

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 Disability

Retirement of:

KEVIN J. JOHNSON

and

COUNTY OF NEVADA, Respondents

Agency Case No. 2023-1070

OAH No. 2024050476

PROPOSED DECISION

Patrice De Guzman Huber, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on September 25, 2024, in Sacramento, California.

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

Kevin J. Johnson (respondent) represented himself.

There was no appearance by or on behalf of respondent County of Nevada. A default was taken. The matter proceeded as a default proceeding pursuant to Government Code section 11520 as to the County of Nevada only.

Evidence was received and the record left open for the parties to submit closing briefs. The parties submitted their closing briefs, which were marked as Exhibits 14 and B and admitted as argument. On October 11, 2024, the record closed and the matter submitted for decision.

ISSUE

Does Kevin J. Johnson remain substantially incapacitated, on the basis of an orthopedic condition in his shoulders, for the performance of his usual duties as a Correctional Officer II for the County of Nevada?

FACTUAL FINDINGS

Disability Retirement History

1. Respondent was a Correctional Officer II (CO II) for the County of Nevada. By virtue of his employment, respondent is a local miscellaneous member of CalPERS subject to Government Code section 21150. On November 16, 2018, respondent filed with CalPERS an application for disability retirement (application).

2. In his application, respondent described his disability as "limited range of motion [in] both shoulders[;] constant pain in both s[h]oulders[;] limited to 20lbs [sic] lifting each shoulder." He stated his disability occurred on August 13, 2016, when, while performing his duties:

[respondent] was attempting to secure an inmate [who] decided to fight [him]. [Respondent] took him to the ground[,] and he continued to fight[.] [Respondent's] R[ight] arm was injured upon the take down [*sic*][.] [His] L[eft] arm popped sever[e]ly while on the ground.

3. As a result, respondent contends he is unable to perform repetitive movements, lift over 20 pounds with either arm, or throw. Respondent stated he is “no longer [able to] perform the tasks of a correctional officer. [He] cannot lift [or] do trainings due to limitations. [He] may have to ‘fight’ again w/ an inmate. [He] can’t use baton . . . et [*sic*].” Respondent has not worked in any capacity for the County of Nevada since July 2018.

4. Upon review of the medical evidence, CalPERS determined respondent was substantially incapacitated for the performance of his usual duties as a CO II for the County of Nevada. CalPERS approved respondent’s application and placed him on disability retirement, retroactively to August 18, 2018.

5. On June 23, 2023, CalPERS notified respondent it was reviewing his disability retirement benefits, pursuant to Government Code section 21192, to determine whether he continued to meet the qualifications for disability retirement. In September 2023, CalPERS retained Harry A. Khasigian, M.D., an orthopedic surgeon, to conduct an Independent Medical Evaluation (IME) of respondent concerning his orthopedic condition and to issue an IME report.

6. Upon review of Dr. Khasigian’s IME report, CalPERS determined respondent is no longer substantially incapacitated for the performance of his duties as a CO II for the County of Nevada. By letter dated October 31, 2023, CalPERS notified

respondent of its determination and advised him of his appeal rights. Respondent filed a timely appeal.

7. On May 3, 2024, Sharon Hobbs, Chief of CalPERS's Disability and Survivor Benefits Services Division, in her official capacity, signed and thereafter filed an Accusation alleging respondent is no longer substantially incapacitated, on the basis of an orthopedic condition in his shoulders, for the performance of his usual duties as a CO II for the County of Nevada. The matter was set for an evidentiary hearing before an ALJ of the OAH, pursuant to Government Code section 11500 et seq.

Correctional Officer II Duties

8. As set forth in the County of Nevada's job description, effective May 2008 (CO II description), a CO II:

monitors and provides a safe and secure environment at a wide variety of locations and facilities associated with the operations of the jail and courts; receives, books, and houses arrestees [and] transports inmates providing armed security; [and] monitors the activities of inmates[,] ensuring their safety and security[.]

9. The CO II description described the physical demands on a CO II as follows:

Possess[:] ample strength and agility to restrain people alone [or] with the assistance of others[,] while wearing a duty belt and ballistic vest[,] [and to] lift or maneuver people weighing more than 165 pounds; mobility to

perform the full range of reaching, bending, grasping, and climbing movements; [and] manual dexterity to operate restraints, firearms, pod consoles, and computer keyboards[.]

Medical Evidence

DAVID W. WANG, M.D.

10. In July 2017, David W. Wang, M.D., an orthopedic surgeon, performed an arthroscopic debridement and an arthroscopic acromioplasty of respondent's right shoulder. Arthroscopic debridement is a minimally invasive procedure to remove damaged cartilage, bone, or other debris from a joint. Arthroscopic acromioplasty is also minimally invasive and meant to treat the friction around the acromion bone by shaving the bone and removing damaged cartilage or bursae.

11. In December 2017, Dr. Wang performed a posterior labral repair and an arthroscopic debridement of respondent's left shoulder. A posterior labral repair is a minimally invasive procedure to reattach the labrum, the cartilage lining the shoulder socket, to the glenoid rim, the rim of the shoulder socket. Respondent began physical therapy after his shoulder procedures.

12. In June 2018, Dr. Wang examined respondent. Respondent complained to Dr. Wang of pain in his shoulders. Upon examination, Dr. Wang's diagnoses were: "bursitis of left shoulder[,] posterior subluxation of left humerus[,] bursitis of right shoulder[,] calcific tendinitis of right shoulder[,] chronic pain syndrome." Dr. Wang concluded respondent "is at maximal medical improvement. . . . [He] has full, symmetric range of motion, resulting in 0% impairment[.] No future medical care is indicated."

PAUL E. KAPLAN, M.D.

13. In November 2017, Paul E. Kaplan, M.D., examined respondent and reviewed prior medical records. Respondent complained to Dr. Kaplan of pain in his shoulders and difficulty performing the activities of daily living. Upon physical examination, Dr. Kaplan observed “nearly completely normal range of motion and power of the shoulders bilaterally.” Dr. Kaplan’s diagnoses were: bilateral shoulder partial rotator cuff tears and cervical spine disk syndrome with strain-sprain disorder. Dr. Kaplan opined respondent was “temporarily totally disabled” as a result of his August 2016 injury while performing his job duties.

STEPHEN P. ABELOW, M.D.

14. In November 2018, Stephen P. Abelow, M.D., examined respondent and reviewed prior medical records. Respondent complained to Dr. Abelow of pain in his shoulders. Due to the pain, respondent has difficulty performing the activities of daily living, including brushing his teeth, combing his hair, getting dressed, and bathing.

15. Dr. Abelow conducted physical tests on respondent and observed tenderness and impingement in both shoulders and full strength in respondent’s rotator cuffs. Upon examination, Dr. Abelow’s diagnoses were: sprain and strain, calcific tendinitis, impingement, paralabral cyst in the right shoulder; and sprain and strain, impingement, and paralabral cyst in the left shoulder. Dr. Abelow concluded a four percent whole person impairment as to respondent’s right shoulder and five percent as to his left shoulder. He concluded as follows:

[F]rom an orthopedic standpoint, [respondent] currently experiences a disability referable to right and left shoulders which is a disability precluding heavy lifting greater than 20

pounds except on an occasional basis, and no use of the right and left arms above chest level. [He] should avoid altercations.

[T]hese restriction[s] would preclude him from returning to his customary and usual job as that of a correctional officer with Nevada County.

16. Dr. Abelow opined the “mainstay of treatment” for respondent’s diagnoses was a “home physical therapy program (which he could do by himself at home)” such as range of motion, stretching, and strengthening exercises. At the time of examination, it did not appear to Dr. Abelow that “any type of acute interventional care was necessary.”

IME BY ROBERT HENRICHSEN, M.D., MAY 2021

17. In May 2021, at CalPERS request, Robert Henrichsen, M.D., conducted an IME of respondent and thereafter prepared a report. Dr. Henrichsen interviewed respondent, conducted a physical examination, and reviewed his medical records, including Drs. Wang and Abelow’s respective reports. Respondent complained to Dr. Henrichsen of pain in his shoulders and difficulty performing the activities of daily living. Dr. Henrichsen observed no impingement or tenderness in either shoulder. Neither shoulder showed instability. Dr. Henrichsen observed popping in the right shoulder.

18. Dr. Henrichsen noted respondent “uses pain to restrict his function” and appeared to have exaggerated his symptoms when compared with his medical records. Dr. Henrichsen believes respondent also exaggerated during Drs. Wang and Abelow’s respective physical examinations. Dr. Henrichsen noted “the findings at the

time of surgeries [in 2017] are not findings that would result in an inability” to meet the physical requirements of a CO II.

19. Nevertheless, Dr. Henrichsen concluded respondent has impairment in his right shoulder “because of the popping,” which suggests “there is additional intraarticular pathology of the right shoulder.” According to Dr. Henrichsen, the right shoulder impairment is a substantial and permanent incapacity. There is no such impairment in respondent’s left shoulder.

GREGORY LICHTMAN, D.O.

20. In April 2024, Gregory Lichtman, D.O., examined respondent. Respondent complained to Dr. Lichtman of pain in his shoulders. Upon physical examination, Dr. Lichtman observed full range of motion, no instability, and good strength in both shoulders.

