

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

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

BONNIE L. JOURDAN,

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS & REHABILITATION,
HIGH DESERT STATE PRISON,

Respondent.

Case No. 2014-0094

OAH No. 2014030398

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, Office of Administrative Hearings, on December 2, 2014, and April 3, 2015, in Sacramento, California.

The California Public Employees' Retirement System (CalPERS) was represented by Cynthia A. Rodriguez, Senior Staff Counsel.

There was no appearance by, or on behalf of, Bonnie L. Jourdan.¹

There was no appearance on behalf of the California Department of Corrections and Rehabilitation, High Desert State Prison.

Evidence was received in the form of documents and testimony. The record was then closed and the case was submitted for decision on April 3, 2015.

¹ Bonnie L. Jourdan did not appear on either hearing date. The second hearing date was scheduled to provide her with an opportunity to present her evidence, while allowing sufficient time (four months) to order a transcript of the December 2, 2014 hearing date. The April 3, 2015 hearing date was set with her knowledge and the expectation that she would appear. Compliance with applicable notice requirements was satisfied, and this matter proceeded by way of default under Government Code section 11520.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
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FACTUAL FINDINGS

1. Bonnie L. Jourdan (respondent) was employed as a Licensed Vocational Nurse by the California Department of Corrections and Rehabilitation, High Desert State Prison (Department). By virtue of her employment, respondent is a state safety member of CalPERS subject to Government Code section 21151.² On July 3, 2012, respondent filed an application for industrial disability retirement with the Benefits Services Division of CalPERS. She described her specific disability as “Left Knee Replacement and Knee Revision.” On her application, respondent requested a retroactive retirement date of December 1, 2011.

2. CalPERS obtained or received medical reports concerning respondent’s orthopedic (left knee) condition from competent medical professionals. After reviewing the reports, CalPERS determined that respondent was not permanently disabled or incapacitated from performance of her duties as a Licensed Vocational Nurse at the time her application for industrial disability retirement was filed. CalPERS’ determination was based upon its review of medical records pertaining to respondent’s orthopedic condition, including reports prepared by Richard Cross, M.D., Jay Bearns, M.D., Michael Sommer, M.D., and Robert Henrichsen, M.D.

By letter dated November 21, 2013, CalPERS notified respondent of its determination and advised her of her appeal rights. Respondent filed an appeal and request for hearing by letter dated December 30, 2013. CalPERS filed a Statement of Issues on March 10, 2014. Per the Statement of Issues, respondent’s appeal is limited to the issue of whether, on the basis of an orthopedic (left knee) condition, she is permanently disabled or incapacitated from performance of her duties as a Licensed Vocational Nurse (LVN) for the Department. If she is found to be permanently disabled or incapacitated, a second issue is whether she should be granted a retroactive retirement date of December 1, 2011.

3. Compliance with service requirements under Government Code sections 11504 and 11509 was established. This matter proceeded by way of default with regard to both respondent and the Department under Government Code section 11520.

Physical Requirements – License Vocational Nurse

4. Respondent worked as an LVN in a Department correctional facility. The specifications for her position indicate that she was responsible for providing a “basic level of general nursing care to inmates with mental, emotional, or developmental disabilities, or visually impaired, medically ill, or infirm inmates, and does other related work.” Her duty statement indicated that: “Incumbents must possess and maintain sufficient strength, agility,

² Government Code section 21151, subdivision (a) provides: “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.”

and endurance to perform physically, mentally, and emotionally stressful and emergency situations encountered on the job without endangering their own health and well-being or that of their fellow employees, inmates, or the public.”

5. The Department has set forth the specific physical functions of the LVN position on an Essential Functions List. According to this list, respondent’s physical responsibilities and duties included the following:

- Have and maintain sufficient strength, agility and endurance to perform during stressful (physical, mental and emotional) situations without compromising health and well-being of self or others,
- Remain sufficiently alert and focused to effectively evaluate and respond to dangerous or emergency situations, including sensory perception (see, hear, smell and touch) sufficient to detect clinically relevant signs and to perceive and respond to alarms, warnings, or dangerous conditions,
- Move about the institution, occasionally to continuously, covering long distances indoors or outdoors in various weather conditions,
- Access all floors of facilities with multiple levels separated by flights of stairs,
- Remain stationary, occasionally to continuously, while keeping records, writing reports, observing designated areas, and performing other nursing tasks,
- Stoop, bend, reach, twist and stretch, occasionally to continuously, sufficiently to inspect, observe, manipulate, move and record objects 360 degrees horizontally or more, from floor through overhead levels,
- Lift and carry, frequently, light (20 pound maximum) to medium (50 pound maximum) loads,
- Lift and carry, occasionally to frequently, very heavy (over 100 pounds) loads, for example when preventing patient from falling,
- Pushing and pulling occasionally to frequently,
- Perform regular duties on a wide range of working surfaces, which may be uneven or rough, or become slippery due to weather or spillage of liquids.

