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:

TENILLIA HEBRON,

and

DEPARTMENT OF STATE HOSPITALS–ATASCADERO,

Respondents.

Agency Case No. 2022-0255

OAH No. 2022070315

PROPOSED DECISION

Administrative Law Judge Holly M. Baldwin, State of California, Office of Administrative Hearings, heard this matter on July 17, 2023, by videoconference.

Staff Attorney Mehron Assadi represented the California Public Employees' Retirement System.

Respondent Tenillia Hebron represented herself.

Personnel Officer Jaycob Javaux observed the hearing on behalf of the Department of State Hospitals–Atascadero, but did not participate substantively.

The record closed and the matter was submitted for decision on July 17, 2023.

FACTUAL FINDINGS

Introduction

1. Respondent Tenillia Hebron was employed as a Hospital Police Officer by the Department of State Hospitals at Atascadero State Hospital (ASH). By virtue of her employment, she was a state safety member of the California Public Employees' Retirement System (CalPERS) under Government Code section 21151.

2. On April 7, 2021, respondent signed an application for industrial disability retirement based on the condition of her right knee.

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

4. On December 21, 2021, CalPERS sent a letter to respondent, denying her application for industrial disability retirement. Respondent timely appealed the denial. A statement of issues was issued by CalPERS on June 9, 2022. This hearing followed.

Job Duties

5. Respondent's injury (see Factual Finding 8) occurred while she was at boot camp in training for a position as a Hospital Police Officer at ASH. The job duties of a Hospital Police Officer include providing security and maintaining order in the facility, handling combative patients, patrolling assigned areas, responding to

emergency alarms and requests for assistance, and escorting patients within and away from the facility. A form signed by respondent and her employer documenting the physical requirements of the position reflects that the usual job activities include frequent sitting, standing and walking; and infrequent running, walking on uneven ground, kneeling, squatting, and climbing.

6. Respondent worked in a light duty assignment after her injury until some time in November 2018, and was off work after that time.

7. Respondent did not graduate from the boot camp training program.

Knee Condition

8. On September 27, 2018, respondent injured her right knee during a drill for arrest and control techniques at boot camp. She was wrestling with a male training officer, and dislocated her right kneecap (patella), experiencing extreme pain. Respondent was taken to the emergency room, and medical staff administered intravenous medications and performed a procedure to put her kneecap back in place. She was provided with crutches, and was in a knee immobilizer for eight to ten weeks.

9. Respondent was treated by orthopedic surgeon Otto Schueckler, M.D., beginning in November 2018. Dr. Schueckler noted that respondent had difficulty with weightbearing and range of motion, and problems with her knee locking, catching, and giving way. He ordered imaging.

10. An MRI scan was taken on November 29, 2018, showing bone contusions in the patella and lateral femoral condyle; cartilage abnormalities over the lateral patellar facet; trace joint effusion and no obvious loose bodies; and edema at the quadriceps insertion.

11. On December 24, 2018, Dr. Schueckler evaluated respondent and diagnosed: right knee status post patellar dislocation with residual instabilities; normal range of motion; apprehension with lateral glide (patient concern for possible dislocation when kneecap is palpated); and severe quadriceps atrophy. Dr. Schueckler recommended physical therapy for respondent's quadriceps muscles.

12. Respondent received physical therapy from January to August 2019, which helped her.

13. As of July 18, 2019, Dr. Schueckler noted respondent continued to have pain and instability of the knee and atrophy of the quadriceps. Respondent was provided a TENS unit (transcutaneous electrical nerve stimulation). Dr. Schueckler believed the ongoing pain was due to quadriceps atrophy causing dysfunction of the patellofemoral joint, and he referred respondent to a pain management specialist.

14. On September 3, 2019, Ernest Miller, M.D., wrote a qualified medical evaluation report for respondent's workers' compensation claim, opining that she had reached permanent and stationary status for the purpose of workers' compensation, and had no permanent impairment. Respondent submitted a complaint to the Department of Industrial Relations alleging Dr. Miller's unprofessional treatment of her. She was later evaluated by a different physician (see Factual Findings 17 and 18).

15. Another MRI scan of the right knee was taken on December 27, 2019, showing: mild quadriceps tendinopathy, stable since the prior MRI in November 2018; resolved patellar tendinosis; resolved bone contusions since the prior MRI; stable meniscal pathology; moderate chondromalacia (softening of cartilage) of the patella; and minimal effusion.

16. As of February 2020, Dr. Schueckler had no further medical treatment to offer respondent. Respondent continued treatment with her pain management physician, and also received chiropractic treatment. Additional physical therapy was recommended by respondent's physicians but was denied by workers' compensation.

17. On September 23, 2020, respondent was seen by orthopedic surgeon Jeffrey M. Lundeen, M.D., for a qualified medical evaluation. Dr. Lundeen noted respondent's symptoms of right knee pain, exacerbated by squatting, kneeling, stair climbing, and walking on uneven terrain; intermittent swelling; and popping and feelings of instability in the patella. Dr. Lundeen's examination found trace effusion in the right knee and normal range of motion. His measurements found atrophy of respondent's right thigh, with the right thigh measuring 40.5 centimeters in circumference as opposed to 42.0 centimeters on the left side (1.5 centimeters of atrophy, which equals 0.59 inches). Dr. Lundeen opined that respondent was not capable of performing the customary duties of her job and was eligible to be a "qualified injured worker" under the workers' compensation system. He opined that respondent should have permanent work restrictions precluding her from squatting, kneeling, pivoting or twisting with the right knee; climbing; repetitive walking on uneven terrain; and running and jumping.

18. Dr. Lundeen wrote a supplemental report on December 16, 2020, after reviewing weightbearing X-rays of respondent's right knee taken on October 15, 2020. He noted the X-rays showed findings consistent with a small joint effusion and were otherwise non-diagnostic. Dr. Lundeen found respondent had a combined total right lower extremity impairment rating for workers' compensation purposes of 12 percent.

Medical Evaluation and Opinion of Dr. Williams

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

20. Dr. Williams is board-certified in orthopedic surgery. He has been in private practice in orthopedic surgery since 1986. Prior to that time, he was an orthopedic surgeon for the United States Army. He has performed independent medical examinations for CalPERS disability retirement matters for eight years.

21. Dr. Williams wrote a report dated November 5, 2021, after his examination of respondent and review of records. At that time, respondent had right knee patellofemoral pain with some activities such as jogging or climbing stairs. She lived on the second floor and could climb those stairs but it was difficult while carrying items such as groceries. The kneecap had not re-dislocated. Respondent had been taking ibuprofen for pain and then switched to topical Voltaren gel.

Upon physical examination, Dr. Williams found that respondent's ligaments are generally a little more lax than normal, which he explained is usually congenital and creates a tendency to allow dislocation of elbows, shoulders, and knees, especially in younger people (respondent was 26 years old at the time of her injury). Respondent could squat only 50 percent of normal and could not go further due to right knee pain. Respondent's knees had excellent range of motion (0 to 150 degrees). The right patella was very lax and allowed movement, but there was no apprehension for re-dislocation

when he applied pressure to it. Respondent's anterior and posterior cruciate ligaments had good stability.

Respondent's right thigh was slightly smaller than her left, measuring 17.75 inches in circumference as opposed to 18 inches on the left side. At hearing, Dr. Williams explained that atrophy is not considered significant unless it is one-half inch or more. He noted respondent had fairly significant atrophy in the past due to an extended period in a knee immobilizer after the injury, but that the atrophy had improved after physical therapy.

Respondent's hips were very limber, with a full range of motion. Abduction and external rotation caused her hip to click, but Dr. Williams did not find that this caused a substantial problem. Dr. Williams did not find localized swelling in his examination or weakness in respondent's right leg.

Dr. Williams diagnosed: right knee chondromalacia post lateral patellar dislocation, and generalized ligamentous laxity. He found that the chondromalacia could cause some discomfort with activities such as stairs, kneeling, and squatting, but that this did not constitute a substantial incapacity to perform those activities. Dr. Williams also noted that the December 2019 MRI showed moderate chondromalacia, but that the condition had improved since then.