21. Dr. Lichtman reviewed respondent’s magnetic resonance imaging (MRI) scans from March 2024. In respondent’s right shoulder, the MRI scans showed supraspinatus tendinosis, an inflammation of the tendon connecting the supraspinatus muscle to the humerus; a tearing within the biceps groove; and an edema within the acromioclavicular joint. In respondent’s left shoulder, the MRI scans showed an “abnormality within the superior labrum,” like a tear. Respondent’s acromioclavicular joint appeared inflamed. After a “lengthy discussion” with respondent, Dr. Lichtman suggested the following treatments: an arthroscopic debridement in the right shoulder; a Mumford procedure, a minimally invasive procedure to decompress the acromioclavicular joint; and an open subpectoral biceps tenodesis to detach the biceps tendon from the labrum and attach it to the humerus.

IME BY DR. KHASIGIAN, SEPTEMBER 2023

22. In September 2023, at CalPERS's request, Dr. Khasigian conducted an IME of respondent and thereafter prepared a report. Dr. Khasigian has been performing IMEs for CalPERS for over 10 years. He is board-certified in orthopedic medicine. In 1974, he earned his medical degree and, in 1979, completed an orthopedic residency. Since 1979, Dr. Khasigian has operated a private practice in orthopedic surgery.

23. As part of the IME, Dr. Khasigian interviewed respondent and conducted a physical examination. He also reviewed the CO II description and respondent's medical records, including reports by Drs. Wang, Abelow, Henrichsen, and Lichtman. Dr. Khasigian assessed whether respondent continued to suffer from an actual and present orthopedic condition which rose to the level of substantial incapacity to perform his job duties. On May 8, 2024, Dr. Khasigian reviewed additional medical records, including x-rays and MRI scans, and thereafter prepared a supplemental report. At hearing, he testified consistently with his IME report and supplemental report.

24. During Dr. Khasigian's IME, respondent complained about pain in both shoulders. Respondent told Dr. Khasigian he experiences pain when crawling, lifting, climbing, pushing or pulling, and reaching above the shoulder. He stated he can lift 50 pounds "carefully" for a short time. Respondent is able to carry grocery bags, work on the lawn, wash the car, and vacuum, for a short duration. He is unable to wash his hair while showering because he cannot lift his arms overhead. Respondent told Dr. Khasigian he takes sleeping pills because his shoulders are so uncomfortable he cannot sleep. Respondent stated his pain level is 9 or 10, on a scale of 1 to 10, with 10 being the highest.

25. Dr. Khasigian and respondent reviewed together the physical demands described in the CO II description. Respondent stated he is unable to restrain people by himself, lift or maneuver a person over 165 pounds, or perform reaching, grasping, or climbing movements. He is unable to drag 165 pounds of weight for more than 20 feet. Respondent is unable to hold a shotgun but could hold a handgun if necessary.

26. Dr. Khasigian observed respondent was "a well-developed, well-nourished male, who is slightly overweight, but is non-restricted in his activities." Dr. Khasigian conducted physical tests and observed respondent's movements were "smooth and coordinated" and his gait was "normal." Respondent was able to sit and stand without difficulty or assistance. His posture was "normal." His shoulders were "level" and showed "no swelling, redness[,] [] induration, [] discoloration, [or] unusual atrophy." Respondent had a "normal biceps profile," symmetric biceps, triceps, and brachioradialis, and "normal" motor and tissue presentation.

27. Dr. Khasigian reviewed respondent's MRI scans from March 2024. In the right shoulder, the MRI scans showed a mild supraspinatus tendinosis with a small intrasubstance tear at the musculotendinous junction. Dr. Khasigian's overall impression of the MRI scans of the right shoulder was that there was no significant disability indicated. The MRI scans of respondent's left shoulder appeared normal, without "acute significant" abnormalities.

28. Although Dr. Khasigian shared Dr. Lichtman's conclusion that, based on the MRI scans, respondent's right shoulder suffered from mild supraspinatus tendinosis, Dr. Khasigian opined this diagnosis is a mild inflammation that does not substantially incapacitate him for the performance of his duties as a CO II. Dr. Khasigian believes respondent's shoulder surgeries successfully repaired them. Dr. Khasigian opined respondent's "subjective complaints appear[] to be out of

proportion to the history, operative findings, and current physical presentation. Again, there is no support for current limitations that would substantiate the subjective complaints." Ultimately, Dr. Khasigian opined respondent was no longer substantially incapacitated for the performance of his usual duties as a CO II.

