

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
Disability Retirement of:

MARCIA L. BUNDY,

Applicant,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
CENTRAL CALIFORNIA WOMEN'S
FACILITY,

Respondent.

Case No. 9297

OAH No. 2013040271

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California heard this matter in Fresno, California, on January 7, 2014.

JeanLaurie Ainsworth, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Applicant Marcia L. Bundy appeared and was represented by Peter O. Slater, Attorney at Law, of Lenahan, Lee, Slater and Pearse, LLP, Attorneys.

Respondent California Department of Corrections and Rehabilitation, Central California Women's Facility, did not appear.

The record was left open to receive written closing argument and Points and Authorities from the parties. Simultaneous opening argument and Points and Authorities submitted by the parties were received January 24, 2014, were marked and made part of the record. CalPERS filed a reply that was received February 7, 2014. The record remained open for an additional week to receive missing pages from an admission report from Fremont Hospital. The pages were not received, but CalPERS pointed out that Dr. Gutierrez referred to

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the missing pages in his report, evidencing the fact that he had seen and reviewed them in rendering his opinions, so CalPERS was satisfied with the fact that Dr. Gottlieb had been able to review those pages, constituting a reasonable substitute for having the actual missing pages produced in the record.

The record was closed and the matter was submitted on February 14, 2014.

PROCEDURAL AND JURISDICTIONAL FINDINGS

1. At all times relevant to this Decision, Marcia L. Bundy (applicant) was employed by the California Department of Corrections and Rehabilitation (CDCR), assigned to the Central California Women's Facility (CCWF), Chowchilla, California.

2. Through her employment with CDCR, at all times relevant to this Decision, applicant has been and remains a safety member of CalPERS. At the time of her application (below), applicant had the minimum service credits necessary to qualify for a service retirement.

3. Applicant applied for a service retirement pending industrial disability retirement from CalPERS approximately April 5, 2007. Applicant's effective retirement date for service was March 1, 2007, and she has been receiving a service retirement allowance from CalPERS since that date.

4. Applicant submitted an application for industrial disability retirement (the application) to CalPERS on April 5, 2007. At the time applicant signed and filed the application, she had been employed by CDCR as a registered nurse from between March or April 2001 and January 4, 2007, her last day of work in CalPERS covered employment. Applicant has approximately six years of CalPERS covered employment service credit.

5. Applicant claimed in the application to be permanently disabled from the performance of her duties as a registered nurse with CDCR due to contracting tuberculosis in May 2005, as well as posttraumatic stress disorder (PTSD) "as the result of psychological effects of the TB."

6. Applicant's description of her work limitations as a result of her claimed disabling medical conditions were vague and appear to have been copied from preclusions imposed as a part of her Workers Compensation claims. Applicant wrote that her limitations/preclusions were, "No working in a correctional setting. No physical extreme exertion. Avoid stressful situations."

7. Applicant wrote in her application that, "Due to my physical and psychological condition, I am no longer able to perform the essential functions of my job." Applicant did not specify any specific work tasks or job requirements that she is now unable to perform as a result of her claimed disabling conditions.

8. Applicant submitted medical records and other documentation in support of her claim to CalPERS. These medical records were largely from her primary care physician and from health care practitioners treating or evaluating her in conjunction with her Workers Compensation claims. Prominent among these were reports for treatment by Dr. Low, from Kaiser Hospital Mental Health Department and Alexa Morgan, Ph.D., for her claims of mental health disabilities. Applicant also submitted medical records from Robert Larson, M.D., Eric Morgenthaler, Ph.D, and Samuel Sobel, M.D.

9. Applicant's medical records were evaluated by the staff of CalPERS' Benefits Services Division, and were submitted to Rustom Damiana, M.D., a Board certified Pulmonologist and Kenneth Gottlieb, M.D., a Board certified psychiatrist, both retained by CalPERS to perform Independent Medical Evaluations (IME). Dr. Damiana performed his IME on August 13, 2012. Dr. Gottlieb performed his IME on December 31, 2008, and submitted a supplemental IME report dated December 31, 2008. Dr. Gottlieb's supplemental report to CalPERS was produced in response to a letter from CalPERS requesting Dr. Gottlieb's assessment and analysis of additional medical and other reports submitted by applicant that had not been considered in Dr. Gottlieb's original IME.

10. CalPERS' Benefit Services staff re-reviewed the medical and other reports submitted by applicant, as well as Dr. Gottlieb's supplemental IME report.

11. CalPERS notified applicant in writing on February 17, 2009, that she had failed to produce sufficient persuasive medical evidence to demonstrate that she was substantially incapacitated from her duties as an RN with the CDCR, and that therefore her application for a disability retirement allowance was denied. Applicant's service retirement benefit continued unimpaired.

12. Applicant timely appealed the CalPERS determination and denial of her application. In her appeal letter, applicant stated, in pertinent part:

I have medical documentation from my doctors verifying that I am unable to return to my job at CCWF. I worked as a Registered Nurse with high-risk inmates for three years. At the age of 55, I was diagnosed with peritoneal tuberculosis, which caused a right lung infiltrate. I was admitted to the hospital four times, a total of two months. I was off work for about six months. The TB medication was very hard on my body. I went back to CCWF, but it was difficult to continue working. At the time, I was not aware that my work was being monitored. After several stressful incidents, I left and retired. I was diagnosed with posttraumatic stress disorder. Emotionally I could not work. Nursing requires critical thinking and decision-making. Article 6 Disability Retirement, section 21150, 21151. In consideration of this appeal, 1) I was 55 when I became ill, 2) The medications made me sick and took a toll on my body, 3)

Upon my return to work, I was monitored by my supervisors and at one point I was told by the Public Health Nurse at CCWF that she felt I was likely to make potentially serious mistakes on the job and possibly lose my nursing license, 4) I was emotionally unable to function at work, 5) I have to walk with the assistance of a cane due to loss of muscle tone secondary to prolonged period of convalescence and hospitalization, 6) Since leaving my position at CCWF I have never fully recovered physically or emotionally from the devastating effects of the illness. The record will show that I had nothing but positive performance appraisals of my work prior to the illness which I contracted while working at CCWF.

13. Anthony Suine, Chief, Benefits Services Division of CalPERS, made the allegations contained in the Statement of Issues in his official capacity and caused it to be filed. The Statement of Issues was made on January 10, 2013. Applicant timely filed a Request for Hearing on the Statement of Issues. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings.

14. Notice of the date, time and place of the evidentiary hearing was duly given to the respondent CDCR. No appearance was made on behalf of the CDCR. The matter proceeded as a default with respect to the CDCR, pursuant to the provisions of Government Code section 11520.

FACTUAL FINDINGS

USUAL AND CUSTOMARY DUTIES

1. Applicant's official CDCR Job Description and Duty Statement (job description) as an RN is comprehensive and detailed. In the portion of the job description entitled "Performance Responsibilities," the following job requirements are set forth:

1. Administers medications, assists the physician in examining in treating inmate patients, collects blood and other specimens for diagnostic tests, receives written and verbal orders from physicians and carries out those orders, reports results of diagnostic tests to the physician, administers nursing care (40%);

2. Documents in the medical record all nursing care provided, condition of the patient, observations made concerning patient, medication administered to the patient, completes necessary reports such as daily census, inmate movement and unusual incidents (30%);

3. Maintain security in regard to medical equipment and supplies, inventories medications, narcotics, needles, syringes, instruments, and utensils, orders and stocks appropriate supplies in the unit, maintains crash cart with appropriate supplies and keeps equipment in good working order (20%); and

4. Assists in the orienting and training of health services personnel, attends in-service training classes, attends continuing education classes to maintain nursing license, performs related duties as assigned by supervisor.

2. Applicant's job description states that an RN working at CDCR, when working at CCWF, could work in one of the four separate clinics located within CCWF, one in each of the housing areas, in the infirmary, which is a skilled nursing 20 bed facility providing 24-hour inpatient services for inmates requiring intermediate level medical care, in the emergency room, in the OB/GYN department, or in the reception center. There was also evidently a telemedicine assignment.

3. Applicant's job description contains a section entitled "Worker Trait Groups." These required traits are listed as: The desire and ability to learn, absorb and apply technical training; The facility for relating to people and an interest in their welfare; Exactness and precision for preparing or administering treatment or medication and keeping charts; The ability to perceive differences in anatomical components; Eye-hand coordination and finger dexterity; and Cleanliness, good health and freedom from communicable diseases. The description notes that the job of RN at CCWF requires different types of occupational situations to which the RN must adapt, including the ability to deal with people beyond giving and receiving instructions, and the precise attainment of set limits, tolerances or standards.

4. Specific functional requirements listed in applicant's job description are: The ability to understand and follow instructions; The ability to perform simple and repetitive tasks; The ability to maintain a work pace appropriate to a given workload; The ability to perform complex and varied tasks; The ability to relate to people beyond giving and receiving directions; The ability to influence people, including the ability to negotiate, explain or persuade as the situation demands; The ability to make generalizations, evaluations or decisions without immediate supervision; and, The ability to accept and carry out responsibility for direction, control and planning.

5. Dr. Damiana and Dr. Gottlieb each read and considered applicant's official CDCR CCWF job description and duty statement in performing their IMEs and in writing their reports.

ACTUAL JOB REQUIREMENTS

6. During her October 8, 2008, IME with Dr. Damiana, applicant told him that her job was to bring patients into the examining room, take vital signs, take a history, perform examinations and make assessments. She discussed the patients via telemedicine, in which she spoke via a video link and telephone to doctor consultants in Sacramento regarding patient history and diagnosis. She told Dr. Damiana that she was not involved in dispensing or prescribing medication. She told Dr. Damiana that her job was performed largely in one room, not particularly well ventilated and most of the patients that she treated were positive for HIV. She told Dr. Damiana that she performed her work this way for approximately three years.

7. Applicant told Dr. Gottlieb on December 15, 2008, that when she first started working at CCWF, she was performing physical examinations in conjunction with the facility doctor. She then changed to intake and release of patients from the clinics. Then she worked part-time with the Public Health Nurse. In 2002, she began working in the telemedicine program. She was largely unsupervised. She continued working in telemedicine until 2005, when she was diagnosed with tuberculosis. Applicant was off work from August 2005 to December 2005, battling and recuperating from having contracted peritoneal tuberculosis.

8. Applicant told Dr. Gottlieb that when she returned to work in December 2005, she was not permitted to return to the telemedicine position. She was assigned to work as a floater, working wherever needed. She told Dr. Gottlieb she went back to work before she should have, because she had not finished her TB medications and was not fully recovered. She told Dr. Gottlieb, "They put me in one place, then another place, then in another place, because I could not function. My mind would not work. I could not do nursing." She complained that the nursing supervisors pulled her from one job to another and put her in assignments where she was not trained to work.

9. Applicant told Dr. Gottlieb that in July or August 2006, she was placed in one of these assignments for which she was not trained, in EOP-ADSEG, a paired unit that housed the mental health prisoners in one area and the prison within the prison for the most dangerous and violent. It took two guards to pull inmates out of each cell in these units. She worked treating patients housed on the mental health side and then in AD SEG, the extremely dangerous side, including death row. When she was assigned to EOP-AD SEG, she had another nurse to help, but it turns out that this helper was no help at all, and actually was there to supervise her.

10. Applicant reported that there was a lawsuit regarding a patient in August 2006. The prisoner sued the prison, claiming that the prisoner did not get a pass for medical appointments. The inmate won the suit, and lawyers went around the institution to make sure that the nurses were following procedures for pulling inmates out of the cells to go to medical appointments. Applicant was told she must pull inmates out of the cells for their medical appointments. She told her supervisor she needed help and she was given an RN to

help her, but she was not a help at all, and although she repeatedly asked for help to pull patients in these units out of their cells for medical appointments, she did not receive the help she needed.

11. Applicant described an incident in November 2006 to Dr. Gottlieb, where an inmate hung herself in her cell with a towel. An officer came to assist her and she helped get the patient down and checked the patient's pulse. She stepped back to ask the officer assisting to alert the treatment clinic, but when she stepped back, the supervising nurse stepped in and took over, and got angry with applicant for asking why the supervisor took over. Applicant felt she had the situation under control, and was upset that she was just brushed aside. Applicant reported having emotional problems dealing with viewing the inmate trying to hang herself and with her supervisor's attitude.

12. Applicant told Dr. Gottlieb she took a refresher class on how to assess patients after she had returned to work, and she passed the class. On January 2, 2007, the lawyers returned to the prison and asked applicant if she was pulling all the inmates out of their cells for their medical appointments. Applicant told the lawyers that she was not pulling the inmates out of their cells because she did not have the help that she needed, and that she was treating the inmates through their cell doors. Applicant told the lawyers that if an inmate had a sore throat, she could treat that inmate while they were still in their cell, and that other inmates did not want to come out of their cells, so she conducted triage through the cell door. The lawyers asked her how she could keep healthcare discussions and decisions with the inmate private through the cell door, and applicant told them that the patients had "no problem" being triaged that way, and that she did not have any help on that particular day because she was working both sides of the EOP-AD SEG unit. Immediately after the lawyers left, applicant's supervisor told her that she was being removed from that assignment and that she was not going to be returned to her post. She was told that she would be a floater because she did not pull the inmates out of their cells every time they had a medical appointment. Applicant told Dr. Gottlieb that she continually asked for help in pulling the inmates out of their cells for their appointments, but the help was not given.

13. Applicant reported that she continued to work for two and a half days after this most recent removal from her post and being assigned to be a floater. She told Dr. Gottlieb that, "emotionally I could not do it." She reported that she made an appointment with Kaiser's outpatient intensive program and with Dr. Morgan, who told her that she had PTSD. At Kaiser, she was told that her symptoms were depression and anxiety. Applicant did not return to work.

14. Applicant told Dr. Gottlieb that she was continuing to see a psychiatrist at Kaiser, Dr. Low, and seeing Dr. Morgan, a psychologist, for therapy through January 2008. When Dr. Morgan closed her practice, she continued seeing a therapist at Kaiser along with the psychiatrist.

15. Applicant reported to Dr. Gottlieb that she was hospitalized at Fremont Hospital in August 2008 on a 72-hour hold. Applicant reported that between her struggles

with CalPERS and having to see Workers Compensation doctors here and in San Francisco, her struggles to get benefits, and her concern that no one believed her about her case and was told that she just had an attitude problem, that she said that she “just could not take it anymore.” When she went to her Kaiser aftercare group, her group facilitator saw that she was suicidal and put her on a 72-hour hold, and she was sent to Fremont Hospital. Her medications were changed, she was discharged and she returned to Kaiser intensive outpatient group. She reported that she continued to see her therapist, and goes to the intensive outpatient group every three weeks. She sees the psychiatrist every one to three months for medication management.

APPLICANT’S TESTIMONY ABOUT HER ACTUAL JOB DUTIES

16. Applicant testified about her actual job physical requirements. Her testimony added few facts beyond what she reported to Dr. Gottlieb, and a similar description she gave to Dr. Larson that appears in his AME reports. Applicant expressed genuine concern about what she came to realize was a significant diminution of her nursing skills upon her return to work. She expressed concerns about impairments in her cognitive skills, her ability to recognize and respond appropriately to situations that might compromise patient safety and health, and a delay in her ability to respond appropriately. She described herself as an “A” nurse before she contracted tuberculosis and was hospitalized and on heavy respiratory medications for extended periods, and that she found she was a “C” nurse on her return. She said one of the reasons she left work was, “I did not want to hurt anyone.”

17. Applicant also reiterated that she was very physically weak when she returned to work, had lost a great deal of weight and strength during her bout with tuberculosis. She was out of leave time and felt she had to return to work. She had not finished her prescribed medications, which did affect her mental functioning. She was also having trouble with a weakness and possible re-injury of her knee that required her to walk with a cane and significantly limited her mobility and ability to stand and walk about for prolonged periods. As she was being constantly assigned to different duties, for some of which she had training, and many of which she did not, with impaired functioning, physical and mental weakness from not being recovered and struggling with trying to get around on a weak knee, she just could not take it any more when she was criticized by her supervisors and the lawyers.

18. There is some corroboration in the record of a significant difference in applicant’s performance as a RN before and after her bout with tuberculosis. Hearsay interviews with applicant’s co-workers and supervisors found in Dr. Larson’s AME report confirmed that applicant’s work performance and nursing skills before she got sick with tuberculosis were good and she was respected among her peers.

