

**ATTACHMENT A**

**THE PROPOSED DECISION**

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

**In the Matter of the Appeal of Reinstatement from Industrial  
Disability Retirement of:**

**ERIC M. JOHNSON and CALIFORNIA HEALTH CARE FACILITY,  
CALIFORNIA DEPARTMENT OF CORRECTIONS AND  
REHABILITATION, Respondents.**

**Agency Case No. 2023-0967**

**OAH Case No. 2024050017**

**PROPOSED DECISION**

Wim van Rooyen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on September 16, 2024, by videoconference from Sacramento, California.

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

There was no appearance by respondents Eric M. Johnson (Johnson) or California Health Care Facility, California Department of Corrections and Rehabilitation (CDCR). Respondents were duly served with the Notice of Hearing in this matter.

Consequently, the matter proceeded as a default against Johnson and CDCR under Government Code section 11520, subdivision (a).

Evidence was received and the record left open until September 17, 2024, for CalPERS to submit a closing brief. On September 17, 2024, CalPERS filed its closing brief, which was marked as Exhibit 22 and admitted as argument. On September 17, 2024, the record was closed and the matter submitted for decision.

## **ISSUE**

Does Johnson remain substantially incapacitated from performing his usual duties as a CDCR Correctional Officer due to orthopedic (lumbar, thoracic, and cervical) conditions?

## **FACTUAL FINDINGS**

### **Jurisdiction**

1. Johnson was previously employed by CDCR as a Correctional Officer. By virtue of his employment, Johnson was a state safety member of CalPERS.

2. On June 15, 2021, CalPERS received an application for industrial disability retirement (IDR), dated June 8, 2021, from Johnson. In the application, Johnson claimed disability based on orthopedic (lumbar, thoracic, and cervical) conditions. On November 22, 2021, CalPERS approved Johnson's application for IDR, effective November 30, 2021.

3. By letter dated February 21, 2023, CalPERS informed Johnson that CalPERS was reviewing whether Johnson continued to meet the qualifications to receive IDR benefits. By letter dated August 8, 2023, CalPERS notified Johnson that he was scheduled for an independent medical examination (IME) with Robert Henrichsen, M.D., on August 22, 2023. Johnson underwent the scheduled examination.

4. By letter dated September 12, 2023, CalPERS notified Johnson and CDCR of CalPERS's determination that Johnson was no longer entitled to IDR benefits. CalPERS explained that, based on the IME and applicable law, Johnson was no longer substantially incapacitated from performing his usual duties as a CDCR Correctional Officer. CalPERS also informed Johnson and CDCR of their appeal rights.

5. By letter dated September 19, 2023, Johnson timely appealed CalPERS's determination. On April 29, 2024, Sharon Hobbs, in her official capacity as Chief of CalPERS's Disability and Survivor Benefits Division, signed and later filed an Accusation for purposes of Johnson's 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.

## **CalPERS's Evidence**

### **CDCR CORRECTIONAL OFFICER PHYSICAL REQUIREMENTS**

6. A CDCR Correctional Officer is a sworn peace officer responsible for:

Carrying out the primary duty of public protection, and performs duties that vary among institutions, and among designated posts within an institution, due to factors such as the varying security levels of inmates, the design of

correctional facilities, geographical location, and the number of inmates. Assignments for this class include duty in towers, housing units, reception centers, kitchens, outside crew supervision, search and escort, control booths, yard, gun posts, and transportation.

7. In terms of relevant physical requirements, a Correctional Officer must be able to perform the following in an eight-hour work day: frequently (2.5 to 5 hours) lift and carry up to 25 pounds, bend at the waist, and twist at the neck and waist; occasionally (31 minutes to 2.5 hours) lift and carry 26 to 50 pounds, sit, stand, walk, run, crawl, kneel, climb, squat, bend at the neck, reach above and below the shoulder, push and pull, and walk on uneven ground; and infrequently (5 to 30 minutes) lift and carry more than 50 pounds, power grasp, drive, and work at heights.

### **REASONS FOR JOHNSON'S REEVALUATION**

8. Greg Neill, an analyst in CalPERS's Disability and Survivor Benefits Division, testified at hearing. Mr. Neill explained that for state safety members receiving IDR benefits who have not yet reached the applicable minimum age for voluntary service retirement, CalPERS generally performs an eligibility reevaluation every 12 or 24 months. By the time Johnson was reevaluated by Dr. Henrichsen, Johnson was only 44 years old. Thus, he was below the applicable minimum age for voluntary service retirement and subject to reevaluation.

9. CalPERS chose to reevaluate Johnson after a shorter period of 12 months for two reasons. First, Johnson contacted CalPERS shortly after his IDR effective date to inquire about working after retirement. Second, CalPERS conducted video surveillance of Johnson that it believed undermined his claims of substantial incapacity.

10. Troy Shinpaugh, a CalPERS investigator, testified at hearing. Mr. Shinpaugh assisted Heather Salvo, another CalPERS investigator, in conducting video surveillance of Johnson over multiple days in November and December 2022, and January and February 2023. In the video footage, Johnson was observed walking, pushing a shopping cart, loading and unloading items from his vehicle, assisting a child into and out of his vehicle, lifting a baby out of his vehicle and holding the baby, and driving his vehicle. He performed these daily activities without any signs of incapacity.

### **AUGUST 2023 IME**

11. Dr. Henrichsen performed Johnson's reevaluation IME on August 22, 2023. Dr. Henrichsen has been licensed by the Medical Board of California since 1968 and a board-certified orthopedic surgeon since 1974. From 1973 to 2011, he maintained a private practice at Auburn Orthopedic Medical Group in Auburn, California. Dr. Henrichsen retired from active clinical practice in 2011 but continues to serve as a Qualified Medical Evaluator for the State of California. He has performed numerous disability evaluations for CalPERS since 2003 and is familiar with CalPERS disability standards.

12. As part of the IME, Dr. Henrichsen reviewed Johnson's available records, including his medical records, the physical requirements of a CDCR Correctional Officer, and CalPERS video surveillance footage; interviewed Johnson regarding his medical history and current symptomology; and performed a physical examination. That same day, Dr. Henrichsen prepared an IME report dated August 22, 2023. After reviewing additional medical records concerning Johnson, Dr. Henrichsen also prepared a supplemental IME report dated May 31, 2024. Dr. Henrichsen testified at hearing consistent with his initial and supplemental IME reports.

13. Johnson told Dr. Henrichsen that he suffered cumulative trauma over the course of his career, but first experienced significant back and neck pain symptoms in 2019 after responding to various incidents and alarms at work. At the time of Dr. Henrichsen's examination, Johnson still experienced lower back pain, left leg pain, numbness in his legs, right knee pain, neck pain, and right arm numbness. Severe low back pain was his predominant complaint. He reported difficulty with self-dressing, bathroom function, writing, typing, standing, sitting, walking, stair climbing, lifting, driving, and getting restful sleep.

14. Upon physical examination of Johnson's lumbar, thoracic, and cervical spine and extremities, Dr. Henrichsen noted Johnson's subjective complaints of tenderness and observed some objective reduced range of motion in his spine. However, there was no evidence of spine instability, nerve impingement, or muscle spasms. Johnson had generally normal strength, normal sensation, normal bulk and tone, no atrophy, functional motion of the spine and all extremity joints (including the right knee), no evidence of joint swelling, and a normal gait. Those findings were consistent with MRI studies, which showed some lumbar degenerative disease consistent with Johnson's age, and reportedly normal electromyography (EMG) and nerve conduction studies.

15. Dr. Henrichsen also testified that he found four indicators on examination that Johnson may have amplified his symptoms. First, his supine straight leg raising was markedly limited due to reported back pain whereas his sitting straight leg raising was normal, which defies medical explanation. Second, he claimed that testing for elbow tendinitis caused him neck pain, which also defies medical explanation. Third, he claimed that he was unable to stand up straight without slightly flexing his lumbar spine. However, during the video surveillance footage, he was seen standing up

straight without any flexion. Fourth, Johnson's lumbar spine flexion on three attempts were 50, 45, and 80 degrees. According to Dr. Henrichsen, such disparate results suggest inconsistent and/or poor effort on the examination.

16. Dr. Henrichsen diagnosed Johnson with a history of lumbar, thoracic, and cervical spine pain; a history of resolved lumbar sprain; and degenerative disc disease of the lumbar spine. Dr. Henrichsen opined that Johnson's condition had greatly improved and that he was no longer substantially incapacitated from performing his usual duties as a CDCR Correctional Officer due to orthopedic (lumbar, thoracic, and cervical) conditions. Dr. Henrichsen explained that although Johnson may experience some pain in performing some of his work duties, e.g., if he were to respond to two or three facility alarms in a row, he is able to complete all physical requirements of a CDCR Correctional Officer.

Dr. Henrichsen based his opinion on Johnson's relatively normal physical examination, limited objective evidence to substantiate Johnson's subjective complaints, the above-mentioned indicators of symptom amplification, unremarkable imaging and electrodiagnostic studies, and surveillance video footage. Although Johnson's treating physician had previously imposed more severe and disabling limitations in the treatment records, those limitations were unsupported by objective examination findings and relied heavily on Johnson's subjective complaints.

## **Respondents' Evidence**

17. Neither Johnson nor CDCR appeared at hearing. Neither party presented any evidence, including any medical opinion evidence.



## LEGAL CONCLUSIONS

1. CalPERS has the burden of proving by a preponderance of the evidence that Johnson is no longer substantially incapacitated from the performance of his usual job duties as a CDCR Correctional Officer and should therefore be reinstated. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (January 22, 2000) CalPERS Precedential Dec. 99-03, <https://www.calpers.ca.gov/docs/99-03-starnes-chp.pdf>.) The term preponderance of the evidence means "more likely than not" (*Sandoval v. Bank of Am.* (2002) 94 Cal.App.4th 1378, 1387), or "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

2. Once Johnson retired for industrial disability, CalPERS had authority to require him to undergo medical evaluation at any time prior to his reaching the minimum age for voluntary retirement for service. (Gov. Code, § 21192.) "If the determination pursuant to Section 21192 is that [he] is not so incapacitated for duty in the position held when retired for disability . . . and . . . [his] employer offers to reinstate [him], . . . [his] disability retirement allowance shall be canceled immediately . . . ." (Gov. Code, § 21193.) Here, Johnson had not reached the minimum age for voluntary service retirement at the time of Dr. Henrichsen's evaluation. (Gov. Code, § 21060, subd. (a).)

3. The analysis of whether an IDR recipient is still incapacitated from the performance of his usual job duties under Government Code section 21192 "is limited to determining whether the conditions for which disability retirement was granted continue to exist." (*California Department of Justice v. Board of Administration of*

*California Public Employees' Retirement System* (2015) 242 Cal.App.4th 133, 141 [the analysis of "still incapacitated" is limited to consideration of the disability for which disability retirement was originally granted, and any substantial incapacity due to a different disability is irrelevant].) The outcome of that analysis must be based on competent medical evidence. (Gov. Code, § 21192.)

4. The appellate courts have interpreted the phrase "incapacitated for the performance of duty" to mean "the substantial inability of the applicant to perform [his] usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) It is not necessary that the person be able to perform any and all duties, because public policy supports employment and utilization of the disabled. (*Schrier v. San Mateo County Employees' Retirement Association* (1983) 142 Cal.App.3d 957, 961.) Furthermore, mere discomfort, which may make it difficult for one to perform his duties, is insufficient to establish incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

5. Here, CalPERS established by a preponderance of the evidence that Johnson is no longer substantially incapacitated from the performance of his usual job duties as a CDCR Correctional Officer and should therefore be reinstated. Specifically, CalPERS offered the supporting opinion of Dr. Henrichsen, who is familiar with the CalPERS disability standards and reviewed Johnson's records, personally examined Johnson, provided a detailed report setting forth his findings and conclusions, and provided consistent testimony at hearing. Dr. Henrichsen's opinion constitutes competent and persuasive medical evidence. Neither Johnson nor CDCR offered any contrary medical opinion evidence applying the CalPERS disability standards.

6. Given the foregoing, CalPERS properly established that Johnson is no longer substantially incapacitated from performing his usual duties as a CDCR

Correctional Officer due to orthopedic (lumbar, thoracic, and cervical) conditions. Consequently, his appeal must be denied.

## **ORDER**

1. The appeal of respondent Eric M. Johnson is DENIED.
2. CalPERS's determination that respondent Eric M. Johnson is no longer substantially incapacitated from the performance of his usual job duties as a CDCR Correctional Officer and should therefore be reinstated is AFFIRMED.

DATE: September 20, 2024

*Wim vanRooyen*

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings