

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Industrial  
Disability Retirement of

KERRY E. CARTER

Respondent,

and

DEPARTMENT OF CORRECTIONS &  
REHABILITATION, CORRECTIONAL  
INSTITUTION, TEHACHAPI,

Respondent.

Case No. 9775

OAH No. 2013010791

**PROPOSED DECISION**

This matter came on regularly before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California, at Bakersfield, California, on June 5, 2013.

Petitioner, California Public Employees' Retirement System (Petitioner or CalPERS) was represented by Renee Salazar, Staff Counsel in CalPERS' Legal Office.

Kerry E. Carter (Respondent) appeared and represented herself.

No appearance was made by or on behalf of Respondent, Department of Corrections & Rehabilitation, Correctional Institution, Tehachapi.

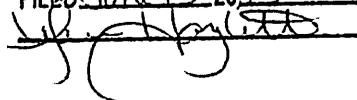
Oral and documentary evidence was received. The record was closed on the hearing date, and the matter was submitted for decision.

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CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM

FILED: June 13, 2013



## FACTUAL FINDINGS

1. At and around the time of her application for industrial disability retirement, Respondent was employed by the Department of Corrections & Rehabilitation, Correctional Institution, Tehachapi as a registered nurse. In that capacity, she is a state safety member of CalPERS pursuant to Government Code section 21151.

2. On April 20, 2008, Respondent submitted to CalPERS an application for disability retirement which was received on April 22, 2008. The application was based on her claim of cardiac arrhythmias and fibromyalgia. CalPERS denied the application on October 13, 2009. On November 9, 2009, Respondent filed a timely appeal of the decision.

3. Respondent's separation date from her employment with the Department of Corrections is August 2, 2005.

4. Respondent was diagnosed with fibromyalgia in 1996. She was prescribed a number of medications, but she chose to discontinue them because she was unhappy with the side effects they caused. Instead, she treated the condition with chiropractic, massage, relaxation, aquatic (hot tub) therapy, and herbal medications. In an independent medical rheumatological examination on July 29, 2009, she told Mark Borigini, M.D. that she believed her disability was based on her cardiac condition, and not on fibromyalgia.

5. Respondent has a lengthy history of mitral valve prolapse, palpitations, and supraventricular arrhythmias. On August 30, 2004, Anil Kumar, M.D. diagnosed her with, among other things, episodic chest discomfort with predominantly atypical features for angina pectoris, longstanding history of mitral valve prolapse, exertional dyspnea, chronic edema, and dyslipidemia. A subsequent exercise treadmill test performed by Dr. Kumar was abnormal, and echocardiogram showed early systolic mitral valve prolapse with minimal mitral regurgitation. On November 4, 2004, an adenosine myocardial perfusion scan was negative showing a low likelihood of significant coronary artery disease. However, exercise-induced SVT (sinoventricular tachyarrhythmia) was also noted. Respondent then underwent an event monitor test that resulted in findings of sinus rhythm, sinus tachycardia, and recurrent non-sustained supraventricular tachycardia with rates up to 150 beats per minute during complaints of palpitations.

6. Following Dr. Kumar's findings, Respondent was referred to electrophysiologist, Koonlawee Nademanee, M.D. Dr. Nademanee treated Respondent with ablation, attempting 17 "burns" to eradicate her arrhythmia. Her condition improved for approximately two months, but the stressors at work began to again precipitate chest flutters, chest pain and other cardiovascular symptoms. Dr. Nademanee considered a second ablation but believed the risks of the procedure outweighed the potential benefits.

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7. On October 26, 2005, in connection with a workers compensation claim, Jeffrey A. Hirsch, M.D. confirmed the documentation of recurrent non-sustained supraventricular tachycardia with rates up to 150 beats per minute. Inderal controlled only the palpitations and shortness of breath, but not the tachycardia. Dr. Hirsch found Respondent to be permanently partially disabled and opined that she was unable to return to her "usual and customary job."

8. On October 27, 2006, Harvey Alpern, M.D. performed a cardiology qualified medical evaluation in connection with Respondent's workers compensation claim. Dr. Alpern performed an extensive record review and a performed a physical examination. He diagnosed recurrent supraventricular tachycardias, improved with ablation and stopping work; atypical chest pain without evidence of ischemia; obesity; and status post thyroid removal due to nodular thyroid<sup>1</sup>. Dr. Alpern wrote:

I believe the stress in her work resulted in increased frequency of chest wall pain and also resulted in superventricular [*sic*] arrhythmia on a frequent basis. The frequency has decreased since both ablation and since stopping work. Stopping work seems to be markedly beneficial in decreasing the frequency of her arrhythmias which resulted in palpitations and in occasional dizziness.

[¶] . . . [¶]

Causation of her arrhythmia appears to be that of marked stress in her work associated with possible underlying mitral valve prolapse which would make the stress effects more prominent in the light of the mitral valve prolapse.

9. On January 28, 2009, T. Anthony Don Michael, M.D. performed a cardiological disability evaluation on Respondent at CalPERS' request. Dr. Michael performed an electrocardiogram a physical examination.

10. Dr. Michael testified at the administrative hearing, but his testimony called into question both his credibility as a witness and the accuracy of his report. For example:

a. Dr. Michael wrote that the ablation had been successful. He later wrote that, after the ablation treatment, Dr. Nademane told Respondent that she could not be further treated safely. At the hearing, Dr. Michael testified that it was Respondent, rather than Dr. Nademane, who was reluctant to undergo a second ablation.

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<sup>1</sup> According to Respondent, the thyroidectomy was only partial.

b. Dr. Michael wrote that Respondent's obesity could be causing her shortness of breath, and that her obesity could prevent Respondent from running on the job<sup>2</sup>. He ignored the fact that her shortness of breath and inability to run was more likely to have been the failure of the ablation to correct the arrhythmias.

c. In his report, Dr. Michael wrote: "In my professional opinion, she is not presently substantially incapacitated for the performance of the usual duties of her current position. She has undergone successful ablation for her tachycardia. Her mitral valve prolapse may cause occasional chest pain and palpitations, but these are not incapacitating." Dr. Michael signed the report under penalty of perjury. However, at the hearing, he testified that he could opine only on Respondent's medical condition, and that he had no opinion as to whether she was substantially incapacitated for the performance of the usual duties of her position as a registered nurse in a men's correctional facility. Yet, in a May 9, 2009 report after being provided the records of the other physicians who have seen Respondent since 2004, Dr. Michael did not change the opinion he wrote in his earlier report.

11. The numerous inconsistencies in Dr. Michael's two reports and his testimony reflect a lack of trustworthiness in all three, and all three are given little weight.

12. Respondent credibly testified that there was much more to her job at the correctional facility than the general duties of a registered nurse reflected in the California Correctional Institution Job Description. For example, she had to run down lengthy corridors over 200 yards long, often times in heat while carrying a heavy bag. She had to run across the expansive yard inhabited by numerous inmates. She had to climb stairs to reach an inmate who was "down," and then get on the floor to treat him or help lift him. She had to see 50-60 patients per day, and release restrained inmates, every 15 minutes, one restraint at a time in order to minimize the risk of the inmate becoming violent. She had to work in areas where gas was used, and she was the nurse on duty during "cell extractions," a process that was frequently very dangerous. She also had to travel for a week at a time to teach off-site classes. Each of these activities was adversely affected by the arrhythmias that had remained after the only partially effective ablation treatment.

## LEGAL CONCLUSIONS

1. Cause exists to sustain Respondent's appeal of CalPERS' determination that Respondent is not substantially incapacitated from her usual duties as a Registered Nurse with the California Department of Corrections and Rehabilitation, pursuant to Government Code sections 20026, 21151, subdivision (a), and 21156, as set forth in Findings 1 through 12.

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<sup>2</sup> In addition to being a cardiologist, Dr. Michael has run a weight loss clinic for many years.

2. Government Code section 20026 states:

“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, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

3. Government Code section 21151, subdivision (a) states:

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

4. Government Code section 21156, subdivision (a) (1), states in pertinent part:

If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, that the member in the state service 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.

5. In order to be eligible for disability retirement, an applicant must have a “substantial inability” to perform his “usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.) “Substantial inability” requires more than only difficulty in performing the tasks common to one’s profession. In *Hosford v. Board of Administration of the Public Employees’ Retirement System* (1978) 77 Cal.App. 3d 854, a case involving a state traffic officer with the California Highway Patrol, who held the rank of Sergeant; the applicant established that he could run, but inadequately, and that his back would probably hurt if he sat for long periods of time, or apprehended a subject escaping on foot over rough terrain or over and around obstacles. The court found that this was insufficient to support a finding of disability. The court stated:

Hosford argues that the “Typical Physical Demands” document requires that he be able to perform these functions “safely and effectively.” Both terms are highly subjective. Even officers in top physical condition may suffer injuries in performing these tasks, and effectiveness certainly cannot be equated with brute strength. Each officer must be expected to have an awareness of his own limitations in facing emergency situations.

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6. In *Dillard v. City of Los Angeles* (1942) 20 Cal.2d 599, 602, the court stated:

Pension laws should be liberally construed and applied to the end that the beneficent policy thereby established may be accorded proper recognition.  
(Citations.)

7. Drs. Kumar, Nademane, and Hirsch all found Respondent highly symptomatic in the wake of the partially successful ablation. Dr. Nademane believed further ablation was not worth the risk to the patient. Drs. Hirsch and Alpern agreed that Respondent was at least partially incapacitated from performing her usual duties as a registered nurse in a men's correctional institution. The main dissenting opinion came from the physician hired and paid by CalPERS. That physician's report and testimony were too inconsistent to warrant significant weight.

8. Respondent's duties in a men's correctional institution went far beyond those of a registered nurse in a non-institutional setting. She suffered from ongoing arrhythmias and tachycardia that prevented her from effectively carrying out her duties. Her cardiac condition rendered her substantially incapacitated from performing her usual duties.

9. Respondent did not prove that she is substantially incapacitated from performing her usual duties due to fibromyalgia. Benefits are granted on the basis of her cardiac condition alone.

#### ORDER

1. Respondent's appeal of Petitioner's determination that Respondent is not eligible for and entitled to disability retirement benefits, pursuant to Government Code sections 20026, 21151 and 21156, is sustained.

2. Respondent shall be provided with appropriate disability retirement benefits forthwith.

Dated: June 12, 2013

  
H. STUART WAXMAN  
Administrative Law Judge  
Office of Administrative Hearings