ATTACHMENT A

THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for the Industrial Disability Retirement of: SONIA ACOSTA, Applicant/Respondent, and R.J. DONOVAN CORRECTIONAL FACILITY, CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION, Respondent.	Case No. 2013-0490 OAH No. 2013070164

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 27, 2014, in San Diego, California.

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

Applicant/Respondent Sonia Acosta (Ms. Acosta) appeared and represented herself.

No appearance was made by or on behalf of Respondent R.J. Donovan Correctional Facility, California Department of Corrections & Rehabilitation.

The matter was submitted on January 27, 2014.

ISSUES

1. Was Ms. Acosta permanently disabled or incapacitated from performing the usual and customary duties of a Correctional Officer at R.J. Donovan Correctional Facility, California Department of Corrections & Rehabilitation (Donovan), as a result of a mental

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
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condition (depression, anxiety) when she filed her application for an industrial disability retirement?

2. If Ms. Acosta is determined to be permanently disabled or incapacitated from performing her usual and customary duties, is her disability industrial or non-industrial pursuant to Government Code section 21166?

FACTUAL FINDINGS

Preliminary Matters

1. Sonia Acosta (Ms. Acosta) was employed as a Correctional Officer at Donovan. By reason of her employment, Ms. Acosta was a safety member of the California Public Employees' Retirement System (CalPERS) and subject to Government Code section 21151.

2. On December 12, 2011, Ms. Acosta signed a Disability Retirement Election Application (application) that she filed with CalPERS. In that application, Ms. Acosta identified her disability as occurring in November 2002 when she "fainted at work from unknown anxiety. Later told that I had major depression related to work." Ms. Acosta claimed that her limitations/preclusions due to her disability were an inability to concentrate on work-related duties and a fear that she would be unable to handle any safety issues at work. Ms. Acosta stated that her condition affected her ability to perform her job because she was "unable to handle work related duties, fear to step onto job site, unable to even think or make solid decisions."

3. On July 19, 2012, Ms. Acosta notified CalPERS that she was changing her application "from disability to industrial disability" because her "disability was work related through my job."

4. CalPERS obtained medical and psychological records and reports related to Ms. Acosta's condition. CalPERS selected a psychiatrist to perform a psychiatric evaluation. Following its receipt of the narrative report from that medical consultant, CalPERS concluded that Ms. Acosta was not permanently disabled or incapacitated from performing the usual and customary duties of a Correctional Officer when she filed her application.

5. By letter, dated January 11, 2013, CalPERS notified Ms. Acosta of its determination that she was not entitled to an industrial disability retirement.

6. By letter, dated February 11, 2013, Ms. Acosta timely appealed CalPERS' adverse determination.

7. On November 16, 2011, petitioner Anthony Suine signed the Statement of Issues in his official capacity. The Statement of Issues and other jurisdictional documents were served on respondents. The matter was set for hearing.

Ms. Acosta's Employment History with the Department

8. Ms. Acosta is 54 years old. She began working as a Correctional Officer in 1989. Before her employment with the Department, Ms. Acosta did not suffer from any debilitating psychological injuries. Ms. Acosta worked as a Correctional Officer until she stopped working in 2005, although she was on leave for different periods between 2003 and 2005.[1]

The Work of a Correctional Officer

9. The Correctional Officer Duty Statement and the Correctional Officer Essential Functions identified the essential job duties of a Correctional Officer. A few of the relevant job functions required Correctional Officers to supervise inmates, stand watch on armed post, patrol the grounds, inspect inmates' quarters, promote acceptable behavior, work in both minimum and maximum security institutions, work with female and male populations, work overtime, range qualify, disarm and subdue inmates, defend oneself against inmates, and conduct inmate searches for contraband.

Ms. Acosta's Mental Condition

10. Ms. Acosta provided numerous medical records from her treating physicians. The records included internal medicine evaluations, psychological records, and workers' compensation physician evaluations. These records were reviewed and considered by CalPERS during its determination. Ms. Acosta introduced records at this hearing documenting that her treaters placed her off work between 2007 and 2012. The records stated that she was "ill and unable to attend work." They did not state that she was permanently disabled or incapacitated from performing the usual and customary duties of a Correctional Officer

11. Ms. Acosta did not produce any report or testimony from any health care providers that stated that Ms. Acosta suffered from a permanent or indefinite physical or mental condition that precluded her from performing the usual and customary duties of a Correctional Officer.

