

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for
Disability Retirement of:

NATALIE LINDSEY,

Respondent.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION, AVENAL STATE
PRISON,

Respondent.

Case No. 2012-0993

OAH No. 2013030892

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Bernardino, California on July 22, 2014¹, January 9, and April 14, 2015.

Christopher Phillips, Staff Attorney, represented Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System.

Natalie Lindsey, respondent, represented herself.

There was no appearance by or on behalf of Department of Corrections and Rehabilitation, California Rehabilitation Center, Avenal State Prison.

¹ On the first day of hearing, the matter was continued because respondent Lindsey's medical evidence was inadequate, and there were questions about the reliability of the documents for several reasons: The name of the provider was not listed on the document; the documents did not include the provider's qualifications to render the opinion; the documents lacked a diagnosis and list of complaints; the documents were not signed; and nothing in the documents indicated whether the provider had evaluated respondent Lindsey's job duties or considered the CalPERS criteria for disability retirement. In addition, petitioner did not call his expert witness to testify, and respondent Lindsey objected.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED June 4th 20 15

Diana R. Kuris

The matter was submitted on May 5, 2015.

FACTUAL FINDINGS

1. Anthony Suine (petitioner), filed Statement of Issues, Case No. 2012-993, against Natalie Lindsey (respondent Lindsey) and Department of Corrections & Rehabilitation – Avenal State Prison (respondent CDCR), in his official capacity as Chief of the Benefit Services Division, California Public Employees' Retirement System (CalPERS), and not otherwise.

2. On July 1, 2011, respondent Lindsey signed an application for service retirement pending a decision on her application for industrial disability retirement. In filing the application, disability was claimed on the basis of a neurological (head, jaw) condition.

3. At the time she filed her application, respondent CDCR employed respondent as a nurse. By virtue of her employment, respondent was a state safety member of CalPERS subject to Government Code section 21151.

4. Effective September 1, 2011, respondent retired for service and has been receiving her retirement allowance from that date.

5. CalPERS obtained medical reports concerning respondent Lindsey's neurological (head, jaw) condition from competent medical professionals. After review of the reports, CalPERS determined that respondent Lindsey was not permanently disabled or incapacitated from performance of her duties as a registered nurse at the time she filed her application for disability retirement.

6. By letter, dated July 1, 2012, CalPERS notified respondent Lindsey of the determination and advised of her appeal rights.

By letter, dated August 6, 2012, respondent Lindsey filed a timely appeal and requested a hearing in this matter.

Respondent CDCR did not file a request for hearing.

7. This appeal is limited to the issue of whether, on the basis of a neurological (head, jaw) condition, respondent Lindsey is permanently disabled or incapacitated from performance of her duties as a registered nurse for respondent CDCR.

History of Injury

8. On November 1, 2010, after donating blood in a blood mobile parked on the grounds of respondent CDRC, respondent Lindsey felt dizzy. As she walked down the steps of the bus, respondent Lindsey fainted and struck her head and face on the ground. She had

lacerations on her face and abrasion on her neck on the left side. She was taken by ambulance to Coalinga Regional Medical Hospital, where she received treatment by an emergency room physician. Her chief complaint was severe headaches, poor mental concentration and numbness in her legs. She had lacerations of her face and abrasion on her neck on the left side. On November 1, 2010, a CT scan of maxillofacial without contrast, a CT scan of cervical spine, and a CT scan of head were performed and found to be normal. Respondent Lindsey was discharged home on the same day.

Two days later, she had a second episode of dizziness; her right leg went numb; she fainted and was found unconscious. She was taken by ambulance to the same hospital.

Medical Evidence

9. The medical evidence includes: a report from Perminder Bhatia, M.D. (Dr. Bhatia), dated September 2, 2011; and several reports from Harish P. Porecha, M.D. (Dr. Porecha), dated 2012 and 2014; as well as the testimony of Dr. Porecha. Petitioner requested the foregoing medical evaluations.

No evidence was offered regarding Dr. Bhatia's qualifications. Since 1978 the Medical Board of California has licensed Dr. Porecha as a physician and surgeon. Since licensure, he has been a practicing neurologist.²

In order to render an opinion in his report, each physician took a history, performed a physical examination (that included a neurological examination), and reviewed medical records. In addition, Dr. Porecha reported that he reviewed the job duties of a registered nurse.

10. On August 8, 2011, Dr. Bhatia evaluated respondent Lindsey and issued his report, dated September 2, 2011. A summary of the medical records (November 8, 2010 through May 2, 2011) that he reviewed was attached to his report.

11. Dr. Bhatia's evaluation occurred nine months after the incident.

He reported respondent Lindsey's complaints as follows.

