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:

MICHAEL J. MENDOZA and

AVENAL STATE PRISON, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondents

Agency Case No. 2021-0560

OAH No. 2021100305

PROPOSED DECISION

Sean Gavin, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on September 6, 2022, October 14, 2022, and January 9, 2023, from Sacramento, California.

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

Eric Lambdin, Attorney at Law, represented respondent Michael J. Mendoza, who was present throughout the hearing.

There was no appearance by or on behalf of the Avenal State Prison, California Department of Correction and Rehabilitation (CDCR), and a default was taken pursuant to Government Code section 11520.

Evidence was received, the record closed, and the matter was submitted for decision on January 9, 2023.

ISSUE

At the time of his application, was respondent substantially incapacitated from the performance of his usual and customary duties as a Correctional Sergeant for respondent CDCR on the basis of cardiovascular (hypertension, coronary artery disease, and ischemia diastolic dysfunction) and orthopedic (bilateral shoulders, bilateral hands/wrists, and neck) conditions?

FACTUAL FINDINGS

Respondent's Application and CalPERS's Denial

1. On November 9, 2020, respondent signed and subsequently filed an application for service pending disability retirement with CalPERS (application). At the time of filing, respondent was employed by the CDCR as a Correctional Sergeant. By virtue of his employment, respondent was a state safety member of CalPERS subject to Government Code section 21151.

2. In his application, respondent identified his disabilities as hypertension, coronary artery disease, and ischemia diastolic dysfunction. He did not identify any orthopedic conditions in his application. He wrote that his conditions were "cumulative

over time." Regarding how his illnesses affected his ability to perform his job, respondent wrote: "precludes me from fulfilling the job responsibilities of a correctional sergeant/correctional officer." Respondent is not currently working in any capacity for the CDCR, having last worked on November 2, 2020.

3. On an unspecified date, respondent submitted to CalPERS a Physician's Report on Disability signed by William N. Foxley, M.D. Dr. Foxley specializes in occupational medicine and first started treating respondent in April 2018. Dr. Foxley noted that respondent's "chief complaints" were "Bilateral shoulders, bilateral upper arms, neck, chest/ribs, chronic headaches [and] fingers on the left hand." He wrote that respondent's injury occurred on October 26, 2017, when respondent, "while responding to a fence alarm, struck a power pole guide line with vehicle." Dr. Foxley further wrote that respondent was substantially incapacitated from performing his duties as a Correctional Sergeant based on coronary artery disease. He did not provide any details other than to reference a page within an August 2020 Qualified Medical Evaluation (QME) report from James Schmitz, M.D., a cardiologist. Finally, Dr. Foxley noted that respondent's incapacity would be permanent.

4. After receiving respondent's application and the Physician's Report on Disability, CalPERS reviewed records from respondent's medical providers, including Dr. Foxley, Dr. Schmitz, M.D., and Shailesh Shetty, M.D., another cardiologist. CalPERS also sent respondent for Independent Medical Examinations (IMEs) with cardiologist Robert B. Weber, M.D., and orthopedic surgeon Scott A. Graham, M.D. Based on its review of the medical records and the IME reports from Dr. Weber and Dr. Graham, on April 13, 2021, CalPERS denied respondent's application because it determined: "your cardiovascular (hypertension coronary artery disease and ischemia diastolic

dysfunction) and orthopedic (bilateral shoulders, bilateral hands/wrists and neck) conditions are not disabling."

5. On May 12, 2021, respondent sent CalPERS a letter appealing the denial. On August 24, 2021, Keith Riddle, Chief of CalPERS's Disability and Survivor Benefits Services Division, in his official capacity, made and filed a Statement of Issues alleging respondent, at the time he filed his application, was not permanently disabled or incapacitated from performing his duties as a Correctional Sergeant on the basis of his cardiovascular (hypertension, coronary artery disease, and ischemia diastolic dysfunction) and orthopedic (bilateral shoulders, bilateral hands/wrists, and neck) conditions.

Duties of a Correctional Sergeant

6. With his application, respondent submitted a Physical Requirements of Position/Occupational Title form for his position completed by the CDCR. The form provides the following information about the physical requirements of the Correctional Sergeant position:

a. Infrequent tasks (between 5 and 30 minutes per day): interacting/communication by phone with the public; operating hazardous machinery.

b. Occasional Tasks (between 31 minutes and 2.5 hours per day): interacting/communication face-to-face with the public; lifting/carrying more than 50 pounds; sitting; standing; walking; running; crawling; kneeling; climbing; squatting; reaching above and below the shoulder; pushing and pulling; power grasping; walking on uneven

ground; driving; exposure to dust, gas, fumes, or chemicals; and working at heights.

c. Frequent Tasks (between 2.5 and 5 hours per day): lifting/carrying between 0 and 50 pounds; sitting; standing; walking; climbing; squatting; bending and twisting at the neck and waist; reaching above and below the shoulder; pushing and pulling; power grasping; handling; fine fingering; computer use; walking on uneven ground; exposure to excessive noise, extreme temperatures, and dust, gas, fumes, or chemicals; and working at heights.

d. Constant Tasks (more than 5 hours per day): interacting/communicating with the inmates, patients, or clients and coworkers; supervising staff; sitting; standing; walking; bending and twisting at the neck and waist; reaching above and below the shoulder; power grasping; handling; fine fingering; computer use; walking on uneven ground; exposure to excessive noise, extreme temperatures, and dust, gas, fumes, or chemicals; and working at heights.

7. In addition, the CDCR job description states all Correctional Sergeants must be able to perform all essential functions. The job description includes a list of essential functions that is substantially similar to the tasks listed in the Physical Requirements of Position/Occupational Title form. It also states that Correctional Sergeants must be able to, among other things, "disarm, subdue and apply restraints

to inmates using approved procedures"; "defend self and staff against an inmate armed with a weapon"; and "occasionally respond as quickly and safely as possible when responding to alarms[,] emergencies or serious incidents, distances vary from a few yards up to several yards, running may take place over varying surfaces including uneven grass, dirt areas pavement, cement, etc., running can include stairs and/or flights of stairs [and] maneuvering up or down."

Respondent's Evidence

RESPONDENT'S TESTIMONY

8. Respondent worked for CDCR for approximately 38 years, the last 31 of which were as a Correctional Sergeant. He loved his job and excelled at it. In early 2019, he began to experience symptoms of high blood pressure. CDCR sent him for a QME with Dr. Schmitz on February 21, 2019. Dr. Schmitz prepared a QME report and referred respondent for additional testing. Respondent underwent a cardio-stress test in September 2019 with Shailesh Shetty, M.D. Dr. Schmitz reviewed Dr. Shetty's findings and then prepared a supplemental QME report on August 18, 2020. According to respondent, based on Dr. Schmitz's supplemental QME report, CDCR notified him he could not return to work as a Correctional Sergeant. He was given the choice to transition to a non-peace officer position or retire. He chose to retire in November 2020.

TESTIMONY OF BIKRAM SONI, M.D.

9. Bikram Soni, M.D., is board-certified in cardiovascular diseases, interventional cardiology, and nuclear medicine. He has been a licensed physician since 1993. He moved to California approximately eight years ago. He practices with Dr. Shetty and reviewed respondent's August 2019 stress test results. He also

personally met with respondent in 2020. At that time, Dr. Soni noted that respondent's stress test results revealed that he could have blockages in his arteries and he recommended further testing, known as an angiogram, to confirm. Respondent declined, stating he was asymptomatic. In Dr. Soni's opinion, an angiogram would be necessary for a conclusive diagnosis of ischemia.

Testimony of Dr. Schmitz

10. Dr. Schmitz is board-certified in cardiovascular diseases and internal medicine. He has several years of experience as a physician and as a professor of cardiology. For the past five years he has performed approximately 30 QMEs per month. He has also performed IMEs before and is familiar with the CalPERS substantial incapacity standard.

11. Dr. Schmitz prepared an initial QME report and three supplemental QME reports[1] for respondent. Dr. Schmitz's prepared the QME reports in relation to respondent's worker's compensation claim, not his application for disability retirement. Dr. Schmitz never evaluated respondent using the CalPERS substantial incapacity standard.

12. In his supplemental QME report dated August 18, 2020, Dr. Schmitz diagnosed respondent with hypertension, coronary artery disease, valvular heart disease, and diabetes. He concluded that respondent "should be precluded from fulfilling the job responsibilities of a correctional officer to include running and

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[1] Dr. Schmitz's August 18, 2020, supplemental QME report was the only such report submitted into evidence.

apprehending inmates, responding to emergency situations and working overtime." He based this conclusion on his understanding that:

> The impact of cardiac conditions on peace officer job performance is codified in California Government Code 12940.1, which establishes that law enforcement candidates with heart trouble are presumed to be unable to perform their duties in a manner that would not endanger their health or safety or the health and safety of others, and states: Only candidates who can demonstrate all of the following should be deemed acceptable: . . . 3. Exercise tolerance of 12 METS[2] (estimated VO2 max of 42 ml O2/kg/min). . . .

13. Dr. Schmitz concluded that, because respondent achieved only 10.1 METs on his August 2019 stress test, he did not meet the statutory requirements to qualify as a peace officer. Dr. Schmitz did not review respondent's specific job duties when forming his opinion.

14. At hearing, Dr. Schmitz testified that he had insufficient information to opine that respondent's incapacity was permanent. Without further testing, Dr. Schmitz has no opinion as to the expected duration of respondent's impairment.

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[2] An MET, or Metabolic Equivalent of Task, is a unit of measurement during cardio-stress tests.

QME Report of William J. Previte, D.O.

15. At hearing, respondent submitted a QME report from William J. Previte, D.O. Dr. Previte prepared the QME report in relation to respondent's worker's compensation claim, not his application for disability retirement. Dr. Previte did not testify at hearing.

CalPERS's Evidence

Dr. Weber's IME and Testimony

16. Dr. Weber received his medical degree in 1974 and obtained his California medical license in 1975. From 1974 through 1978, he completed an internship and two residencies in internal medicine. In 1978, he was certified by the American Board of Internal Medicine, and in 1983 was certified in the subspecialty of cardiac disease. In 1979, he started a private practice in internal medicine. From 1980 through 1982, he completed a clinical fellowship in cardiology, and from 1982 through the present, he has maintained a private practice in cardiology. He has been a fellow of the American College of Cardiology since 1997. Since approximately 2012, he has performed IMEs for CalPERS and is familiar with the CalPERS substantial incapacity standard.

17. On February 24, 2021, Dr. Weber conducted an IME on respondent. He interviewed respondent, took a medical history and an accounting of his illnesses, reviewed his medical records and job duties, and physically examined him. Thereafter, Dr. Weber wrote an IME report. He testified at hearing consistent with his report.

18. Based on the above, Dr. Weber diagnosed respondent with, as relevant to this matter, "hypertension, suboptimally controlled" and "history of abnormal

exercise myocardial perfusion scan; possibly representing small areas and amount of ischemia." Regarding the hypertension, Dr. Weber opined:

> [Respondent] has hypertension without echocardiographic evidence of hypertensive heart disease, as would be manifested by left ventricular hypertrophy. He has a normal ejection fraction, both by echocardiogram and by myocardial perfusion imaging. He was found to have left ventricular diastolic dysfunction / impaired relaxation by Doppler echocardiogram. This pattern is ubiquitous in people that have reached middle age and above and, in the majority of cases, reflects the normal phenomenon of aging as it affects left ventricular myocardial function.

19. Dr. Weber also reviewed Dr. Shetty's findings following respondent's August 2019 stress test. Dr. Weber summarized the findings as follows:

> [Respondent] performed well on the treadmill stress test of August 9, 2019, which was combined with nuclear perfusion imaging. In his exercise, he reached a maximal heart rate representing 91% of his predicted maximal heart rate, indicating very adequate stress of the heart. He walked eight minutes and 50 seconds and completed a workload of 10 METs without experiencing symptoms of excessive shortness of breath or chest pain. Thus, [respondent's] performance on this stress test indicates very good exercise tolerance for his age.

20. Regarding respondent's ischemia, Dr. Weber wrote:

> In regard to the described mild and small areas of hypoperfusion on his nuclear myocardial scan during exercise, interpreted by the performing cardiologist as "ischemia," this should not be considered a definitive diagnosis of coronary artery disease, but rather merely a suspicion, in that the pattern and size and extent of the perfusion abnormality as described suggests that if indeed there is evidence of ischemia, meaning insufficient blood supply to the heart muscle, this is of a very limited degree. These abnormal image findings could also be due to artifact. [Respondent] clearly has no clinical evidence of ischemic heart disease.

21. Based on his IME and review of respondent's medical records, Dr. Weber opined in his report:

> It is my opinion that the member does not have an actual and present impairment on the basis of hypertension that arises to the level of substantial incapacity to perform his usual job duties.
>
> Although his hypertension control has room for improvement, he has no evidence of hypertensive heart disease and, as discussed above, has been documented to have good exercise capacity.

> With respect to the issue of coronary artery disease, on the basis of the study performed to date, there is insufficient evidence to conclude that he has significant coronary artery disease and there is no clinical history of ischemic heart disease.

Dr. Graham's IME and Testimony

22. Dr. Graham received his medical degree in 1979 and obtained his California medical license in 1980. From 1979 through 1984, he completed an internship and two residencies in orthopedics. In 1988, he was certified by the American Board of Orthopaedic Surgery. From 1984 through 2017 he maintained a private practice in orthopedics and sports medicine. Since December 2017, he has maintained a medical-legal practice in which he performs QMEs and IMEs. He has performed multiple IMEs for CalPERS and is familiar with the CalPERS substantial incapacity standard.

23. On March 19, 2021, Dr. Graham conducted an IME on respondent. He interviewed respondent, took a medical history and an accounting of his illnesses, reviewed his medical records and job duties, and physically examined him. Thereafter, Dr. Graham wrote an IME report. He testified at hearing consistent with his report.

24. Based on the above, Dr. Graham diagnosed respondent with multilevel cervical spondylosis, bilateral shoulder rotator cuff tendinitis, and bilateral carpal tunnel syndrome. In response to CalPERS's question about whether respondent's orthopedic conditions substantially incapacitated him from performing his duties as a Correction Sergeant, Dr. Graham opined:

> It is my understanding that this [respondent] had his accident 10/26/17[.] This accident resulted in the above diagnoses. Despite this [respondent] continued to work without any restrictions whatsoever for the next three years. This was full duty no restriction whatsoever and he continued to perform his usual and customary work. The reason he was taken off was because of his cardiac condition. It was his intention all along to complete his 40 years of service.
>
> Therefore at this time given his history [respondent] does not have an actual and present orthopaedic condition that arises to the level of substantial incapacity to perform him usual job duties.

ANALYSIS

25. Respondent bears the burden to establish, through competent medical evidence, that at the time of his application, he was substantially incapacitated from performing his usual job duties based on his cardiovascular (hypertension, coronary artery disease, and ischemia diastolic dysfunction) and orthopedic (bilateral shoulders, bilateral hands/wrists, and neck) conditions. He failed to do so. Rather, the persuasive medical evidence established that respondent's medical conditions did not, at the time of his application, substantially disable him from performing his usual job duties as a Correctional Sergeant.

26. Dr. Weber examined respondent, reviewed his medical records, and evaluated him using the CalPERS substantial incapacity standard. Based thereon, he

found that respondent's hypertension and ischemia did not preclude him from performing his usual job duties. His conclusions were credible and supported by his experience and training, especially in the field of cardiology.

27. Dr. Foxley's findings and opinions, as reflected in his Physician's Report on Disability form, were less persuasive than Dr. Weber's for two reasons. First, Dr. Foxley's medical specialty is occupational medicine, and there was no evidence that he has any specialized training or knowledge regarding cardiology. In contrast, Dr. Weber has extensive experience and training in cardiology.

28. Second, Dr. Weber testified at hearing consistently with his written reports. He explained his reasons for not only his own findings, but also for disagreeing with respondent's other medical providers. Dr. Weber credibly explained why respondent's conditions do not demonstrate his substantial incapacity using the CalPERS standard. In contrast, Dr. Foxley did not testify at hearing, was not subject to cross-examination, and did not respond to Dr. Weber's conclusions. When weighed against one another, Dr. Weber's findings and opinions were more persuasive than Dr. Foxley's.

29. Furthermore, neither Dr. Soni's testimony nor Dr. Schmitz's testimony or QME report constituted competent medical evidence related to respondent's substantial incapacity under the CalPERS standard. Dr. Schmitz acknowledged that his QMEs were not done under the CalPERS standard. Dr. Soni and Dr. Schmitz both acknowledged that more testing would be necessary before they could opine about the expected duration of respondent's incapacity, if any. Finally, Dr. Schmitz's finding of incapacity was based on his belief that Government Code section 12940.1 includes, among other things, a minimum METs score for peace officers. No such language

exists with that code section. Consequently, respondent's evidence was inadequate to rebut Dr. Weber's findings.

30. Similarly, Dr. Graham examined respondent, reviewed his medical records, and evaluated him using the CalPERS substantial incapacity standard. Based thereon, he found that respondent's orthopedic conditions did not preclude him from performing his usual job duties. His conclusions were credible and supported by his experience and training, especially in the field of orthopedics. Dr. Previte's findings and opinions, as reflected in his QME report, were less persuasive than Dr. Graham's because he did not apply the CalPERS substantial incapacity standard and did not testify at hearing.

31. When all the evidence is considered, respondent did not prove through competent medical evidence that, at the time of his application, his cardiovascular (hypertension, coronary artery disease, and ischemia diastolic dysfunction) and orthopedic (bilateral shoulders, bilateral hands/wrists, and neck) conditions substantially incapacitated him from performing his job duties for the CDCR. Therefore, his application must be denied.

LEGAL CONCLUSIONS

1. By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151. To qualify for disability retirement, respondent had to prove that, at the time he applied, he was "incapacitated physically or mentally for the performance of his duties in the state service." (Gov. Code, § 21156.) As defined in Government Code section 20026,

> "Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain 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.

2. The party asserting the affirmative at an administrative hearing has the burden of proof, including the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) Respondent has not met his burden.

3. An applicant must demonstrate his substantial inability to perform his usual duties based on competent medical evidence, and not just the applicant's subjective complaints of pain. (*Harmon v. Bd. of Retirement* (1976) 62 Cal.App.3d 689, 697; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854; *Mansperger v. Public Employees' Retirement System*, *supra*, 6 Cal.App.3d at pp. 876–877 [fish and game warden's inability to carry heavy items did not render him substantially incapacitated because the need to perform such task without help from others was a remote occurrence].) And mere discomfort, which may make it difficult to perform one's duties, is insufficient to establish permanent incapacity from performance of one's position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Bd. of Administration*, *supra*, 77 Cal.App.3d at p. 862.)

4. As discussed in the Factual Findings as a whole, and in particular Factual Findings 25 through 31, respondent did not prove by a preponderance of competent

medical evidence that he was substantially incapacitated from the performance of his usual and customary duties as a Correctional Sergeant for the CDCR on the basis of cardiovascular (hypertension, coronary artery disease, and ischemia diastolic dysfunction) or orthopedic (bilateral shoulders, bilateral hands/wrists, and neck) conditions at the time he filed his disability retirement application. Accordingly, as explained in the Factual Findings and Legal Conclusions as a whole, respondent is not entitled to retire for disability pursuant to Government Code section 21151.

ORDER

The application for service pending disability retirement filed by respondent Michael J. Mendoza is DENIED.

DATE: February 8, 2023

Sean Gavin (Feb 8, 2023 16:10 PST)

SEAN GAVIN

Administrative Law Judge

Office of Administrative Hearings