

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM

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

LYNN MOLLER,
Respondent.

and

DEPARTMENT OF CORRECTIONS &
REHABILITATION RJ DONOVAN
CORRECTIONAL FACILITY

Respondent.

Agency Case No. 2010-0626

OAH No. 2011020526

AMENDED PROPOSED DECISION AFTER HEARING ON REMAND

Administrative Law Judge Vallera J. Johnson, State of California, Office of
Administrative Hearings, heard this matter on remand in San Diego, California, on
September 2, 2014.

Rory J. Coffey, Senior Staff Counsel, represented Petitioner Mary Lynn Fisher, Chief,
Benefit Services Division, Board of Administration, California Public Employees
Retirement.

Edward L. Faunce, Esq., Faunce, Singer & Oatman, represented Respondent Lynn
Moller.

There was no appearance by or on behalf of Respondent Department of Corrections
and Rehabilitation RJ Donovan Correctional Facility.

The matter was submitted on October 20, 2014.¹

¹ The remanded hearing occurred on September 2, 2014. The Administrative
Law Judge ordered the parties to file closing briefs by specified dates. Subsequent to the
hearing, the Administrative Law Judge granted an extension to file closing briefs. On
October 3, 2014, Respondent Moller filed her Closing Brief – Remand Hearing, and it was

FACTUAL FINDINGS

Procedural History

1. Mary Lynn Fisher (Petitioner) filed Statement of Issues, Case No. 2010-0626, against Lynn Moller (Respondent Moller) and Department of Corrections & Rehabilitation – Division of Adult Institutions RJ Donovan Correctional Facility (Respondent CDCR), in her official capacity as Chief of the Benefit Services Division, California Public Employees' Retirement System (CalPERS), and not otherwise.

Respondent Moller filed a Response to Statement of Issues and Notice of Special Defenses requesting a hearing in this matter.

2. Beginning in May 2008, Respondent CDCR employed Respondent Moller as a Clinical Social Worker, also known as Senate Bill 618 Prison Case Manager.

3. On February 15, 2010, Respondent Moller signed an application for disability retirement on the basis of an orthopedic (back and neck) condition.

4. Petitioner obtained or received medical reports concerning Respondent Moller's orthopedic (back and neck) condition from competent medical professionals. After review of the reports, Petitioner determined that Respondent Moller was not permanently disabled or incapacitated from performance of her duties as a Clinical Social Worker at the time the application for disability retirement was filed.

5. By letter, dated July 1, 2010, Petitioner notified Respondent Moller of the determination and advised of her appeal rights.

6. On July 14, 2010, Respondent Moller filed an appeal and requested a hearing.

The appeal was limited to the issue of whether, on the basis of her orthopedic condition, Respondent Moller was permanently disabled or incapacitated from the performance of her duties as a Clinical Social Worker.

7. The hearing occurred on September 15, 2011, and January 6, 2012. On August 3, 2012, the Administrative Law Judge issued her proposed decision recommending denial of Respondent Moller's disability retirement application.

8. CalPERS Board of Administration notified Respondent Moller that it adopted the Administrative Law Judge's Proposed Decision.

marked Exhibit MMM. CalPERS did not file a response. On October 20, 2014, the record was closed, and the matter was submitted.

9. Respondent filed a request for and received the administrative record. On January 3, 2013, Respondent Moller filed a Petition for Writ of Mandamus under Code of Civil Procedure section 1094.5.

10. Following the decision of the CalPERS Board of Administration, counsel for Respondent Moller contacted Respondent CDCR on October 31, 2012, January 29, 2013, and March 13, 2013, and requested information regarding reinstatement of Respondent Moller to work and/or to the payroll. In the letter, dated January 29, 2013, counsel for Respondent Moller also stated that Respondent Moller had experienced a "flare-up" of her medical condition and was resuming treatment with Kamshad Raiszadeh, M.D., her orthopedist.

11. Letters and treatment notes (also known as encounter notes) were created subsequent to CalPERS' decision that Respondent Moller was not disabled from her duties as a Clinical Social Worker.

12. On October 22, 2014, Respondent Moller filed an Ex Parte Application to File an Amendment to the Petition for Writ of Mandamus based on "newly produced evidence" (Findings 10 and 11).

On October 24, 2013, the Superior Court granted Respondent Moller's Application to File an Amendment to the Petition for Writ of Mandamus.

13. On December 6, 2013, the parties (CalPERS and Respondent Moller) stipulated that newly produced medical evidence should be included in the administrative record and evaluated, that the most appropriate action would be for CalPERS to re-evaluate that evidence and any other relevant evidence that might be produced, and that the court remand this case to CalPERS to set aside its former decision finding that Respondent Moller is not disabled and to take whatever steps are necessary so that all evidence in the record may be evaluated.

14. On December 9, 2013, pursuant to the stipulation of the parties (Finding 13), the Superior Court issued an Order to "set aside your decision denying petitioner a service-connected disability retirement allowance, which proceedings are remanded to you, and you are ordered to conduct and to take whatever other steps are necessary to make a final decision based upon a re-evaluation of the evidence in the administrative record."

Evidence Taken at Remand Hearing

Correspondence Between Sheila De Jesus and Dr. Raiszadeh

15. On November 19, 2012, Sheila De Jesus, Respondent CDCR's Workers' Compensation Return-to-Work Analyst, contacted Dr. Raiszadeh and solicited responses to certain questions. Attached to the letter was a document that set forth the Essential Functions of the Clinical Social Worker position.

In her letter, De Jesus stated: "Drawing on your knowledge and records concerning Ms. Moller's medical condition, please provide your responses to the questions below in order to all CDCR to determine Ms. Moller's ability to perform in her Clinical Social Worker position at the CDCR". Based on the foregoing, she asked: "After reviewing the essential functions enclosed, is Ms. Moller able to perform all of the essential functions of Clinical Social Worker position at the CDCR. If the answer is no, please list the limitations. Finally, do you believe the limitations are permanent or temporary?"

16. On November 28, 2012, Dr. Raiszadeh responded to De Jesus' letter. He stated:

As per my permanent and stationary report (2/2/10) Ms. Moller is unable to return to her occupation due to significant prolonged sitting. She is restricted from heavy lifting and bending. She has 50% loss in capacity to lift and bend. She is precluded from prolonged sitting. She will not be able to safely react to life-threatening situations. Due to her injury she has decreased of [sic] strength, agility and endurance. She has limitations to sitting at the computer. She has limitation in getting to attend meetings.

Finally, he stated that the limitations were permanent.

17. When Dr. Raiszadeh rendered his opinion that Respondent Moller was unable to return to her occupation and stated the reasons therefor, Dr. Raiszadeh relied on his report, dated February 2, 2010. At the first hearing this report was found to be insufficient to support a finding of disability.

No evidence was offered to establish that this report was any more reliable at the hearing after the court-ordered remand on September 2, 2014.

Medical Evidence

18. Medical evidence submitted at the remand hearing included:

- Treatment notes, also known as encounter notes, prepared by Kamshad Raiszadeh, M.D., Respondent Moller's treating physician, between January and September 2013
- Authorization Request from Spine Institute of San Diego, prepared by Jason Wu PA-C, a physician assistant who worked with Dr. Raiszadeh, dated May 20, 2014

- Progress Report & Authorization Request, from Pacific Center of Health & the Healing Point Acupuncture, prepared by Adrian Bean, L.Ac., dated August 20, 2014

19. Respondent Moller received treatment from Dr. Raiszadeh between January 3, 2013 and September 11, 2013, on a monthly basis. Dr. Raiszadeh is Respondent Moller's Workers' Compensation physician. During each visit, Dr. Raiszadeh took a brief history, performed a physical examination; in some instances, he performed a medical record review and ordered objective tests, such as x-rays and MRI. Her subjective complaints were the same or similar to those described in the prior hearing, to wit: "continued neck with radiation of left posterior shoulder and arm pain" and "low back pain centralized in a band-like fashion in her back with increased activities."

20. In his report, dated January 3, 2013, Dr. Raiszadeh stated, in part: "History of chronic bilateral C5-C6 radiculopathies diagnosed by EMG." Dr. Raiszadeh did not identify the date of the EMG to which he was referring. The foregoing findings are consistent with the EMG report, dated January 26, 2009, presented at the first hearing.

In the report, dated January 3, 2013, Dr. Raiszadeh stated, in part: "Severe bilateral foraminal stenosis, left greater than right at C6-7 with left C7 radiculopathy, but main complaint of axial neck pain." In his report, Dr. Raiszadeh did not identify the source or date of this information.

21. In his report, dated February 7, 2013, Dr. Raiszadeh stated, in part:

Ms. Moller continues to be quite debilitated due to predominantly neck but also significant low back symptomatology. She has pathology that has progressed in her neck. She has chronic EMG-documented radiculopathy at C5-6 and evidence of foraminal stenosis at both C6-7 and C5-6. She has foraminal stenosis at C4-5 also, but predominantly on the right side.

Dr. Raiszadeh did not identify the source or date of the EMG findings identified in this report. No evidence was offered to establish the distinction between this EMG report and the findings in the EMG report, dated January 26, 2009.

22. In his report, dated August 14, 2013, Dr. Raiszadeh reported, in part:

Mrs. Moller is here for follow-up of her neck and arm pain as well as low back pain and left leg pain. She recently noted that she had significant give-out of her left leg causing her to fall. She also was unable to make it to the bathroom due to all of her pains and had soiled herself on one incident. She also has noted significant increase in her neck and radiating pain. She has

noticed that she is dropping things more and her numbness in her hand is getting worse.

23. In his report, dated August 20, 2013, Dr. Raiszadeh stated, in part: "recent x-rays of the lumbar spine." Dr. Raiszadeh did not identify the date of the x-rays. He did not state whether he ordered the x-rays, whether he reviewed the x-rays, or whether he reviewed an x-ray report. Regarding the x-rays, he reported:

AP, lateral, and flexion-extension x-rays of the lumbar spine reveal severe disc degeneration at L3-L4, L4-5, and L5-S1. There is no motion on spondylolisthesis noted on flexion and extension.

The findings in this x-ray report are different from the findings in the May 2010 x-ray report presented at the prior hearing.

Under plan, Dr. Raiszadeh stated, in part:

Ms. Moller has had continued significant symptoms in her low back and left leg as well as neck and radiating left arm. She has been authorized for injection at C6-7 on the left side. ... As there is noted significant degenerative disc disease with noted corresponding weakness in the EHL and tibialis anterior as well as decreased sensation in an L4 distribution, I would recommend proceeding with a lumbar MRI scan to assess the amount of stenosis at the L4-5 and L5-S1 levels.

24. Respondent Moller obtained treatment from Dr. Raiszadeh on September 11, 2013. In his report of the same date, on physical examination, Dr. Moller stated:

Motor exam shows some continued weakness in left grip and left wrist extension, though it is improved. In the left EHL and tibialis anterior there is noted 4+/5 strength on testing. She has decreased sensation along the left L4-5 distribution. Her cervical range of motion as well as lumbar range of motion is restricted, though the cervical range of motion has improved somewhat after the injection on Monday. Toe and heel walking is difficult to due to her left side sensation of weakness.

25. No evidence was offered to establish that Respondent Moller received treatment from Dr. Raiszadeh after September 11, 2013.

26. In Dr. Raiszadeh's reports, January 2013 through September 2013, he described the nature and extent of Respondent Moller's impairments due to her neck, arm, back, and leg conditions, including her left leg giving way and causing her to fall. Further,

his reports show his reliance on EMG, MRI and x-rays to substantiate her need for continued treatment, including epidural injections, TENS unit, physical and aquatic therapy, and medications.

27. Respondent Moller began treatment with an acupuncturist from Pacific Center of Health & The Healing Point Acupuncture. In a report, dated August 29, 2014, the acupuncturist stated, in part:

To date Mrs. Moller has received 25 acupuncture treatments. Treatments include acupuncture, manual myofascial release, cold laser therapy, heat and diathermy neuromuscular re-education. Currently her cervical pain is 5/10 and lumbar pain is 4/10 (on the VAS scale). Her constant stiffness of the neck and low back continue, along with the moderate and constant paresthesia and spasm of the trapezius muscles. Her ability to perform ADLs has somewhat increased as she can perform more activities with less pain. She experiences slightly more ease with getting into and out of the car and driving. She has reduced the number of nights she sleep [sic] in her recliner from 5 out of 7 per week to 2 out of 7 per week, but sleep is still disturbed. The trapezius and levator muscles continue to be hypertonic. Over the past several weeks there has been increased pain due to stress related to the legal proceeding of the case.

Due to the chronicity of this condition, the patient will suffer from degenerative disc disease. She has experienced some reduction of pain with increase in functional ability but limits remain. Mrs. Moller would benefit greatly from long term [sic] care. For now, I recommend 1-2 treatments per week for 12 more treatments.

28. There is no dispute that Respondent Moller suffers pain. Based on the subjective and objective medical evidence, it appears that Respondent Moller's medical condition may have deteriorated. However, the extent of the deterioration, if any, was not established.

On physical examination, on Jamar Testing, Respondent Moller's scores changed. However, no evidence was offered to explain scores achieved on the test over time or the significance of the scores on Respondent Moller's ability to perform her usual duties as a Clinical Social Worker.

Dr. Raiszadeh relied on objective medical evidence to determine her condition for purposes of obtaining authorization for treatment. No testimonial or documentary evidence was offered to establish the distinction between Respondent Moller's medical condition and

the results of testing, including the EMG, MRI and x-rays. Further, no evidence was offered to establish the impact of the subjective complaints and objective findings on Respondent Moller's ability to perform her usual duties as Clinical Social Worker at Respondent CDRC.

Did Respondent CDRC Deny Respondent Moller's Return to Work

29. Respondent Moller argued that she made an effort to return to work but Respondent CDRC refused to allow her to do so.

After the decision by the Board of Administration that denied Respondent Moller's application for disability retirement, by letters, dated October 31, 2012, January 29, 2013, and March 13, 2013, Respondent Moller contacted Respondent CDCR. In the letters, Respondent Moller requested to be returned to her position as Clinical Social Worker.

By letter, dated March 15, 2013, on behalf of Respondent CDRC, De Jesus contacted Respondent Moller. In her letter, De Jesus stated that she had been in communication with Respondent Moller by letter, dated December 10, 2012, and by telephone on December 17, 2012. De Jesus informed Respondent Moller that, based on Dr. Raiszadeh's determination that she was incapable of performing the essential functions of the position of Clinical Social Worker, she provided Respondent Moller with a STD 678 (State Application form), asked her to complete the application, and to identify positions of interest to her to determine if Respondent Moller met the minimum qualifications of the identified positions. According to De Jesus, Respondent Moller stated that she would not be able to return the State Application by the date requested because she had to wait for her attorney's input, and it may not be returned until the beginning of the year. Respondent Moller did not comply. Instead, Respondent Moller left a message that "she was really disabled, having flare-ups and seeing Dr. Raiszadeh." In her letter, dated March 15, 2013, De Jesus stated that she pulled Respondent Moller's most recent application, sent it to the Office of Personnel Services to review and determine positions Respondent Moller may meet the minimum qualifications and be able to perform the essential functions so that she may return her to work. De Jesus identified the positions that were identified, and listed them. Further, De Jesus stated that she was "waiting for information from OEW on the viable positions within CDCR. You will be advised of these viable positions as soon as I receive the information."

No evidence was offered to establish that the foregoing statements in the letter were inaccurate. No evidence was offered to establish that Respondent Moller pursued the positions identified by De Jesus or any other positions with Respondent CDCR. No evidence was identified to show that Respondent CDCR failed to locate any positions for Respondent Moller, or that Respondent CDCR located positions for Respondent Moller but failed to offer them to her.

Given the facts in the foregoing paragraphs, insufficient evidence was offered to establish that Respondent CDCR was unable to find a position for Respondent Moller that she is capable of performing with the limitations imposed by Dr. Raiszadeh.

LEGAL CONCLUSIONS

1. Despite the terms of the Superior Court Order, dated December 9, 2013, Respondent Moller argued that only the new evidence should be considered and that the old evidence should not be given any weight. However, the language of the Superior Court Order does not limit the evidence that should be considered; rather, the Order refers to the record as a whole. In addition, among the “new evidence” submitted is Dr. Raiszadeh’s report, dated February 2, 2012, submitted in the prior hearing. Respondent Moller cannot have it both ways. He cannot submit “new evidence” that incorporates information from the earlier record but then expect the court to reject exhibits from the prior record. For the foregoing reasons, Respondent Moller’s argument is rejected.

2. Pursuant to the terms of the Superior Court Order, dated December 9, 2013, the evidence in this administrative record has been considered. This includes the Findings of Fact and Legal Conclusions in the Proposed Decision, dated August 3, 2012, and subsequently adopted by the Board of Administration of CalPERS, as well as evidence introduced during the hearing on September 2, 2014.

3. Having considered the actual and usual duties of Clinical Social Worker, the position held by Respondent Moller, the physical requirements of the position, and the medical evidence (including evaluation notes between January and September 2013 as well as the report from the acupuncturist), insufficient competent medical evidence was offered to establish that her orthopedic back and neck condition prevented Respondent Moller from performing the usual duties of a Clinical Social Worker employed by Respondent CDCR, albeit with pain or discomfort.

4. Insufficient evidence was offered to establish either that Respondent CDCR refused to return Respondent Moller as a Clinical Social Worker, or if CDCR refused to allow Respondent to work as a Social Worker, that it failed to offer Respondent Moller another position.

5. Respondent Moller argued that she is stuck between two state agencies, i.e., CalPERS saying that she is not disabled and Respondent CDCR stating that she cannot return to work. Therefore, she is entitled to a disability retirement. (*English v. Board of Administration* (1983) 148 Cal.App.3d 839; *Roccaforte v. City of San Diego* (1979), 89 Cal.App.3d 877). However, insufficient evidence was offered to establish that Respondent CDCR denied her either to return to work or failed to offer her a position.

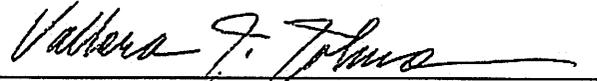
6. Respondent Moller is not substantially incapacitated from performing her duties as Clinical Social Worker employed by Respondent CDCR on the basis of an orthopedic back and neck condition.

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ORDER

The application for disability retirement of Lynn Moller is denied.

DATED: January 23, 2015



VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings