

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

**BEFORE THE  
BORARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

**In the Matter of the Application for  
Industrial Disability Retirement of:**

Case No. 2012-756

**JACQUELINE GUILLORY,**

OAH No. 2012110476

**Respondent,**

**and**

**CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND  
REHABILITATION,**

**Respondent.**

**PROPOSED DECISION**

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, heard this matter in Glendale, California on March 7 and August 28, 2013. Petitioner California Public Employees' Retirement System (CalPERS) was represented by Patricia B. Miles, Senior Staff Counsel, on the first hearing day, and by Elizabeth Yelland, Senior Staff Counsel, on the second hearing day. Patricia Castillo, Associate Government Program Analyst, and Enrique Martin, Staff Service Analyst, both appeared on behalf of respondent California Department of Corrections and Rehabilitation on the first hearing day. Respondent Jacqueline Guillory (Guillory) represented herself.

The matter was submitted for decision on August 28, 2013. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

**FACTUAL FINDINGS**

1. The Statement of Issues was signed on behalf of petitioner by Anthony Suine in his official capacity as Chief, Benefit Services Division of CalPERS.

2. Respondent Guillory is a registered nurse and a certified family nurse practitioner employed by Department of Corrections and Rehabilitation, California State Prison Los Angeles County since May 2007. Guillory is a local safety member of CalPERS pursuant to Government Code section 20422. On September 15, 2011, Guillory applied for

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RETIREMENT SYSTEM  
FILED Sept 30 2013  
*[Signature]*

industrial disability retirement. On her application, Guillory listed her disabilities as “bilateral carpal tunnel syndrome, bilateral elbow tendonitis—lateral epicondylitis & bilateral shoulder impingement.” (Ex. 3.) Guillory listed her limitations as “no repetitive wrist motion, no lifting over shoulders, no lifting/pushing/or pulling of items, carts, meds, or people over 10lbs.” (Ex. 3.)

3. By letter dated June 25, 2012, CalPERS notified Guillory that her application for industrial disability retirement was denied. Guillory filed an appeal on July 22, 2012. Thereafter, these proceedings ensued.

4. An “Essential Functions List” indicates that Guillory’s duties of a registered nurse working in the Department of Corrections and Rehabilitation include assessing patients’ physical and psychosocial status, and taking and recording their medical histories and vital signs. She is responsible for administering medications, injections, treatments, and therapeutic agents. She is responsible for performing diagnostic testing, dressing wounds, and applying immobilization devices. She prepares documentation and reports on nursing care. She collaborates with physicians and other health care providers. Guillory performs her duties while standing or walking with frequent, repetitive gross and fine motor motions of twisting, turning, pushing, pulling, reaching, gripping, and grasping. (Ex. 9.)

5. On a typical work day, the pharmacy provides Guillory with a large bag containing packages of medications for her distribution to each inmate/patient requiring medication. Guillory removes each medication from packaging typically consisting of either hard plastic wraps that must be punched out to retrieve a tablet or bottles of liquids with safety caps to which a downward twisting pressure must be applied to open. Approximately four hours per work shift are required for Guillory to prepare medications for distribution to their intended recipients. Medical records for each inmate patient are located in binders weighing, in some instances, up to seven and a half pounds. Guillory must retrieve those binders from shelving at or above her head to make handwritten notations. Guillory requires approximately three hours per work shift to make handwritten entries. The remainder of Guillory’s work shift is spent triaging medical issues, providing wound care, administering injections, and performing other ministerial tasks.

6. In August 2009, Guillory noted pain in her right hand, wrist, elbow, shoulder, and neck. She additionally observed a lump on her right wrist. She treated herself with Motrin, which appeared to resolve the pain she was experiencing. Guillory, however, developed intermittent and gradually increasing pain, numbness, and tingling of her upper right extremity, which in turn caused her difficulty sleeping at night. She again observed the lump on her right wrist.

7. For several months, Guillory’s condition was treated non-surgically. Then, in June 2010, Dr. Sohell Younai performed endoscopic surgery on Guillory for right carpal tunnel release, right deQuevain release, and excision of a ganglion cyst.

8. Post-surgery, Guillory received physical therapy. Guillory returned to work with restrictions limiting her lifting to objects weighing less than 10 pounds. In January 2011, Guillory took leave when she developed a respiratory infection. At around this time, in connection with a workers' compensation claim, Dr. Mark Ganjianpour examined Guillory. Dr. Ganjianpour's April 4, 2011 Qualified Medical Examiner (QME) Report, which was not produced at the hearing, but which is excerpted in an Orthopaedic Independent Medical Evaluation Report (IME Report),<sup>1</sup> indicated the following:

**IMPRESSSION: right hand carpal tunnel syndrome treated by Dr. Youani and endoscopic carpal tunnel release with some improvement of these symptoms, although occasional numbness and tingling is present. Right hand volar ganglion cyst removal by Dr. Younai through a transverse incision with some sensitivity over the superficial radial nerve distribution over the dorsal aspect of the thumb and scar sensitivity. Decreased grip strength on the right side. Possible left hand carpal tunnel syndrome as a result of continuous trauma. Bilateral upper extremity tendinitis radiating up to the shoulder with some improvement after receiving medication for recent bout of asthma attack.**

(Ex. 13.)

9. One month later in a May 2, 2011 QME Follow-up Report, Dr. Ganjianpour reportedly noted the following: "At this time, I believe that she has reached maximum medical improvement and should be considered permanent and stationary." Dr. Ganjianpour recommended Guillory's "return back to her job as a nurse" with "restrictions of maximal lifting up to 10 pounds, no repetitive gripping and grasping, no repetitive torquing or pushing and pulling." (Ex. 13.)

10. Guillory did not, however, return to work. She had a non-work related medical condition requiring surgery and a prolonged period of recovery. Guillory was on leave from work between June 2011 and March 2012. During much of that time, she repeatedly complained about edema, stiffness, numbness, pain, and limited ranges of motion. On July 12, 2011, Guillory reportedly made complaints to Dr. Younai about her left extremities: "patient complaining of left hand numbness and tingling and right elbow pain. Complains of weakness of left hand." Dr. Younai reportedly diagnosed left carpal tunnel syndrome. According to the IME Report, Dr. Younai, in a September 13, 2011 Physician Report on Disability, which was not produced at the hearing, indicated that Guillory should be considered substantially incapacitated from performance of her usual duties. Dr. Younai reportedly imposed work restrictions precluding Guillory from performing repetitive wrist turning motion activities such as writing and lifting, pushing, or pulling more than 10 pounds. Dr. Younai additionally indicated that Guillory lacked sufficient strength for daily task and emergency situations. Dr. Younai reported that Guillory's incapacity is permanent.

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<sup>1</sup> At the request of CalPERS, Dr. Pierre Hendricks examined Guillory and prepared the IME Report. The IME Report, which was admitted in evidence as Exhibit 13, summarizes or excerpts several earlier reports that were not produced at the hearing.

11. Four months later on January 10, 2012, Dr. Younai reportedly noted the following in Guillory's medical records.

Subjective complaints: "occasional left hand pain and tightness. Right thumb and wrist pain. Bilateral elbow and shoulder pain right >left. Bilateral shoulder pain increased with range of motion/lifting. Right elbow pain improved since last visit and treatment. Increased right hand nocturnal numbness." Objective findings: "left hand with mild edema. Right thumb and lower wrist tenderness, on palpation. Bilateral shoulder tenderness right >left." The diagnoses are: radial styloid tenosynovitis, ganglion of joint, Tempsumpvotos pf Jamd (sic) wrist not elsewhere classified, carpal tunnel syndrome, enthesopathy site not otherwise specified, lateral epicondylitis." The treatment plan is: "continue wearing splints and observe." The disability is "no lifting/pulling >5 pounds, no repetitive wrist motion twisting rotation torquing lifting of upper extremities."

(Ex. 13.)

12. Dr. Younai reportedly performed endoscopic left carpal tunnel release on April 13, 2012. In an August 19, 2013 Primary Treating Physician Progress Report, Dr. Younai has indicated Guillory's work status as follows: "no lift/push with right and left hands >10lbs." (Ex. E.)

13. Drs. Ganjianpour and Youani did not testify at the hearing.

14. Dr. Hendricks, who prepared the IME Report, examined Guillory, administered several diagnostic tests to her, and reviewed her medical records. In the IME Report, Dr. Hendricks concluded that Guillory "is presently not substantially incapacitated for the performance of her usual duties as a registered nurse for the California Department of Corrections." The following explanation accompanies Dr. Hendricks' conclusion:

She has bilateral carpal tunnel syndrome that was treated with right carpal tunnel release and steroid injection of the left carpal tunnel with improvement. She does have residual decreased sensation in both hands that should not preclude work activities. She had right lateral epicondylitis that was successfully treated by steroid injection with no objective evidence of residual impairment. She had right volar wrist ganglion cyst excision with no objective evidence of residual impairment. She had a release of the right wrist first dorsal compartment for treatment of deQuervain's tenosynovitis with no objective evidence of residual impairment. She had a steroid injection to the right shoulder subacromial space for treatment of right shoulder impingement syndrome with no objective evidence of residual impairment.

(Ex. 13.)

15. Dr. Hendricks found that during his examination, Guillory withheld her best efforts during a grip strength evaluation and that she made claims about tendons of her right shoulder and both hands that were inconsistent with her diagnosis suggesting that she embellished her symptoms. No medical evidence was offered to refute Dr. Hendricks' findings.

16. Dr. Hendricks testified at the hearing consistent with the IME Report he prepared. Dr. Hendricks additionally opined that the medical evidence does not indicate that Guillory has severe pain precluding her performance of her usual duties. Dr. Hendricks' expert medical opinion was that any mild pain Guillory experiences constitutes an annoyance that does not affect her job performance and that her experience of any moderate pain would require additional time for her to perform her usual duties.

17. Guillory testified that her surgery "helped some," but that she still experiences pain, which she described as moderate to severe. She variously testified that she has adopted a grin-and-bear-it resignation and that she is "no longer able to tolerate what is going on with . . . [her]." She tries not to use her right arm and she uses her left arm more frequently.

## LEGAL CONCLUSIONS

1. Absent a statutory presumption, an applicant for disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) "Preponderance of the evidence means evidence that has more convincing force than that opposed to it." (Citations.) . . . [T]he sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) (Emphasis in text.) In meeting the burden of proof by a preponderance of the evidence, the applicant "must produce substantial evidence, contradicted or un-contradicted, which supports the finding." (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 339.)

2. The California Public Employees' Retirement Law provides that "[a]ny . . . local safety member incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability . . . regardless of age or amount of service." (Gov. Code, § 21151, subd. (a).)

3. "Disability" means "inability to engage in any substantial gainful occupation by reason of any physical or mental impairment." (Gov. Code, § 20027) An "industrial disability" is a disability resulting from an "injury or disease arising out of and in the course of the [employee's] employment. (Gov. Code, § 20046.)

4. "Incapacitated for the performance of duty" means that an applicant must have a "substantial inability" to perform his or her "usual duties." (*Mansperger v. Public*

*Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) "Substantial inability" means more than difficulty in performing the tasks common to one's profession. For example, *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, involved a California Highway Patrol sergeant who suffered a back injury lifting an unconscious motorcycle accident victim. This injury aggravated previous injuries suffered in two prior accidents. The officer established that he experienced pain from prolonged sitting. The court found the sergeant's physical impairments insufficient to support a finding of disability because the sergeant was substantially able to perform his usual duties as a highway patrol sergeant although he experienced back pain.

5. Whether an individual is substantially unable to perform his or her "usual duties" requires an examination of the duties actually performed by the individual. Generalized job descriptions and physical standards are not controlling. Infrequently performed duties are not controlling. Contentions that a task should be avoided as a prophylactic restriction are to be rejected as the court did in the *Hosford* case. The highway patrol sergeant in the *Hosford* case claimed that his back injuries created an increased risk for further injury. In rejecting that claim, the court stated that the sergeant's "assertion does little more than demonstrate his claimed disability is only prospective (and speculative), and not presently in existence." (*Id.* at 863.)

6. The determination of whether an applicant is qualified for disability retirement must be made on the basis of "competent medical opinion." (Gov. Code, § 20026.)

7. A medical conclusion of permanent disability under the workers' compensation system is not the equivalent of "incapacitated for the performance of duty" under the public employees' retirement system. (*Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208.) As explained in *Reynolds*, the workers' compensation scheme and the public employees' retirement system have distinct objectives requiring different eligibility standards. The objective of workers' compensation is "to provide adequate compensation for employees, public or private, who are injured in the course and scope of their employment while such employees are disabled and incapable of earning a living." (*Id.* at 213.) The public employees' retirement system, on the other hand, was "adopted primarily for the betterment of government. Its objective is not only to recognize the public obligation to certain employees who after long and faithful service become incapacitated by age or physical disabilities, but it is also to make certain that these employees will be replaced by more capable employees for the betterment of the public service without undue hardship on the employees removed (Citations.)" (*Id.*)

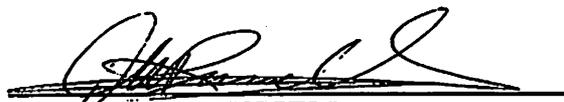
8. Guillory has not sustained her burden of establishing that she has a substantial inability to perform her usual duties as a registered nurse in the Department of Corrections and Rehabilitations. Summaries and excerpts from reports by her treating physicians—Drs. Younai and Ganjianpour—were incorporated into the IME report prepared by CalPERS' reviewing physician, Dr. Hendricks. Those summaries and excerpts indicated that Drs. Younai and Ganjianpour found Guillory to be disabled. It is unclear whether Dr. Younai or Dr. Ganjianpour's findings were limited to Guillory's workers' compensation claim. Neither

Dr. Younai nor Ganjianpour was present at the hearing to explain their findings and medical conclusions regarding Guillory's condition. Dr. Hendricks, on the other hand, provided persuasive testimony elucidating Guillory's symptoms, cause, treatment, and physical limitations. Dr. Hendricks explained how during medical testing and evaluations Guillory exhibited sub-maximal gripping effort. Dr. Hendricks explained how objective medical evaluations indicated that whatever post-operative pain Guillory experienced, that pain did not rise to a level of severity precluding her continuing performance of her usual work duties. Dr. Hendricks' credible, competent medical opinion refuted the disability findings of Drs. Younai and Ganjianpour. The totality of the evidence does not establish that Guillory is qualified for industrial disability retirement.

**ORDER**

Respondent Jacqueline Guillory's appeal of the decision by the California Public Employees' Retirement System denying her application for industrial disability retirement is denied.

DATED: September 27, 2013

  
JENNIFER M. RUSSELL  
Administrative Law Judge  
Office of Administrative Hearings