Dr. Williams opined that the condition of respondent's right knee did not substantially incapacitate her from performing her usual job duties. He opined that respondent may have periods of anterior knee pain upon certain activities such as repetitive squatting or prolonged kneeling, but that this does not rise to the level of substantial incapacity of performing her usual job duties. Dr. Williams noted that imaging showed the tendinitis and bone contusions had resolved, that respondent's

patella was stable upon his examination, and that the remaining amount of atrophy was not a significant impairment.

Dr. Williams reviewed the September 2020 report in which Dr. Lundeen opined that respondent was incapacitated for performance of her usual job duties and imposed work restrictions. Nevertheless, based on his own evaluation of respondent in November 2021 and review of the medical records, Dr. Williams opined that respondent was not incapacitated for the performance of her usual job duties.

22. Dr. Williams wrote a supplemental report on January 21, 2022, after reviewing additional records from respondent's workers' compensation proceeding, including a settlement and award with an impairment rating of nine percent. He wrote that his previous opinions remained unchanged. Dr. Williams noted that respondent could squat 50 percent, could bend over and touch the floor, and was able to stoop. He opined that respondent was not substantially incapacitated for her job duties.

At hearing, Dr. Williams explained that reviewing these records did not change his opinion because the workers' compensation system and CalPERS disability retirement have different standards. Workers' compensation awards are based on pathology shown from the dislocation, but he applied the disability retirement standard, which requires a showing of substantial incapacity to perform job duties.

Respondent's Evidence

23. Respondent testified at hearing regarding her knee condition, medical treatment, and work history. Respondent was a credible witness, but she is not a medical expert. Respondent also submitted copies of medical records, including the

reports of Dr. Lundeen. These were admitted as administrative hearsay.[1] Respondent did not present any witness to provide non-hearsay medical opinions at the hearing.

24. Respondent must complete the boot camp program before she can work as a Hospital Police Officer. She believes that due to her knee condition, she would not be able to do required boot camp activities such as "burpee" exercises, walking in cadence, running for five miles, and performing arrest and control techniques. Respondent also believes that if she completed the boot camp and worked as a Hospital Police Officer, she would not be able to perform some required job duties such as running to respond to emergencies, and walking on uneven ground and climbing and descending stairs while patrolling the facility. Respondent reports that she requires the assistance of a railing in climbing and descending stairs. She also develops a limp by the end of the day due to pain and swelling in her right knee. Respondent is concerned that she would not be able to adequately protect her co-workers. She stated that "red lights" occur daily and require emergency responses of running to the alarm area and subduing and restraining combative patients. She is also concerned that patients would observe her walking with a limp or having difficulty with stairs, and would then target her for attack. Respondent agrees with the work restrictions stated by Dr. Lundeen.

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[1] Government Code section 11513, subdivision (d), provides: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration."

25. Respondent wanted to obtain further physical therapy. She has continued to do home exercises.

26. Respondent stated her right knee frequently clicks and feels loose, and she has to "pop" her knee back into place. She reports popping or crunching sounds and sensation in her knee due to the condition of the cartilage. Respondent ices her knee and uses a TENS unit nightly.

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 is not sufficient to meet the

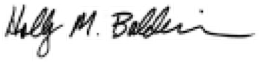
standard of substantial incapacity for performance of duty. (*Hosford, supra*, 77 Cal.App.3d at p. 862.)

3. Dr. Williams testified credibly as to his medical opinion that respondent is not substantially incapacitated for performance of duty, and as to the bases for his opinion. (Factual Findings 21-22.) Dr. Lundeen's reports indicate that, in evaluating respondent's workers' compensation claim, he found respondent to be substantially unable to perform her usual duties due to her knee condition. However, the standard applied in disability retirement cases is different from the standard applied in evaluating a worker's compensation claim. (*Winn v. Board of Pension Commissioners* (1983) 149 Cal.App.3d 532.) The examination conducted by Dr. Williams was also more recent. 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 Hospital Police Officer. Accordingly, her application must be denied.

ORDER

The application of Tenillia Hebron for industrial disability retirement is denied.

DATE: 08/11/2023



HOLLY M. BALDWIN
Administrative Law Judge
Office of Administrative Hearings