

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:**

**FRANKIE T. VELORIA and KERN VALLEY STATE PRISON,
CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION, Respondents**

Agency Case No. 2022-1033

OAH No. 2023090315

PROPOSED DECISION

Matthew S. Block, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on December 21, 2023, by videoconference from Sacramento, California.

Nhung Dao, Attorney, represented the California Public Employees' Retirement System (CalPERS).

Frankie T. Veloria (respondent) appeared and represented himself.

There was no appearance by or on behalf of Kern Valley State Prison, 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 December 21, 2023.

ISSUE

Whether respondent was substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer at the time of his 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 Kern Valley State Prison. By virtue of his employment, respondent is a state safety member of CalPERS subject to Government Code section 21151.

2. On May 13, 2022, respondent signed and thereafter filed an application for IDR. The application claimed disability on the basis of an orthopedic (lumbar and cervical spine) condition.

3. In a letter dated October 31, 2022, CalPERS denied respondent's application for IDR. The letter stated that after a review of the medical evidence

submitted, CalPERS found respondent's orthopedic condition did not render him substantially incapacitated from performing his usual duties as a Correctional Officer.

4. In a letter dated November 14, 2022, respondent appealed CalPERS's denial of his IDR application. On July 21, 2023, Sharon Hobbs, in her 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

5. CalPERS submitted three documents explaining respondent's job duties: a "Physical Requirements of Position/Occupational Title" (Physical Requirements); a "Job Description (Correctional Officer)" (Job Description); and an "Essential Functions (Correctional Officer)" Statement (Essential Functions). The Physical Requirements describe the frequency of a Correctional Officer's tasks. A Correctional Officer is physically required to complete activities of movement, including: standing, walking, running, and carrying up to 25 pounds (constantly); climbing, lifting up to and greater than 50 pounds, and bending at the neck and waist (frequently); interacting with the public, crawling, squatting, or kneeling (occasionally); and supervising staff (never/rarely).

6. The Job Description described a Correctional Officer's job as physically and mentally stressful. Specifically:

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 include verbal abuse/harassment by inmates or physical attack involving 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 bodily fluids thrown on them; etc.

7. The Essential Functions Statement provides specific examples of the tasks a Correctional Officer must be prepared to perform during each shift. The Correctional Officer may be called upon to search inmate cells for contraband, physically restrain inmates during physical altercations or searches, and fire a weapon while crouching down. Additionally, the Correctional Officer may be required to defend oneself, staff, and inmates during exposure to chemicals such as pepper spray and tear gas. At all times, the Correctional Officer is required to wear protective equipment weighing up to 15 pounds and must be able to use a baton to subdue offenders during safety incidents.

Respondent's Injury

8. On October 9, 2020, respondent was injured while assisting another Correctional Officer who was assaulted by an inmate. Respondent experienced pain in

his neck and lower back and went to the emergency room where he was diagnosed with muscle strains. He was started on anti-inflammatory medication but did not find it helpful. He returned to work in a limited capacity until December 20, 2021, at which point work became too painful to endure due to prolonged sitting and standing. He has not worked for CDCR since December 2021.

CalPERS's Evidence

DIAGNOSIS

9. Respondent's primary treating physician is Richard E. Sall, M.D. He examined respondent on October 10, 2020, the day after the injury. Respondent reported pain at a level of 8/10 (10 being the worst pain ever felt), which worsened when he moved. Dr. Sall diagnosed respondent with a strain of muscle, fascia, and tendon in his lower back and prescribed ibuprofen and Tylenol to treat the pain. He cleared respondent to return to work on modified duty with restrictions against bending and twisting.

CALPERS'S INVESTIGATION

10. Pravneel Sharma is a CalPERS Investigator. He was assigned to investigate respondent's disability claim and testified at hearing. Mr. Sharma surveilled respondent's home on six different occasions during summer 2022 but never observed any activity. He also performed a social media search for information on respondent. He found a Facebook account under the name "Frankie Veloria." The account promoted a business called "Daddy Frank's Tritip." It included images of barbecue sandwiches and menus, as well as a photograph of respondent with a young child sitting on his shoulders.

11. Mr. Sharma also found Instagram accounts belonging to respondent under the names "Frankie44mp" and "Daddyfrankstritips." Like his Facebook account, both Instagram accounts promoted respondent's business and featured images of barbecue sandwiches and menus.

INDEPENDENT MEDICAL EVALUATION

12. CalPERS retained Michael Quacinella, M.D., to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Quacinella earned a bachelor's degree in health science at the University of California, Santa Cruz. He earned a master's degree in public health and his medical degree from Touro University. He then completed an internship and residency at the Naval Medical Center in San Diego. He is certified by the American Board of Orthopedic Surgery and has been performing IMEs for CalPERS since 2022.

13. Dr. Quacinella performed respondent's IME at his office in Visalia, California, on October 21, 2022, using the CalPERS substantial incapacity standard. Dr. Quacinella obtained respondent's history and symptomology, reviewed his medical records, including a Qualified Medical Report that was prepared in relation to respondent's workers' compensation claim, and physically examined respondent. He issued an IME report dated October 21, 2022 and testified at hearing about his findings.