6. A percentage breakdown of an LVN in respondent’s position provides that 40 percent of her work time is providing nursing care and basic hygiene including administration of medications, intake and obtaining specimens for diagnostic testing; 20 percent of her time is participating as a member of the interdisciplinary team to develop multi-disciplinary treatment plans; 15 percent of respondent’s time is record keeping of tools and narcotics; 10 percent of her time is documenting nursing activities within the medical records; and 5 five percent of her time is insuring a safe therapeutic environment for the inmates and staff.

Medical History

7. On May 23, 2009, respondent slipped and fell while at work. She experienced pain in her left knee. Her primary physician, Jay Beams, M.D., evaluated her and obtained an MRI. Dr. Beams referred her to an orthopedic surgeon, Jerry Crum, M.D., who

performed an arthroscopy on July 2, 2009. Dr. Crum noted tri-compartmental arthritis. Following debridement of her joint, respondent did not do well.

Respondent was evaluated by a second orthopedic surgeon, Keith Swanson, M.D. After obtaining and reviewing a Technetium-99 bone scan, Dr. Swanson performed a left knee replacement on December 28, 2009.

8. Respondent continued to experience symptoms including persistent irritation of her left knee joint. She had physical therapy, as well injections that provided only temporary relief. Respondent apparently disagreed with Dr. Swanson's plan to allow slow healing, and sought evaluation by a third orthopedic surgeon, Richard Cross, M.D. Dr. Cross obtained an additional bone scan in March 2011, and performed revision knee surgery on June 15, 2011. Respondent's patella and tibial components were revised. It was noted that the tibial component was loose, but the femoral component was intact.

9. By 2012, respondent began having increasing difficulties with her knee. Dr. Cross recommended an orthosis to protect her patellofemoral joint. In July 2012, both Dr. Beams and Dr. Cross completed CalPERS disability papers. Dr. Beams believed respondent's disability was permanent, and Dr. Cross believed her disability was temporary.

Independent Medical Examination

10. On June 25, 2013, respondent was seen for an independent orthopedic medical evaluation by Robert Henrichsen, M.D. Dr. Henrichsen is board certified in orthopedic surgery, and has practiced over 40 years in the field. He has performed independent medical evaluations (IME) for CalPERS in the past. Dr. Henrichsen was provided with respondent's medical records from May 23, 2009, through May 2013, including the relevant operative reports, bone scans, x-rays, and medical records from Dr. Beams, Dr. Cross, Dr. Swanson, and Dr. Cross. He was also provided with non-medical sources including respondent's job description and Essential Functions Duty Statement. Dr. Henrichsen met with respondent, obtained her history and current symptoms, and performed a physical examination.

11. Respondent reported to Dr. Henrichsen that she had reduced motion, reduced strength and left knee pain at night. She indicated that she was not able to walk on unstable ground or perform cardiopulmonary resuscitation (CPR) at work. She was taking one Norco tablet, twice a day, for pain. On a 10 scale, respondent reported her knee pain at a level 8. She noted that her average knee pain was 5, and that it could be as high as 10. She indicated that she experienced symptoms with lying down, sitting, standing, reaching, walking, crouching, climbing and stooping.

12. On physical examination, Dr. Henrichsen made the following observations:

There is no effusion of either knee or either ankle. Both her knees are stable while testing the collateral ligaments. Her left knee replacement has a little better stability than the native right

knee. Again there is no effusion, and the patellofemoral joint articulates well. She has a healed anterior incision and some arthroscopic incisions. I did not see a Baker's cyst. She has some tenderness about the medial side of the joint of a slight amount. She has some lateral numbness consistent with her incision. The incision is well healed without any sepsis or erythema.

13. Dr. Henrichsen's diagnosis of respondent included: "Aggravation of preexisting degenerative arthritis left knee" and "Persistent pain, left knee, following replacement and revision x 2." He noted that she did not have a typical post-knee replacement course, and that she has had significant difficulty. In his June 25, 2013 IME report Dr. Henrichsen provided the following conditional assessment of whether respondent was substantially incapacitated for performance of her LVN duties:

Whether or not she is incapacitated depends upon a more specific occupational description. If she is not required to do frequent CPR and she does not have to climb stairs more than three hours a day, and if she is not required to run or squat then I do not find that she is substantially incapacitated from her work. If she has to run, and if she is required to get down on her knees and accomplish frequent CPR, and if she has to do stairs more than three hours a day, then she is physically substantially incapacitated for her occupation.

