

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:

DANIELLE M. JORDAN,

and

**PAROLE AND COMMUNITY SERVICES DIVISION, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,**

Respondents.

Agency Case No. 2023-1018

OAH No. 2024041069

PROPOSED DECISION

Administrative Law Judge Holly M. Baldwin, State of California, Office of Administrative Hearings, heard this matter on October 3, 2024, by videoconference and telephone.

Attorney Bryan Delgado represented the California Public Employees' Retirement System.

Respondent Danielle M. Jordan represented herself.

There was no appearance on behalf of the Parole and Community Services Division, California Department of Corrections and Rehabilitation.

The matter was submitted for decision on October 3, 2024.

FACTUAL FINDINGS

Introduction and Procedural History

1. Respondent Danielle M. Jordan was employed for more than 20 years as a Parole Agent I by the Parole and Community Services Division of the California Department of Corrections and Rehabilitation. By virtue of her employment, she is a state safety member of the California Public Employees' Retirement System (CalPERS) under Government Code section 21151.

2. On September 29, 2021, respondent signed an application for service retirement, pending industrial disability retirement. She claimed disability on the basis of orthopedic conditions (bilateral elbows and bilateral hips).

3. Respondent retired for service effective October 31, 2021.

4. Respondent was evaluated by orthopedic surgeon Don T. Williams, M.D., at the request of CalPERS. As is discussed in more detail below, Dr. Williams concluded that respondent is not substantially incapacitated from performing her usual duties as a Parole Agent I.

5. On March 29, 2022, CalPERS sent respondent a letter, denying her application for industrial disability retirement. Respondent timely appealed the denial. A statement of issues was issued by CalPERS on April 5, 2024. This hearing followed.

Job Duties

6. As reflected in the duty statement for the position, the essential job duties of a Parole Agent I include (among other things): field supervision of parolees, conducting parole compliance searches, preparing written reports, investigating alleged parole violations, locating and apprehending parolees who have violated conditions of parole, electronic monitoring of some parolees, serving as officer of the day for the field unit on a rotating basis, and completing firearms and defensive tactics training and quarterly qualifications.

7. A CalPERS form signed by respondent documenting the physical requirements of the Parole Agent I position reflects that her usual job duties include: lifting and carrying (frequently up to 10 pounds, occasionally up to 25 pounds, infrequently over 25 pounds or over 50 pounds); frequent sitting and standing; infrequent walking, running, crawling, kneeling, climbing, and squatting; occasional bending, twisting, and reaching; occasional power grasping; occasional holding or light grasping; and constant driving and computer use.

Orthopedic Conditions: Bilateral Elbows and Bilateral Hips

8. Respondent received chiropractic treatment from Russell Baar, D.C., for many years, predominantly for hip pain and lumbar spine adjustments.

9. In February 2019, respondent made a workers' compensation claim for cumulative trauma to her bilateral hips and bilateral elbows, which were aggravated by firearms range qualifications and defensive tactics training.

10. Respondent kept working from February 2019 to January 2020, while receiving medical treatment.

11. Respondent was off work from January 2020 through the date of her service retirement on October 31, 2021.

12. Respondent has received a variety of treatments for her hips and elbows, including pain and anti-inflammatory medications, steroid injections to the hips and elbows, physical therapy, acupuncture, chiropractic, massage therapy, and a TENS unit (transcutaneous electrical nerve stimulation). Dr. Baar also recommended a sit/stand adjustable desk, which helped respondent somewhat.

13. In July 2019, pelvic X-rays and MRI imaging showed mild circumferential annular bulging at the L4-5 and L5-S1 levels; minimal chronic interstitial tearing along the ischial tuberosities; and minimal tearing at the ischial attachments.

14. Treating physician Victor Li, M.D., gave respondent repeated steroid injections to the hips and elbows. He referred respondent to a functional restoration program in 2020, which she completed, followed by work conditioning sessions.

15. On January 30, 2020, records from a workers' compensation follow-up visit at WorkWell WC Salinas include a note that respondent was doing firearms qualifications that day and felt sharp pain in the right elbow and right hip. She was put on restricted duty due to the flare, with restrictions of no commercial driving and no carrying a duty belt and gun, with a follow-up appointment in two weeks.

16. A lumbar MRI in May 2021 showed disc bulges of 2-3 mm at the L4-5 level and the L3-4 level.

17. Respondent was evaluated for her workers' compensation claim by chiropractor and qualified medical evaluator Michel R. Gagnon, D.C., who wrote a

report dated May 4, 2021. At that time, Dr. Gagnon believed respondent might be permanent and stationary but he needed to review additional records.

18. On September 1, 2021, Dr. Li provided work restrictions of: no lifting more than 60 pounds, no heavy or repetitive pushing or pulling, no commercial driving, and no carrying duty belt and gun.

19. After reviewing additional medical records, Dr. Gagnon wrote a supplemental report on October 15, 2021. He noted respondent's reports of pain and weakness in the upper extremities and that respondent did not feel capable of completing training and safely disarming, subduing, and restraining parolees. Dr. Gagnon diagnosed bilateral hip flexor strain, bilateral lateral epicondylitis (commonly called "tennis elbow"), and lumbar sprain. He opined that respondent had reached permanent and stationary status as of May 4, 2021, and provided whole person impairment (WPI) ratings for her lumbar spine (8%) and right hip (4%), but provided no rating for her left hip or bilateral epicondylitis at that time. Dr. Gagnon provided work restrictions of: no repetitive bending, avoid carrying duty belt and running with duty belt, and no repetitive gripping.

20. On November 24, 2021, Dr. Li completed a CalPERS "physician's report on disability." He noted diagnoses of lateral epicondylitis, bilateral elbow pain, hip flexor pain, hip pain, and myofascial pain. Dr. Li found permanent incapacity and imposed work restrictions of: no heavy lifting, no duty belt, no prolonged commercial driving, and no lifting over 40 pounds.

21. In 2021 and 2022, respondent received additional corticosteroid injections to her hips and elbows, a TENS unit, physical therapy, and acupuncture.

22. In a supplemental report dated February 24, 2022, Dr. Gagnon modified his findings about respondent's elbows to include a 3% WPI rating for each elbow.

23. On June 29, 2022, Stella Flores P.A.-C., provided restrictions of: no lifting more than 40 pounds, no repetitive bending or stooping, and no repetitive grasping with bilateral hands.

24. In a supplemental report dated July 14, 2022, Dr. Gagnon noted respondent had received continued treatment with primary care provider Dr. Panchal, who noted right hip aggravation. Dr. Gagnon suggested a re-evaluation.

25. Dr. Gagnon wrote a re-evaluation report on September 14, 2022, after examining respondent and reviewing her job description and medical records. At the time of this re-evaluation, respondent reported pain in both elbows, both hips, and the right lower back; difficulty gripping and twisting such as with opening jars; difficulty sitting comfortably for a long time or sitting with crossed legs; and the ability to lift only light to medium objects. She told Dr. Gagnon that her elbow pain rendered her unable to do self-defense training or hold an accurate position with a firearm.

Dr. Gagnon's physical examination noted respondent had a normal gait, and slowness in moving from sitting to standing position, which he attributed to hip pain. Respondent had myofascial pain of the posterior forearm and tenderness at the lateral epicondyle bilaterally, but the range of motion for her elbows was normal. Respondent continued to have significant pain in the anterior region of the hips and the greater trochanter region was sore to palpation bilaterally. She had some pain on rotation and flexion of the right hip, pain in the lumbosacral joint region and piriformis, good range of motion and strength in the lower extremities, and no signs of radiculopathy.

Dr. Gagnon diagnosed bilateral hip flexor strain; bilateral lateral epicondylitis; and lumbar sprain with quadratus lumborum trigger points.

Dr. Gagnon found respondent was unable to return to her job due to elbow pain and inability to perform in self-defense classes or protect herself in case of altercations with parolees. He provided a rating of 4% WPI for the right hip based on decreased range of motion, no impairment rating for the left hip, and 3% WPI for each elbow. Dr. Gagnon provided permanent work restrictions of: no repetitive bending, avoid carrying duty belt, no running with duty belt, no repetitive gripping, and no sustained gripping or power gripping.

Independent Medical Evaluation and Opinions of Dr. Williams

26. Dr. Williams was retained by CalPERS to perform an independent medical evaluation of respondent's claim for industrial disability retirement, with reference to the standards governing CalPERS disability retirement. He performed a physical examination of respondent and reviewed her medical records, job description, and physical requirements of the position. Dr. Williams testified at hearing, providing opinions consistent with his written reports.

27. Dr. Williams is board-certified in orthopedic surgery and is licensed to practice medicine in California. He has been in private practice in orthopedic surgery since 1986 and was previously an orthopedic surgeon for the United States Army. Dr. Williams stated that in about 10 percent of cases where he serves as an independent medical examiner for CalPERS disability retirement matters, he finds the applicant is not substantially incapacitated for the performance of duty.

28. Dr. Williams wrote a report dated March 4, 2022, after examining respondent and reviewing records. At that time, respondent was experiencing pain in

the anterior hip or groin region (near the hip joint); pain in the outside area of the elbows when holding things for a prolonged period of time; and some pain in the lower back. Respondent reported that she modified some activities such as by using a sit/stand desk, changing positions frequently, and being careful when opening car doors. She had more pain when using a firearm, wearing a duty belt, and with excessive driving. She had flare-ups of pain with defensive tactics training, and was able to perform the tactics but avoids doing so. She reported having problems shooting (especially at the nighttime firearms range due to the need to hold both a light and weapon) and problems getting in and out of a car quickly (although she was able to get in and out). Respondent was taking Advil and using the TENS unit for her pain.

In his physical examination, Dr. Williams found that respondent had tenderness over the lateral epicondyle of the elbows. She had full range of motion in her elbows, and good strength in extension and flexion of the wrist and fingers. At hearing, Dr. Williams explained that the extensor muscles of the hand originate at the lateral epicondyle, and that testing the strength of these muscles against resistance ruled out a tear in that area. Dr. Williams found no significant physical abnormalities of respondent's elbows.