14. Respondent told Dr. Quacinella he suffered daily from dull, achy pain, and stiffness in his neck and lower back. The pain and stiffness are aggravated by physical activity and alleviated with rest and anti-inflammatory medications. Respondent told Dr. Quacinella that acupuncture and chiropractic therapy had been

somewhat beneficial in temporarily improving his systems but that neither had provided him with any lasting pain relief.

15. Dr. Quacinella reviewed approximately 17 months of medical records pertaining to respondent's treatment history for his injury. He learned respondent consistently reported being in constant moderate to severe pain in his neck and back which was exacerbated by walking, standing, or sitting for a prolonged period. Respondent also reported periodically experiencing a burning feeling and muscle spasms in his back. X-rays were taken immediately after the injury with reported normal findings. He attended chiropractic therapy from November 3 through November 17, 2020, but reported it made his pain worse.

16. Respondent underwent a Magnetic Resonance Imaging (MRI) examination on December 21, 2020. The MRI revealed mild degenerative disc disease in respondent's lower back but no other irregularities. Respondent was prescribed several different medications for his pain, most of which he reported as being ineffective. He attended physical therapy sessions from March 15, 2021, through April 12, 2021, but found the sessions unhelpful in dealing with his symptoms. In sum, respondent's medical records revealed he reported the pain in his neck and back continued to worsen despite various attempts at treatment.

17. Scott A. Graham, M.D., performed a QME in relation to respondent's workers' compensation case on May 19, 2022. Dr. Quacinella reviewed Dr. Graham's QME report. Most of Dr. Graham's findings were consistent with the findings of other medical professionals contained in respondent's records. However, Dr. Graham found that as of the date of the QME, respondent had reached Maximum Medical Improvement (MMI), and that the pain he was experiencing was caused solely by his

injury on October 9, 2020. He recommended further medical evaluation, anti-inflammatory medication, and physical therapy should problems persist in the future.

18. During Dr. Quacinella's physical examination, respondent was in no acute distress. There was no evidence that he was experiencing hypertonicity, or muscle spasms, in his neck or back. He was able to walk with a heel to toe gait, and his vital signs were all within normal limits.

19. Dr. Quacinella found his spine to have normal curvature. He evaluated the range of motion in respondent's neck and lower back. He found respondent to have normal range of motion in his neck, although slightly decreased range of motion when rotating his head to the left. Significantly, he found nothing to indicate that the pain respondent reported experiencing in his neck was caused by non-organic means. The range of motion in respondent's lower back while bending forward, backward, and side to side were all within normal limits.

20. Dr. Quacinella also reviewed a copy of Mr. Sharma's investigative report. He questioned respondent about his participation in the barbecue business given respondent's reported physical limitations and found respondent's answers to be "evasive." Dr. Quacinella was also unable to draw a correlation between respondent's reported symptoms of pain with the records he reviewed and his own objective findings during the IME.

21. Dr. Quacinella ultimately diagnosed respondent with a cervical spine sprain and a lumber muscle strain. However, it is his opinion that those conditions do not render respondent substantially incapacitated for the performance of his duties as a Correctional Officer. In reaching that conclusion, Dr. Quacinella reasoned, in part:

I do believe that there were inconsistencies in the examinee's history as well as the appearance of his activity level on the private investigative report on his social media activity. However, the examinee's history of his occupational injury and the medical documentation of his injury is consistent. There were no non-organic pain physical exam findings. But there were no significant physical exam findings that would corroborate the examinees [sic] claims of substantial incapacity.

Respondent's Evidence

RESPONDENT'S TESTIMONY

22. Respondent testified at hearing. He is 34 years old and suffers from pain every day. There are days where his back spasms are so severe that he cannot function normally. He has received three epidural injections, but they have been largely ineffective. He tried to return to work in a limited capacity for approximately six months and worked in the "control room." In that assignment, he had minimal contact with inmates, and his job primarily consisted of "just pressing buttons." However, sitting or standing for extended periods of time caused him pain. Moreover, even when working in a limited capacity in the control room, he is required to wear a duty belt and bulletproof vest, the weight of which exacerbated his pain.

23. Respondent no longer enjoys spending time with his wife and children because he is so limited physically. He describes himself as a "broken man" and his mental health has suffered significantly. Respondent has had to give up physical

activities he previously enjoyed that “kept [him] sane.” Since his injury, respondent has taken up video gaming and barbecuing as hobbies.

24. Respondent and his wife only operated the Daddy Frank’s Tri-tip business for approximately one year. It started as a hobby, but he eventually tried to turn it into a business. He was unsuccessful. Respondent had help with the project and never lifted more than the weight of a tri-tip roast. He was responsible for cooking and assembling sandwiches but left the more physically strenuous activities to Mr. Estrada. The child in the photo on respondent’s Facebook page is his son. When the picture was taken, the child was only one year old and was not heavy.

