

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:

SHAHIDA NAZ, M.D.,

Applicant/Respondent,

and

DEPARTMENT OF CORRECTIONS AND
REHABILITATION, CALIFORNIA
STATE PRISON AT CALIPATRIA,

Public Entity Employer/Respondent.

CalPERS Case No. 9439

OAH No. 2013050883

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on February 18 and May 6, 2014, in San Bernardino, California.

Thomas Hoegh, Attorney at Law, represented applicant/respondent Shahida Naz, M.D., who was present throughout the administrative proceeding.

Jeanlaurie Ainsworth, Senior Staff Counsel, represented petitioner Mary Lynn Fisher, Chief of the Benefit Services Division, California Public Employees' Retirement System, State of California.

No appearance was made by or on behalf of public entity employer/respondent Department of Corrections and Rehabilitation, California State Prison at Calipatria.

On May 6, 2014, the matter was submitted.

ISSUE

Was Shahida Naz, M.D., permanently disabled or incapacitated from performing the usual and customary duties of a physician for the Department of Corrections and

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED 6-9-2014

Rehabilitation, Calipatria State Prison, as a result of one or more orthopedic conditions or as a result of one or more internal medical conditions?

FACTUAL FINDINGS

Preliminary Matters

1. Applicant/respondent Shahida Naz, M.D. (Dr. Naz or applicant) was employed by public entity/respondent Department of Corrections and Rehabilitation, California State Prison at Calipatria (Calipatria State Prison), as a physician. By reason of her employment, Dr. Naz was a state safety member of the California Public Employees' Retirement System (CalPERS) subject to Government Code section 21151.

2. On September 5, 2008, Dr. Naz signed a Disability Retirement Election Application that she filed with CalPERS. In her application, Dr. Naz claimed the right to receive a disability retirement on the basis of lumbar and cervical conditions, bilateral shoulder pain, hypertension, hypertensive heart disease, diabetes, and glaucoma.

3. CalPERS obtained medical records and reports related to Dr. Naz's orthopedic, internal, and ophthalmological conditions from medical professionals. CalPERS selected an orthopedic surgeon, an internist, and an ophthalmologist to conduct disability evaluations. The physicians that CalPERS selected provided narrative reports containing findings and conclusions related to Dr. Naz's asserted eligibility for a disability retirement.

After reviewing various records and reports, CalPERS determined that Dr. Naz was not permanently disabled or incapacitated from performing the usual and customary duties of a physician at Calipatria State Prison when she filed her application for a disability retirement.

4. By letter dated March 11, 2009, CalPERS notified Dr. Naz of its adverse determination and of her right to appeal.

5. By letter dated March 29, 2009, Dr. Naz timely appealed from CalPERS's adverse determination.

6. On July 27, 2012, petitioner Mary Lynn Fisher, CalPERS's Chief, Benefit Services Division, signed the statement of issues in her official capacity. The statement of issues and other required documentation was served on Dr. Naz and upon the Department of Corrections and Rehabilitation, California State Prison at Calipatria.

The matter was set for an administrative hearing. On February 12, 2014, Acting Presiding Administrative Law Judge Beth Faber Jacobs issued an order granting a request to add an additional day for hearing in the matter. The matter was set for hearing on February 18, 2014, and May 6, 2014, in San Bernardino, California.

7. On February 18, 2014, the record in the hearing was opened. Jurisdictional documents were presented. Applicant waived her claim to a disability retirement on the basis of glaucoma. The parties stipulated to the truth of the factual matters alleged in paragraphs I, II, III, V (other than CalPERS's ultimate conclusion), VI, VII, and VIII of the statement of issues as modified by applicant's waiver. Official notice was taken of the statutory law contained in paragraph IV of the statement of issues. Sworn testimony was received and documentary evidence was produced. The hearing was continued to May 6, 2014, to take further evidence. On May 6, 2014, the record was reopened; sworn testimony and documentary evidence was received; closing arguments were given; the record was closed; and the matter was submitted.

Applicant's Background, Education, and Training

8. Dr. Naz was born in Pakistan in 1952. She came to the United States in 1974. She attended the University of Chicago, where she obtained a degree in Genetics. She attended American University of the Caribbean School of Medicine from 1982 through 1986. She received a medical degree in 1986. After completing an internship at St. Thomas Hospital in the U. S. Virgin Islands, Dr. Naz returned to the United States. She participated in an Internal Medicine residency at the University of Louisville for one year, and then transferred to the University of California, San Francisco, School of Medicine where she completed a three-year Nuclear Medicine residency program. Dr. Naz is board eligible in Nuclear Medicine, but is not board certified.

Dr. Naz's Employment at Calipatria State Prison

9. Calipatria State Prison is located in Calipatria, a relatively small city in the Imperial Valley that is about 20 miles north of El Centro. It is a male-only correctional facility that houses approximately 3,500 to 4,000 inmates, some of whom are Level IV inmates. The prison itself covers about 300 acres.

10. Dr. Naz began working for the Department of Corrections in 2000. When she began her employment at Calipatria State Prison, she did not have neck, shoulder, or low back problems; she did not suffer from hypertension or diabetes. There were six licensed physicians on staff at Calipatria State Prison when Dr. Naz began working there. Five physicians were assigned to separate clinics, and Dr. Martin Levin, the prison's Health Care Manager and Chief Medical Officer, was stationed at the central administrative building.

11. Dr. Levin was Dr. Naz's supervisor. He was seldom present when Dr. Naz provided direct medical services to inmates in the medical clinics that were located within the prison. Dr. Levin usually worked in the administration building or triage treatment area (TTA). From time to time, Dr. Levin provided services outside of the prison. Petra G. Baltierrez, R.N., a nurse, frequently worked with Dr. Naz.

12. Dr. Naz's usual and customary practice required her to stop at the central administration building to check on her daily assignments, to review lab results and the results of other diagnostic testing, and then to see patients at the prison's central health

infirmery, also known as the outpatient housing unit. When examining and treating patients in the infirmary, Dr. Naz often had to kneel or squat down to examine patients who were diagnosed with mental disorders because those patients usually were lying on mattresses on the infirmary floor. She usually examined three to five patients a day at the infirmary. While psychiatrists provided mental health services to patients diagnosed with mental disorders, Dr. Naz and the other rank and file physicians provided direct medical care to these inmates. Dr. Naz's examination and treatment of mentally disordered patients sometimes lasted as long as an hour.

After rounding at the infirmary, Dr. Naz had emergency room duty. She obtained histories and conducted physical examinations at the TTA. The inmates seen in the TTA were usually confined to a gurney when Dr. Naz conducted examinations and provided medical treatment. Many of the inmates in the TTA engaged in drug seeking behavior and claimed injuries that required the administration of pain medications or other psychoactive drugs. Many of the physical examinations Dr. Naz performed in the TTA required Dr. Naz to perform straight leg raising tests for purported low back injuries and physical testing that required her to exert force to move or resist the movement of inmate limbs.

After concluding her TTA duties, Dr. Naz went to the medical clinic in the yard to which she had been assigned for that day. She carried the charts of add-on patients she was scheduled to see that day at least one quarter mile from the central administration building to the outlying medical clinic. It was not uncommon for the charts to weigh as much as 15 pounds, and sometimes as much as 25 pounds. Once she arrived at the clinic, Dr. Naz provided medical services to at least 20 inmates per day. Services were provided continuously for periods lasting up to six or seven hours. There was no assigned lunch break. Dr. Naz was assisted by a medical technician, and there was usually one nurse assigned to each outlying clinic.

The inmates Dr. Naz examined and treated in an outlying clinic suffered from various chronic medical conditions, such as diabetes or hypertension, as well as more acute conditions including common illnesses such as the flu, colds, and other infections. Most inmates had some type of foot problem, usually a fungus. Examinations at an outlying clinic were provided in an examination room. Dr. Naz usually conducted examinations and provided medical services from a rolling office chair. No security was present.

In providing services at an outlying clinic, Dr. Naz obtained a history, reviewed the patient chart, conducted a neurological and orthopedic examination, sometimes squatted down to examine lower extremity reflexes and an inmate's foot. She had to raise her arms above her shoulders to conduct some physical examinations.

When violence occurred within the prison that required a medical response, Dr. Naz was sometimes summoned to provide examinations in the yard or in an inmate's cell. In conducting examinations in the yard, Dr. Naz had to squat down. She had to ride in an ambulance when transporting injured inmates to the TTA. Other inmates sometimes helped Dr. Naz into and out of the ambulance. Dr. Naz had to climb a flight of stairs when conducting examinations in cells located on the second floor.

As a part of her responsibilities, Dr. Naz often reduced minor fractures and dislocations arising out of sports injuries or acts of violence. Doing so required strength and the use of physical force.

Physical Requirements of the Position

13. Dr. Naz completed a Physical Requirements of Position/Occupational Title form. She reported that she was occasionally required to run, frequently had to stand, and constantly had to sit. She indicated she was required to kneel and climb occasionally. She reported that she was required to bend, twist, reach, push and pull frequently. She indicated that she was required to lift up to 100 pounds on occasion. In a narrative statement attached to the form, Dr. Naz indicated that she had to kneel to attend to inmates who had been stabbed, who suffered from heat stroke, or who experienced sports injuries. She stated she had to climb into an ambulance when transporting patients from the yard for emergency treatment. She stated that she had to bend, twist and reach when examining patients. She described having to move heavy patients.

The representations Dr. Naz made in the Physical Requirements of the Position form were consistent with her description of her daily responsibilities. With the exception of having to lift 100 pounds, Dr. Levin testified that the duties set forth in a 2009 job description were consistent with what Dr. Naz was required to do, and that it was possible that Dr. Naz had to lift up to 75 pounds on occasion, although he believed that would be unusual. He agreed that Dr. Naz might be required to lift 11 to 25 pounds up to three hours a day, and he was certain that she was required to kneel, bend, twist and bend from three to six hours a day. Dr. Levin believed Dr. Naz had to climb stairs to the second floor of an inmate housing building once a year to provide tuberculosis testing. Dr. Levin did not recall that he had issued a memorandum directing rank and file physicians at Calipatria State Prison to accompany patients they had treated in the yards to the TTA in ambulances. Dr. Levin agreed that when Dr. Naz was employed, she was required to perform duties consistent with most of the non-administrative duties described in a 2009 statement. Among other matters, Dr. Naz was required to possess and maintain sufficient strength, agility and endurance to perform during stressful (physical, mental and emotional) situations encountered on the job without compromising personal health and well being or that of fellow employees or inmates. She was also required to maintain order, make clinical rounds, perform clinical duties, and occasionally to frequently lift and carry objects in the light and medium (20 to 50 pound maximum) ranges.

14. Petra G. Baltierrez, R.N., was a nurse at Calipatria State Prison from 2000 through 2006. She worked with Dr. Naz many times. She observed Dr. Naz examining inmates and providing them with medical care. She observed Dr. Naz's conduct thorough assessments that required bending and kneeling for prolonged periods of time. She observed Dr. Naz kneeling to treat inmates who were injured in the yard. She observed Dr. Naz forcefully examining inmates who resisted examination. She observed Dr. Naz forcefully reducing shoulder dislocation injuries. She observed Dr. Naz being helped into and out of the ambulance. She observed Dr. Naz carrying numerous patient charts, weighing 15 pounds

or more, from the central administration building to an outlying clinic that she estimated was a half a mile away.

The November 2003 Incident

15. On Thanksgiving weekend 2003, Dr. Naz fell to the floor from a rolling office chair and injured her neck, shoulder and lower back. She continued to work immediately after her fall despite her injuries.

16. On December 10, 2003, Dr. Naz saw George Fareed, M.D., at Pioneer Memorial Hospital in Brawley, California. Dr. Fareed obtained a history, conducted a physical examination, and established a treatment plan for Dr. Naz's injuries.

When Dr. Naz's condition did not improve, Dr. Fareed referred Dr. Naz to Dr. Larry Dodge, a San Diego orthopedic surgeon who specializes in the diagnosis and treatment of spinal injuries. Dr. Naz continues to treat with Dr. Dodge.

17. Dr. Dodge referred Dr. Naz to Dr. Christopher Behr, another orthopedic surgeon, for evaluation of Dr. Naz's shoulder injury. In September 2004, Dr. Naz underwent a right shoulder surgery that Dr. Behr performed.

18. Dr. Naz was temporarily off work as a result of her orthopedic injuries. She returned to work in April 2005. According to Dr. Naz, she obtained a release to return to work "because I wanted to work."

Dr. Naz remained at work until June 2005, when she aggravated her neck and shoulder injuries. Following examination, Dr. Dodge imposed a work restriction that the Department of Corrections could not accommodate. Dr. Naz's condition has been deemed permanent and stationary since September 2005.

19. Dr. Naz has not been employed since June 2005. She currently lives with her daughter in San Diego. Her daily activities are limited to doing minor housework (washing dishes, making breakfast, grocery shopping), eating, and watching television. She is unable to tolerate long car rides.

The Hypertension, Hypertensive Heart Disease, Glaucoma, and Diabetes Conditions

20. In her application for a disability retirement, Dr. Naz asserted, among other matters, that "hypertension, hypertensive heart disease, diabetes and glaucoma developed during service due to being subject to constant stress and strain on the job" and that she was unable "to work in the very stressful environment of demanding, physically threatening, hostile, verbally abusive, and extremely dangerous patients, as well as a very heavy workload due to medical staff shortages."

21. The onset of diabetes, hypertension and glaucoma occurred during Dr. Naz's employment with Calipatria State Prison. No credible expert evidence was provided that

established that Dr. Naz's diabetes, hypertension or glaucoma resulted in permanent disability or incapacity that precluded Dr. Naz from performing the usual and customary duties of a physician for the Department of Corrections and Rehabilitation, Calipatria State Prison. Indeed, the credible medical evidence was to the contrary.

22. On the issue of glaucoma, Dr. Naz withdrew her claim. In addition, Larry A. Pasquali, M.D., a board certified ophthalmologist who examined Dr. Naz on January 22, 2009, and reviewed relevant medical records, provided uncontradicted expert medical testimony that established that Dr. Naz's glaucoma occurred naturally, was not related to her work, was well controlled, and was not disabling in any way.

23. On the issue of Dr. Naz's hypertension, hypertensive heart disease, and diabetes, Sahniah Siciarz-Lambert, M.D., a board certified internist and disability analyst, examined Dr. Naz on November 19, 2008, and reviewed relevant medical records. Dr. Siciarz-Lambert provided compelling expert medical opinion that established that Dr. Naz's hypertension, hypertensive heart disease, and diabetes did not preclude Dr. Naz from performing any of the usual and customary duties of a physician employed at Calipatria State Prison. Dr. Siciarz-Lambert's opinion was based upon Dr. Naz's history of the present illness, her past medical and surgical history, her family history, her work history, a review of systems, a physical examination that included a neurological examination, a review of medical records, and a review of diagnostic testing. Dr. Siciarz-Lambert's diagnoses included Dr. Naz being moderately obese, hypertensive with poor control, diabetic without significant evidence of end-organ damage, having glaucoma, and dissatisfied with her employment position.

In her report and testimony, Dr. Siciarz-Lambert concluded there were no specific vocational duties that required modification as result of Dr. Naz's hypertension, that there were no specific vocational duties that required modification as a result of Dr. Naz's hypertensive heart disease, and that there were no specific vocational duties that required modification as a result of Dr. Naz's diabetes. Dr. Naz could perform her usual and customary duties despite her hypertension, hypertensive heart disease, and diabetes. In her report and testimony, Dr. Siciarz-Lambert made it clear that she was not reaching any opinion on any orthopedic complaints.

24. Dr. Naz provided scant evidence to support a finding that she was unable to meet her responsibilities as a physician at Calipatria State Prison due to her hypertension, hypertensive heart disease, or diabetes. No independent expert testimony was offered to support that claim. Records and reports related to Dr. Naz's hypertension, hypertensive heart disease, and glaucoma were received as administrative hearsay.¹ However, these medical records and reports were insufficient on their own to establish a finding that the aforementioned conditions resulted in Dr. Naz being permanently disabled or incapacitated

¹ Government Code section 11513, subdivision (d), provides in part: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions"

from performing the usual and customary duties of a physician for the Department of Corrections and Rehabilitation, Calipatria State Prison.

The Orthopedic Conditions

25. Dr. Naz's application for disability retirement mentioned cervical spine, lumbar spine, and bilateral shoulder conditions as a basis for her disability retirement.

Very little evidence was introduced concerning Dr. Naz's shoulder injuries or cervical spine condition. The focus of Dr. Naz's disability claim was on her alleged lumbar spine injury and the disability arising out of that injury.

The Shoulder Condition

26. Dr. Dodge referred Dr. Naz to Dr. Behr for treatment of her shoulder injury. Following examination, Dr. Behr diagnosed Dr. Naz as suffering from chronic impingement syndrome, right shoulder.

On September 29, 2004, Dr. Naz underwent diagnostic arthroscopy of the right shoulder, arthroscopic debridement of a glenoid labral tear, and arthroscopic subacromial decompression with acromioplasty of the right shoulder joint. Dr. Behr performed those surgical procedures. Dr. Behr did not testify.

No evidence was presented to establish that Dr. Naz's right shoulder injury or the surgical repair of that shoulder resulted in a condition that permanently disabled or incapacitated Dr. Naz from performing the usual and customary duties of a physician for the Department of Corrections and Rehabilitation, Calipatria State Prison.

27. Dr. Behr evaluated Dr. Naz's left shoulder in July 2005. Following his examination, Dr. Behr diagnosed, among other matters, a left shoulder impingement syndrome that precluded Dr. Naz from overhead work. Dr. Behr reexamined Dr. Naz in September 2005. He conducted another physical examination and reviewed additional medical records.

No evidence was presented to establish that Dr. Naz's left shoulder injury resulted in a condition that permanently disabled or incapacitated Dr. Naz from performing the usual and customary duties of a physician for the Department of Corrections and Rehabilitation, Calipatria State Prison.

The Cervical Condition

28. Dr. Fared did not mention a cervical injury or cervical spine complaints in the reports he authored.

Dr. Dodge's report following his first examination of Dr. Naz did not mention a cervical injury or any cervical spine complaints. Dr. Dodge mentioned Dr. Naz's complaints

of diffuse neck pain in a report dated September 14, 2004. However, that report and Dr. Dodge's other reports focused almost exclusively on Dr. Naz's complaints of lumbar spine pain and the disability it caused. No permanent and stationary report that Dr. Dodge authored in Dr. Naz's worker's compensation action specifically mentioned any disability arising out of a cervical spine injury.

No compelling evidence was presented to establish that Dr. Naz suffered an injury to her cervical spine that resulted in a condition that permanently disabled or incapacitated her from performing the usual and customary duties of a physician for the Department of Corrections and Rehabilitation, Calipatria State Prison.

The Lumbar Spine Condition and Disability

29. Conflicting expert medical testimony concerning Dr. Naz's lumbar injury and any resulting disability was provided by Dr. Larry Dodge, Dr. Naz's treating physician, and Dr. Robert L. Horner, M.D., a consulting physician who examined Dr. Naz at CalPERS's request on February 6, 2008.

Dr. Larry Dodge

30. Larry Dodge, M.D., received his medical degree from the University of California, San Francisco, School of Medicine in 1980. He completed a surgical internship at the University of Michigan, Ann Arbor, in 1981, a junior Orthopedic Surgery residency and a junior residency in Hand Surgery at the University of California, San Francisco, School of Medicine in 1984. He completed a Spine and Spinal Cord Injury fellowship at Case Western Reserve University in Cleveland, Ohio, in 1986. He is board certified in Orthopedic Surgery. He was Chairman, Department of Orthopedic Surgery, at Scripps Mercy Hospital from 1999 through 2003.

Dr. Dodge is currently a Clinical Instructor in Orthopedic Surgery at the University of California, San Diego, School of Medicine. He is a member of numerous professional organizations. He holds staff privileges at several hospitals in San Diego County.

Dr. Dodge's medical specialty involves the care and treatment of spinal injuries and diseases. About 75 to 80 percent of his medical practice is related to workers' compensation claims. Less than three percent of his practice involves independent medical examinations. He has performed many thousand spinal surgeries.

Dr. Robert L. Horner

31. Robert L. Horner, M.D., received his medical degree from Loma Linda University School of Medicine in 1953. He completed a rotating internship at Los Angeles County General Hospital in 1954. He completed an Orthopedic Surgery residency at the UCLA School of Medicine in 1958. He later completed a Hand Surgery fellowship. He became board certified in Orthopedic Surgery in 1961. He taught medicine at the University of Colorado School of Medicine.

It was not clear whether Dr. Horner currently practices medicine. He volunteers at Loma Linda University School of Medicine.

Dr. Horner has been involved in about two dozen spinal surgeries over the course of his sixty year medical career. While he is somewhat knowledgeable about spinal diseases and injuries, his medical expertise is not in that field.

In reaching his opinions and conclusions in this matter, Dr. Horner reviewed Dr. Naz's application for a disability retirement, the physical-requirement-of-the-position form that Dr. Naz completed, and a questionnaire Dr. Naz filled out in connection with her visit with him on February 6, 2008.

Dr. Dodge's Treatment, Opinions, and Conclusions

32. Dr. Dodge first saw Dr. Naz as a workers' compensation patient on April 13, 2004. He obtained chief complaints (right shoulder and arm pain, low back and left leg pain), a history of the present illness, and a past medical history (it was negative for similar injuries). He conducted a physical examination and reviewed x-rays and medical records.

Dr. Dodge concluded that Dr. Naz suffered from lumbosacral strain and contusion with resultant aggravation or propagation of a lumbar disc herniation at L5-S1 with associated stenosis causing a compression of the left S1 nerve root and continual low back pain. He determined that Dr. Naz was temporarily partially disabled from work. Dr. Dodge recommended that Dr. Naz avoid repetitive bending and stooping, prolonged standing or walking, and the lifting of more than 15 pounds.

33. Dr. Dodge continued to follow up with Dr. Naz for her orthopedic injuries every sixty days or so. He authored a report dated November 3, 2004, in which he opined that Dr. Naz had subjective complaints that might handicap her in performing the activities that precipitated and aggravated her lumbar pain including repetitive bending, stooping and lifting. Dr. Dodge believed that Dr. Naz had a disability that precluded her from engaging in very heavy work.

34. Dr. Dodge continued to follow up with Dr. Naz on a regular basis thereafter. In a report dated June 29, 2005, Dr. Dodge reported that Dr. Naz had difficulty working because of low back pain that radiated into her buttocks and leg. Dr. Dodge performed a physical examination. He believed obtaining a MRI was appropriate.

An MRI taken July 7, 2005, revealed increased pathology with a focal left sided disc herniation at L4-5 and a lesser degree of disc disease at L3-4.

In a report dated July 20, 2005, Dr. Dodge did not recommend surgery, but he recommended lumbar epidural injections.

35. Dr. Dodge saw Dr. Naz again on August 23, 2005, and she was “not doing well.” Dr. Dodge conducted an evaluation that revealed limited range of motion in the spine and positive straight leg raising.

36. On September 23, 2005, Dr. Dodge issued another permanent and stationary report. With regard to the lumbar spine, Dr. Dodge believed Dr. Naz’s condition precluded her from engaging in heavy lifting and repeated bending and stooping. Based upon her complaints of pain and her repeated absences from work, Dr. Dodge believed Dr. Naz was a qualified injured worker. He recommended certain vocational restrictions

The Department of Corrections and Rehabilitation could not provide Dr. Naz with the reasonable work restrictions and accommodations that Dr. Dodge proposed.

37. Dr. Dodge continued to evaluate Dr. Naz regularly, and he continued to report his findings and conclusions to the workers’ compensation carrier following each office visit. Dr. Dodge examined Dr. Naz more than 20 times before Dr. Naz filed her application for a disability retirement in September 2008. Since then, Dr. Dodge has evaluated Dr. Naz on at least 20 more occasions.

38. Dr. Dodge testified about his many meetings with Dr. Naz, what she told him, what he understood was required of a physician employed at Calipatria State Prison, what he believed Dr. Naz was required to do as a prison physician, the results of the many physical examinations he conducted, and the results of the imaging studies he reviewed. Dr. Dodge was knowledgeable about Dr. Naz, her condition and her limitations. Dr. Dodge possessed a valid understanding of the usual and customary duties of a Calipatria State Prison physician. Dr. Dodge found Dr. Naz to be a highly credible patient who did not exaggerate her symptoms or physical condition.

39. Based upon his interactions with Dr. Naz, his care and treatment of her, the results of numerous imaging studies, and his understanding of the physical requirements of the position of a physician employed at the Calipatria State Prison, Dr. Dodge testified to a reasonable medical certainty that Dr. Naz suffered from a permanent lumbar disability that precluded her from performing the usual and customary duties of a physician at Calipatria State Prison. Objective evidence of her disability included restricted ranges of motion, positive straight leg raising testing, and abnormal MRI findings that were “bad enough to justify surgery” even though Dr. Dodge had not yet recommended that Dr. Naz undergo such surgery. Dr. Dodge reached these conclusions with reference to the relevant CalPERS’s disability standard, and not a worker’s compensation disability standard.

40. On cross-examination, Dr. Dodge conceded that he had classified Dr. Naz as having no more than “slight” subjective complaints of pain and that he believed Dr. Naz was precluded from “very heavy work.” Dr. Dodge testified these descriptions were drawn from the workers’ compensation rating systems and did not factually or fairly describe the extent of Dr. Naz’s disability. He testified that the employment limitations he recommended – that Dr. Naz avoid repetitive bending and stooping, prolonged standing or walking, and not lifting more than 15 pounds – were both prophylactic and actual restrictions when they were issued.

However, Dr. Dodge testified that, if Dr. Naz were to engage in conduct that exceeded the limitations he had recommended, she would surely suffer additional injuries, which made these actual restrictions rather than prophylactic restrictions.

Dr. Horner's Visit with Dr. Naz and the Evolution of his Opinions and Conclusions

41. On February 6, 2008, Dr. Horner evaluated Dr. Naz at his office. He obtained Dr. Naz's present complaints, a work history, occupational requirements of the job, a history of the present injury, a past medical history and a social history. He performed a system review. He conducted an orthopedic examination that included examinations of the cervical spine, hands, wrist, elbows, shoulders, thoracic spine, and lumbar spine. Dr. Horner reviewed medical records and summaries of diagnostic testing.

Dr. Horner issued a report dated February 6, 2008, in which he concluded that Dr. Naz's diagnoses were: (1) postoperative status following arthroscopic surgery right shoulder; (2) acromion impingement; (3) lumbosacral strain with persistent spasm in lumbar area without radiculopathy; and (4) chronic cervical strain with significant degenerative intervertebral disk disease. In his February 6, 2008, report, Dr. Horner wrote:

Ms. Naz is unable to do the following job duties that she states that she was required to do as a physician: 1. Relocate hip and shoulder dislocations. 2. Squat down by injured inmates to give them appropriate care. 3. Get up in the van or ambulance when inmates are being transported to the clinical facility. 4. Lifting over 20 pounds repetitively or 25 pounds occasionally.

[¶] . . . [¶]

Ms. Naz is substantially incapacitated from doing her usual duties as a prison physician and surgeon. This disability began in approximately June 2005.

[¶] . . . [¶]

The incapacity is permanent.

42. Dr. Horner essentially confirmed his February 6, 2008, opinion in a letter to CalPERS dated August 7, 2008. He concluded that Dr. Naz was unable to constantly lift up to 25 pounds and that she was unable to stand or walk on a frequent basis due to her low back symptoms. He believed that Dr. Naz was unable to perform her usual duties as a prison physician. He did not mention an inability to lift 100 pounds as the basis of his opinion.

43. Dr. Horner thereafter reviewed the essential functions statement and a statement from an individual he identified as "Dr. Nevin" (evidently a misspelling of Dr. Levin). Based on that statement concerning Dr. Naz's responsibilities and duties as a prison physician, Dr. Horner concluded that his previous opinions were erroneous.

Dr. Horner issued a "supplemental report" dated October 16, 2008, in which he mentioned reviewing a "list of job descriptions written by Dr. Nevin [sic] in a document dated March 17, 2008." That document was not produced. Based on that document, Dr. Horner asserted that Dr. Naz was not required to perform those vocational duties that he had previously described in earlier reports. Based upon this new information, Dr. Horner concluded that Dr. Naz was not permanently disabled from performing any of the usual and customary duties of a prison physician and that she was not entitled to a disability retirement.

44. Dr. Horner's testimony mirrored the opinions and conclusions contained in his three previous reports. To support the evolution of his medical conclusions, Dr. Horner testified that the protrusion he observed in Dr. Naz's MRI was not uncommon in adults and was likely to be present in overweight persons, and he mentioned that the protrusion (which he did not refer to as a herniation) was not necessarily due to trauma. These opinions were not set forth in any report that Dr. Horner issued. Dr. Horner admitted that during the examination he performed, he found spasm in the lumbar spine. Dr. Horner admitted that he had no idea who "Dr. Nevin" was. Dr. Horner stated that the primary reason he changed his disability opinion was that he learned that Dr. Naz was never required to lift as much as 100 pounds while working, even though he failed to mention that as being a critical finding in his report. Dr. Horner testified he believed Dr. Naz exaggerated her complaints, even though he specifically wrote in his first report, "Ms. Naz cooperated with the examination putting forth her best effort and there was no exaggeration of complaints to any degree." Dr. Horner did not explain the basis of this new opinion.

Resolving Conflicting Expert Testimony

45. In resolving any conflict in the testimony of expert witnesses, the opinion of one expert should be weighed against that of another. In doing this, consideration should be given to the qualifications and believability of each witness, the reasons for each opinion, and the matter upon which it is based. (BAJI section 2.41.)

46. Dr. Dodge is a highly educated, well trained, experienced, board certified orthopedic surgeon who specializes in the evaluation and treatment of lumbar injuries and diseases. He has seen and evaluated Dr. Naz for her complaints of low back pain on more than three dozen occasions. He based his opinion on his education, training, experience, numerous contacts with Dr. Naz, and a valid understanding of the physical requirements incumbent upon a physician working at Calipatria State Prison. His understanding of what was required of a prison physician was consistent with the duties described by Dr. Naz and Nurse Baltierrez's observations.

Dr. Dodge, as the treating physician, was far more knowledgeable than any other medical expert about the nature and extent of Dr. Naz's low back problem, the treatment of it, and her physical limitations. Dr. Dodge prepared a detailed narrative report that documented what he was told, what he observed, and what he recommended after each patient encounter. Dr. Dodge's testimony was consistent with the information contained in his reports, and the orthopedic condition he testified about remained consistent from visit to visit. His opinions were not changed by hearsay information provided by others. Dr. Dodge

testified in a direct manner, answered all questions he was asked, did not appear to be an advocate, and demonstrated no bias. His testimony was extremely credible.

47. Dr. Horner is an educated, trained, experienced, board certified orthopedic surgeon who has never specialized in lumbar injuries or diseases. He saw Dr. Naz one time. He was not as knowledgeable as Dr. Dodge concerning Dr. Naz's history, complaints, symptoms, physical condition, treatment, or physical limitations. He changed his ultimate disability opinion based upon the hearsay statement of a "Dr. Nevin," an individual he knew nothing about. Dr. Horner's understanding of the physical requirements of a physician working at Calipatria State Prison was inconsistent with Dr. Naz's credible testimony and with Nurse Baltierrez's observations of Dr. Naz actual job duties. Dr. Horner demonstrated bias by suggesting that Dr. Naz was prone to exaggeration when he had no objective reason to reach that conclusion and had, in fact, expressed an opinion to the contrary immediately after his only examination of Dr. Naz.

Arguments

48. Counsel for Dr. Naz argued that Dr. Naz's testimony concerning the essential functions and physical requirements of the position of a physician for Calipatria State Prison was corroborated by the testimony of Nurse Baltierrez, that Dr. Levin observed very few of the services Dr. Naz actually provided in the infirmary and outlying clinics, that Dr. Dodge credibly testified that Dr. Naz was incapable of performing the usual and customary duties of a prison physician, and that Dr. Dodge's testimony was more believable than Dr. Horner's testimony. Counsel argued that a preponderance of the evidence supported a conclusion that Dr. Naz's application for disability retirement should be granted.

49. Petitioner's counsel argued that the resolution of this matter required credibility assessments. Counsel argued that Dr. Naz was hired in 2000; that Dr. Naz was very unhappy with the job; and that when Dr. Naz suffered a minor injury following an industrial accident occurring in 2003, she used that opportunity to avoid further work and obtain a paid retirement. Counsel argued that Dr. Naz overstated both her physical complaints and the physical demands of her employment. Counsel argued that Dr. Dodge based his disability conclusion on improper workers' compensation standards and that Dr. Dodge did not understand what Dr. Naz was actually required to do because Dr. Naz had misrepresented her duties. Counsel argued that Dr. Horner was an independent medical examiner who properly changed his opinion concerning Dr. Naz's eligibility for a disability retirement when he was presented with the true facts. With regard to the tasks that Dr. Naz might not be able to perform physically, counsel argued those tasks were infrequent and did not involve usual and customary duties required of a prison physician. Counsel argued that Dr. Naz failed to prove her case and that her application for a disability retirement should be denied.

Evaluation

50. A preponderance of the evidence established Dr. Naz's right to receive a CalPERS disability retirement. Dr. Naz suffered a low back injury that resulted in her being

unable to perform the usual and customary duties of a physician employed at Calipatria State Prison.

In her employment as a physician at Calipatria State Prison, Dr. Naz was required to frequently stand and constantly sit. She was required frequently kneel, stoop, twist, bend, push and pull when carrying out her usual and customary clinical responsibilities. She was required to occasionally climb stairs or climb into and out of ambulances. She was required to carry medical charts weighing at least 15 pounds for distances up to one half mile daily. She frequently lifted and carried objects in the 20 to 50 pound range, and she occasionally lifted objects weighing up to 75 pounds. She was sometimes required to forcefully examine inmates or to use physical force to reduce dislocations. These were usual and customary activities; they were not uncommon or infrequent duties.

Dr. Dodge was Dr. Naz's treating physician. Based upon his many interactions with Dr. Naz, his care and treatment of her, and his legitimate understanding of the physical requirements of the position of a physician employed at the Calipatria State Prison, Dr. Dodge testified to a reasonable medical certainty that Dr. Naz suffered from a permanent lumbar disability that precluded her from performing the usual and customary duties of a physician working at Calipatria State Prison. There was objective evidence that supported this disability conclusion, which was rendered in accordance with the relevant CalPERS's disability standard. Dr. Dodge's testimony was far more credible than the contrary medical testimony of Dr. Horner.

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 provides in part:

“Disability” and “incapacity for performance of duty” as a basis of retirement means disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

3. Government Code section 21151 provides in part:

(a) Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial

disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service. . . .

4. Government Code section 21152 provides in part:

Application to the board for retirement of a member for disability may be made by:

[¶] . . . [¶]

(d) The member or any person in his or her behalf.

5. Government Code section 21154 provides in part:

The application shall be made only (a) while the member is in state service . . . On receipt of an application for disability retirement of a member . . . the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. . . .

6. Government Code section 21156 provides in part:

(a)(1) If the medical examination and other available information show . . . that the member in the state service is incapacitated physically . . . for the performance of . . . her duties and is eligible to retire for disability, the board shall immediately retire . . . her for disability

(2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion

7. Government Code section 21166 provides in part:

If a member is entitled to a different disability retirement allowance according to whether the disability is industrial or nonindustrial and the member claims that the disability as found by the board . . . is industrial and the claim is disputed by the board . . . the Workers' Compensation Appeals Board, using the same procedure as in workers' compensation hearings, shall determine whether the disability is industrial.

The jurisdiction of the Workers' Compensation Appeals Board shall be limited solely to the issue of industrial causation. . . .

Appellate Authority

8. "Incapacitated" means the applicant has a substantial inability to perform his or her usual duties. When an applicant can perform his or her customary duties, even though doing so may be difficult or painful, the public employee is not "incapacitated" and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887.)

9. Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854; *Bowman v. Board of Administration* (1984) 155 Cal.App.3d 937.)

10. *Mansperger* and *Hosford* do not stand for the proposition that a public employee is entitled to disability retirement only when he or she is substantially unable to perform the usual duties of the position he most recently held. The usual duties of a job should be measured in terms of the job classification the applicant held. Tying an applicant's entitlement to disability retirement to his last specific assignment would tend to lead to highly inconsistent results for persons in identical job categories who suffer from identical disabilities. (*Beckley v. Board of Administration of California Public Employees' Retirement System* (2013) 222 Cal.App.4th 691, 699.)

11. A public employee who suffers a disability that reaches a medically determinable state of severity does not have a prospective disability but a medically certain condition. The employee's unsuccessful attempt to continue employment, despite increased symptoms, does not require the employee to return to employment. A chronic disease that prevents the employee from performing his or her duties constitutes a condition sufficient to grant a disability retirement. The provisions for disability retirement are also designed to prevent the hardship which might result when an employee who, for reasons of survival, is forced to attempt performance of his duties when physically unable to do so. (*Wolfman v. Board of Trustees* (1983) 148 Cal.App.3d 787, 791.)

Evidentiary Matters

Hearsay Evidence – the Medical Records

12. Government Code section 11513, subdivision (d), provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in

civil actions. An objection is timely if made before submission of the case or on reconsideration.

13. The hearsay objection to the medical records related to the care and treatment of Dr. Naz's hypertension, hypertensive medical condition, diabetes, and shoulder injury, and the opinions related to Dr. Naz's disability that were contained in those records, was timely. There was no relevant expert testimony those records supplemented or explained.

14. A sufficient foundation was established to permit the introduction of the medical records and reports related to Dr. Naz's lumbar disability. Dr. Dodge authenticated most of those records and relied on the remaining records. Dr. Horner also read, considered and relied on those records in forming his expert opinions and conclusions.

Credibility Determinations

15. Evidence Code section 411 provides: "Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact."

16. Oral testimony of witnesses given in the presence of the trier of fact is valued for its probative worth on the issue of credibility because such testimony affords the trier of fact an opportunity to observe the demeanor of witnesses. A witness's demeanor is part of the evidence and is of considerable legal consequence. The testimony of witnesses on direct examination is afforded significant weight in ascertaining their credibility; cross-examination does not provide the sole evidence relevant to the weight to be accorded their testimony. In a contested hearing, the precise words and demeanor of a witness during direct as well as cross-examination bears on the credibility and weight the trier of fact accords the witness's testimony. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1358.)

17. A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Work in a particular field is not an absolute prerequisite to qualification as an expert in that field. For example, qualifications other than a license to practice medicine may serve to qualify a witness to give a medical opinion. Because of the dramatic growth of diverse interdisciplinary studies in recent times, individuals of different professions are called upon to give medical opinions or at least opinions involving some medical expertise. The determinative factor is whether the expert has sufficient skill or experience in the field so that his testimony would assist in the search for the truth. The degree of expertise goes to the weight of the expert's testimony, not its admissibility. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1318-1319.)

18. Dr. Naz and Nurse Baltierrez were credible witnesses who had the opportunity to see, hear and recall the matters to which they testified insofar as their testimony related to the usual and customary duties of a physician employed at Calipatria State Prison. Dr. Levin was a credible witness with respect to many of those customary duties, but he did not have as great an opportunity to observe the many tasks Dr. Naz was actually required to perform in

the infirmary and outlying clinics. Dr. Dodge was a highly credible expert whose education, training, and experience, medical specialty in the field of lumbar injuries and diseases, and many interactions with Dr. Naz, made his testimony far more credible than that offered by Dr. Horner, who did not have a medical specialty in lumbar injuries or diseases and who met with Dr. Naz just one time.

Cause Exist to Grant the Application

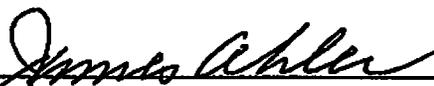
19. A preponderance of the evidence established that cause exists to grant Dr. Naz's application for a disability retirement. Competent medical opinion established that Dr. Naz was incapacitated from the performance of duty as a result of a lumbar spine disability that was of permanent or extended and uncertain duration, and that her disability rendered her incapable of performing the usual and customary duties of a physician employed by Calipatria State Prison when she filed her application for a disability retirement with CalPERS.

20. If there is a dispute concerning the industrial origin of Dr. Naz's disability, this matter shall be referred to the Workers' Compensation Appeals Board for resolution of that dispute. The jurisdiction of the Workers' Compensation Appeals Board shall be limited to the issue of industrial causation and the matter shall be resolved by using the same procedure used in workers' compensation hearings.

ORDER

The application for a disability retirement filed by Shahida Naz, M.D. is granted.

DATED: June 6, 2014



JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings