ATTACHMENT E

THE PROPOSED DECISION

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

In the Matter of the Appeal of Reinstatement from Industrial Disability Retirement of:

MICHELLE L. MONTANO, Respondent

Agency Case No. 2022-0218

OAH No. 2022070160

PROPOSED DECISION

Erin R. Koch-Goodman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on October 11, 2022, by videoconference from Sacramento, California.

Nhung Dao, Attorney, California Public Employees' Retirement System (CalPERS), represented complainant, Keith Riddle, Chief, Disability and Survivor Benefits Division, CalPERS.

Respondent, Michelle L. Montano, appeared and represented herself.

There was no appearance by or on behalf of respondent Valley State Prison (VSP), California Department of Corrections and Rehabilitation (CDCR). Proper service

was made on CDCR. As such, the matter proceeded as a default against respondent CDCR pursuant to Government Code section 11520.

Evidence was received, the record closed, and matter submitted for decision on October 11, 2022.

ISSUE

Does respondent remain disabled or substantially incapacitated from the performance of her usual job duties as a Certified Nursing Assistant (CNA) for respondent CDCR based upon her orthopedic (right shoulder) condition?

FACTUAL FINDINGS

Jurisdictional Matters

1. On January 12, 2018, respondent submitted an application to CalPERS for Industrial Disability Retirement (IDR), based upon an orthopedic (right shoulder) condition. At all times relevant, respondent was employed by CDCR as a CNA. CalPERS approved respondent's IDR application, effective July 17, 2018, when respondent was 45 years old.

2. In 2021, CalPERS reviewed respondent's disability retirement eligibility, to determine if she continued to meet the qualifications to receive disability retirement benefits. On December 21, 2021, CalPERS notified respondent that it had determined that she was no longer substantially incapacitated from the performance of her job duties as a CNA, due to her orthopedic condition, and that she would be reinstated to her former position.

3. On January 19, 2022, respondent timely appealed the CalPERS reinstatement decision. On June 9, 2022, Keith Riddle, Chief, Disability and Survivor Benefits Division, CalPERS, in his official capacity, made and served an Accusation, seeking a determination as to whether respondent remains disabled or substantially incapacitated from the performance of her job duties as a CNA, and whether she should be reinstated to her former position.

Job Duties of a CNA

4. The California Correctional Health Care Services, CDCR, supplied an Essential Functions list for the CNA classification. The functions affecting respondent's physical condition include lifting and carrying up to 50 pound from the ground to an overhead position; pushing, pulling, and gripping; stooping, bending, kneeling, reaching, squatting, climbing, crawling, twisting and stretching; inspecting, observing, manipulating, and moving objects 360 degrees horizontally from floor through overhead levels.

5. CDCR also completed a Physical Requirements of Position form, for respondent's CNA position at VSP. The form sorts required tasks into three categories: occasionally (up to three hours per shift), frequently (three to six hours per shift), and/or constantly (over six hours per shift). The requirements categorized as occasionally, frequently, and constantly include sitting, standing, walking, crawling, kneeling, climbing, squatting, bending (neck and waist), twisting (neck and waist), reaching (above and below shoulder), fine manipulation, power and simple grasping, repetitive use of hands, keyboard and mouse use, walking on uneven ground, use of special visual or auditory protective equipment, and working with biohazards (re: blood borne pathogens, sewage, hospital waste, etc.). The occasional and frequent tasks include lifting and carrying zero to 50 pounds, exposure to extreme temperature,

humidity, or wetness, and working at heights. The requirements categorized as occasionally include running, driving, working with heavy equipment, exposure to excessive noise, exposure to dust, gas fumes or chemicals, and operation of foot controls or repetitive movement. Finally, a CNA is never required to lift and/or carry 51 to 100 or more pounds.

Respondent's Medical History

6. On or about July 7, 2014, while at work, respondent helped another employee to transfer an inmate into a wheelchair. During the transfer, the inmate's legs collapsed under him, causing him to fall forward onto respondent, leaving her to support the inmate's entire body weight. Respondent felt severe pain in her right shoulder. Respondent reported her injury to CDCR and filed a worker's compensation claim.

7. On September 15, 2014, Christian Safian, M.D., performed right shoulder surgery with acromioplasty, Mumford biceps tenodesis, and labral debridement. A post-surgical Magnetic Resonance Imaging (MRI) revealed mild tendinosis; a partial tear of the supraspinatus tendon bursal surface; an intact labrum; moderately severe arthrosis of the acromioclavicular joint with moderate supraspinatus outlet compromise; and no abnormal subacromial or subdeltoid bursitis. In 2016 and 2017, respondent saw Marshal Lewis, M.D., who diagnosed a stable superior labrum tear and bicipital tendinitis, but respondent continued to complain of right shoulder pain and limited mobility. Respondent was sent for further testing, revealing a normal electromyography (EMG) at the cervical spine and normal nerve conduction studies of the right upper extremities.

8. On August 31, 2017, Donald C. Pompan, M.D., completed a Qualified Medical Examination (QME), finding respondent to be permanent and stationary with a 27 percent impairment in the upper right extremity and a limitation on lifting anything more than 10 pounds. On November 30, 2017, another MRI showed adhesive capsulitis. In January 2018, respondent applied for IDR. On May 30, 2018, CDCR sent respondent to Frank Guellich, M.D., orthopedic surgeon, for an Independent Medical Examination (IME). Dr. Guellich found respondent to have limited motion in her right shoulder and determined she was unable to lift more than 20 pounds above the shoulder. In July 2018, CalPERS approved respondent's IDR.

9. In January 2020, respondent began seeing Diego Allende, D.O. Respondent continued to complain of right shoulder pain. On July 27, 2020, respondent had another MRI, showing adhesive capsulitis with long head biceps tenodesis and supraspinatus tendinopathy without full-thickness tear. On July 29, 2020, Dr. Allende reviewed the MRI and examined respondent, noting forward flexion of 110 degrees. Dr. Allende diagnosed respondent with adhesive capsulitis and a 50 percent superior labral tear, superior labrum bucket handle tear, status post shoulder subacromial decompression, distal clavicle resection (Mumford procedure), and chronic pain. In September 2020, Dr. Allende referred respondent to Peter Simonian, M.D., orthopedic surgeon.

10. Dr. Simonian treated respondent with steroid injections, physical therapy, and acupuncture, but respondent was still in pain. On April 8, 2021, Dr. Simonian completed a second right shoulder surgery. Dr. Simonian diagnosed respondent with right shoulder without adhesive capsulitis, small tear of the anterior/superior labrum, and partial tear of the supraspinatus and subacromial impingement.

Don T. Williams, M.D., M.S. – 2021 IME

11. On October 14, 2021, CalPERS retained Dr. Williams to perform a reevaluation of respondent's orthopedic condition. Dr. Williams is an orthopedic surgeon practicing in Clovis. Dr. Williams earned a medical degree from Case Western Reserve Medical School in Cleveland, Ohio, in 1977. Then, he completed a general surgery internship at St. Vincent Hospital in New York City and an orthopedic surgery residency at New York Orthopedic Hospital, Columbia Presbyterian Medical Center in New York. He served as an orthopedic surgeon for the United States Army from 1982 to 1986. He is a Diplomate of the American Board of Orthopedic Surgery. Since 1986, Dr. Williams has operated a private orthopedic surgery practice treating patients with various orthopedic conditions, specializing in shoulders, elbows, hands and knees, as well as treating cervical and lumbar spines. Dr. Williams has performed evaluations as a qualified/agreed medical examiner for worker's compensation cases, and for seven years, has conducted IMEs for CalPERS.

12. On October 30, 2021, Dr. Williams saw respondent for an IME based on her orthopedic condition. Dr. Williams conducted a physical examination, reviewed respondent's medical records, and wrote an IME report, dated November 19, 2021, and a Supplemental IME report, dated January 26, 2022, finding respondent not to be substantially and/or permanently incapacitated from her CNA position. Dr. Williams testified at hearing consistent with his reports.