Respondent's Evidence

29. Respondent testified. He disagrees with Dr. Khasigian's opinion. Respondent contends Dr. Khasigian's conclusions are not credible because he was distracted during the IME. Illustratively, according to respondent, his shoulders "popped" during the IME, but Dr. Khasigian failed to note the "popping" in his report.

30. Respondent believes Dr. Lichtman's recommended treatments demonstrate his right shoulder requires further medical intervention. Respondent contends this medical intervention is necessary and supports his position that he continues to be substantially incapacitated for the performance of his duties as a CO II. He explained he has not sought this additional intervention until recently, although he feels it was necessary, because he has been caring for his elderly father since 2016. However, he plans to schedule Dr. Lichtman's recommended procedures soon.

31. Respondent is motivated to return to work, if his condition improves. However, he recently learned the County of Nevada "is not mandated to take [him] back." A few years ago, the County of Nevada reclassified respondent's position to local safety, but it was classified as local miscellaneous at the time of respondent's service and disability retirement. Had respondent's position been reclassified as local safety at the time of disability retirement, he would have had a guaranteed right to return to work.

LEGAL CONCLUSIONS

1. CalPERS has the burden of proving by a preponderance of the evidence respondent is no longer substantially incapacitated for the performance of his usual job duties as a CO II 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.) The term preponderance of the evidence means "more likely than not" (*Sandoval v. Bank of America* (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. To prevail, CalPERS must show respondent is no longer "incapacitated physically or mentally for the performance of his or her duties." (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 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.

3. Incapacity for the performance of duty "means the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Substantial inability to perform usual duties must be measured by considering a member's abilities. Discomfort, which

makes it difficult to perform, is insufficient to establish permanent incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Bd. of Admin. of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 862.) A condition or injury that may increase the likelihood of further injury or a fear of future injury does not establish a present "substantial inability." (*Hosford, supra*, 77 Cal.App.3d at pp. 863-864.)

4. The minimum age for service retirement is 50 years old. (Gov. Code, § 21060, subd. (a).) CalPERS's Board of Administration may require a member who retired for disability and is under the minimum age for service retirement to undergo a medical examination to determine if he remains substantially incapacitated from his former position. (*Id.* at § 21192.) Respondent was not yet 50 years old when CalPERS notified him his disability retirement was under review in June 2023. If the Board determines, after medical examination, a local miscellaneous member is no longer substantially incapacitated, he may be reinstated to his former position. (*Id.* at § 21193.)

5. Here, CalPERS proved, by a preponderance of the evidence, respondent was no longer substantially incapacitated for the performance of his usual duties as a CO II for the County of Nevada and should therefore be reinstated. Specifically, CalPERS offered the opinion of Dr. Khasigian, who applied CalPERS disability standards in conducting his IME of respondent. Dr. Khasigian reviewed respondent's medical records, physically examined him, prepared a detailed report setting forth his findings and conclusions, and provided consistent testimony at hearing. Upon conclusion of his IME, Dr. Khasigian opined respondent's surgeries in 2017 successfully repaired his shoulders and respondent currently does not suffer from a condition that restricts his

ability to meet the physical demands of a CO II. Dr. Khasigian's opinion constitutes competent and persuasive medical evidence.

6. To support his position that he continues to be substantially incapacitated, respondent provided reports by Drs. Wang, Kaplan, Abelow, Henrichsen, and Lichtman. Respondent relies particularly upon Dr. Lichtman's recommendations, especially because he reviewed the same MRI scans as Dr. Khasigian. Both Drs. Lichtman and Khasigian diagnosed respondent's right shoulder with supraspinatus tendinosis. While Dr. Lichtman appears to believe respondent's diagnosis warrants medical intervention, such as arthroscopic debridement, a Mumford procedure, and an open subpectoral biceps tenodesis, there is no evidence Dr. Lichtman applied CalPERS disability standards or otherwise opined respondent's condition rendered him substantially incapacitated for the performance of his duties as CO II. As a result, respondent's medical evidence is not competent because it did not specifically apply the CalPERS substantial incapacity standard.

7. When all the evidence is considered, CalPERS established, upon competent medical evidence, respondent is no longer substantially incapacitated for the performance of his usual duties as a CO II for the County of Nevada, on the basis of an orthopedic condition in his shoulders. Accordingly, respondent's appeal of reinstatement from disability retirement must be denied.

ORDER

1. CalPERS determination that Kevin J. Johnson is no longer substantially incapacitated for the performance of his usual duties as a Correctional Officer II for the

County of Nevada, on the basis of an orthopedic condition in his shoulders, is
AFFIRMED.

2. Kevin J. Johnson's appeal of reinstatement from disability retirement is
DENIED.

DATE: October 23, 2024



PATRICE DE GUZMAN HUBER

Administrative Law Judge

Office of Administrative Hearings