12. Ms. Acosta testified about her inability to perform the usual and customary duties of a Correctional Officer. According to Ms. Acosta, because of her mental condition, she could not perform the duties required of a Correctional Officer. During this hearing, Ms. Acosta became extremely emotional and cried while testifying. Her presentation at hearing demonstrated that the very thought of returning to her former job as a Correctional Officer causes her extreme anxiety. However, be that as it may, this was insufficient to demonstrate that she was permanently disabled or incapacitated from performing the usual and customary duties of a Correctional Officer. Ms. Acosta's testimony, although heartfelt, did not constitute competent medical evidence. Her testimony was not corroborated by any witness or by any expert report. Moreover, the evidence introduced cast great doubt on Ms. Acosta's

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[1] The evidence was unclear regarding Ms. Acosta's work history.

veracity and demonstrated that she tended to over exaggerate her condition and omit pertinent information. The reports documented that Ms. Acosta provided differing accounts of incidents to different treaters. The evidence portrayed an individual who has been less than candid about her condition and other contributing factors with both her employer and her treaters.

Testimony of Perry Maloff, M.D.

13. Perry Maloff, M.D., is a board certified psychiatrist. Dr. Maloff testified that 75 percent of his practice involves patient care and 25 percent involves forensic work for state agencies and insurance companies. Dr. Maloff has performed hundreds of forensic medical evaluations in his 36-year career. Dr. Maloff estimated that he had conducted between five and 10 independent medical examinations for CalPERS before he examined Ms. Acosta in October 2012.

Dr. Maloff reviewed Ms. Acosta's medical records and summarized them in a very thorough, detailed report. Dr. Maloff attempted to obtain a history of the present illness from Ms. Acosta. However, as outlined in his report, this was extremely difficult to do because Ms. Acosta refused to answer many of Dr. Maloff's questions. Ms. Acosta even refused to discuss general background information prompting Dr. Maloff to write that it "became immediately apparent that this was going to be a very difficult interview." Ms. Acosta either could not remember information or refused to discuss various topics. She did discuss the sexual harassment claims she filed against two of her coworkers, one of whom was her sergeant. Ms. Acosta told Dr. Maloff that, when that claim was denied, her "world turned upside down." Ms. Acosta was so upset by that denial that she advised her supervisors that she had thoughts of killing her sergeant. Those statements resulted in her being removed from the workplace in 2005, and she has not returned. Ms. Acosta told Dr. Maloff that she "harbored considerable anger towards [her employer] when they did not, apparently, take the allegations she made towards her sergeant seriously." Ms. Acosta stated that she was "fed up with it." During the interview Ms. Acosta also referenced her marital difficulties and her son's "unnatural death." Ms. Acosta acknowledged during her evaluation that she has been capable of working for several years but was advised that she should not work until her claim had been closed. However, Ms. Acosta would not tell Dr. Maloff who had given her that advice. Ms. Acosta planned to return to her former line of work, providing medical assistant services in a small private physician's office.

Dr. Maloff's report contained a lengthy summary of the various medical records he reviewed. Those records documented Ms. Acosta's other psychological issues, including a history of hair pulling and anxiety. Those records confirmed that Ms. Acosta advised one of her treaters that she could perform her usual and customary duties if the alleged perpetrators of the sexual harassment were not within the workplace. Most importantly, those records contained information that conflicted with the statements Ms. Acosta made to Dr. Maloff and also conflicted with statements she made to her other treaters. The records raised significant doubts regarding Ms. Acosta's veracity. Based upon his interview and his review of the records, Dr. Maloff did not find Ms. Acosta to be a credible historian. Dr. Maloff opined that Ms. Acosta "seems to have provided a different set of facts for different audiences." She

made gross exaggerations and omitted relevant family history information. Dr. Maloff noted that one of Ms. Acosta's evaluators wrote that:

> The additional records reviewed contain no objective data regarding Ms. Acosta's complaints of workplace sexual harassment. The records document very superficial treatments at Kaiser, with poor evaluations having been documented – but clearly indicate that Ms. Acosta has not been frank or forthcoming when I evaluated her regarding her past psychiatric history. The records clearly document repetitive treatment for anxiety since 1990, due to various circumstances, with anxiety predominating over depression, but various symptoms described - yet when I evaluated Ms. Acosta, as noted in my initial report, Ms. Acosta was rather guarded when asked if she has had any prior history of emotional problems. (Emphasis in original.)

Dr. Maloff concluded that Ms. Acosta did not suffer from any mental condition that would prevent her from returning to her work as a Correctional Officer. However, he opined that she could not return to Donovan because her issues with co-workers made that option not feasible. Dr. Maloff acknowledged that Ms. Acosta's "level of psychological symptoms at certain points throughout her employment appear serious and overwhelming." However, he attributed that to Ms. Acosta's Axis II pathology, personality disorders of "considerable drama, narcissism, [and] histrionic traits." Dr. Maloff observed that these conditions "gathered steam and momentum sufficient for her to rally herself in victim mode for the purpose of seeking compensation, getting even with her employer, and getting ready to spend life without her husband." However, Dr. Maloff determined that these personality traits "are not long-term disabilities."