19. Dr. Larson’s Supplemental AME report (below), relying in part upon the statements of applicant’s coworkers and supervisors, particularly those of Ms. Kristova and Ms. Mayugba, picked up this theme as the basis for Dr. Larson changing his opinion in applicant’s Workers Compensation case regarding an industrial connection between applicant’s bout of tuberculosis and her depression/mood disorder she experienced upon her

return to work. Dr. Larson noted that Ms. Kristova and Ms. Mayugba both reported that applicant was a good, dependable employee who had physical health problems upon returning to work, and both commented that applicant returned to work in a weakened physical state. In pertinent part, Dr. Larson stated:

This additional information now results in the undersigned physician revising his opinion concerning causation for Ms. Bundy's clinical depression. From what I can tell the applicant returned to work in a vulnerable state. After a hospitalization and treatment for tuberculosis that had invaded the peritoneum, the applicant made a good faith attempt at a return to work. The facts point toward her being somewhat debilitated and certainly physically limited when she reentered the prison. She was weak, had lost weight and had difficulty walking to the point that she required the use of a cane. Ms. Bundy was still taking medications that might well have been affecting her mental abilities. She was still getting over a serious illness that had probably left her prone toward fatigue and could also contribute to concentration problems. In that scenario rather than being given a single assignment she was moved about as needed within the prison in her role as a nurse. The assignments that she was given had both physical and mental demands. In that setting while still getting over the industrial physical injury applicant went on to develop clinical depression that ultimately led to consultation with Dr. Morgan. ... In this physician's opinion Ms. Bundy was emotionally vulnerable at the point that she returned to work. The admitted physical injury and its residual is most definitely a contributing factor. Then the work assignments that the applicant had while struggling to recover from the physical injury added to her burden to the point that symptoms of a mood disorder came forth. Thus, it is a combination of the direct effects of the physical injury and the applicant not having been accommodated by the employer when making a return to work that brought forth the depression. (Absence of punctuation in original).

20. Applicant's testimony was not materially different from what she told Dr. Larson that he reported in his AME report, quoted above. Applicant repeatedly referred to her concern that because her skills were impaired, that she might hurt someone, and that the lack of cooperation and assistance she received from her supervisors in the workplace made it too frustrating and difficult for her to go on.

21. Applicant also acknowledged in her testimony that she is a long-term alcoholic, and although she does not drink as much as she used to, she still consumes alcohol. Her husband, in his testimony, also confirmed that applicant is a long-term

alcoholic, and continues to consume alcohol, although not nearly as much as she did before she contracted tuberculosis.

22. Applicant also confirmed in her testimony that she is no longer taking the tuberculosis medications that may have contributed to the problem she experienced when she returned to work. She is still taking psychotropic medications and continues receiving therapy and medication management for her depression/mood disorder from Kaiser, but is stable. Her husband testified that applicant is periodically depressed, and spends much more time in her bedroom than she did when she was working, and has become markedly withdrawn from social, church and family activities.

TUBERCULOSIS CLAIMS

DR. DAMIANA

23. Dr. Damiana conducted an IME on October 8, 2008, restricted to evaluating applicant's claim of disability with respect to her 2005 bout with peritoneal tuberculosis. Dr. Damiana's IME assessed whether applicant was substantially incapacitated from the performance of her duties due to her claimed disability due to contracting peritoneal tuberculosis through her work with high risk patients at work at CCWF in May 2005, as described in her application.

24. Dr. Damiana conducted a physical and respiratory examination, with particular focus on applicant's abdomen where she had sustained the attack of peritoneal tuberculosis, reviewed applicant's history and summary of present complaints, and reviewed applicant's medical records, including hospital and surgical records and reports from physicians who treated applicant. Dr. Damiana also reviewed medical reports and opinions from physicians who treated and evaluated her for her Workers Compensation claims.

25. Dr. Damiana noted that applicant was first diagnosed with tuberculosis on May 21, 2005, and last worked for the CCFW in January 2007.

DR. DAMIANA'S IME FINDINGS AND CONCLUSIONS

26. Dr. Damiana concluded that applicant sustained an extended bout of tuberculosis that began in March 2005 that was ultimately diagnosed to be peritoneal tuberculosis with ascites and pleural effusion. She was treated with anti-tuberculosis medications for a period of six months with no further recurrence and no positive tuberculosis skin test since conclusion of the treatment.

27. Dr. Damiana expressed his professional medical opinion that even though applicant had an occupational injury 2005, when she contracted peritoneal tuberculosis, she was successfully treated and released, and has been negative for tuberculosis since the completion of the treatment. Dr. Damiana wrote in his IME report, and reiterated in his testimony, that in his professional medical judgment, from a respiratory standpoint, applicant

is not substantially incapacitated from the performance of her usual job duties due to tuberculosis and is physically able to perform the essential functions of her job.

DR. SOBOL

28. Dr. Sobol is Board certified as an Internal Medicine specialist, with a subspecialty in cardiovascular disease. He performed an agreed medical examination (AME) on June 27, 2007, regarding applicant's claim of disability due to tuberculosis. His diagnostic impressions were that applicant suffered from peritoneal tuberculosis which had been treated and improved and had osteoarthritis in her right knee.

29. Dr. Sobol performed a supplemental evaluation and wrote a supplemental AME report dated March 16, 2008. Dr. Sobol received and reviewed several additional medical reports in the findings of other physicians who had evaluated applicant that he had not seen in making his original report. Dr. Sobol found that with respect to her tuberculosis and any residual pulmonary dysfunction that she was "relatively asymptomatic at the present time." He mentioned that applicant's long history of heavy smoking contributed to any pulmonary distress.

30. Dr. Sobol continued in his opinions and comment as follows:

Regarding the patient's gastrointestinal symptomology, she continues to have episodic nausea and occasional vomiting for reasons which are not entirely clear. Although symptoms of nausea and vomiting began while she was taking anti-tuberculosis medications and almost certainly were due to those medications, she has not required them since Christmas of 2005 and yet continues to have intermittent symptoms. As noted these are probably due to her cirrhosis and her current medications.

PSYCHIATRIC CLAIMS

DR. GOTTLIEB

31. The second CalPERS ordered IME was conducted by Dr. Gottlieb on December 15, 2008, and addressed applicant's claim of disability due to psychiatric injury. Dr. Gottlieb's IME assessed whether applicant sustained psychiatric injury as a result of her contracting tuberculosis at work in 2005, and focused upon whether the problems she experienced at work due to the lingering effects of the treatment she received for the tuberculosis and her debilitated physical state, as she tried to return to work before she was physically and emotionally ready to do so caused injury to applicant's psyche.

32. Dr. Gottlieb conducted a full psychiatric examination, including a detailed clinical interview, performed a mental status examination, and had psychological testing

done, both by himself and by a professional psychologist. Dr. Gottlieb also sought, received and reviewed a detailed medical history and summary of present complaints provided by applicant. He reviewed applicant's medical and psychiatric treatment records, including hospital and surgical records and reports from physicians who treated applicant, and medical reports and opinions from physicians who treated and evaluated her for her Workers Compensation claims.

33. At the time of Dr. Gottlieb's first IME evaluation, he did not have records from applicant's psychiatric hospitalization at Fremont Hospital on August 27, 2008, through September 5, 2008, nor did he have records from Alexa Morgan, Ph.D., who briefly acted as applicant's therapist. Dr. Gottlieb received and reviewed those records and issued a supplemental IME opinion on December 31, 2008. Dr. Gottlieb was able to review the first page of the Fremont Hospital admission assessment, which was not produced in evidence in this matter, leading to the dispute referenced in the preamble above. Since Dr. Gottlieb was able to review and consider the information in the complete admission document, CalPERS decided not to continue to insist the entire document be produced.

DR.GOTTLIEB'S IME FINDINGS AND CONCLUSIONS

34. Dr. Gottlieb concluded that there are no specific job duties of an RN with CDCR that applicant is unable to perform on a psychological basis, were she inclined to do so. Dr. Gottlieb specifically discounted in the making of his opinion applicant's anger at her employer, and frustration with regard to the processing of her disability claims. Dr. Gottlieb's opinion is that there are no critical tasks in applicant's job description that she is psychologically disabled from performing.

35. Dr. Gottlieb wrote in response to the specific CalPERS question as to whether applicant is substantially incapacitated for the performance of her duties as follows:

Marcia Bundy has long-standing psychological difficulties which have been manifest prior to her employment with the State of California. Appropriate diagnoses would include Somatization Disorder, Depressive Disorder NOS, Anxiety Disorder NOS and Borderline Personality Traits. She has had periods of at least partial incapacity in the past, at least in part, on a psychological basis. Currently, she unquestionably regards herself as incapacitated, both physically and psychologically. She is angry at her employer for reasons given above. Putting aside her physical limitations, evaluated by others, psychologically, her current "infirmity" would appear to be more of a reflection of her anger, irritability and recalcitrance, than any Axis I psychiatric condition. She continues to take anxiolytic and antidepressant medications. Her treating psychiatrist and psychologist have noted improvement in her condition. She has no cognitive impairment on clinical

examination. Her affect is dysthymic and angry. Her psychological testing is augmented. Upon review of the member's job description, on the basis of all the foregoing, I cannot say that the member is substantially incapacitated on a psychological basis from the performance of her duties, were she inclined to return to work.

36. In the portion of the CalPERS questionnaire that sought Dr. Gottlieb's opinion regarding whether any incapacity is permanent or temporary, Dr. Gottlieb wrote, in pertinent part:

From a psychological perspective-and putting aside the issue of causation, it is medically most probable that the employee has long-standing psychiatric diagnoses of Somatization Disorder, Depressive Disorder NOS, Anxiety Disorder NOS and Borderline Personality Traits which, in combination, are periodically incapacitating. As best as can be gathered from the employee and the medical records, applicant has been receiving ongoing outpatient psychotherapeutic and (individual and group) psychological assistance from Kaiser. She remains very angry at her employer which, while a barrier to returning to work, does not constitute a disability. On the basis of her current psychological examination, I cannot say that-were she willing-that she would not be able to perform her position as a registered nurse.

37. In the portion of the CalPERS questionnaire that sought whether any disability, if it existed, was attributable to non-industrial or pre-existing causes, Dr. Gottlieb opined:

The employee has a non-industrially related, pre-existing psychological condition-long preceding her employment with the State of California and best diagnosed as Somatization Disorder, Depressive Disorder NOS and Anxiety Disorder NOS. This had previously required treatment in the 1990s, as is documented in the medical record. This was likely partially temporarily and intermittently disabling. Secondly, the employee likely had some degree of psychological residue following her 2005 hospitalization which was felt to have been related to (industrially related) tuberculosis and ascites, likely alcohol related. Finally, the employee reports a variety of work stresses, including a failure to accommodate her (physical) work restrictions and additional stresses resulting from discrimination and retaliation, resulting in her departure from work in January, 2007.

38. Dr. Gottlieb continued:

On the basis of the employee's report as well as the available medical records there is a history of one or more pre-existing psychiatric conditions-dating back to at least 1990-manifested by fluctuating chronic fatigue, anxiety and depression-for which the patient has previously received treatment. Her emotional state was also affected by her 2005 medical illness-requiring lengthy hospitalization-diagnosed as ascites, pleural effusion and tuberculosis from which she felt she never recovered. When she returned to work she felt she had difficulties concentrating and retaining information (this is difficult to evaluate absent work records) she did have a number of medical restrictions and ongoing difficulties with her left knee. Her departure from work in January, 2007 appears to have been proximately related to a reprimand from the Director of Nursing, which the employee felt was retaliatory in nature. Overall, there was unquestionably an interplay between the employee's underlying psychology/psychopathology of her work situation.

39. Dr. Gottlieb issued his Supplemental IME report after reviewing records from Fremont Hospital and medical evaluation and treatment by Trevor Folks, M.D. The hospitalization began August 27, 2008, and continued through September 5, 2008. Applicant was admitted involuntarily as suicidal and thinking of overdosing on medications. She reported being depressed since May, 2005, and worse in the week prior to her admission. She reported having taken an overdose of aspirin at age 16. She reported that she was grieving the loss of her career. A toxicology panel obtained at the time of admission was positive for cannabinoids.

40. Dr. Gottlieb stated in his Supplemental IME report that applicant experienced an episode of major depression with suicidal ideation at the end of August and beginning in September, 2008 that temporarily disabled her from performing any duties of her occupation as a registered nurse for a period of "a number of weeks following her discharge from the hospitalization." Dr. Gottlieb then affirmed and confirmed all of his previous findings and conclusions in his original IME report, concluding that there was nothing in the additional records that he reviewed that would cause him to change his previously expressed opinions.

THE AME REPORTS FROM DR. LARSON

41. Dr. Larson conducted an AME evaluation of applicant on March 12, 2008, as part of her Workers Compensation claim of psychiatric injury. Dr. Larson added a Supplemental AME Report on January 7, 2010, in order to assess additional medical and other records, and a physician's deposition.

42. Dr. Larson's AME concluded that applicant's claim that she suffers from PTSD was not well supported by the medical evidence and his clinical assessment. He diagnosed applicant on Axis I as having a Depressive Disorder NOS, with associated irritability, anxiety and somatization; on Axis II as having a Dependent and Avoidant Personality dynamic; on Axis III, having treated peritonitis related to tuberculosis exposure; on Axis IV as experiencing moderate psychosocial stressors including legal, financial, occupational and physical health concerns, and on Axis V, that applicant's global assessment of functioning (GAF) was 60, which was functioning moderately well but having features of moodiness, anxiety, somatization and mistrust.

43. Dr. Larson expressed his opinion that applicant presented at the time of his evaluation with features of a clinical depression. He found that her depressive symptoms were more serious than would be typical of an adjustment disorder, but whether she meets the actual criteria for a major depressive disorder was debatable. He concluded that Dr. Morgan's diagnosis of PTSD was not justified, and he persuasively explained the reasons for his opinion.

44. Dr. Larson continued as follows:

It does not appear to this physician that Ms. Bundy's psychiatric difficulties can be attributed to a compensable consequence psychiatric injury in response to the admitted medical problems. There is no obvious correlation as such. Her treating doctors at Kaiser gave no indication that she became emotionally disturbed as a result of treatment received for the medical problem and exposure at the present. For her psychiatric problems to be considered compensable they would then have to follow from employment stress. Once again this would seem to bring up the issue of job assignment that she found distasteful or perhaps even onerous. The applicant reports that upon returning to work from the industrial leave she was assigned duties that she would not have expected. She felt that the float status was not in her best interest. She felt that supervisors put her at unnecessary risk. She saw that position as unduly stressful.

45. Dr. Larson revised his opinion in his Supplemental AME psychiatric report of January 7, 2010, as was set forth in detail above. Dr. Larson reviewed numerous witness statements and records from applicant's work at CDCR CCFW as part of his supplemental evaluation. Dr. Larson's revised comments, opinions and conclusions are quoted in material and applicable part above. Dr. Larson concluded "at this point" (referring to the time of his supplemental evaluation in January 2007) that Ms. Bundy should be viewed as "having been temporarily totally disabled."

46. Dr. Larson continued as follows:

The applicant seems to take the position that she was incapable of working as a nurse whether at the prison, for the Department of Corrections elsewhere or in any other clinical setting. I do not view the applicant is so disturbed as to be incapable of work as a nurse though it is probably inadvisable that she not return to the women's prison.

47. Dr. Larson relied upon psychological testing conducted by and opinions expressed by Eric Morgenthaler, Ph.D., in making his opinions and conclusions contained in his original and supplemental AME psychiatric reports. In pertinent part, Dr. Morgenthaler's evaluation of psychological testing administered to applicant as part of the AME evaluation is as follows:

Intellectual assessment revealed that Ms. Bundy is an individual with average range intellectual capabilities who is currently functioning without cognitive impairment. The psychological test data indicated that Ms. Bundy is a depressed, paranoid, anxious and somatically preoccupied individual. She harbors persecutory beliefs that may be delusional in nature. Further, there is a high probability that a significant psychological component underlies many of her current physical complaints. The psychological test data indicated that Ms. Bundy's personality is best characterized by an admixture of dependent and avoidant dynamics that could predispose her to depression, low self-esteem, the somatic expression of emotional distress, interpersonal hypersensitivity, the indirect expression of anger and passive dependency.

WORK RESTRICTIONS AND SUBSTANTIAL INCAPACITY

48. The existence of physician-imposed workplace limitations and restrictions do not necessarily equate to substantial incapacity to perform the ordinary and customary requirements of one's employment. Dr. Larson's equivocal comment in his Supplemental AME evaluation, that it would "probably be inadvisable" for applicant to return to work at CCFW, could be interpreted as a workplace limitation.

49. Workplace restrictions and limitations imposed through a physician or other healthcare provider through Workers Compensation can address a potentially very wide variety of situations, and may relate to either temporary partial or total incapacity, or longer lasting conditions, up to and including permanent disability. Workers Compensation work restrictions can reflect conditions or pathology that may or may not be substantially incapacitating. Dr. Larson's comment is best interpreted as advisory rather than an absolute prohibition. It was also focused on applicant's condition in 2007.

50. In addition, substantially less proof is required to prove a compensable injury in the Workers Compensation system than is required to meet the proof of substantial incapacity threshold for a disability retirement. Applicant's comment that she "won" her Workers Compensation case has no material impact on the determination that must be made here, to determine whether her claims of substantial incapacity have credible and persuasive medical support. The Worker's Compensation and disability retirement systems have different objectives and different mechanisms to evaluate what constitutes compensable injuries, disabilities or conditions, or substantially incapacitating injuries or conditions requiring permanent separation from one's usual and customary occupation. Even a finding of permanent total disability under the Worker's Compensation standards does not necessarily equate to and require a finding of substantial incapacity in the disability retirement system. The nomenclature and the rating system of the Workers Compensation system for disability finds no parallel and has no meaning in evaluating whether a person is substantially incapacitated from the ability to perform their usual and customary job duties.

ANALYSIS OF THE MEDICAL EVIDENCE OF INCPACITY

TUBERCULOSIS CLAIM

51. The medical evidence submitted in support of claimed disability on the basis of applicant's contracting peritoneal tuberculosis supports only a conclusion of a period of temporary total disability. The period of temporary total disability does not equate to substantial incapacity, which requires evidence of a permanent and sustained substantially incapacitating disability that does not exist in this record. Dr. Damiana and Dr. Sobel both concluded that, following applicant's hospitalization and treatment for peritoneal tuberculosis, and a period of recovery and rehabilitation, applicant recovered, and there is no current evidence of continuing disability. Both physician evaluators concluded that applicant has made a full recovery. There is no contrary medical evidence. Applicant is not substantially incapacitated as a result of having contracted peritoneal tuberculosis.

PSYCHIATRIC DISABILITY

52. Similarly, the medical evidence in this record does not support a claim of substantial incapacity based on psychiatric/mood disorder, and/or depression. Again, the evidence supports a conclusion that applicant suffered a period of temporary total disability as a result of the debilitating effects of battling peritoneal tuberculosis, combined with her efforts to return to work before she was fully recovered and strong enough to deal with the rigors of a workplace and supervision environment that substantially changed from the time she was hospitalized. Both Dr. Gottlieb and Dr. Larson agreed that there was a period of time following applicant's contracting peritoneal tuberculosis and her recovery in which she sustained a bout of major depression. Both concluded applicant's major depression was situational, but time-limited, and was episodic, part of a much larger pattern of periodic bouts of situational depression that long preexisted applicant's work with CDCR. The medical records, as Dr. Gottlieb in particular, and, to some extent, Dr. Larson as well pointed out, identify several instances of applicant experiencing periods of major depression, perhaps

totally disabling, that occurred in the 1990s and long preexisted her employment with CDCR. If this long standing condition was indeed permanently disabling and substantially incapacitating as claimed, and applicant is unable to ever return to work as a RN as the result of her episodic major depression, as she claims, simple logic requires the conclusion that applicant would never have been able to undertake the RN position at CDCR in the first place, or perform as well as she did, because she already suffered from the condition when she took the RN job. In fact, the medical records well document that applicant has been dealing with this claimed permanently disabling condition for a very long period of time, including coping with situational and episodic bouts of temporarily totally disabling major depression. Thus, the medical evidence does not sustain a conclusion that applicant's psychiatric condition constitutes a permanent disability that is substantially incapacitating.

53. Dr. Gottlieb pointed out in his reports that there are significant collateral contributors to applicant's psychiatric condition that exacerbate her periodic and episodic mood disorder that have nothing to do with work-related injury to her psyche. Dr. Gottlieb pointed out, and Dr. Larson agreed, that applicant has significant feelings of anger, irritability and recalcitrance toward her supervisors at work and how she was treated, as well as substantial anger and complaints about her working conditions. She also expressed feelings of depression about her children, her living situation, finances and struggles with obtaining benefits from Workers Compensation and CalPERS. In addition, applicant failed to disclose to Dr. Gottlieb her long standing alcoholism, which is another factor pointed out by Dr. Larson as significantly impacting applicant's psychiatric state due to its contribution to her declining state of physical health.

54. Both Dr. Gottlieb and Dr. Larson pointed out that applicant is psychiatrically able to return to work and perform her duties as an RN, if she were willing to do so. There is no evidence in this record that applicant is physically or psychiatrically substantially incapable of returning to work as an RN and performing her usual and customary job duties. Applicant elected to not continue working for CDCR, not necessarily because of a substantially incapacitating physical or psychiatric incapacity that prevented her from ever performing her RN duties, although for a short period of time she was temporarily totally incapacitated. After that period passed and she received appropriate medical treatment, she decided she did not want to continue dealing with supervisors and a work situation that she found intolerable and resistant to accommodating her. Similarly, her concerns about realizing that her skills and competence may be impaired because she returned to work without having made a full recovery were time limited and temporary. By the time Dr. Gottlieb evaluated applicant, her cognitive skills were found to be fully intact and functional. Although her initial departure from work may well have been within the window of temporary total disability due to the combined effects of her weakness from fighting tuberculosis, returning to work too soon without having fully recovered, and the psychological effects of dealing with her workplace issues, that period of time passed. There is no evidence that applicant is unable to return to work and perform satisfactorily, should she desire to do so.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. “As in ordinary civil actions, the party asserting the affirmative in an administrative hearing has the burden of proof going forward and the burden of persuasion by a preponderance of the evidence.”¹ It has been repeatedly held that the applicant for a disability retirement has the burden of proving eligibility for the benefit, including presenting satisfactory evidence of substantial incapacity to perform the usual and customary duties of his or her position.² An applicant for a CalPERS disability retirement bears the burden of proof and the burden of going forward with the evidence.³ *Mansperger* requires the applicant for disability retirement to prove that he or she is “substantially incapacitated” from the performance of his or her usual and customary duties.⁴

2. “‘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.”⁵

3. “If the medical examination and other available information show to the satisfaction of the board ... that the member is incapacitated physically or mentally for the performance of his or her duties in the state service and is eligible to retire for disability, the board shall immediately retire him or her for disability....”⁶

4. “We hold that to be ‘incapacitated for the performance of duty’ within section 21022 means the substantial inability of the applicant to perform his usual duties.”⁷ *Mansperger* continues to be the definitive statement of California courts to date regarding

¹ *McCoy v. Board of Retirement* (1986) 183 Cal.App. 3d 1044, 1051.

² *Id.*, *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332, *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App. 3d 873, 876.

³ *Id.*, *Harmon v. Board of Retirement* (1976) 62 Cal.App. 3d 689, 691, *In Re: Theresa V. Hasan*, Board of Administration of the California Public Employees’ Retirement System Precedential Decision No. 00-01.

⁴ *Mansperger, supra.*

⁵ Government Code section 20026, in pertinent part.

⁶ Government Code section 21156, in pertinent part.

⁷ *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App. 3d 873, 876.

the meaning of the language of section 21156 “incapacitated for the performance of duty,” in the context of an application for a disability retirement.

5. In applying the *Mansperger* standard, it has been held that the fact that a person has a limiting and painful physical condition, or an emotionally troubling psychological condition that limits, but does not preclude, the person’s ability to perform his or her usual duties; or makes performing the usual and customary duties of one’s occupation more difficult or unpleasant physically or mentally does not necessarily constitute a substantial incapacity for the purposes of a disability retirement.⁸ The fact that the physical or psychological condition may preclude the applicant from performing some but not all usual and customary job duties does not necessarily mean the applicant is substantially incapacitated within the meaning of *Mansperger* and section 21156.⁹

6. As set forth in the Factual Findings, applicant failed to carry her burden of proof to prove by a preponderance of the evidence that she is substantially incapacitated for the performance of her usual and customary duties as an RN with the CDCR. The medical evidence does not support a claim of substantial incapacity on the basis of peritoneal tuberculosis or on the basis of psychiatric injury. There is no evidence at all of substantially incapacitating injury on the basis of peritoneal tuberculosis. Applicant sustained a period of total temporary disability while she battled and recovered from the disease.

7. With respect to her claim of psychiatric incapacity, the evidence most favorable to applicant in this matter, that of Dr. Larson’s opinions, supports no more than another period of temporary total disability, when applicant experienced a period of major depression following her effort to return to work without having fully recovered from her tuberculosis and encountered difficult work conditions, and lingering physical and likely cognitive impairment due to the fact that she had not fully recovered and was not finished taking medication to treat the tuberculosis. Those periods passed, as set forth in the Factual Findings, and there is no psychiatric evidence in this record that demonstrates that applicant is either substantially incapacitated from performing her duties as an RN, or is unable to return to work, if she wanted to do so. Applicant has decided that the emotional discomfort of continuing to work under the circumstances and conditions of her employment were more than she could continue to bear, leading to this application for disability retirement. The legal standards for proof of substantial incapacity require more than what applicant presented. The medical evidence upon which this Decision may rely to make Factual Findings and Legal Conclusions, do not support applicant’s claim that she is substantially incapacitated due to her psychiatric disability claims.

8. As pointed out by CalPERS in its closing brief, the psychiatric evidence in this matter supports more a conclusion that applicant is unwilling rather than incapable of returning to work, a set of circumstances that does not support a conclusion of substantial

⁸ *Hosford v. Board of Administration* (1978) 77 Cal.App. 3d 854, 861-863.

⁹ *Id.*

incapacity.¹⁰ A lack of willingness, as opposed to a lack of ability to perform due to a physical or mental injury or condition causing a substantial incapacity to perform, does not constitute a basis to award a disability retirement.¹¹

9. Therefore, Applicant failed to meet her burden to prove by competent medical opinion, that she is substantially incapacitated, within the *Mansperger* standard, as a result of peritoneal tuberculosis and/or her psychiatric condition, from the performance of her usual and customary duties as an RN with CDCR. The application must be denied.

ORDER

The application of Marcia L. Bundy for a disability retirement is DENIED. The determination of the CalPERS Benefits Division that applicant is not substantially incapacitated from the performance of her duties as an RN for the CDCR, is AFFIRMED.

DATED: March 7, 2014



STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings

¹⁰ *Heywood v. American River Fire Protection District* (1998) 67 Cal.App. 4th 1292, 1296.

¹¹ *Id.*