- She had headaches, localized on the left side of her forehead but also on the right side, "close to the area where she had lacerations"³. She described the headaches as tight, comes and

² On the date the Statement of Issues was filed in this case, his physician and surgeon's certificate was current, but it expired on October 31, 2013. No evidence was offered to establish that Dr. Porecha's certificate has been renewed.

³ This report is inconsistent with the progress note from the hospital on the date of the incident; according to the progress note, the lacerations were on the left side.

goes, and averages 7/10 and 8/10. She had jaw pain on the right side that began approximately a week after the accident. She had trouble eating because it was painful to eat and to bite properly; as a result she had lost 30 pounds.

- Occasionally she suffered from leg numbness. Occasionally her legs got weak, and she felt like she would fall down. Her most recent incident of falling down was three days prior to this evaluation.
- She had numbness in her left hand at digits one to three.
- Her mood was depressed because she could not do “much of anything.” She had been on multiple pain medications without relief.

In addition, respondent Lindsey reported that she had no prior history of seizures.

12. In Dr. Bhatia’s opinion, the CT scan performed on the date of the incident indicated possible coronoid fracture.

13. Dr. Bhatia’s neurological examination included a mental status examination, an examination of cranial nerves, and a motor examination. All of Dr. Bhatia’s findings were within normal limits. Regarding gait and station, Dr. Bhatia observed that respondent Lindsey walked normally, with no limp and that her “heel to toe” was normal.

14. Dr. Bhatia questioned whether respondent Lindsey had received proper treatment for her headache pain and depression and made recommendations for treatment, including changing the medications for pain and depression. He ordered an EEG to rule out any subclinical seizure that could be giving her leg weakness, an MRI of the brain, a CT scan or MRI of the temporomandibular (TM) joint to clarify the fracture of the coronoid process, and possible cortisone steroid injections into the TM joint by a dentist.

15. Dr. Bhatia rendered no opinion regarding whether respondent Lindsey was incapacitated for the performance of her duties as a registered nurse.

16. In December 2011, respondent Lindsey did not answer the door of her home. The police were called, responded, and found her on the floor. She was taken by ambulance to Coalinga Regional Medical Center but despite treatment, she required a higher level of care. She was taken by life flight to a trauma center unconscious. Respondent was not able to breathe on her own for almost two weeks and required intubation and feeding via a feeding tube. Respondent Lindsey stated that an occupational therapist taught her to swallow again, and a physical therapist taught her to walk again; she went to a rehabilitation hospital

to gain weight and strength. Later, in December 2011, respondent Lindsey moved to Colorado, where her daughter lived.

17. Eight months after Dr. Bahtia performed his evaluation, on April 2, 2012, Dr. Porecha performed his evaluation of respondent and thereafter issued his report, dated April 15, 2012. He reviewed the records of the emergency room physician, Dr. Bhatia's reports, and Dr. Chahill's reports provided by petitioner. Dr. Porecha did not include a summary of the medical records he reviewed. In his supplemental report, dated April 24, 2012, Dr. Porecha stated: "I have reviewed the job duties."

Dr. Porecha's history of the incident was consistent with the facts in Findings 8 and 11. He noted that, since the age of 16, respondent Lindsey had had a history of migraines but that she had no history of loss of consciousness or seizures.

On the date of Dr. Porecha's evaluation, respondent Lindsey's symptoms included pain on the forehead, pain on the left side of the head and pain on the right side of the jaw at the temporomandibular (TM) joint.

18. On physical examination, Dr. Porecha noted, among other things, that respondent Lindsey was being treated for high blood pressure and that all major tests had been checked out as normal. As such, her current symptoms have not been "impacted or worsened by any untreated, uncontrolled illness."

Regarding this neurological examination, Dr. Porecha stated:

Current nerve examination shows normal nerve function in cranial nerves 1–12. There was a normal air conduction more than bone conduction in both ears and the Weber test lateralized to both sides. Facial nerve was intact on both sides. Swallowing function was normal and the voice function was normal. These results indicate there is no damage or impairment in these nerves.

Motor nerve examination shows muscle strength in all the upper and lower extremities was grade 5/5. Straight leg raise test on the right side caused pain at 80 degrees in the front of the right leg from the knee to the foot (which might be due to the injury), but was normal on the left leg at 90 degrees. Deep tendon reflexes, 0 to 1+ on all extremities except ankle jerks which were absent. There was no Babinski sign.

Sensory nerve examination shows she has sensations to light touch, pinprick, temperature, vibration sensations, on both sides in the arms and the legs. Gait is normal.

Mini-mental status examination: Score 29/30

This is a test used to detect symptoms of cognitive impairment.
A score of 29/30 indicates a normal level of cognitive function.

Dr. Porecha explained that the foregoing was a normal neurological examination.

