

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:

ERIC R. DEVORE, Respondent

Agency Case No. 2022-0999

OAH No. 2023050428

PROPOSED DECISION

Matthew S. Block, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on July 26, 2023, by videoconference from Sacramento, California.

Mehron Assadi, Attorney, represented the California Public Employees' Retirement System (CalPERS).

Eric R. Devore (respondent) appeared and represented himself.

There was no appearance by or on behalf of California State Prison Sacramento, 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 July 26, 2023.

ISSUE

Was respondent substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer at the time he filed an 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.) Respondent was employed by CDCR as a Correctional Officer at California State Prison, Sacramento. By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151, subdivision (a).

2. Respondent last worked in July 2019. He retired from service with CDCR in April 2020. On June 30, 2022, respondent signed and thereafter filed with CalPERS an application for IDR because of an orthopedic (right shoulder) injury he suffered at work. After receiving respondent's application, CalPERS reviewed respondent's medical records and sent him for an Independent Medical Examination (IME) with Harry Khasigian, M.D. Based on its review of the medical records and Dr. Khasigian's IME report, on October 24, 2022, CalPERS denied respondent's application because his "orthopedic (right shoulder) condition is not disabling."

3. Respondent timely appealed the application denial in a letter dated November 10, 2022. Consequently, on April 26, 2023, Keith Riddle, in his 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

4. CalPERS submitted an eight-page document entitled "Correctional Officer Job Description" (Job Description) which explains the essential job duties of a Correctional Officer. The Job Description lists the percentage of time spent on tasks relevant to the Correctional Officer position. There are five categories of time required: supervising, training, and directing inmates within correctional institutions (40 percent); providing security to inmates, observing inmate behavior to prevent disturbances and escapes, escorting inmates throughout correctional institutions, and screening visitors and supervising visiting locations (40 percent); inspecting locks, bars, doors and fences for tampering, and conducting routine searches of inmates and cells for contraband (10 percent); performing random searches within the area of supervision and other duties as directed by the Correctional Sergeant (5 percent); and preparing written reports (5 percent).

5. A Correctional Officer's job can be mentally demanding. The Job Description states:

Correctional Officers must be alert and must have the ability to sustain their alertness over an 8-hour work day or longer if overtime is required. Correctional Officers are at risk by

aggressive or combative inmates of physical violence at all times in a correctional institution; by physical attack including verbal/harassment by inmates or physical attack including violence between inmates.

Correctional Officers must be able to make decisions rapidly and correctly and respond in life threatening situations.

Correctional Officers must be able to shoot to kill if necessary. Correctional Officers may be exposed to unpleasant situations including inmates who have attempted or committed suicide by hanging themselves in their cells or slashing their wrists; gassings or having body fluids thrown on them; etc.

6. A Correctional Officer is required to complete activities including: sitting in meetings and while performing paperwork, loading weapons, twisting at the neck, and using a telephone (frequently to constantly); reaching in front of the body while using a computer (frequently); and standing, walking, running, climbing, and crawling (occasionally). Emergency situations may require the Correctional Officer to restrain inmates or wrestle them to the floor. While the job typically only involves lifting items weighing up to five pounds, the Correctional Officer must be physically capable of dragging or carrying items weighing between 80 and 400 pounds while working simultaneously with others.

Respondent's Evidence

7. Respondent testified at hearing. He is 55 years old and presently resides in Tennessee. He worked as a Correctional Officer for CDCR for 28 years. He did not

want to retire when he did, because if he worked for two more years, he would have been entitled to the maximum possible retirement allowance for a Correctional Officer.

8. On June 11, 2019, respondent was assigned to supervise a crew of inmates working in food service. While pushing a large metal trash bin on a loading dock, he felt a sharp burning pain in his right shoulder. He had an MRI on June 19, 2019, which revealed minor fraying but no tear of the rotator cuff. He was diagnosed with rotator cuff impingement and acromioclavicular (AC) joint arthritis. He attempted physical therapy and acupuncture therapy but neither alleviated the pain. Randall Schaefer, M.D., performed an acromioplasty on respondent's shoulder on January 29, 2020. During this surgical procedure, Dr. Schaefer shaved off a small part of respondent's AC joint to remove inflammatory material and provide the muscles and tendons in respondent's shoulder more room to move. He confirmed there was no tear of the rotator cuff.

9. Respondent was told by three different doctors, including Dr. Schaefer, that he would not be able to resume his usual and customary duties as a Correctional Officer. He believes the pain in his shoulder would preclude him from protecting himself and performing the more physically demanding tasks of a Correctional Officer.

10. Respondent filed a claim for worker's compensation on March 10, 2020, and was told by the CDCR worker's compensation coordinator that he was not allowed to return to work. After he filed the worker's compensation claim, respondent was referred for a qualified medical evaluation (QME) with Evan Marlowe, M.D. Respondent submitted Dr. Marlowe's QME report, which identifies him as "Board-Certified in Physical Medicine and Rehabilitation." Dr. Marlowe physically examined respondent and reviewed a variety of medical records pertaining to his injury. In his report, dated June 9, 2020, Dr. Marlowe wrote, in pertinent part:

I find [respondent] has reached maximal medical improvement and is considered permanent and stationary as of 10/3/19 when he was declared as such by his orthopedist.

Dr. Khasigian's IME and Testimony

11. CalPERS retained Harry Khasigian, M.D., to perform an IME of respondent. Dr. Khasigian obtained his bachelor's degree and his medical degree from the University of Southern California. He then completed an orthopedics residency at the University of California, Irvine Medical Center. He is certified by the American Board of Orthopedic Surgery, and he has practiced as an orthopedic surgeon in California for approximately 43 years.

12. Dr. Khasigian physically examined respondent on September 30, 2022, took his medical history, and reviewed his medical records. He thereafter prepared an IME report and testified at hearing about his findings.

13. During the IME, respondent told Dr. Khasigian that his shoulder initially felt better after surgery. However, he still felt pain when reaching overhead, crawling, lifting, climbing, pushing, and pulling. He experiences significant pain when riding in a vehicle, lying on his stomach, or lying on his side with his knees bent. The pain is worse at night, and respondent is often unable to fall and stay asleep as a result.

14. During the physical examination, Dr. Khasigian evaluated the range of motion in respondent's neck and shoulders. He found respondent to have full range of motion in his neck, with only slightly decreased but still functional range of motion in his right shoulder. Despite respondent's subjective pain complaints, Dr. Khasigian found "minimal physical presentation of restriction or limitation." In concluding that

respondent is not substantially incapacitated from performing the duties of a Correctional Officer, Dr. Khasigian reasoned:

His surgery was mild shaving of the shoulder joint to remove inflammatory material. The important structures of the shoulder were not injured or damaged to any significant degree. No unusual structural removal was performed of any parts of the shoulder. The description of the findings in the shoulder was remarkably benign at the time of the operation. Presently, he has close to full range of motion. He has normal strength, and he does not have significant findings which show dysfunction of the rotator cuff mechanism or the shoulder joint. He has not had any diagnostic tests performed which provide information of a derangement within the right shoulder subsequent to surgery.

Supplemental IME Report

15. Dr. Khasigian was subsequently provided with Dr. Marlowe's QME report and the images from respondent's MRI in 2019. He was asked to prepare a supplemental IME report and explain whether the additional materials changed his opinion that respondent was not substantially incapacitated from performing his duties as a Correctional Officer. In that report, dated November 18, 2022, Dr. Khasigian wrote, in pertinent part:

Without any information that provides a more temporally related findings [sic] regarding his right shoulder, the

current information does not provide any basis for modification of my previously expressed opinions because they predate the examination and do not have any other hard factual findings that are incremental to the previous examination and opinions.

Analysis

16. 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 an orthopedic (right shoulder) injury. He failed to do so. The persuasive medical evidence established that the injury did not, at the time of his application, substantially disable him from performing his duties as a Correctional Officer.

17. Dr. Khasigian examined respondent, reviewed his medical records, and evaluated him using the CalPERS substantial incapacity standard. He concluded that the pain in respondent's shoulder did not preclude him from performing his usual job duties. He testified at hearing consistently with his reports. He found respondent to have normal strength and close to full range of motion in his right shoulder. Respondent's subjective complaints of pain were unsupported by the objective medical evidence. Respondent testified that three different physicians told him he would not be able to resume his duties as a Correctional Officer. However, none of them testified at hearing. Dr. Marlowe did not evaluate respondent using the CalPERS substantial incapacity standard when he performed the QME and prepared his report. Moreover, Dr. Marlowe appears to have adopted the diagnosis of respondent's orthopedist, which pre-dated respondent's surgery.

18. When all the evidence is considered, respondent did not prove through competent medical evidence that the pain in his right shoulder substantially incapacitated him from performing his duties as a Correctional Officer for CDCR at the time of his application. Consequently, his application must be denied.

LEGAL CONCLUSIONS

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, 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.)

2. By virtue of his employment with CDCR, respondent is a state safety member of CalPERS subject to Government Code section 21151. 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).)

3. 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 employing the member, on the basis of competent medical opinion." (Gov. Code, § 20026.) 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."

4. 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 a task without help from others was a remote occurrence]; *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.)

5. Based on the Factual Findings and Legal Conclusions as a whole, respondent failed to prove by a preponderance of competent medical evidence that he was substantially incapacitated from the performance of his duties as a Correctional Officer for CDCR when he filed his application for IDR.

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ORDER

The application for Industrial Disability Retirement of respondent Eric R. Devore is DENIED.

DATE: August 22, 2023

Matthew Block

MATTHEW S. BLOCK

Administrative Law Judge

Office of Administrative Hearings