

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Involuntary
Reinstatement from Disability Retirement of:

Case No. 9825

OAH No. 2011030114

SABRINA R. CARTER,

Respondent,

and

DEPARTMENT OF DEVELOPMENTAL
SERVICES,

Respondent.

PROPOSED DECISION

This matter was heard by Humberto Flores, Administrative Law Judge with the Office of Administrative Hearings on August 14, 2012, in Visalia, California.

Elizabeth Yelland, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Sabrina R. Carter (respondent Carter) appeared personally and represented herself.

The Department of Developmental Services was represented by Shawna Gregg, Human Resources Director.

Evidence was introduced at the hearing and the matter was submitted for decision. The Administrative Law Judge finds as follows:

FACTUAL FINDINGS

1. Petitioner Mary Lynn Fisher made and filed the Accusation in her official capacity as Chief, Benefit Services Division, CalPERS.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED September 25th 2012
Lisa Olanoff

2. Respondent Carter was employed by respondent Department of Developmental Services as a psychiatric technician assistant, at a facility located in Porterville, California. By virtue of her employment, respondent Carter was a safety member of CalPERS pursuant to Government Code section 21151.

3. On or about September 19, 2001, respondent Carter submitted an application for industrial disability retirement. In filing the application, respondent Carter claimed disability based on her contention that she suffered from an orthopedic (upper extremities and back) condition. Respondent Carter's application was approved by CalPERS and she retired on disability effective September 6, 2002. Respondent Carter injured her back when she attempted to transfer a client from her wheelchair to a toilet.

4. Respondent Carter was born on November 28, 1970. Under Government Code section 21060, respondent Carter was under the minimum age for voluntary retirement for service applicable to members of her classification when she underwent a medical examination pursuant to the terms of Government Code section 21192.

5. CalPERS obtained or received medical reports concerning respondent Carter's orthopedic condition from competent medical professionals. Based on said medical reports, CalPERS determined that respondent Carter is no longer permanently disabled or incapacitated from performance of her duties as a psychiatric technician assistant.

6. By letter dated November 25, 2009, respondent Carter was notified of the determination by CalPERS that she is no longer disabled from her job duties, and would be reinstated.

7. Respondent Carter filed a timely appeal and requested a hearing.

8. CalPERS has the burden to establish that respondent Carter is no longer permanently disabled or incapacitated from performance of her duties as a psychiatric technician assistant.

9. The general duties of a psychiatric technician assistant include providing care and supervision for facility clients with mild to profound developmental disabilities. During high activity times there are six staff members to 32 clients. The facility is divided into a secured area for clients, known as forensic clients, who exhibit serious behavioral problems, and a non-secured area for clients who do not usually exhibit behavioral problems. The duties of a psychiatric technician assistant include: assisting trainers and primary care providers, assisting in training clients in daily living tasks, escorting clients to appointments and daily activities on and off campus, assisting with behavior intervention (which includes containing a combative client), assisting with supervision of clients on and off campus, assisting with the supervision of clients during leisure activities, and assisting classroom teachers. In addition, a psychiatric technician assistant is required to document client records and complete incident reports.

10. Respondent Carter “wrenched her back” when she attempted to transfer a client from her wheelchair to a toilet. She testified that she still experiences pain in her upper and lower back, pain in her shoulders that radiates to her hands, and pain in her left leg and left knee. She testified that she would be unable to contain a combative client. It is noted, however, that a psychiatric technician assistant is not required to contain a client by herself. Three to five staff members generally perform this task.

11. Respondent Carter obtained a vocational nurse license in 2000. She worked as a licensed vocational nurse for approximately four years until 2007.