Dr. Williams also found no significant physical abnormalities in respondent's lumbar spine, after testing her muscles, range of motion, and reflexes, apart from slightly diminished reflexes. Respondent was able to do a full squat.

Examination of respondent's hips showed a normal range of motion. Dr. Williams observed no muscle atrophy in respondent's legs. She had mild tenderness of the right hip in the anterior groin (the front of the hip joint); no tenderness posteriorly over the ischium; and a little tenderness in the right sacroiliac region. In Dr. Williams's

opinion, this tenderness is not a significant pathological defect in itself, although it could point to mild tendinitis or early arthritis. Dr. Williams noted that an MRI of respondent's hip showed mild tendinitis in the ischium area (where she had no tenderness), and no tendinitis in the area where she had tenderness. Dr. Williams also noted that the lumbar MRI showed disc bulges at the L4-5 and L3-4 levels, which supply the area of the hip joint and may account for the sensation of pain. But in his opinion, this does not constitute a substantial or significant impairment.

Dr. Williams diagnosed: lateral epicondylitis, both elbows, right greater than left; bilateral hip strain, right greater than left; and lumbar strain.

Dr. Williams opined that the conditions of respondent's elbows and hips did not substantially incapacitate her from performing her usual job duties. He saw no need for any work restrictions based on incapacity to perform job activities.

29. Dr. Williams wrote a supplemental report on July 5, 2024, after reviewing additional medical records, including Dr. Gagnon's re-evaluation report (see Factual Finding 25). Dr. Williams's opinions remained unchanged.

30. At hearing, Dr. Williams discussed the bases for his opinion that respondent was not incapacitated for the performance of her usual job duties, despite the work restrictions imposed by Dr. Gagnon and Dr. Li. Dr. Williams noted that the physical examination findings by Dr. Gagnon were consistent with his own observations, including normal range of motion and strength. Dr. Williams considers the restrictions imposed by Dr. Gagnon and Dr. Li to be prophylactic to reduce pain or protect against further injury, rather than reflective of an inability to physically perform the activities. Dr. Williams opined that respondent's medical records are consistent

with his findings upon physical examination, and reflective of minor conditions, rather than substantial incapacity to perform her usual job duties.

Respondent's Evidence

31. Respondent testified at hearing. Respondent was a credible witness, but she is not a medical expert. Respondent did not present any witness to provide non-hearsay medical opinions at the hearing.

32. Respondent began her law enforcement career at age 22. In 2016 to 2017, she was working as an acting supervisor, which was more of a desk job. Her chiropractor, Dr. Baar, recommended a sit/stand desk due to her worsening pain in the hips and elbows, but there were delays in obtaining such a desk. After respondent submitted her February 2019 workers' compensation claim due to increased pain from the firearms qualification and field training, she finally received a sit/stand desk.

33. Treatments such as physical therapy and chiropractic helped, but respondent was still experiencing pain while working in 2019 and early 2020. After receiving work restrictions in January 2020, respondent was informed by her supervisor that the restrictions could not be accommodated.

34. Respondent found the functional restoration program helpful, but she did not feel capable of returning to work. Respondent continues to experience pain, which she treats with Advil, ice, and heat.

35. Respondent believes she cannot complete the required defensive tactics training and firearms qualifications, due to weakness and pain. Respondent also stated that as a parole agent she drove about 1,500 miles per month, getting in and out of the car many times a day with all her duty gear, and stated that sitting hurt her hips.

Since retirement, respondent has been offered armed security jobs but declined because she does not feel able to do the required training.

LEGAL CONCLUSIONS

1. Government Code section 21151, subdivision (a), provides that a state safety member who becomes incapacitated for the performance of her usual duties as the result of an industrial disability shall be retired for disability. The burden of proof is on the employee to establish that she is incapacitated, by a preponderance of the evidence. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691; *Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.2d 234, 238; *Lindsay v. County of San Diego Retirement Board* (1964) 231 Cal.App.2d 156, 160-162; Evid. Code, § 115.)

2. The terms "disability" and "incapacity for the performance of duty" 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, . . . on the basis of competent medical opinion." (Gov. Code, § 20026.) An applicant is "incapacitated for performance of duty" if she is substantially unable to perform the usual duties of her position. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876; accord *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.) Mere discomfort or difficulty or fear of injury is not sufficient to meet the standard of substantial incapacity for performance of duty, and the disability must be presently existing, not prospective or speculative. (*Hosford, supra*, 77 Cal.App.3d at p. 862-863.)

3. Dr. Williams testified credibly as to his medical opinion that respondent is not substantially incapacitated for performance of her usual duties, and as to the bases for his opinion. (Factual Findings 26-30.) Respondent did not present any competent, non-hearsay medical evidence in support of her application or in opposition to the opinions of Dr. Williams. Respondent has not met her burden of establishing that she was substantially incapacitated for the performance of the usual duties of a Parole Agent I. Accordingly, her application must be denied.

ORDER

The application of Danielle M. Jordan for industrial disability retirement is denied.

DATE: **10/10/2024**



HOLLY M. BALDWIN

Administrative Law Judge

Office of Administrative Hearings