CHARACTER WITNESSES

25. Carlos Lara is a Correctional Officer Sergeant at Wasco State Prison and testified at hearing. He has known respondent since high school and worked with him at Kern Valley State Prison. According to Sergeant Lara, respondent’s injury turned his life “upside down.” He had to give up recreational activities he enjoyed such as weightlifting, which has been detrimental to his mental health. As much as Sergeant Lara cares for respondent, he “wouldn’t feel safe” relying on respondent in a correctional setting due to his physical limitations.

26. Alberto Estrada has known respondent for approximately three years and testified at hearing. He and his fiancée worked with respondent and his wife to operate the Daddy Frank’s Tri-tip business together. The business used respondent’s recipes and respondent cooked tri-tip and assembled sandwiches. However, Mr. Estrada had to do the “heaving lifting” due to respondent’s injury. According to Mr. Estrada, respondent’s injury has impacted his relationships with friends, as he is unable to

socialize or participate in recreational activities for extended periods of time without discomfort.

27. Pamela Veloria is respondent's wife and testified at hearing. Respondent's injury has significantly affected their marriage. When they go on vacation, their trips must be planned by taking respondent's physical limitations into consideration. Respondent is limited in what he can do to help her at home. Additionally, since being injured, respondent's personality has changed. He frequently appears angry with her and their children because he is in pain, and it has taken a toll on his relationships with them.

Analysis

28. Respondent bears the burden of proving, by competent medical evidence, that he was substantially incapacitated from the performance of his usual and customary duties as a Correctional Officer at the time of his application for IDR. Respondent has failed to meet his burden.

29. Respondent established that he often experiences residual pain associated with his 2020 injury, which at times makes performing his duties as a Correctional Officer more difficult. However, as Dr. Quacinella explained, pain alone does not render respondent substantially incapacitated. Respondent testified that even being assigned to limited duty, which requires only prolonged sitting and standing, is too painful for him to bear. That testimony is suspect, given respondent's admitted participation in a barbecue business for a period of approximately one year. While he testified that his role in the business was limited to cooking tri-tip and assembling sandwiches, it can be reasonably inferred that those two tasks required him to either sit or stand for prolonged periods of time, just as his work as a Correctional Officer

would require. Respondent failed to establish any meaningful physical distinction between the two.

30. When all the evidence is considered, respondent did not prove that he was substantially incapacitated for the performance of his duties as a Correctional Officer at the time he filed his application for IDR. As such, his appeal must be denied.

LEGAL CONCLUSIONS

Burden and Standard of Proof

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, 1051 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.)

Applicable Laws

2. 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).) 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 employees 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.”

USUAL AND CUSTOMARY DUTIES

3. An applicant must show a substantial inability to perform their usual duties based on competent medical evidence. (Gov. Code, § 20026; *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876.) “Usual Duties” are based on the duties of the last job classification held and applicable law. (*Beckley v. Bd. of Administration* (2013) 222 Cal.App.4th 691, 699-700 [California Highway Patrol (CHP) officer assigned to public affairs role had to be capable of carrying out complete range of tasks required of CHP officers under Vehicle Code section 2268].)

4. The inability to perform a rarely performed, albeit necessary duty of a position does not automatically render an applicant disabled. (*Mansperger v. Public Employees’ Retirement System, supra*, 6 Cal.App.3d at pp. 876-877 [fish and game warden was not incapacitated where he was able to do all normal activities except lift and carry heavy objects, tasks which rarely occurred]; *Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854 [CHP sergeant with physical limitations was not incapacitated where the physically demanding activities of his job were performed much less often by someone in his supervisory role].) However, in certain public safety positions, an uncommon activity can be a “usual duty” if the employee “must be capable of and prepared for the worst every day.” (*Thelander v. City of El Monte, supra*, 147

Cal.App.3d at p. 742; *Beckley v. Bd. of Administration, supra*, 222 Cal.App.4th at pp. 600-700.)

SUBSTANTIAL INCAPACITY

5. An applicant's disability must be presently existing and cause an inability to perform, rather than an increased risk of future injury or aggravation. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (Precedential Decision 99-03); *Wolfman v. Bd. of Trustees* (1983) 148 Cal.App.3d 787, 791 [applicant's disability "was not merely a prospective probability, but a medical certainty"].) Additionally, mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Bd. of Administration, supra*, 77 Cal.App.3d at p. 863; *Mansperger v. Public Employees' Retirement System, supra*, 6 Cal.App.3d at pp. 876-877.) And discomfort, which may make it difficult to perform one's duties, is insufficient to show 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.)

Determination

6. Based on the Factual Findings and Legal Conclusions as a whole, respondent failed to prove by competent medical evidence that he was substantially incapacitated for the performance of his duties as a Correctional Officer with CDCR at the time he filed his application for IDR. Consequently, his appeal is denied.

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ORDER

The appeal of respondent Frankie T. Veloria is DENIED.

DATE: January 16, 2024

Matthew Block

MATTHEW S. BLOCK

Administrative Law Judge

Office of Administrative Hearings