12. On May 8, 2009, Ernest B. Miller, M.D., an orthopedist, examined respondent Carter. As part of his examination and evaluation of respondent Carter, Dr. Miller reviewed extensive medical records which describe an injury consistent with a strain or sprain and are set forth as follows:

- (a) Respondent Carter had an MRI of the cervical spine on November 12, 1999, which showed normal degenerative disc disease evidenced by mild bulging at C4-5 and C5-6, which was consistent with age, weight and sex. The MRI was read by Dr. Eugene Roos who stated in his report that there was no evidence of spinal cord or nerve root impingement.
- (b) Dr. Miller also reviewed a medical record from Dr. Stephen Schopler, who evaluated respondent Carter on December 2, 1999. Dr. Schopler stated in his report that x-ray studies of the lumbar spine were normal and he made a diagnosis of subscapular bursitis and lumbar strain. After seeing respondent Carter a number of times in 2000, Dr. Schopler stated in a November 10, 2000 letter that “[respondent Carter] has been undergoing a continuing workup for thoracic outlet syndrome.¹ She continues to complain of severe interscapular pain, right greater than left, headache, as well as low back pain, right leg and resolved right groin pain. Diagnosis: Cervical Strain; Lumbar Strain; Possible Thoracic Outlet Syndrome. Treatment Plan: Complete her workup through the UCLA Vascular Surgery Department to rule out thoracic outlet syndrome.”
- (c) In a second letter dated February 2, 2001, Dr. Schopler stated that respondent Carter “continues to experience upper extremity pain with overhead work. Diagnosis: Thoracic Outlet Syndrome; Rule out Right Shoulder Pathology. Treatment Plan: Physical Therapy directed toward shoulder retraction, stretching of the pectoral and chest wall muscles, strengthening her scapular stabilizers, and an MRI of the right shoulder.”

¹ Thoracic outlet syndrome is the compression of the brachial plexus and subclavian artery by the muscles near the first rib and clavicle, characterized by pain in the arm, numbness of the fingers, and weakness of the hand muscles.

In a May 3, 2001 letter, Dr. Schopler noted that respondent Carter continues to have upper extremity, shoulder and low back pain. Dr. Schopler diagnosed respondent Carter with Thoracic Outlet Syndrome and Cervical Strain. Dr. Schopler determined that respondent Carter was temporarily partially disabled, and precluded her from repetitive overhead lifting, pushing and pulling.

- (d) On June 8, 2000, an EMG (records the electrical activity of the muscle) and an NCS (nerve conduction study) were taken and read by Dr. Stephen Helvie. In his report, Dr. Helvie noted that the EMG of the musculature of both extremities was normal, with no evidence of acute or chronic cervical radiculopathy. The nerve conduction studies were normal and there was no evidence of conduction block at the wrist or carpal tunnel syndrome. The ulnar nerve conduction studies were normal with no evidence of conduction block at the elbow or wrist.
- (e) Dr. Hugh Gelabert, a vascular surgeon, examined respondent Carter on December 20, 2000, and stated in a note that respondent Carter “has pain in the neck, in the upper right para-scapular region, in the shoulder, in the outer aspect of the upper arm, in the elbow, and in the 4th and 5th digits of the hand. There does not seem to be a continuous radiation of pain from one area to another, but the areas seem to be separated. . . . Today she had SEP testing [testing for thoracic outlet syndrome] at UCLA. The tests are normal and do not indicate compression of the median or ulnar nerves. It does not support the diagnosis of thoracic outlet syndrome. Impression: Based on the MRI, it would appear that she has spasm of the paraspinal muscles. . . . Based on the results of the [scaling] block and the SEP testing, I would conclude that thoracic outlet compression of the brachial plexus is not the cause of her severe symptoms. Ms. Carter is not interested in surgery. . . .”
- (f) Respondent Carter had another MRI of the right shoulder on February 22, 2001, which showed minimal fluid subacromial-subdeltoid bursal space due to mild bursitis and no definite evidence of tendon tear or retraction.
- (g) Respondent Carter was seen by Dr. Michael Wlasichuk on May 14, 2001. Dr. Wlasichuk diagnosed respondent Carter with: (1) cervical strain/myofascial syndrome of the bilateral upper and mid-trapezius muscles; (2) headaches; (3) chronic lumbar strain; and (4) mild right thoracic outlet syndrome. Dr. Wlasichuk prescribed an MRI of the lumbar spine, pain medication, physical therapy, an EMG, and a nerve conduction study of the upper right extremity. In a June 11, 2001 report, Dr. Wlasichuk noted that respondent Carter complained of numbness subdeltoid, and low back pain with spasms. Dr. Wlasichuk ordered an MRI of

the cervical spine and recommended that respondent Carter remain off work.

- (h) Respondent Carter had MRIs of the cervical spine and the lumbar spine on July 6, 2001. Both MRIs were negative for significant posterior disc protrusions, spinal stenosis, or definite impingement of the cervical and lumbar nerve roots.
- (i) In a July 17, 2001 Permanent and Stationary Report, Dr. Wlasichuk noted that respondent Carter complained of constant burning pain, muscle spasms in the interscapular area, headaches, pain in the upper shoulders, pain with numbness in her arms when pushing, pulling and overhead reaching, and constant minimal localized pain with numbness and tingling in the thoracal lumbar spine. Dr. Wlasichuk's diagnosis of respondent Carter's condition included: (1) cervical strain/myofascial syndrome of the bilateral upper and mid-trapezius muscles; (2) headaches secondary to number 1; (3) mild right thoracic outlet syndrome; and (4) chronic lumbar strain. Dr. Wlasichuk opined that respondent Carter was a qualified injured worker and would not be able to return to her previous job.
- (j) Dr. Alan Sanders examined respondent Carter on January 30, 2002, and noted in a letter that respondent Carter complained of constant pain in her neck with movement, constant low back pain, and leg pain on a daily basis. Dr. Sanders diagnosed respondent Carter with "chronic cervical, dorsal and lumbar sprain with symptom magnification and exaggeration." Dr. Sanders prescribed mild analgesics and an over-the-counter oral anti-inflammatory. Finally, Dr. Sanders stated that "no work restrictions are indicated."
- (k) On May 14, 2002, Dr. John Branscum examined respondent Carter and noted in his report that she complained of constant neck pain, pain in the right scapula, pain in both hands and fingers, worse at night, constant dull pain in the lumbar area, pain in her right hip and buttock area, and left leg pain on the inside of her thigh that radiates down to below the knee joint. Dr. Branscum diagnosed respondent Carter with: (1) Neck sprain, (2) Severe sprain of the shoulder girdles with a great deal of muscle spasm; (3) sprain of the thoracic area; and (4) sprain of the low back. Dr. Branscum ordered work restrictions precluding respondent Carter from heavy lifting, overhead work, and repetitive bending and stooping.
- (l) Dr. Mark Nystrom, an orthopedic surgeon, examined respondent Carter on or about November 18, 2002. In his report, Dr. Nystrom noted that respondent Carter complained of constant pain that occurred on the date of her injury and has never subsided. Dr. Nystrom diagnosed respondent Carter with: (1) lumbosacral spine strain; (2) cervical and thoracic strain

and pain; and (3) mild thoracic outlet syndrome. Dr. Nystrom opined that respondent Carter could not perform any repeated lifting greater than 10 pounds, or any repeated bending, twisting, stooping, turning, squatting, pushing, pulling and reaching. Dr. Nystrom determined that respondent Carter would not be able to perform the usual and customary duties of her occupation without restrictions.

13. After reviewing the above medical reports, Dr. Miller performed a physical examination of respondent Carter. In his report, Dr. Miller noted that respondent Carter complained of "pain radiating from the neck to the lower back, through the mid-back, and into the upper extremities and the lower extremities." Respondent Carter complained that the pain is "continuous and really bad." Dr. Miller stated in his report that respondent Carter's complaint of pain was "global, non-specific" and that her complaint of "continuous severe pain was non-physiologic, non-anatomic symptom that is not consistent with musculoskeletal problems and musculoskeletal injuries." He further opined that respondent Carter exaggerated her symptoms and complaints. During the examination, Dr. Miller performed numerous tests and determined that the range of motion was full and normal for the cervical spine, the shoulders, the lumbosacral spine, the hips and the knees. Further, there was no evidence of muscle weakness or reflex abnormality, no evidence of thoracic outlet syndrome, and no evidence of radiculopathy or neurological deficit. Finally, Dr. Miller stated that the MRIs and other studies showed no evidence of any nerve damage or impingement. Dr. Miller testified at the hearing that he disagreed with the initial decision for disability retirement because the conditions diagnosed by respondent Carter's previous physicians, such as strain or sprain require only a brief period of activity restriction (generally less than three weeks) and normal resumption of activity with an exercise program to improve and maintain muscle tone, muscle endurance, and range of motion.

14. Based on his examination of respondent Carter, and her documented medical history, Dr. Miller opined that respondent Carter is not substantially incapacitated for the performance of her duties as a psychiatric technician assistant.

15. Respondent Carter submitted a July 31, 2012 letter from Dr. Wlasichuk stating that he disagreed with Dr. Miller's findings and opinions. However, Dr. Wlasichuk did not testify at the hearing.

16. Respondent Carter testified that she continues to suffer pain that she has expressed to physicians in the past. Respondent Carter's testimony regarding her pain and symptoms is questionable. The evidence in this case included a surveillance video (exhibit 11) that showed respondent Carter while at a youth football game performing certain activities that are inconsistent with her testimony and her claim of pain and disability. The surveillance video, which was taken by an investigator on November 2 and 9, 2002, shows respondent Carter carrying her infant child for extended periods of time, and at times holding her child high above her head and shoulders; bending over to pick up items off the ground; bending over to pick up her child out of the car seat; pulling out a baby stroller from her car; putting on her right shoe while standing on her left leg; and putting on her left shoe while

standing on her right leg. The video also shows respondent Carter sitting on the grass while holding her baby. She was then able to get up from the sitting position while holding her baby. Respondent Carter was able to perform all of these tasks without showing any outward signs of pain or discomfort and without the caution that one might expect of someone who suffers from a serious back or shoulder injury and its attendant pain.

LEGAL CONCLUSIONS

1. The following provisions of the Government Code, which were in effect at all times pertinent to this appeal, are relevant to disability retirement:

Section 20026 provides in pertinent part:

“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.

Section 21151, subdivision (a), provides in pertinent part:

Any patrol, state safety, state industrial, state peace officer/firefighter, or local 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.

Section 21156, subdivision (a)(1), provides in pertinent part:

If the medical examination and other available information show to the satisfaction of the board that the member is incapacitated physically or mentally for the performance of his or her duties in the state service and is eligible to retire for disability, the board shall immediately retire him or her for disability. . . .

Section 21060 provides in pertinent part

A member shall be retired for service upon his or her written application to the board if he or she has attained age 50 and is credited with five years of state service. . . .

Section 21192 provides in pertinent part:

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, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. The board, or in the case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, shall also cause the examination to be made upon application for reinstatement to the position held at retirement or any position in the same class, of a person who was incapacitated for performance of duty in the position at the time of a prior reinstatement to another position. The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. 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, the university, or contracting 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.

Section 21193 provides in pertinent part:

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. If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position. However, in that case, acceptance of any other position shall immediately terminate any right to reinstatement. A recipient who is found to continue to be incapacitated for duty in his or her former position and class, but not incapacitated for duty in another position for which he or she has applied for

reinstatement and who accepts employment in the other position, shall upon subsequent discontinuance of incapacity for service in his or her former position or a position in the same class, as determined by the board under Section 21192, be reinstated at his or her option to that position. If the recipient was an employee of a contracting agency other than a local safety member, with the exception of a school safety member, the board shall notify it that his or her disability has terminated and that he or she is eligible for reinstatement to duty. The fact that he or she was retired for disability does not prejudice any right to reinstatement to duty which he or she may claim.

2. Cause exists under Government Code section 21192 to affirm the determination of CalPERS that respondent Sabrina R. Carter is no longer permanently disabled or incapacitated from the performance of her duties as a psychiatric technician assistant.

3. Cause exists under Government Code sections 21192 and 21193 to cancel the disability retirement allowance previously approved for respondent Sabrina R. Carter and to reinstate her, at her option, to her former position with respondent Department of Developmental Services.

4. Cause exists to deny the appeal of respondent Sabrina R. Carter.

ORDER

1. The determination by CalPERS that respondent Sabrina J. Carter is no longer permanently disabled or incapacitated from performing her duties as a psychiatric technician assistant is affirmed, and the appeal filed by respondent Sabrina R. Carter is denied.

2. Pursuant to Government Code section 21193, the disability retirement allowance previously approved by CalPERS is cancelled. Further, respondent Sabrina R. Carter shall be reinstated, at her option, to the position of psychiatric technician assistant.

DATED: September 20, 2012



HUMBERTO FLORES
Administrative Law Judge
Office of Administrative Hearings