Dr. Maloff opined that Ms. Acosta developed a series of adjustment disorders, the last of which began in June 2005. Even giving her the benefit of the doubt, an adjustment disorder, by definition, lasts no longer than six months. At most, Ms. Acosta would have been temporarily disabled through December 2005. Thereafter, she could have continued working as a Correctional Officer. Even if Ms. Acosta was substantially incapacitated from performing her job duties during this time, it was a "temporary condition which is now in complete relief" if she "avoids exposure to triggering events which would be precipitated by working" at Donovan or having contact with the two colleagues she accused of sexually harassing her. Dr. Maloff further opined that Ms. Acosta was not putting forth her best effort. She purposely excluded important information and exaggerated other information for the purpose of seeking workers' compensation benefits. Dr. Maloff opined that "the vast majority, if not 100%," of Ms. Acosta's disability was due to nonindustrial or pre-existing conditions. Dr. Maloff opined that her pre-existing psychiatric disorders would have caused problems in any work environment; there was nothing specific about her job as a Correctional Officer which lent itself to her current pathology.

Dr. Maloff testified at hearing consistent with his report. Although Ms. Acosta challenged Dr. Maloff's opinions on the basis that he only met with her one time, the evidence demonstrated that he spent considerable time reviewing her records and was

sufficiently familiar with her medical history to provide competent, well-reasoned testimony. Moreover, Dr. Maloff's lengthy report demonstrated that he spent an appropriate amount time interviewing Ms. Acosta and reviewing her records to render his opinions. Moreover, Dr. Maloff's impressions were supported by Ms. Acosta's medical records.

Evaluation of the Evidence

14. Although Ms. Acosta claimed that she could not perform the usual and customary duties of a Correctional Officer when she applied to CalPERS for a disability retirement, her lay testimony did not constitute competent medical opinion. The medical records from Ms. Acosta' treaters did not establish a disability of a permanent nature that precluded Ms. Acosta from performing her usual and customary duties.

By contrast, Dr. Maloff's testimony involved the expression of a competent medical opinion. Dr. Maloff reviewed Ms. Acosta's medical records and interviewed her. Dr. Maloff testified that Ms. Acosta could perform the usual and customary duties of a Correctional Officer. There was no expert opinion to the contrary.

A preponderance of the competent medical evidence did not establish that Ms. Acosta was entitled to a CalPERS disability retirement. Given this finding, the second issue, whether Ms. Acosta's alleged disability was industrial or non-industrial, is moot.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a 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.)

Applicable Statutes

2. Government Code section 20026 defines the terms "disability" and "incapacity for performance of duty," when used as a basis for retirement, to mean a "disability of permanent or extended and uncertain duration" that is based on "competent medical opinion."

3. Government Code section 21151, subdivision (a), provides that a state safety or state peace officer who is "incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability...regardless of age or amount of service."

4. Government Code section 21156 provides that if the evidence demonstrates 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. The determination of incapacitation shall be based on competent medical opinion.

5. Government Code section 21166 governs cases involving disputes between members and the board regarding whether a disability is industrial or non-industrial.

Eligibility for a Disability Retirement

6. "Incapacitated for the performance of duty" means the substantial inability of the applicant to perform his or her usual duties. (*Mansperger v. Public Employees' Retirement System* (1979) 6 Cal.App.3d 873, 876.)

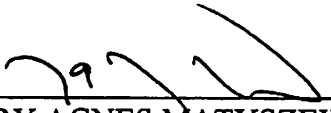
Cause Exists to Deny the Application

7. Cause exists to deny the application for a disability retirement filed by Ms. Acosta. A preponderance of the competent medical evidence did not establish that, when Ms. Acosta filed her application for a disability retirement, she suffered from a mental condition of a permanent or extended and uncertain nature that resulted in her substantial inability to perform the usual and customary duties of a Correctional Officer. No competent medical opinion demonstrated that Ms. Acosta's mental condition was of a permanent or extended and uncertain duration. No competent medical opinion demonstrated that Ms. Acosta is incapacitated mentally from performing her duties as a Correctional Officer. The evidence did not support the granting of an industrial disability retirement to Ms. Acosta on the basis of a mental condition.

ORDER

The application for a disability retirement filed by Sonia Acosta with the California Public Employees Retirement System is denied.

DATED: February 25, 2014



MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings