

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

In the Matter of the Reinstatement from Industrial Disability

Retirement of:

JUANITA NUNEZ and

**DEPARTMENT OF CORRECTIONS VALLEY STATE PRISON FOR
WOMEN, CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION, Respondents**

Agency Case No. 2019-1122

OAH No. 2020010673

PROPOSED DECISION

Jessica Wall, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter via videoconference on October 28, 2021, from Sacramento, California.

Dustin Ingraham, Attorney, represented the California Public Employees' Retirement System (CalPERS).

Juanita Nunez (respondent) represented herself.

There was no appearance by or on behalf of Department of Corrections Valley State Prison for Women, California Department of Corrections and Rehabilitation (Department). CalPERS established that it served the Department with a Notice of Hearing. Consequently, this matter proceeded as a default hearing against the Department pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record closed, and the matter submitted for decision on October 28, 2021.

FACTUAL FINDINGS

1. The Department employed respondent as a Correctional Officer. On November 2, 2017, CalPERS received respondent's Disability Retirement Election Application (application) dated September 25, 2017, in which she claimed disability based on an orthopedic condition in her back and right hip. By letter dated May 2, 2018, CalPERS approved respondent's application, and placed her on disability retirement.

2. On May 9, 2019, pursuant to Government Code section 21192, CalPERS reviewed respondent's incapacity from the performance of her former duties. CalPERS requested respondent (1) complete a "Retiree Questionnaire for CalPERS Disability Re-evaluation; (2) provide a "Treating Physician Packet" for her treating physician to send a medical opinion to CalPERS; (3) complete a form that authorizes Kaiser Permanente physicians to provide her medical information to CalPERS; and (4) complete and return to CalPERS an "Authorization to Disclose Protected Health Information" form.

3. CalPERS arranged for an Independent Medical Examination (IME) of respondent to reevaluate her status, which occurred on August 6, 2019. On October 1,

2019, CalPERS informed respondent that after its review of reports from Donald C. Pompan, M.D.; Theodore Georgis, M.D.; Luis Sosa, M.D.; Naveen Alam, M.D.; Jere Stahl Ozaeta, M.D.; and Don T. Williams, M.D., CalPERS determined that respondent was no longer substantially incapacitated from performing her usual job duties and that she should be reinstated, pursuant to Government Code section 21193. Respondent filed a timely appeal. This hearing followed.

Duties of a Correctional Officer

4. CalPERS submitted a list of a Correctional Officer's essential functions and a document titled "Physical Requirements of Position/Occupational Title." The essential functions list states that a Correctional Officer is responsible and accountable for carrying out the duty of public protection, which varies based on the security level of inmates, facility design, geographic location, and number of inmates. The physical requirements include:

Occasionally (up to three hours): Running, carrying between 51 and over 100 pounds, walking on uneven ground, and driving.

Frequently (up to six hours): Crawling, kneeling, climbing, squatting, pushing and pulling, carrying between 26 and 50 pounds, and working with heavy equipment.

Constantly (over six hours): Sitting, standing, walking, bending neck and waist, twisting neck and waist, and carrying up to 25 pounds.

Expert Opinion: Dr. Don Williams

5. CalPERS referred respondent to Dr. Don T. Williams, a board-certified orthopedic surgeon, to conduct an IME. Dr. Williams is a Diplomate of the American Board of Orthopedic Surgery. He has worked as an orthopedic surgeon for 40 years, a Qualified Medical Examiner in Worker's Compensation matters for the State of California for 30 years, and an independent medical examiner for CalPERS for seven years. He completes about three to four IMEs each month, totaling about 250 IMEs since he started working with CalPERS.

6. Dr. Williams conducted an IME on respondent, and prepared a report regarding his findings. His report was based on his review of the list of essential functions for a Correctional Officer, the "Physical Requirements of Position/ Occupational Title," an interview with and examination of respondent, and a review of respondent's medical records that CalPERS provided him. Dr. Williams examined respondent on August 6, 2019, and prepared an IME report the same day. He testified at hearing about the findings in his report.

7. During his testimony, Dr. Williams referred to his report, which gave an overview of respondent's status, a review of her medical records, and the results of his physical exam. At the time, respondent:

still has lower back pain with pain into the right leg, numbness[,] and burning. She occasionally feels like ants crawling on her skin, sciatica type pain, and right buttock down the leg. She feels that she cannot lift over 20 pounds. She feels she cannot sit for long periods, cannot drive for

long periods. She cannot do crouching or bending. She cannot climb bunk beds to do searches.

At the time of the IME, she lived with her husband and three children and converted a downstairs room to a bedroom because of her difficulty climbing stairs. She saw her internal medicine physician and gastroenterologist several times each month, along with periodic visits to a dermatologist and infectious disease specialist. She did not list an orthopedic surgeon as having treated her in the prior year. She was taking several medications for unrelated skin and digestive medical conditions, along with hydrocodone from her primary treating physician.

8. Dr. Williams reviewed respondent's medical records, which document lumbar myofascial syndrome, chronic back pain with sciatica, right hip pain, and several ailments unrelated to her orthopedic disability claim. Respondent first saw a doctor about her orthopedic pain in October 2015 and received a diagnosis of bursitis of right trochanteric bursa and right thigh muscle strain. An orthopedic consultation the following month found similar right hip inflammation and tenderness.

In March 2016, an electromyography (EMG) procedure showed that respondent had normal muscle response in her bilateral lower extremities in response to nerve stimulation. Magnetic resonance imaging (MRI) performed on respondent's right hip in 2016 suggested a gluteus medius strain. MRIs performed on respondent's lumbar spine in 2016 and 2018 indicated mild degenerative disc disease and a 3-millimeter (mm) bulge.

Two weeks before her August 2019 IME, respondent underwent a physical therapy examination. This examination reported unrelated medical conditions had complicated respondent's treatment for lower back pain, and documented tingling

and numbness following a 2016 epidural shot. The examination further stated that respondent had some muscle tenderness and that her chronic back pain and other medical conditions could interfere with rehabilitation.

9. Over the years, several physicians noted that the objective medical evidence did not support respondent's complaints. In January 2017, neurosurgeon Dr. Adam Bryant found nothing on the lumbar imaging that accounted for respondent's symptoms. In April 2018, an IME performed by Dr. Donald Pompan reported that respondent exaggerated her symptoms and her reluctant attempts at moving were inconsistent with the MRI results. In August 2019, the current IME, Dr. Williams similarly found symptom magnification, noting that respondent "did not put forth her best effort" and exaggerated her complaints.

10. Dr. Williams concluded that respondent had (1) mild multilevel lumbar disc disease with 3 mm disc bulge without central canal stenosis; (2) mild right hip trochanteric bursitis; (3) healed left ankle sprain; (4) resolved Valley Fever; and (5) resolved left ankle. Dr. Williams expressed that he did not think that respondent was substantially incapacitated for the performance of her duties. He relied on the minimal changes noticed on the MRI and respondent's ability to perform a straight leg raise to 90 degrees in finding that respondent had magnified her symptoms.

Respondent's Evidence

11. Respondent is in her forties. She testified that an October 16, 2015 work injury resulted in her back and right hip injuries and substantially altered her life. On that day, respondent was cleaning up blood on the ground and suddenly felt a sharp pain "like a snake bite" on her leg. She described that her leg went numb, she felt pain

on standing, and struggled to lift a 30-pound mailbag in the days that followed. Three days after the incident, she saw a doctor and has not worked since.

12. Since 2019, respondent moved to a new home to help with her limited mobility. She remains in a reclining chair most of the day. Respondent no longer drives because she does not trust her foot on the gas and brake pedals. She has resisted taking pain medication, instead trying epidural steroid injections until they were no longer available. She testified that she also attempted physical therapy, reflex therapy, and acupuncture.¹

13. Respondent has more recent MRIs that document her orthopedic injuries, including one from October 2019 and a second from October 2020. Evidence of those MRIs was not provided in the record. She claimed that Kaiser's MRIs were inaccurate because of miscalibration, so she went through private insurance to get new MRIs. Respondent admitted to "babying" her pain during August 2019, but felt the examination was too brief for Dr. Williams to accurately assess her injuries. Additionally, respondent stated that her condition has worsened since the August 2019 IME. In November 2020, respondent fell, broke her right ankle, and sustained a hairline fracture on her left ankle. She stated that she walked with a cane before she broke her ankles and now uses a walker.

¹ The record provided documents of a single examination by a physical therapist in July 2019. The record does not include evidence of other treatments.

Analysis

14. The burden is on CalPERS to establish that respondent is no longer substantially incapacitated from performing her job duties. CalPERS has not carried that burden. Respondent's application for disability retirement was approved based on her orthopedic (right hip, back) conditions effective May 2, 2018. The determination to approve respondent's application was based in part on Dr. Pompan's April 2018 IME, which included the EMG's normal findings, and Dr. Brant's January 2017 determination that the lumbar imaging did not account for respondent's symptoms. Although Dr. Pompan expressed his belief that respondent was exaggerating her symptoms, he noted that respondent was unable to do the 100-pound lifting required for her position and found her to be substantially incapacitated.

15. Dr. Williams opined that respondent had no restrictions on her ability to perform her duties as a Correctional Officer and was not substantially incapacitated from those duties. He did not find any specific job duties that respondent would be unable to perform based on her orthopedic injury. While Dr. Williams' IME persuasively documented respondent's ability to bend and squat, as well as her symptom magnification, the report did not assess all the activities required to work as a Correctional Officer. The position necessitates that respondent be able to constantly carry up to 25 pounds, frequently carry between 26 and 50 pounds, and occasionally carry over 100 pounds. Additionally, Correctional Officers must frequently climb to inspect bunk beds. The August 2019 IME did not assess respondent's lifting and carrying capacity, nor did it assess her ability to climb. Additionally, the IME does not address one of respondent's present limitations that conflicts with a Correctional Officer's physical requirements: the need to occasionally drive. Based on respondent's testimony, her limitations have further declined in the two years since the IME because

she is presently using a walker. Thus, based on the missing and inconsistent findings, the August 2019 IME as a whole was not persuasive.

16. When all the evidence is considered, CalPERS failed to submit sufficient evidence to meet its burden. As a result, CalPERS’s request that respondent be involuntarily reinstated from industrial disability retirement is denied.

LEGAL CONCLUSIONS

1. Respondent is a state safety member of CalPERS by virtue of her former employment with CDCR. (Gov. Code, § 20403.) CalPERS granted her application for an industrial disability retirement on May 2, 2018, pursuant to Government Code section 21151, subdivision (a), due to orthopedic (right hip, back) condition. That statute provides: “Any . . . state safety . . . member incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.” (Gov. Code, § 21151, subd. (a).)

2. In accordance with Government Code section 21192, CalPERS reevaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examinationThe examination shall be made by a physician or surgeon, appointed by the boardUpon the basis of the examination, the board or the governing body shall determine whether he or she is

still incapacitated, physically or mentally, for duty in the state agency . . . where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

3. Government Code section 21193 governs the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty and, in relevant part, provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

4. Government Code section 20026 defines "disability" and "incapacity for performance of duty," and, in relevant part, provides:

"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, . . . on the basis of competent medical opinion.

5. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court held "that to be 'incapacitated for the performance of duty' . . . means the *substantial* inability of the applicant to perform his usual duties." Discomfort, which may make it difficult for one to perform her duties, is insufficient to establish permanent incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207 [mere discomfort which makes it difficult to perform one's job does not constitute a permanent incapacity].) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability retirement. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863.)

6. To involuntarily reinstate respondent from industrial disability retirement, CalPERS had to establish by competent medical evidence that respondent is no longer substantially incapacitated from performing the usual duties of a Correctional Officer for the Department. As set forth in Findings 14 through 16, CalPERS did not offer sufficient competent medical evidence to meet its burden of proof. Consequently, when all the evidence is considered, CalPERS' request that respondent be involuntarily reinstated from disability retirement must be denied at this time.

//

//

//

ORDER

The appeal of respondent Juanita Nunez is GRANTED. The request of California Public Employees' Retirement System to involuntarily reinstate respondent Juanita Nunez from industrial disability retirement is DENIED without prejudice for CalPERS to require respondent to undergo further examination pursuant to Government Code section 21192.

DATE: November 10, 2021

Jessica Wall

Jessica Wall (Nov 10, 2021 10:42 PST)

JESSICA WALL

Administrative Law Judge

Office of Administrative Hearings