ATTACHMENT A

THE PROPOSED DECISION

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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
ON BEHALF OF THE COUNTY OF RIVERSIDE
STATE OF CALIFORNIA

In the Matter of the Involuntary Reinstatement from the Industrial Disability Retirement of: KAREKA MITCHELL, Respondent, and DEPARTMENT OF MENTAL HEALTH, Respondent.	Agency Case No. 2010-0848 OAH No. 2012030795

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on September 13, 2012.

Rory J. Coffey, Senior Staff Counsel, represented complainant California Public Employees Retirement System (CalPERS).

No appearance was made by or on behalf of respondent Kareka Mitchell.

No appearance was made by or on behalf of respondent Department of Mental Health.

On September 13, 2012, the matter was submitted.

SUMMARY

Kareka Mitchell was employed as a Psychiatric Technician by the Department of Mental Health. On August 25, 2005, Ms. Mitchell submitted an application for an industrial disability retirement which CalPERS approved on the basis of Ms. Mitchell's psychiatric, neurological, and orthopedic conditions. Following its review of various medical records and reports, CalPERS subsequently determined that Ms. Mitchell was no longer substantially incapacitated and could return to her employment as a Psychiatric Technician. Ms. Mitchell disputed that determination.

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The competent medical and other evidence established that Ms. Mitchell is no longer substantially incapacitated from the performance of her duties as a Psychiatric Condition, that she is capable of returning to work, and that she should be reinstated to her former employment as a Psychiatric Technician with the Department of Mental Health.

FACTUAL FINDINGS

Preliminary Matters

1. Respondent Kareka Mitchell was born on June 20, 1973. Respondent Department of Mental Health, Patton State Hospital, employed Ms. Mitchell as a Psychiatric Technician. By virtue of her employment, Ms. Mitchell was a state safety member of CalPERS.

On August 26, 2003, a male inmate assaulted Ms. Mitchell during the course of her employment. Ms. Mitchell sustained injuries to her head, neck and shoulders as a result of the assault for which she sought medical treatment.

In an application for an industrial disability retirement that was dated August 25, 2005, Ms. Mitchell represented that she was unable to perform the duties of her job as a result of constant neck and shoulder pain, severe migraine headaches, a loss of equilibrium, and a loss of upper body strength.

By letter dated June 28, 2006, CalPERS approved Ms. Mitchell's application for a disability retirement. However, that letter advised, "You may be reexamined periodically to determine your qualification for reinstatement if you are under the minimum age for service retirement."

2. By letter dated September 17, 2009, CalPERS advised Ms. Mitchell of its intent to have her submit to a reexamination. CalPERS requested that Ms. Mitchell provide an authorization for the release of medical information, the names and addresses of her treating and examining physicians, and a written statement regarding her current employment status. Ms. Mitchell was too young at the time to qualify for a service retirement.[1]

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[1] Government Code section 21175 provides:

> If any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class refuses to submit to medical examination the pension portions of his or her allowance may be discontinued until his or her withdrawal of the refusal. If the refusal continues for one year his or her disability retirement allowance may be canceled.

By letter dated September 8, 2010, CalPERS advised Ms. Mitchell that following a review of various reports, CalPERS determined that Ms. Mitchell was no longer substantially incapacitated from performing the job duties of a Psychiatric Technician with the Department of Mental Health based upon her neurological (head) condition. CalPERS advised Ms. Mitchell of her right to appeal from that determination.

By letter received by CalPERS on October 6, 2010, Ms. Mitchell expressed her strong disagreement with CalPERS's determination. Ms. Mitchell asserted that she continued to suffer psychologically and physically as a result of her assault, that she had severe pain in her head that prevented her from attending to her daily affairs, that she had suffered short term memory problems, that she experienced severe pain in her shoulders and was unable to lift heavy objects, that she had frequent visions of male patients, and that she experienced severe migraine headaches. Ms. Mitchell stated that Dr. Zardouz was her neurologist and that Dr. Harris was her orthopedics surgeon. She appealed from CalPERS's determination.

3. On March 26, 2012, Mary Lynn Fisher, Chief, Benefit Services Division, signed the accusation on CalPERS' behalf. The accusation and other required documents were served on Ms. Mitchell at her address of record where she was receiving a disability retirement allowance, and upon The Department of Mental Health at its headquarters in Sacramento.

The Amended Notice of Hearing, setting a hearing date for September 13, 2012, to commence at 10:00 a.m., at CalPERS's San Bernardino office was served on Ms. Mitchell at her address of record where she was receiving a disability retirement allowance, and upon The Department of Mental Health at its headquarters in Sacramento.

All jurisdictional requirements were met.

4. The record in this matter was opened on September 13, 2012, at CalPERS's San Bernardino office at approximately 10:30 a.m. No appearance was made by or on behalf of respondents Ms. Mitchell and the Department of Mental Health. Efforts were made before going on the record to contact Ms. Mitchell by telephone, to no avail.

Notice was taken of Ms. Mitchell's address of record with CalPERS. Documentary evidence established that address. Jurisdictional documents were presented that establihished jurisdiction in this matter. Complainant's request to take a default judgment under the provisions of Government Code section 11520 was granted. Documentary evidence was received and sworn testimony was taken. The record was closed and the matter was submitted.

The Medical Evidence

5. A narrative medical reported authored by Bijan Zardouz, M.D., who Ms. Mitchell had previously represented was her treating neurologist, was received. The report was dated September 3, 2009. The report summarized Dr. Zardouz's neurological examination of Ms. Mitchell earlier that day. The report stated that "the patient's

neurological examination is stable. There is no evidence of any focal neurological deficit. Physical therapy was recommended for Ms. Mitchell's neck pain and limited range of motion.

6. A narrative medical reported authored by Arthur S. Harris, M.D., who Ms. Mitchell had previously represented was her orthopedist, was received. The report was dated November 30, 2009. The report summarized Dr. Harris's orthopedic examination of Ms. Mitchell earlier that day. Dr. Harris diagnosed a cervical and thoracic spine strain, a disc protrusion at C5-6, and bilateral shoulder/rotator cuff strain. The report stated, "The patient is to return to regular duties." Ms. Mitchell's neurological examination was stable. There was no evidence of any focal neurological deficit. Physical therapy was recommended for Ms. Mitchell's neck pain and limited range of motion.

7. Alice Martinson, M.D., a board-certified orthopedic surgeon, testified. Dr. Martinson reviewed a job duties description for a Psychiatric Technician. Dr. Martinson evaluated Ms. Mitchell at CalPERS's request on March 18, 2010. She prepared a narrative report concerning that orthopedic evaluation. Dr. Martinson diagnosed "Chronic cervical strain complaints without evidence of radiuclopathy, neuropathy, or myelopathy." There was no objective evidence of pathology in the shoulders. Dr. Martinson concluded the orthopedic examination was "essentially normal." Dr. Martinson determined that "there are no specific job duties which she is currently unable to perform" and that "From an orthopedic standpoint she is not substantially incapacitated."

8. Oluwafemi Adeyemo, M.D., a board-certified psychiatrist, testified. Dr. Adeyemo obtained information related to Ms. Mitchell's duties and conducted a psychiatric evaluation on April 1, 2010, that included presenting complaints, a history of the present injury, a past history, a vocational history, a legal history, a personal history, and he conducted a clinical interview, a mental status examination, and a review of records. Dr. Adeyemo concluded that Ms. Mitchell had a diagnosis of Post-Traumatic Stress Disorder (Chronic), in partial remission, on Axis I; Cluster B personality traits on Axis II; a history of headaches and a history of neck and shoulder pain on Axis III; memory problems and financial constraints on Axis IV; and a GAF (global assessment of functioning) of 70. [2] In his supplemental report, Dr. Adeyemo concluded that there were no specific duties Ms. Mitchell could not perform and that Ms. Mitchell was not substantially incapacitated from performing her duties as a Psychiatric Technician.

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[2] The diagnosis was set forth in a format consistent with the *Diagnostic and Statistical Manual of Mental Disorders* (fourth edition, text revision), commonly referred to as the *DSM-IV-TR*. The *DSM-IV-TR* is published by the American Psychiatric Association and is widely used in the diagnosis of mental disorders. The *DSM-IV-TR* is organized into a five-part "axis" system. Axis I sets forth the diagnosis of any "clinical disorder." Axis II sets forth any personality disorders and intellectual disabilities. Axis III sets forth relevant medical issues. Axis IV sets forth, psychosocial and environmental factors and stressors. Axis V sets forth a global assessment of functioning, from 100 to zero, with 100 representing superior functioning.

9. Abdul K. Jaffer, M.D., a board-certified neurologist, testified. Dr. Jaffer obtained information related to Ms. Mitchell's duties and conducted a neurological evaluation on April 1, 2010. Dr. Jaffer obtained chief complaints, a history of the present illness, a past medical history, a personal and family history, reviewed medical records, and conducted a physical examination, all of which was set forth in a narrative report. Dr. Jaffer's impression was cervical sprain/strain, chronic headache, dizziness and short term memory problems, likely the result of depression, and post traumatic stress disorder with a major depression with anxiety. Dr. Jaffer determined that from a physical standpoint, Ms. Mitchell was able to perform all of her duties, and that from a neurological standpoint Ms. Mitchell was not substantially incapacitated form performing her duties. He believed that a psychiatrist would be more qualified to determine if there was a psychiatric problem that prevented Ms. Mitchell from returning to work as a Psychiatric Technician.

10. No evidence was present that tended to establish that Ms. Mitchell was unable to return to work at the Department of Mental Health (Patton State Hospital) as a Psychiatric Technician. All of the evidence was to the contrary.

Other Matters

11. Documentary evidence established that on November 12, 2007, when Ms. Mitchell was receiving an industrial disability retirement, she completed a pre-employment health evaluation form for a position with Loma Linda University Health Care Occupational Medicine Center. In that form, Ms. Mitchell represented that she left her employment at Patton State Hospital to attend "school"; she failed to mention that she had retired from that employment based upon an industrial disability. She represented in that form that she was currently employed by All Star Staffing. Ms. Mitchell thereafter was employed by Loma Linda University as a Psychiatric Technician from January 12, 2008, through February 6, 2010. Ms. Mitchell received an industrial disability retirement during this employment.

12. Documentary evidence established that the Department of Social Services paid hourly wages to Ms. Mitchell from 2008 through 2011 for In Home Supportive Services she provided to a Department of Social Services client.

13. In a health screening form that was completed in March 2008 related to a position as a Psychiatric Technician at St. Bernadine Medical Center, found Ms. Mitchell was found "Acceptable without work restrictions." In an application form that Ms. Mitchell completed, she denied having "back or neck trouble," "joint pain," and "migraine headache." She denied having sustained any injuries to her neck, back, extremities, or sprains and dislocations, or other serious injuries. She denied that she had ever been unable to hold a job for health reasons and she denied having had a disability rating for any reason. Ms. Mitchell was employed thereafter as a Psychiatric Technician.

14. Ms. Mitchell's statements to prospective employers and the unrestricted positions she has successfully held since 2008 are inconsistent with her claim that she cannot perform the essential functions of a Psychiatric Technician and that she is substantially incapacitated from her employment with the Department of Mental Health.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Evidence Code section 500 provides:

> Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

2. Evidence Code section 115 provides in part:

> "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. . .
>
> Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.

3. In this matter, complainant had the burden of proving by a preponderance of the evidence that circumstances had changed, that Ms. Mitchell was no longer substantially incapacitated from performing the duties as a Psychiatric Condition, that Ms. Mitchell is capable of returning to work, and that Ms. Mitchell should be reinstated to her former employment as a Psychiatric Technician with the Department of Mental Health.

Relevant Industrial Disability Retirement Statutes

4. Government Code section 20026 provides:

> "'Disability' and 'incapacity for performance of duty' as a basis of retirement, mean disability of permanent or extended and uncertain duration . . . on the basis of competent medical opinion."

5. Government Code section 21151 provides in part:

> (a) Any . . . state safety . . . member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service . . . .

6. Government Code section 21156 provides in 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 and is eligible to retire for disability, the board shall immediately retire him or her for disability . . . .

7. Government Code section 21192 provides in 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[3] to undergo medical examination . . . 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 . . . .

8. Government Code section 21193 provides in 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 . . . 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 . . . and is so determined to be not incapacitated for duty in the position held when retired for disability . . . he or she shall be reinstated, at his or her option, to that position . . . .

Incapacitated for the Performance of Duty

9. "Incapacitated for the performance of duty" within the meaning of the Government Code means the substantial inability of the applicant to perform his usual duties. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) An employee who is incapacitated only to a limited extent is not entitled to disability retirement.

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[3] Under Government Code section 21060, the minimum age to obtain a service retirement is age 50 so long as the member also have five years of state service.

(*Mansperger*, *supra*, at pp. 875-877 [fish and game warden unable to lift heavy objects could otherwise carry out normal duties.].)

Conclusion

10. The uncontradicted competent medical evidence and other available information established by a preponderance of the evidence that Ms. Mitchell is no longer substantially incapacitated from performing the customary and usual duties required of a Psychiatric Technician with the Department of Mental Health (Patton State Hospital), that Ms. Mitchell is physically and mentally capable of returning to work as a Psychiatric Technician, that she should be reinstated to her former employment as a Psychiatric Technician with the Department of Mental Health, and that her industrial disability allowance should be cancelled.

ORDER

Kareka Mitchell shall be reinstated to her former employment as a Psychiatric Technician with the Department of Mental Health, at her option, and her receipt of an industrial disability allowance shall be cancelled.

DATED: September 14, 2012

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearing