

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Of:

JENNIFER L. RUSHLOW,

Respondent,

and

DEPARTMENT OF STATE HOSPITALS,
ATASCADERO STATE HOSPITAL,

Respondent.

Case No. 2013-0162

OAH No. 2013050708

PROPOSED DECISION

This matter came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in San Luis Obispo, California, on October 15, 2013.

Rory J. Coffey, Senior Staff Counsel, represented Complainant Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Jane H. Oatman, Attorney at Law, represented Jennifer L. Rushlow (Respondent).

Respondent Department of State Hospitals (Department), Atascadero State Hospital (ASH) did not appear at the hearing.

Complainant seeks to deny Respondent's disability retirement application on grounds that the medical evidence does not support her claim of disability based on her psychological (post-traumatic stress disorder) condition. Respondent asserts that she is disabled for the performance of her duties.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in his official capacity.

2. At the time Respondent filed her application for disability retirement, August 22, 2011, she was employed by the Department as a psychiatric technician at ASH. By virtue of her employment, Respondent is a state safety member of CalPERS.

3. Respondent started her employment with ASH on January 8, 2008. As a psychiatric technician, Respondent was responsible for maintaining order and supervising mentally disordered offenders who are patients at ASH, for providing a basic level of general behavioral psychiatric nursing care to the patients, for participating in the overall psychiatric treatment program of the patients, and for supervising other psychiatric technicians. Many of the patients are or can become violent, and are housed in approximately 34 separate units in ASH.

4. On June 7, 2010, Respondent was the victim of a vicious attack by a patient at ASH. A five-foot, eleven-inches, 300-pound male patient, upset at a female staff member who had denied him certain privileges for engaging in misconduct, rushed into a room where Respondent was talking to the other staff member. As he rushed into the room, the patient shoved the door into Respondent and pinned her against the wall. The patient proceeded to strike the other staff member, to pull her by the hair, and to bite her. It appeared to Respondent that the man was trying to kill her coworker. The woman was screaming and was trying to get away. Respondent, who is five-foot, seven-inches and who weighed about 120 pounds at the time, came to the aid of her coworker. She jumped on the man's back and tried to place him on a neck hold. As the man tried to get her off him, Respondent clung to his body to keep from being hit. Her coworker ran into a restroom and locked the door. Respondent screamed for help from other coworkers, but the door to the small room was locked. Respondent struggled with the man, and after a while was able to open the door. About ten staff members rushed in to subdue the patient.

5. Respondent suffered injuries to her shoulder, face, hand, and groin, and was treated at the medical surgical unit at ASH. She received further medical treatment at the clinic used by ASH for on-the-job injuries, Med Stop.

6. Respondent was off work for about one month, and on desk assignment for about three weeks. ASH does not have a modified work assignment, and psychiatric technicians are typically sent back to their regular duties after a brief period without patient contact. After her return to work, Respondent was more sensitive to noises in the workplace, such as the slamming of doors, and became anxious as soon as she was nearing the hospital. She suffered panic attacks, was often shaking, her thoughts were often racing and she lost focus on multiple occasions. She tried to cope by excusing herself to go into the employee break room to calm herself and to cry. She also called in sick several times. The symptoms became so bad that on November 23, 2010, Respondent passed out in the room in which the attack occurred. Because of the November 23, 2010, incident, ASH required that Respondent be cleared before she could return to work. However, as noted below, her treating physician concluded she was unable to return to work.

7. Respondent was referred to Peter Robert Russell, Ph.D. (Russell), a psychologist with extensive experience treating ASH employees and who is very familiar with their work duties and environment. Dr. Russell first saw Respondent on July 17, 2010, and continues to see her for therapy once per month. Following the November 23, 2010 incident, Dr. Fisher removed Respondent from the work place, concluding that she could not perform her duties. His diagnoses at the time were Major Depression, Single Episode, Severe and Generalized Anxiety Disorder with panic attacks. His current diagnoses are Post Traumatic Stress Syndrome and Major Depression.

8. Dr. Russell opined that Respondent cannot perform the duties of a psychiatric technician. Respondent continues to suffer from recurring nightmares, flashbacks to the incident, insomnia, and panic attacks. Her symptoms are aggravated by stimuli related to or remindful of the incident. Being at ASH or in close proximity to the hospital can trigger episodes, as it has in the past. Respondent suffers from episodic dissociation in which she is not aware of the situation she is in; she has a tendency to withdraw; she has difficulties focusing on tasks. In Dr. Fisher's opinion, Respondent would present a danger to herself and others if she were to return to work at ASH.

9. In Dr. Russell's opinion, Respondent's psychiatric condition has prevented her from even discharging nursing duties similar to those performed by a psychiatric technician in another part time job.

10. Respondent is also receiving care and treatment, primarily in the form of medication management, from Nir Y. Lorant, M.D. (Lorant), a psychiatrist to whom Dr. Russell referred her. Dr. Lorant's diagnoses of Respondent are Post Traumatic Stress Disorder, Major Depression, Single Episode, Moderate, and Generalized Anxiety Disorder.

11. On March 22, 2012, Thomas F. Wylie, Ph.D., R.N. (Wylie), in his capacity as a Qualified Medical Examiner in the workers compensation matter filed by Respondent, diagnosed Respondent as suffering from Post Traumatic Stress Disorder, Chronic, and Major Depressive Disorder, and concluded that she was precluded from working in a forensic/correctional setting.

12. Andrea R. Bates, M.D. (Bates), examined Respondent at the request of CalPERS on March 22, 2012. Dr. Bates obtained pertinent history, conducted a mental status examination, and reviewed medical reports, a duty statement and a job analysis. Dr. Bates derived the following diagnoses: Depressive Disorder, Not Otherwise Specified; rule out Dysthymic Disorder; rule out Depressive Disorder; and history of Post Traumatic Stress Syndrome. Dr. Bates opined that Respondent was not incapacitated for the performance of duty, if motivated to return to work. Dr. Bates would also require a "graduation" period before Respondent could return to her usual job functions, a period in which her interaction with patients could be minimized and in which she could be "well monitored." Dr. Bates further opined that absent such transitional period Respondent may not be able to perform the duties of her position.

13. As established by the testimony of those familiar with ASH practices and policies, Dr. Russell, Respondent, and Sandy Lee Friedeck, Respondent's supervisor, ASH does not have regular modified assignments. The hospital provides a short period of approximately three weeks for a returning psychiatric technician before he/she must work in one of the units providing direct patient care. There are no positions that would involve less contact with patients as Dr. Bates would require for a period before Respondent could resume her usual and customary duties. ASH does not employ the staff to, and it is not its practice to, have psychiatric technicians provide care in pairs, as partners. It does not have extra staff that can monitor Respondent's activities during a shift. ASH does provide escorts to and from the gate to a specific unit, but the escorts are typically other psychiatric technicians who have regular assignments of their own. There are no "safer" units in which to place Respondent to minimize potential incidents or stimuli, as all units have patients who may become aggressive and patients are at times permitted to walk outside their units.

14. The credible medical evidence and opinion establishes that Respondent is incapacitated for the performance of duty by reason of her psychological condition. Dr. Russell's opinion is persuasive and establishes Respondent's disability. Not only is Dr. Russell the most familiar with Respondent, but he is also the most familiar with her duties and work environment. His opinion is corroborated by those of Respondent's treating psychiatrist, Dr. Lorant, and of the Qualified Medical Examiner, Dr. Wylie. Dr. Russell's opinion is also corroborated in part by Dr. Bates, who opined that Respondent could perform her duties if she received certain accommodations. However, ASH does not provide the kind of supports Dr. Bates believes Respondent needs in order to be able to ultimately perform her usual and customary duties.

LEGAL CONCLUSIONS

1. Government Code section 20026 defines the following relevant terms: "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."

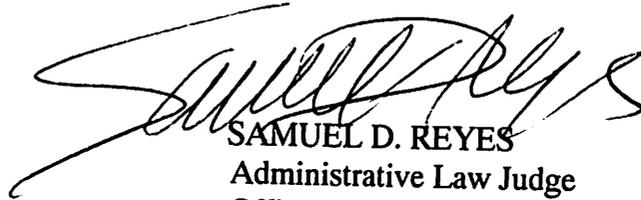
2. Government Code section 21156 provides, in pertinent part: "If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability. . . ."

3. By reason of factual finding numbers 3 through 14, Respondent has established, on the basis of competent medical opinion, that she is mentally incapacitated for the performance of duty within the meaning of Government Code sections 20026 and 21156.

ORDER

The application for disability retirement of Jennifer Rushlow is granted.

DATED: 11/26/03



SAMUEL D. REYES

Administrative Law Judge
Office of Administrative Hearings