13. At the examination, respondent reported her current symptomology to include right shoulder pain with less than full range of motion and increased pain when lifting more than five pounds overhead. She is unable to pick up her grandchildren. She has some problems with dressing and going to the bathroom independently. She has pain doing her hair or scratching her back. It is also painful to

sleep on her right shoulder. She can walk and sit and drives, and she is able to handle small items. However, she avoids physically strenuous activities and does not do any pushing, pulling, or reaching. She does not clean house, do yard work, wash the car, or shop for groceries. She also does not participate in any recreational sports. She can cook, but it causes her some pain. Given the above, respondent believes she is unable to complete the essential functions of her job as a CNA.

14. Dr. Williams conducted a physical examination of respondent, finding respondent to be 5 feet tall, weighing 180 pounds. Dr. Williams documented the following information. Respondent is right-handed. She can rise from a chair and walk with a normal gait. Her cervical spine had good motion without any complaints of pain. Measurements for her right upper extremity revealed the following range of motion: active flexion to 140 degrees, passive flexion to 160 degrees; extension to 40 degrees; external rotation to 70 degrees; internal rotation to 50 degrees; active abduction to 140 degrees; passive abduction to 160 degrees; and adduction to 30 degrees. Dr. Williams found respondent's range of motion to all be within normal limits. He found respondent to exaggerate her symptoms, showing poor effort during the examination and actively resisting the range of motion testing.

15. Dr. Williams diagnosed respondent with post second surgery debridement for adhesive capsulitis of the right shoulder and status post biceps tenotomy, proximal biceps tenodesis, postop distal clavicle excision, and subacromial decompression. Based on his review of medical records and the requirements of the CNA classification, his physical examination of respondent, combined with his training and experience, Dr. Williams found respondent did not have a substantial incapacity and was able to perform her usual duties as a CNA.

Dr. Williams made his findings based on several factors. He has treated many people with biceps tendonitis without rotator cuff tears and respondent has past the normal time period to recover from such an injury. Moreover, Dr. Simonian found no adhesive capsulitis during respondent's second right shoulder surgery and the post-operative MRI showed an intact rotator cuff. Finally, Dr. Williams explained:

> [respondent] is not incapacitated because the second surgery did remove additional spurring and impingement upon the rotator cuff. Her motion has improved. The MRI shows that the rotator cuff is intact and that there is no atrophy of the rotator cuff muscle on the MRI. Her physical exam shows that she maintains a functional range of motion, although she does have some residual loss of motion. Her muscles are grade 5/5. [Respondent] was able to do her job before this injury. I feel that she has returned to her pre-injury state and I feel with reasonable medical certainty that she can return to her former job.

Respondent's Evidence

16. Respondent testified on her own behalf. She also called her husband to testify. Respondent is a 49-year-old woman, currently receiving IDR disbursements from CalPERS. She suffers from persistent right shoulder pain following an on-the-job injury to her right shoulder. She was evaluated by Dr. Pompan for her worker's compensation claim and was determined to be 27 percent impaired in the upper right extremity with a limitation on lifting anything more than 10 pounds. She produced a one-page Work Status form from Dr. Allende, dated September 21, 2022, recording respondent's current restrictions: no lifting more than five pounds, no pushing/pulling

with her right hand more than five pounds, and no reaching above shoulder level with right arm. The Work Status form allows respondent to engage in transitional work, if available. Respondent believes the worker's compensation findings by Drs. Pompan and Allende prove she is substantially incapacitated and should be credited. However, respondent did not offer any expert medical testimony.

17. In addition, respondent criticized the examination and findings by Dr. Williams. Respondent reports meeting with Dr. Williams for less than 20 minutes, even though his report says he spent more time with her. Moreover, respondent alleges Dr. William never touched her to perform a physical examination or measure her range of motion.

18. Today, respondent believes her limitations are the same as when she was evaluated by Dr. Pompan and was considered to be permanent and stationary with a 27 percent limitation. For respondent, her condition has not resolved, decreased, or improved since CalPERS granted her IDR application. According to respondent, with her limitations, CDCR will not allow her to return to her CNA position because she is unable to complete the essential functions of the job. She cannot reach above the shoulder, repetitively use her hands (e.g., administer cardio-pulmonary resuscitation), and lift or carry up to 50 pounds, all of which are essential functions for a CNA. Moreover, she cannot protect or defend herself against inmates.

Analysis

19. CalPERS bears the burden of proving that respondent is no longer substantially incapacitated from performing the usual duties of her position, based upon competent medical evidence. Here, CalPERS offered an IME and Supplemental reports, along with the testimony of Dr. Williams. Following a review of medical

records and a physical examination of respondent, Dr. Williams found respondent is not substantially incapacitated from the essential functions of a CNA.

20. In comparison, respondent relied on her 2017 QME with Dr. Pompan to support a continued finding of substantial incapacity. First, since the QME, respondent has had rehabilitative care as well as a second right shoulder surgery with positive objective medical results. Second, the QME is not considered competent medical evidence for the purposes of determining substantial incapacity under the CalPERS standard. A QME is for the purpose of workers compensation and determining the financial liability of an employer for an on-the-job injury, in addition to prophylactic protections for the worker going forward, whereas an IME evaluates objective medical findings and considers them in light of the essential functions of a job. Findings issued for the purposes of workers compensation are not evidence that respondent's injuries are substantially incapacitating for the purposes of disability retirement. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; *English v. Bd. of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal.App.3d 839, 844; *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563.)

21. Respondent may suffer from pain or believe she cannot perform her job without prophylactic restrictions in place to prevent further injury to her right shoulder, but neither prevent respondent from performing the essential functions of a CNA. While respondent may be in pain, discomfort alone, even if it makes performance of one's duties more difficult, is insufficient to establish a substantial incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207 (*Smith*); citing, *Hosford v. Bd. of Admin.* (1978) 77 Cal.App.3d 854, 862 (*Hosford*).) Similarly, an increased risk of further injury is insufficient to demonstrate a present disability. (*Hosford, supra*, 77 Cal.App.3d at p. 863.) Rather, the written reports and testimony of

Dr. Williams were persuasive and unchallenged. (*Peter Kiewitt Sons v. Industrial Accident Commission* (1965) 234 Cal.App.2d 831, 838 ["Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a commission finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence"].) In sum, respondent does not remain substantially incapacitated on the basis of an orthopedic (right shoulder) condition.

22. When all the evidence is considered, CalPERS established, based on competent medical evidence, that respondent is no longer substantially and permanently incapacitated from performing the usual duties of a CNA. In other words, CalPERS presented sufficient competent medical evidence to meet its burden of proof. Consequently, its request that respondent be reinstated from industrial disability retirement should be granted.

LEGAL CONCLUSIONS

1. In accordance with Government Code section 21192, CalPERS re-evaluates 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 examination .....The examination shall be made by a physician or surgeon, appointed by the board. ..... Upon 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.

2. 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.

3. 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 and uncertain duration, as determined by the board . . . on the basis of competent medical opinion."

4. 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.) In *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 862, the court held that a disability or incapacity must currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient. And, discomfort, which may make it difficult to perform one's duties, is insufficient to establish permanent incapacity from performance of one's position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Board of Administration, supra*, 77 Cal.App.3d at p. 862.)

5. To reinstate respondent from industrial disability retirement, CalPERS had to establish that respondent is no longer substantially incapacitated from performing the usual duties of an CNA. As set forth in the Factual Findings as a whole, CalPERS offered sufficient competent medical evidence at the hearing to meet its burden of proof. Consequently, CalPERS' request that respondent be reinstated from industrial disability retirement should be granted.

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ORDER

The request of California Public Employees' Retirement System to reinstate respondent Michelle L. Montano from industrial disability retirement is GRANTED.

DATE: November 10, 2022

ERIN R. KOCH-GOODMAN
Administrative Law Judge
Office of Administrative Hearings