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:

MARIBETH D. ARAGONES, Respondent,

and

PELICAN BAY STATE PRISON, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondent,

Agency Case No. 2020-0067

OAH No. 2020040236.1

PROPOSED DECISION ON REMAND

This matter was heard before Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, via videoconference from Sacramento, California, on January 14, 2021, and December 2, 2021.

Staff Attorney Charles Glauberman represented the California Public Employees' Retirement System (CalPERS).

Maribeth D. Aragones (respondent) represented herself.

CalPERS properly served Pelican Bay State Prison, California Department of Corrections and Rehabilitation (CDCR), with the Statement of Issues and Notice of Continued Hearing. CDCR made no appearance. This matter proceeded as a default against CDCR pursuant to Government Code section 11520, subdivision (a).

PROCEDURAL HISTORY

Evidence was received, the record was closed, and the matter was submitted for decision on January 14, 2021. On February 17, 2021, the ALJ issued a proposed decision which recommended that respondent's application for industrial disability retirement be denied.

At its meeting on June 16, 2021, CalPERS's Board of Administration (Board) voted to remand this matter to the ALJ to receive and consider additional evidence regarding respondent's condition given a medical procedure respondent had post-hearing.

The hearing on remand was conducted on December 2, 2021. Staff Attorney Charles Glauberman represented CalPERS and respondent appeared on her own behalf. Evidence was received on remand, the record was closed, and the matter was submitted for decision on December 2, 2021.

ISSUE

Was respondent permanently disabled and substantially incapacitated from performing her usual and customary duties as a Licensed Vocational Nurse (LVN) for

CDCR based on orthopedic (cervical and lumbar spine) conditions when she applied for industrial disability retirement?

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent worked for CDCR as an LVN. On June 6, 2019, respondent signed and filed with CalPERS a Disability Retirement Election Application (application).

2. On her application, respondent specified that her disability occurred on two dates: "November 30, 2017 injury – Lumbar Spine (protruding discs L4-L5, and L5-S1, and annular tear) July 23, 2018 injury – Cervical spine (protruding discs on C3-4, C4-5, C5-6, C4-5 strain and significant discopathy, central disc protrusion, right foramina, with central canal stenosis)."

3. Respondent specified that her disability occurred as follows:

> I was injured carrying the emergency backpack when I worked a mandatory overtime in B-Yard at Pelican Bay State Prison during sick call [illegible] pick up from housing units. I worked mandatory overtime on November 30, 2017 from 3 p.m. to 10 p.m., I also worked from 7 a.m. to 3 p.m. at my regular post that day. The pain on my lower back, right thigh and leg started the next day.

4. Respondent described her limitations and preclusions due to this condition as: "No heavy lifting, twisting, repetitive use of upper extremities or lower extremities, feel pain when bending, kneeling, walking on uneven ground, walking for

more than a mile, sitting for more than [an] hour and standing for more than 15 minutes." Respondent specified that her condition affected her ability to perform her job because "pain affects [her] focus and concentration at work. Pain slows [her] down from accomplishing [her] tasks and most of the duties of an LVN aggravates [her] injury because [she is] injured. [She poses] a risk to [herself and her] co-workers also, and the chance to get another injury is high."

5. When asked to describe her current job duties, respondent specified:

> Spend hours on the computer to chart, to assist providers, to do research, responds to emergency alarms, dispenses medications, check vital signs of patients and perform LVN skills (wound care) etc. Assist tele-med providers and other providers at work. Do inventories, attends trainings and meetings, coordinates with custody regarding safety in the facility.

6. By letter dated December 2, 2019, CalPERS notified respondent that her application for industrial disability retirement had been denied. Respondent timely appealed from the denial.

CalPERS' Evidence

DUTIES OF AN LVN

7. CalPERS submitted two exhibits that describe the duties of an LVN: (1) a California Correctional Health Care Services LVN (Safety) Essential Functions List (essential functions list); and (2) a completed CalPERS Physical Requirements of Position/Occupational Title form for an LVN assigned to CDCR's Pelican Bay State

Prison (physical job requirements form), signed by respondent and a CDCR Return to Work Coordinator on June 7, 2019.

8. According to the essential functions list, the duties of an LVN include assisting in the delivery of basic patient care services within the scope of LVN practice in a state correctional facility. Among other things, the LVN must: work long hours in security institutions, including weekends and holidays as the needs of the institution dictates; remain alert, focused and effectively evaluate and respond to dangerous or emergency situations to maintain a safe and secure environment and anticipate problems (e.g., harm to self or others, escapes, change in an inmate's mental functioning, etc.); communicate effectively both orally and in writing; document, prepare and maintain reports and records; inspect, lock and secure clinical areas and medical materials; observe and report contraband and dangerous or self-injurious inmate behavior; and wear personal protective equipment, clothing and breathing apparatus to prevent injuries and exposures to blood and airborne pathogens.

9. The LVN must maintain sufficient strength, agility, and endurance to perform during stressful situations without compromising the health and well-being of self and others; access all floors of multi-level facilities separated by flights of stairs; stoop, bend, reach, twist and stretch, occasionally to continuously, to allow the LVN to observe and manipulate objects around them; frequently lift and carry up to 50 pounds and occasionally lift and carry over 100 pounds; walk occasionally to continuously up to long distances indoors and outdoors in various weather conditions; sit occasionally to continuously while performing record keeping; and perform regular duties on a wide range of working surfaces, which may be uneven or rough or become slippery due to weather or spillage of liquids.

10. According to the physical job requirements form, an LVN occasionally (i.e., up to three hours) runs, crawls, kneels, squats, pushes and pulls, engages in power grasping, lifts and carries between 51 and 100 pounds, walks on uneven ground, and drives. An LVN is also occasionally exposed to excessive noise, extreme temperatures, humidity and wetness, dust, gas, fumes, or chemicals, and works with biohazards. An LVN frequently (three to six hours) sits, stands, climbs, bends the neck and waist, twists the neck and waist, reaches above and below the shoulder, engages in simple grasping, repetitively uses the hands, uses a computer keyboard and mouse, and lifts or carries between 11 pounds and 50 pounds. An LVN constantly (over six hours) walks, engages in fine manipulation, lifts or carries up to 10 pounds, and works with biohazards such as blood-borne pathogens, sewage, and hospital waste.

Respondent's Evidence

RESPONDENT'S TESTIMONY

11. Respondent is 50 years old and worked as an LVN for CDCR since January 2012. She injured her lumbar spine on November 30, 2017, and injured her cervical spine on July 23, 2018. Respondent last reported to duty on August 6, 2018.

12. Respondent testified that LVNs are "front-liners" performing critical duties at CDCR's institutions. They provide patient medications, assist physicians with examinations and procedures, draw blood, and maintain critical patient information in computer databases. The most challenging part of the job for respondent has been responding to emergencies and alarms. Emergencies and alarms may result from an inmate experiencing cardiac arrest, drug overdoses, fights and riots. When responding to emergencies, an LVN must frequently run across large yards at the institution, sometimes pushing medical carts in harsh weather. When responding to fights or riots,

an LVN is sometimes exposed to powder grenades used by correctional officers to control and submit inmates.

13. An LVN can be mandated to work overtime hours "whether [they] like it or not." Respondent was working as an LVN care coordinator when she was first injured in November 30, 2017. She carried a heavy backpack containing medical equipment that weighs approximately 20 pounds, in addition to wearing a utility belt that weighs approximately one pound and a "stab-proof" vest that weighs approximately five pounds. After responding to an emergency on that date, respondent experienced a dull pain in her lower back, right leg and hip. The pain increased over time and spread to her right knee and right ankle.

14. In early July 2018, while working in CDCR's Administrative Segregation Unit, respondent was typing on her computer with one hand while talking on the telephone and holding the telephone in her other hand. She suddenly experienced a "shooting pain" in her back she assumed would relent with time. Approximately three weeks later, on July 23, 2018, she reinjured or exacerbated this injury when responding to an inmate fight. While running across the yard carrying her medical equipment, she experienced extreme back pain. Later that night, she woke up with severe right hand pain. Respondent was unable to return to work for approximately two days. She received physical therapy to treat her symptoms, but still experiences pain. Respondent continues to treat her symptoms with physical therapy, cortisone injections, and functional restorative therapies that include, aqua-therapy and acupuncture.

15. Respondent finds working in a prison is very stressful, which exacerbates her symptoms. She has attempted to reduce her stress by engaging in tai chi, yoga, and other holistic relaxation techniques.

16. Respondent testified that she cannot perform her job duties because she cannot sit for over three hours without experiencing pain and having to "move and shift" while sitting and massaging her back. She testified that she cannot stand for three to six hours because it "triggers" her sciatica. She testified that she cannot run, climb stairs, reach above her shoulders, lift over 11 pounds, or twist at the neck because those activities cause her so much pain she is unable to work. She also stated that she is unable to crawl, as required by her job, because when she does she cannot get up.

17. Respondent testified that she is unable to work mandatory overtime or respond to emergencies while working because those activities cause her to experience disabling pain. She testified that wearing her protective gear and equipment belt causes her pain because it's too heavy. She stated that performing CPR training also causes her severe pain and that her general level of pain while working is so severe that she is unable to remain alert and focused, which causes a risk to herself and others.

DOCUMENTS SUBMITTED BY RESPONDENT

18. Respondent did not call a medical expert to testify on her behalf. Instead, she submitted a UC Davis online healthcare medical note related to a bone scan she received on or about December 14, 2020, and a written statement, prepared by her, dated January 11, 2021. These documents were admitted into evidence as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).[1] The "Assessment" portion of the

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[1] Government Code section 11513, subdivision (d), in relevant part, provides:

medical note reflects that respondent has "chronic neck pain, refractory to conservative treatments; C4-5 disk osteophyte complex; C3-4, C4-5 central canal stenosis; and Osteopenia." The "Plan" section of the medical note states: "Request surgical case; Anterior cervical discectomy and fusion C3-4 and C4-5." Respondent's written statement, in part, specifies:

> While working mandated over time at Pelican Bay State Prison I was injured on November 30, 2017, on my lumbar spine, at L3-4, and L4-5 levels, and on July 23, 2018 on my cervical spine, C3-4, C4-5, and C5-6 levels. The last MRI for lumbar spine which was completed October 30, 2019, shows mild loss of height and signal on L3-4, decreased disc signal consistent with desiccation and bulging annulus with central and right paracentral disc protrusion on L4-5. There is a small annular tear in the bulging disc.
>
> The latest MRI for cervical spine was completed on February 20, 2020. The result shows: 4 mm annular bulge of the posterior margin indenting the thecal sack without central canal stenosis or foraminal stenosis on C3-4, loss of disc height and central disc protrusion [illegible] the thecal sack and projecting 8.6 mm from the posterior margin, appears

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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.

to be slightly compressing and effacing the spinal cord on C4-5.

Expert Opinion

19. CalPERS called Robert K. Henrichsen, M.D., as its expert at hearing. Dr. Henrichsen is a board-certified orthopedic surgeon and a certified Fellow of the American Academy of Orthopaedic Surgeons. He obtained his medical degree from Loma Linda University in 1967. He was in private practice with Auburn Orthopaedic Medical Group from 1973 until 2011. His practice currently involves performing Independent Medical Evaluations (IMEs) and Qualified Medical Evaluations for a variety of entities. On October 22, 2019, Dr. Henrichsen performed an IME on respondent to determine whether she was substantially incapacitated from performing her former job duties, based on the conditions of her back and cervical spine. Dr. Henrichsen's evaluation included interviewing respondent, conducting a physical examination of respondent's spine and extremities, and reviewing her job functions and medical records. Dr. Henrichsen detailed his evaluation, along with his findings and conclusions, in a 17-page IME report.

20. During the interview, respondent reported pain in her lower back, sciatic-like symptoms into her knee, legs and toes, mostly on the right, neck pain, pain in her right shoulder and arm with tingling, occasional numbness in her hands and feet, and pain so severe at times, after prolonged standing, that she is unable to perform many activities. She reported pain with walking, lifting over 10 pounds, and sitting for more than an hour, and reported that her symptoms are aggravated with twisting, doing laundry and grocery shopping.

21. Dr. Henrichsen's physical examination revealed that respondent had normal strength in her heels and toes. She exhibited no signs of hip muscle weakness. She could squat 40 percent of normal without overt knee crepitus.[2] Respondent appeared to have equal leg length and had no symptoms of femoral nerve damage. Respondent's lumbar spine curvature was normal while standing, but she did experience more pain with flexion and lateral bending to the right than with other motions. The examination of respondent's hips and knees with full extension revealed a small amount of tenderness in the right and left side of her paraspinal musculature. There was no tenderness of the sacroiliac identified. She reported back pain with active straight leg raises and with hip motion, that was more on the right than the left. There was no evidence of knee or ankle effusion or instability.

22. Evaluation of respondent's cervical spine revealed some pain with rotation to the right, and downward pressure on the top of her head produced some neck pain. Respondent's biceps and triceps and brachial radiology reflexes were equal to normal, and her upper extremities were similar in circumference.

23. Dr. Henrichsen reviewed several medical records provided for review as part of his evaluation. Those records covered reported injuries and treatment, dating back to December 11, 2017. He also reviewed a CD left by respondent of her cervical spine MRI scan of October 11, 2018, which showed there is degenerative disease at several levels of her cervical spine. The scan reflected there were some degenerative changes at C2-3 and at C3-4. However, Dr. Henrichsen noted in his report that, upon his review of the MRI results, the foramina were clear and he did not see a destructive

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[2] A grating sound or sensation produced by friction between bone and cartilage or the fractured parts of a bone.

process. After completing the interview, physical examination and reviewing respondent's medical records, Dr. Henrichsen reached the following diagnostic impressions:

> Degenerative disc disease lumbar spine with symptoms of radicular syndrome right lower extremity, degenerative disc disease, degenerative arthritis cervical spine with upper extremity symptoms.

24. In the "Discussion" section of his report, Dr. Henrichsen noted that his examination demonstrated there is some reduced mobility of respondent's spine. She has some discogenic changes as seen on her MRI scan and has some reduced motion in the cervical spine. But, there were no findings that were overtly abnormal except the reduced motion. Dr. Henrichsen noted that respondent symptoms are significantly greater than her overall findings. Her reported significant pain and symptoms were not well supported by his examination findings, nor were they supported by the findings of other physicians in the medical records he reviewed.

25. Dr. Henrichsen testified that although there was evidence that respondent has degenerative disc disease of the lumbar spine, there was no evidence of an existing significant pathology or traumatic injury to respondent's lumbar or cervical spine that supported her claimed incapacity. Based on his review of respondent's essential job functions and physical job requirements, Dr. Henrichsen opined that there were no specific LVN job duties or physical job requirements that respondent was unable to perform. Accordingly, he concluded that respondent was not substantially incapacitated from performing her usual and customary duties as an LVN for CDCR.

26. At CalPERS' request, Dr. Henrichsen prepared three supplemental IME reports, dated October 30, 2019, June 3, 2020, and December 18, 2020, after receiving additional medical records and information about respondent's conditions and symptoms for consideration. The additional records and information did not alter Dr. Henrichsen's opinion that respondent was not substantially incapacitated from the performance of her duties as an LVN for CDCR.

Evidence Submitted on Remand

Respondent's Additional Testimony

27. On April 8, 2021, respondent had surgery on her cervical spine due to ongoing symptoms of pain in her arms and fingers, related to the July 23, 2018 injury she described in her application for industrial disability retirement. She is now relieved of most of the pain in her neck and surrounding area, but is still recovering from surgery. The range of motion in her neck is limited and rotating her neck beyond her limited range produces pain. She does not believe she will be able to perform all of her job duties because of ongoing limitation, but believes she can perform light duty work.

28. To reduce her lower back pain, respondent utilizes McKenzie back decompression methods she learned during her physical therapy sessions. She does this approximately every two to three hours and it has been effective at relieving her pain. Respondent testified that if she fails to perform these decompression techniques at regular intervals, she will suffer sciatic back pain.

29. Respondent testified that her physical therapy has been effective at increasing the range of motion she has in her neck. She testified that she is now able to drive, but only for short distances. She only drives on streets that have four-way

stop signs, because that allows her to safely observe the surrounding roadway and cross streets without experiencing neck pain. She utilizes her vehicle's back up camera to observe what is behind her, because she is unable to turn her head and look over her shoulder without experiencing pain. For these same reasons, it is difficult for her to change lanes and merge into moving traffic.

30. Respondent has not yet worked with her physical therapist to increase her ability to lift the amount of weight required to perform her duties. During her most recent visit with her primary care physician, Kee Kim, M.D., she asked what her lifting restrictions or limitations were. Dr. Kim replied that he did not have a specific limitation and also stated that respondent "probably needed a different job," but he hopes her condition will improve.

31. Respondent testified that she is unable to perform the essential functions of her job because she is still unable to run due to pain, cannot lift her emergency backpack kit due to pain, cannot bend to perform CPR due to pain, and cannot turn her neck sufficiently to drive to work or maintain appropriate visual surveillance at all times while working. She added that she also cannot perform her duties, because performing those duties will not allow her to perform her back decompressions every two to three hours.

Expert Opinion on Remand

32. At CalPERS' request, Dr. Henrichsen received and reviewed additional records related to respondent's April 8, 2021 neck surgery and prepared a Supplemental IME report, dated July 21, 2021. Dr. Henrichsen's review of these records revealed that the condition of respondent's cervical spine remained the same as it was during his previous evaluation. He noted that respondent may experience discomfort

when working or performing daily activities, due to age-related arthritic disease. There were indications in the records that respondent continued to experience persistent lower back pain and that respondent's physical therapy goals included a 50 percent reduction in neck pain. However, nothing in the additional documents provided indicates that respondent is unable to perform her duties. Therefore, the additional records and information did not alter Dr. Henrichsen's opinion that respondent was not substantially incapacitated from the performance of her duties as an LVN for CDCR.

ANALYSIS

33. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, when she applied for industrial disability retirement, she was substantially and permanently incapacitated from performing the usual duties of an LVN for CDCR. She had no medical expert testify on her behalf and produced no additional medical records at the remand hearing. Although she testified that she remains unable to perform several of her duties due to the limited range of motion in her neck and stated inability to drive to work, there was no evidence of a diagnosed pathology to support her stated inabilities. Respondent testified that her condition has actually improved since she was found capable of performing her duties at the initial disability retirement hearing. To support her application, she repeated an oral hearsay statement from Dr. Kim, in which he reportedly stated that respondent "probably needs another job." This statement alone is insufficient to support a factual findings and is not supported by medical evidence. In short, respondent produced no competent medical evidence to support that she

was substantially incapacitated from performing her usual and customary duties as an LVN when she applied for industrial disability retirement.

34. Dr. Henrichsen testified in detail regarding his initial examination and evaluation of respondent and review of the additional records related to her April 2021 neck surgery. His opinion remained that respondent was not substantially incapacitated from performing her usual job duties, and his basis for that opinion was persuasive. His review of the additional medical records provided no additional medical information that indicated respondent could not perform her duties. His Supplemental IME report was thorough and his testimony at hearing was clear. The results of his prior physical examination and his assessment of all of the medical records provided to him supported his opinion.

35. The burden was on respondent to offer sufficient competent medical evidence to support her industrial disability retirement application. Respondent did not meet her burden.

36. Because respondent failed to offer sufficient competent medical evidence at hearing to establish that, when she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of an LVN for CDCR, her industrial disability retirement application must be denied.

LEGAL CONCLUSIONS

1. To qualify for disability retirement, respondent had to prove that, when she applied, she was "incapacitated physically or mentally for the performance of [her] duties in the state service." (Gov. Code, § 21156.)

2. “Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board … on the basis of competent medical opinion. (Gov. Code, § 20026.)

3. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term “incapacity for performance of duty” as used in Government Code section 20026 (formerly section 21022) to mean “the *substantial* inability of the applicant to perform his usual duties.” (Italics in original.) The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, 863, explained that prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, the court found that discomfort, which may make it difficult for an employee to perform his duties, is not sufficient in itself to establish permanent incapacity. (See also, *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.)

4. When all the evidence is considered in light of the analyses in *Mansperger, Hosford*, *Smith*, and *Keck*, respondent did not establish that her industrial disability retirement application should be granted. She failed to submit sufficient evidence based upon competent medical opinion that, at the time she applied for industrial disability retirement, she was permanently and substantially incapacitated from performing the usual duties of a Licensed Vocational Nurse for CDCR. Consequently, her industrial disability retirement application must be denied.

ORDER

The application of respondent Maribeth D. Aragones for industrial disability retirement is DENIED.

DATE: December 29, 2021

Ed Washington

ED WASHINGTON

Administrative Law Judge

Office of Administrative Hearings