ATTACHMENT A

THE PROPOSED DECISION

Attachment A

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Disability Retirement of: BRENDA STEVENSON, Respondent, and DEPARTMENT OF CORRECTIONS PAROLES AND COMMUNITY SERVICES DIVISION, Respondent.	Case No. 8281 OAH No. 2010061327

PROPOSED DECISION AFTER REMAND

Administrative Law Judge Nancy L. Rasmussen, Office of Administrative Hearings, State of California, heard this matter on August 23, 2010, in Oakland, California. Administrative Law Judge Diane Schneider, Office of Administrative Hearings, State of California, heard this on August 23, 2012, in Oakland, California following a remand from the Board of Administration.

Senior Staff Counsel Patricia Miles represented petitioner California Public Employees' Retirement System (CalPERS).

Respondent Brenda Stevenson was self-represented.

There was no appearance by or on behalf of respondent Department of Corrections Paroles and Community Services Division.

Submission of the matter was deferred until August 27, 2012, pending receipt of the original exhibit binder from the hearing on August 23, 2012. The exhibit binder was timely received, and the matter was submitted for decision on August 27, 2012.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 11-7-2012

FACTUAL FINDINGS

Procedural Background

1. Process was duly served in the manner prescribed by law. Compliance with Government Code sections 11505 and 11509 was established.

2. Respondent Brenda Stevenson was employed by respondent Department of Corrections Paroles and Community Services Division. At the time she filed her application for disability retirement, she was employed as a Parole Agent I. By virtue of her employment, Stevenson is a state safety member of CalPERS subject to Government Code section 21151.

3. Stevenson submitted to CalPERS an application for disability retirement, dated June 3, 2006. She claimed to be disabled because of cervical radiculopathy.

4. Following review of medical reports on Stevenson's orthopedic condition (back, neck and left shoulder), CalPERS determined that she was not permanently incapacitated from the performance of her job duties as a Parole Agent I. In a letter dated May 31, 2007, CalPERS notified Stevenson that her application for disability retirement was denied.

5. Stevenson appealed the denial of her application for disability retirement. Her appeal was initially heard on August 23, 2010, by Administrative Law Judge Nancy L. Rasmussen. On September 20, 2010, the Administrative Law Judge submitted a proposed decision to the Board of Administration (Board), in which she recommended that the appeal be denied.

6. On November 17, 2010, the Board remanded the case to the Administrative Law Judge for "the taking of further evidence around the medical issues presented for Ms. Stevenson."

Factual Findings Pertaining to Initial Hearing

7. After working for seven years as a correctional officer at San Quentin, Stevenson became a Parole Agent I in June 2001. Her duties involved supervising parolees and managing a caseload of 70 to 80 cases. She averaged about six hours a day in the field, visiting parolees and sometimes attending hearings. The rest of Stevenson's time was spent in the office, doing paperwork, making telephone calls and meeting parolees. The job description for a Parole Agent I includes as essential functions apprehending and arresting parolees, and disarming, subduing and applying restraints to parolees. According to Stevenson, in the rare instances when she anticipated making an arrest or encountering a safety issue, she would take another parole agent along with her. In her three and one-half years as a parole agent, she never encountered a noncompliant parolee when she was in the

field by herself. On the occasions when she had another agent with her, there were maybe four or five times when a parolee was noncompliant. Stevenson never had to physically restrain a parolee during her time as a parole agent. Occasionally, there would be a minor altercation with a parolee who came to the office, but there were plenty of parole agents on hand to deal with the situation. Certain physical requirements listed in the job description, like climbing and crawling, were rarely, if ever, called for outside of tactical training.

8. On October 18, 2004, Stevenson was lifting and moving some heavy boxes in her office when she felt a pull or "crunch" in her left shoulder area. She was able to continue working, but when she woke up the next morning, she felt pain in her left shoulder blade and back. The pain extended to her neck and down her left arm. Stevenson went to work but the pain persisted. She also had numbness in her left arm. After a couple of days, she sought medical attention at the emergency room at Kaiser in Antioch. Stevenson received an arm sling and ibuprofen. Her symptoms continued, and on November 5, 2004, Stevenson was seen in the Occupational Medicine clinic at Kaiser. Jaspal S. Sidhu, M.D., completed a Doctor's First Report of Occupational Injury or Illness that day, in which he listed a diagnosis of Trapezius Sprain/Cervical Radiculitis. Dr. Sidhu took Stevenson off work until November 10, 2004.

9. Stevenson continued to be treated by Dr. Sidhu. Her symptoms included pain in the left trapezius and periscapular area, with radiation down the left arm to her fingers. Stevenson last worked as a Parole Agent I on January 7, 2005, after which she was off on temporary disability. During 2005, Stevenson saw physiatrist James D. Fontaine, M.D., and orthopedic surgeon Joseph M. Grant, M.D. She underwent physical therapy and was prescribed an anti-inflammatory medication, Vicodin and Flexeril. Stevenson had an epidural steroid injection, which did not provide any pain relief.

10. On October 18, 2005, in connection with Stevenson's workers' compensation claim, Dr. Sidhu issued a Primary Treating Physician's Permanent & Stationary Report. On September 26, 2006, agreed medical examiner Dominic Tse, M.D., conducted an orthopedic evaluation. These reports, as well as the reports of Dr. Fontaine and Dr. Grant, are in evidence as hearsay only.

11. In her workers' compensation case, Stevenson received permanent disability benefits. She was considered a qualified injured worker, unable to return to her usual and customary occupation as a parole agent.

12. The only non-hearsay medical evidence is from orthopedic surgeon John R. Lang, M.D., who performed an independent medical examination on October 30, 2006, at the request of CalPERS. Dr. Lang issued a report dated November 7, 2006, and he testified at the hearing. In his report, Dr. Lang described Stevenson's complaints as follows:

> Two years post-incident she states she still has pain on an occasional basis which "comes and goes." This may last three to four minutes. If it lasts longer she takes an

> anti-inflammatory. This may be increased by family stress, such as her husband recently being diagnosed with cancer of the esophagus and undergoing surgery. She takes Vicodin "rarely" and the same for the anti-inflammatory. As regards Flexeril, a muscle relaxant, she "doesn't like it." She describes "numbness" in her hand and a burning type of pain. She feels that her hand "crumples" and there is burning, specifically, in the fourth and fifth fingers of the upper left extremity. This usually occurs when there is more in the way of neck pain. Overall, symptoms are present 60 percent of the time. . . .

Dr. Lang examined Stevenson and reviewed x-rays of the cervical spine taken September 26, 2006, and a September 6, 2006, report from Dr. Sidhu. Dr. Lang's diagnosis was cervical syndrome with left upper extremity radiculopathy (one grade triceps weakness/ C7 nerve root). In his report, he discussed his findings and conclusions as follows:

> Based on review of the submitted information, and current evaluation and examination, the history would indicate that this examinee experienced cervical symptoms accompanied by left upper extremity symptomatology secondary to an isolated lifting incident when she was lifting a number of boxes on a particular day. From my understanding, there was minimal response to evaluation and treatment, which led to an MRI. Unfortunately, neither the MRI report nor the actual films were submitted for this evaluation. Be that as it may, the examinee currently exhibits specific objective findings of one grade triceps weakness in the left upper extremity and a three-quarter inch decreased circumference of the left arm. These two findings are consistent with a C7 radiculopathy. There are no current sensory findings. The grip difference is rather minimal, and she is right-hand dominant. Based upon the other finding of note, which is a full range of cervical spine motion, but with symptoms localized only to the paracervical region with Spurling maneuver, i.e., a negative test but no production of radicular symptomatology, it is my opinion that the radiculopathy is stable. This means that there has probably not been change in the motor status over the last number of months.
>
> Apparently it was decided by her treating physician at Kaiser Occupational Medicine that she was unable to return to her usual and customary occupational duties. Review of the physical occupational demands of a Parole Agent I would indicate there is the possibility of engaging in altercations, arresting parolees, carrying a weapon, and essentially acting as a law enforcement officer. In my opinion, someone required to

> do these particular jobs should have no glaring neurological deficits. That being said, a one grade loss of strength is not that significant in my opinion. This, coupled with a negative Spurling test, would indicate there is a stable situation in the cervical spine. For those reasons, again not having available the MRI, in my opinion, this individual is not substantially disabled from the performance of her usual and customary duties.

13. Dr. Lang issued a supplemental report dated January 3, 2007, following his review of two MRI reports, the results of an electromyogram (EMG) and the records of Dr. Sidhu, Dr. Grant, Dr. Fontaine and Dr. Tse. Dr. Lang's opinion on the issue of substantial disability remained unchanged. He explained:

> Review of all submitted information, including medical records from the various evaluating/treating physicians, they are all consistent with the problem emanating from the cervical spine. However, no specific study revealed any specific pathoanatomy that could be directly considered as specific causative of the member's symptomatology. In the examination of 11/2/2006, it indicated 1 grade weakness of the left triceps, which would indicate possible C7 nerve root involvement. Her considerations have been C7 and/or C8 nerve root involvement.
>
> However, as noted by Dr. Fontaine in a later evaluation, the symptoms had subsided, he considered her neurological examination unremarkable and considered the member permanent and stationary.
>
> Dr. Sidhu and Tse were of the opinion that the member could not return to her usual and customary job duties as a parole agent. In my opinion, that would have been a reasonable consideration and conclusion in the clinical course, however, the member did stabilize. In my opinion, the member exhibited certain findings of cervical discomfort with motion and 1 grade triceps weakness, but overall, taking into consideration that the member must, on occasion, be called upon possibly to arrest a parolee, my opinion remains the same the member could return to her usual and customary occupational duties.

14. In his testimony, Dr. Lang pointed out that Stevenson's neck discomfort improved significantly without treatment, and that medical reports subsequent to Dr. Lang's examination do not reflect a worsening of her symptoms. (These additional reports are hearsay.) While acknowledging that Stevenson has some pain and left ulnar nerve neuropathy, Dr. Lang maintains that these symptoms are not disabling and her condition would not get worse if she returned to work as a parole agent. Hearing Stevenson's

testimony about the actual physical demands of her job, compared with the job description for a Parole Agent I, only reinforced Dr. Lang's opinion that she is not substantially unable to perform the usual duties of her position.

15. From January 2005 to January 2008, Stevenson was off work. For some of this time, she attended school to study theology. On January 27, 2008, Stevenson returned to work as a Parole Service Associate. The Department of Corrections gave her the choice of returning to work as a Parole Agent I or as a Parole Service Associate, and she chose the latter job because she did not think she could perform the duties of a parole agent. The Parole Service Associate job was a sedentary one involving typing and filing all day. Stevenson had discomfort in her shoulder, neck and back, and her left arm and hand would get numb. She "went out" from the Parole Service Associate job on August 15, 2008, because she could not tolerate these symptoms. Stevenson has not worked since then. On April 1, 2010, she resigned from the Department of Corrections. Stevenson is going to school, and as part of her doctoral work she teaches theology. When she turns 50 on May 19, 2011, she will be eligible for service retirement.

16. Stevenson is convinced she cannot work as a parole agent. She believes if she tried to physically restrain a parolee she would be jeopardizing herself and the parolee. Stevenson is concerned that she would risk further injury to her shoulder. She has not tried to qualify with a handgun since her October 2004 injury, but she does not believe she could do so. Although she draws her gun with her right hand, Stevenson uses her left hand to steady her right hand, and her left hand "numbs up."

17. Stevenson takes Vicodin and codeine occasionally for pain in her neck and left upper extremity. At the time of the hearing, she had last taken Vicodin over a month earlier and codeine about two weeks earlier.

Factual Findings Pertaining to Remand

18. Following the Board's remand order, CalPERS requested J. Hearst Welborn, M.D., to perform an additional independent medical evaluation of Stevenson. Dr. Welborn is a board certified orthopedic surgeon. He examined Stevenson on April 25, 2012, and reviewed Stevenson's medical records and the job requirements of a Parole Agent I. He issued a written report and testified at the hearing regarding his findings.

19. Dr. Welborn diagnosed Stevenson with degeneration of the cervical intervertebral disc. He noted that she did not exhibit "significant stenosis on her C spine MRI and no neurologic loss or weakness." Dr. Welborn determined that this condition "only mildly interferes with her ability to use her neck." Dr. Welborn also diagnosed Stevenson with a mild case of cubital tunnel syndrome. He concluded that these conditions did not render Stevenson substantially unable to perform her duties as a parole agent.

20. Stevenson submitted two medical reports pertaining to her diagnosis of cubital tunnel syndrome. The first report is a qualified medical evaluation for Stevenson's workers'

compensation case, performed by Christopher Chen, M.D., on August 21, 2009. Dr. Chen is a specialist in anesthesiology and pain management. He concluded that Stevenson is "unable to grip forcibly with her left hand." Dr. Welborn disagrees with Dr. Chen's conclusion, and notes that Stevenson is "right hand dominant." The second report is from James Han, M.D, D.O. Dr. Han's report does not draw any conclusions regarding Stevenson's ability to perform her job duties.[1]

21. Dr. Welborn's conclusions are found to be more persuasive than those of Dr. Chen. Dr. Chen did not testify at the hearing and he was not subject to cross-examination. Additionally, his 2009 report was prepared in the context of a workers' compensation case pertaining to Stevenson's work as a Parole Service Associate.

22. Stevenson is dissatisfied with Dr. Welborn's evaluation. She thought that he was distracted during his examination of her, and she pointed out errors in his report regarding her history. Stevenson continues to feel that her symptoms, particularly in her neck and left hand, preclude her from performing her duties as a parole agent. Stevenson genuinely believes that she cannot work as a parole agent without placing herself or the public at risk of harm.

LEGAL CONCLUSIONS

1. Under Government Code section 21151, Stevenson would be entitled to a disability retirement if she is "incapacitated for the performance of duty as the result of an industrial disability." The issue in this proceeding is whether Stevenson is incapacitated for the performance of her duties as a Parole Agent I. The Court in *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, held that to be "incapacitated for the performance of duty" within the meaning of Government Code section 21022 (the pre-1996 designation of section 21151), the applicant must be substantially unable to perform the usual duties of his or her position.

2. The evidence does not support a determination that Stevenson is substantially unable to perform the usual duties of a Parole Agent I. Dr. Lang provided competent and persuasive medical evidence that she is not substantially unable to perform her usual job duties. Dr. Welborn's most recent evaluation of Stevenson's condition is consistent with the conclusions of Dr. Lang. This is not to say that Stevenson would not experience discomfort if she were to return to work, but her symptoms would not preclude her from doing her job. The only medical evidence to the contrary is hearsay.

3. Stevenson has not met her burden of proving that she is incapacitated for the performance of duty within the meaning of Government Code section 21151.

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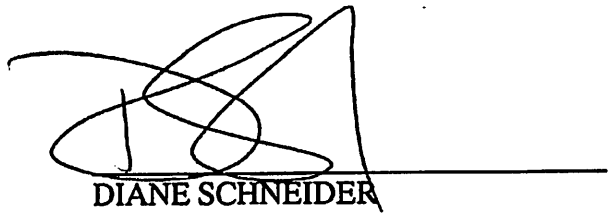
[1] From the report, it appears that Stevenson was referred to Dr. Han for nerve conduction and EMG studies.

ORDER

The application of respondent Brenda Stevenson for disability retirement is denied.

DATED: 11/2/12



DIANE SCHNEIDER
Administrative Law Judge
Office of Administrative Hearings