[¶] ... [¶]

Overall, as I review the available information, she is able to function in her employment if she worked in a clinic status where she had some limited stair work, no running or squatting requirement and she could use her intellectual judgment to accomplish her professional duties.

14. Dr. Henrichsen prepared a Supplemental Report dated July 24, 2013, after being provided additional medical records and other documents. He determined from additional record information that respondent was not required to do frequent CPR, and that she was not required to run or squat. Her stair climbing was less than three hours per day. Based upon this information Dr. Henrichsen opined that there were no specific preclusions from respondent's work based on the Department's clarification that her work required no lifting over 100 pounds, no squatting, and not running. Dr. Henrichsen explained his revised assessment as follows:

Based on the new information available and, again, review of the physical requirements of the licensed vocational nurse category for High Desert Prison, she is not substantially

incapacitated for performance of her licensed vocational nurse duties as described. At the time of my initial evaluation in June 2013, there has been quite a discussion that she was not able to run, but it has been seen on occupational forms and also the recent communication from the prison that running is not a requirement.

Discussion

15. No medical evaluation reports or medical expert testimony was offered at hearing on behalf of respondent. Respondent has not demonstrated through competent medical evidence that she is permanently disabled or incapacitated from performance of her duties as a Licensed Vocational Nurse with the California Department of Corrections and Rehabilitation, High Desert State Prison.

Dr. Henrichsen's IME evaluation reports and testimony are persuasive that respondent's orthopedic (left knee) condition does not permanently disable or incapacitate her from the performance of her usual duties as a Licensed Vocational Nurse. Accordingly, respondent's application for industrial disability retirement should be denied.

16. Because respondent is not permanently disabled or incapacitated, it is unnecessary to address the issue of whether she should be granted a retroactive retirement date.

LEGAL CONCLUSIONS

1. Under Government Code section 21151, state safety members incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability. Government Code section 20026 provides that "'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." In *Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, the court construed the term "incapacitated for the performance of duties" to mean a substantial inability to perform the employee's usual duties. (*Id.* at p. 876.) The applicant in *Mansperger* was a warden with the Department of Fish and Game whose physician opined that he could no longer perform heavy lifting and carrying. The evidence established that such tasks were an infrequent occurrence, and the applicant's customary activities were the supervision of hunting and fishing. The *Mansperger* court found that the applicant was not entitled to disability retirement because, although he suffered some physical impairment, he could perform most of his usual job duties.

2. Subsequently, in *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, the Court of Appeal applied the *Mansperger* test to the disability retirement claim of a California Highway Patrol sergeant who sustained injuries to his back and leg, which restricted his ability to carry out some of the functions of a

patrol officer, including driving a patrol car for lengthy periods. Regarding whether there must be actual present disability or whether fear or possibility of future injury is sufficient to find disability, the court noted that "Hosford relied and relies heavily on the fact that his condition increases his chances for further injury . . . this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently in existence." The *Hosford* court held that the disability or incapacity must presently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient. (*Id.* at p. 862.)

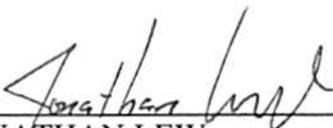
3. Respondent has the burden of proving entitlement to disability retirement. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691; *Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.3d 234, 238.) It is well accepted that CalPERS may rely on decisions affecting other pension plans when the laws are similar, and since Government Code section 31724 (County Employees' Retirement Law) is similar to Government Code section 21151 (California Public Employees' Retirement Law), the rule concerning burden of proof shall be applied to cases under CalPERS law. (*Bowman v. Board of Pension Commissioners for the City of Los Angeles* (1984) 155 Cal.App.3d 937, 947.)

4. The matters set forth in Findings 4 through 16 have been considered. It was not established through competent medical evidence that respondent's orthopedic (left knee) condition substantially disables her from the performance of her usual and regular duties as a Licensed Vocational Nurse with the Department's High Desert State Prison. Her application for industrial disability retirement should therefore be denied.

ORDER

The application of Bonnie L. Jourdan for industrial disability retirement is denied.

DATED: April 9, 2015



JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings