in spontaneous rotating, twisting, wrestling or forcibly restraining an inmate. Dr. Isono opined that it would be incomprehensible and unethical from a medical standpoint to allow respondent to continue to work as a correctional officer.

Potential Reinstatement From Retirement

19. Because of the medical re-examination performed by Dr. Henrichsen, described in Factual Findings 12 through 16, on December 3, 2020, CalPERS notified respondent that he will be reinstated to his former position as a correctional officer with San Quentin. On December 18, 2020, respondent timely appealed the determination of CalPERS.

20. For several reasons, Dr. Henrichsen's opinion that respondent is capable of performing the duties of a correctional officer at San Quentin is not persuasive. First, Dr. Henrichsen did not identify any material improvement in respondent's condition between his retirement in February 2007 and either Dr. Henrichsen's examination in July 2020 or the follow-up x-rays and MRI in October 2020 and June 2021. Second, Dr. Henrichsen demonstrated a lack of appreciation for the duties of a correctional officer. He minimized the heavily physical nature of the duties, set forth in the correctional officer job analysis, and suggested that respondent could engage in physical altercations in a controlled manner, and possibly inform a supervisor that he could not respond to alarms because of his back condition. Third, Dr. Henrichsen was not definitive. Instead of stating that respondent could substantially perform the usual physical duties required of a correctional officer, Dr. Henrichsen stated that respondent's ability to subdue a violent inmate would "depend[] on the circumstances." Finally, Dr. Henrichsen did not consider how respondent's subjective description of his own limitations (inability to fight with inmates, inability to run the required distances, inability to walk for eight hours or work 16 to 24 hours, constant low-level pain in his right leg and occasional "back attacks") might impair respondent's abilities to meet the requirements of a correctional officer.

21. In contrast, Dr. Isono's opinion that respondent is substantially incapacitated for the performance of duties as a correctional officer is persuasive. While Dr. Isono stated that he did not have an understanding of the criteria CalPERS uses for determining disability, he clearly explained that respondent cannot currently perform the duties of a correctional officer because of his low back and lower extremities. Dr. Isono described, in detail, the nature of respondent's lumbar spine condition and how that condition precludes respondent from engaging in the duties of a correctional officer. Dr. Isono's comprehensive analysis and understanding of the

day-to-day physical duties of a correctional officer contributed to the overall credibility of his testimony.

22. The evidence in this matter does not establish that respondent has ceased to be substantially incapacitated from the performance of his job duties as a correctional officer with San Quentin.

LEGAL CONCLUSIONS

1. Pursuant to Government Code section 21151, subdivision (a), a state safety member who becomes incapacitated for the performance of his usual duties as the result of an industrial disability shall be retired for disability. The terms "disability" and "incapacitated for the performance of duty" mean "disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months . . . on the basis of competent medical opinion." (Gov. Code, § 20026.) A person is "incapacitated for performance of duty" if he is substantially unable to perform the usual duties of his position. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.)

2. The matters stated in Factual Finding 5 confirm that CalPERS determined in February 2007 that respondent could not continue in employment as a correctional officer with the CDCR at San Quentin because he was substantially incapacitated for the performance of his usual duties as a correctional officer. These matters also confirm that the industrial disability precluding respondent's continuing employment with the CDCR at San Quentin were his orthopedic (back and lower right extremity) conditions.

3. After a state safety member has retired for industrial disability, and before that person reaches service retirement age, CalPERS may require the person to submit to medical re-examination. (Gov. Code, § 21192.) If CalPERS determines on the basis of such re-examination that the person is substantially able to perform the usual job duties of the former position, CalPERS may cancel the person's industrial disability retirement allowance. (*Id.*, § 21193.)

4. In this matter, where CalPERS proposes action that could result in cancellation of respondent's industrial disability retirement allowance, CalPERS bears the burden of proving, by a preponderance of the evidence, that respondent's condition has changed since his retirement.

5. The matters stated in Factual Findings 5, 6, 8 through 18, and 20 through 21 fail to establish that respondent's orthopedic (back and right lower extremity) conditions have changed since February 2007 such that he can now substantially perform the usual job duties of a correctional officer for the CDCR at San Quentin.

ORDER

Respondent Matthew M. Scott remains substantially incapacitated for the performance of his duties as a correctional officer with the California Department of Corrections and Rehabilitation, at San Quentin State Prison.

DATE: 05/11/2022

Sarah Sandford-Smith

SARAH SANDFORD-SMITH

Administrative Law Judge

Office of Administrative Hearings