19. In the report, dated April 15, 2012, Dr. Porecha opined, in part:

The patient complains of not being able to focus, but my findings don't indicate that it is due to mental impairment. I suspect that she cannot focus due to pain and constant jaw discomfort. Maybe the side effects of her medications also impact her ability to focus. Perhaps her depression due to her injury and all that followed could be contributing to a difficulty in focusing as well. My test findings don't show that her inability to work come [sic] entirely from neurological problems due to the injury. The reason is that the migraine headaches have been present since the age of 16, according to her medical history, and they were aggravated by the injury. I believe that the aggravation should be short-lasting and further symptoms of head and jaw pain would make her eligible for treatment for 6 – 12 months." Dr. Porecha described his proposed plan of treatment. Finally, he stated: "If her pain and jaw discomfort can be improved, she may be able to return to work. ..."

20. In response to additional questions from petitioner, Dr. Porecha issued a report, dated April 24, 2012; in this report, he stated, in part:

... I have reviewed the job duties. I believe that she will be able to resume her work as a registered nurse at the correctional facility after her complaints of head and jaw pain are addressed with treatment to reduce her symptoms. I do not believe that she is substantially incapacitated for her usual duties. Her current symptoms may continue to incapacitate her any time between 6 months to a year during which she should be under the care of a neurologist and a dentist, and most likely a psychiatrist. In my opinion, the medications to be used would [sic] any appropriate course of treatment for her migraines, which should preferably be non-addictive, non-narcotic drugs.

.....

21. Subsequent to his report, dated April 24, 2012, at petitioner's request, Dr. Porecha reviewed additional medical records, dated, March 9, 2011 to August 10, 2011, and April 2, 2013 to December 12, 2013, which included medical records from the Mayo Clinic in Arizona. In addition, Dr. Porecha requested the CT scan of the head and cervical spine

from CalPERS but received the reports of the foregoing CT scans. Based on the foregoing, Dr. Porecha issued additional reports. With the exception of the CT scan reports interpreting CT scans performed on the date of the incident, the medical records upon which Dr. Porecha relied were not attached to his reports, included as exhibits or summarized by Dr. Porecha.

22. In June of 2012, respondent Lindsey moved to Arizona and commenced treatment at the Mayo Clinic in Arizona. As set forth in Finding 21, petitioner asked Dr. Porecha to review documents from the Mayo Clinic. Based on his review of the records from the Mayo Clinic, Dr. Porecha issued a report with a facsimile date of October 20, 2014.

Respondent Lindsey received treatment from neurologists and from, among others, Naresh Patel, M.D. (Dr. Patel), a neurosurgeon. Dr. Patel evaluated respondent Lindsey on April 23, 2013. Because of her symptoms in her arms and legs, Dr. Patel ordered a CT scan. Respondent Lindsey has a cord lesion at C1 and spinal canal stenosis at C4-C5. On May 8, 2013, Dr. Patel performed anterior cervical discectomy with bone graft fusion successfully.

Respondent Lindsey had a small ventral lesion at C2 in the cervical spine. It was investigated for demyelinating disease; "it was felt to be due to small vessel ischemic change. Evoked potential studies and spinal fluid studies were performed. Visual evoked potentials and brain stem auditory evoked potentials were normal."

An EMG of bulbar muscles was abnormal but nonspecific. A pharyngeal swallow evaluation was nonspecific.

Based on symptoms of neck pain with bilateral upper extremity radiation of more than one-year duration and tingling in both upper arms and hands, Dr. Patel suspected that respondent had dysarthria and dysphagia. However, there was no objective or subjective evidence of "a progressive dysfunction".

Based on these reports from the Mayo Clinic EMG study in the right lower and upper limbs as well as facial motor nerve conduction studies, trigeminal blink reflexes were normal. Mild right median neuropathy was detected. There were "fibrillate potentials" in right lower through upper lumbar paraspinal muscles.

23. On November 26, 2014, petitioner submitted additional questions for Dr. Porecha's opinion, to wit:

Upon initial evaluation, you were asked to evaluate Ms. Lindsey's complaints of head and jaw pain. You indicated in your report dated 4/15/12 that her inability to focus is suspected to be due to pain and constant jaw discomfort and possibly the side effects of her medications. We now need clarification regarding Ms. Lindsey's complaints of jaw pain. You indicated that based solely on a neurological basis, Ms. Lindsey is not

substantially incapacitated from her usual duties. It is unclear as to whether or not your medical opinion includes her jaw pain condition.

Then petitioner asked Dr. Porecha to respond to questions. He asked, "Does your medical opinion, based on a neurological basis that the member is not substantially incapacitated, include the member's complaints of jaw pain?" Dr. Porecha responded "no." Petitioner asked, "On a neurological basis, is jaw pain a condition that would be evaluated by a neurologist?" Dr. Porecha responded, "No." Finally petitioner asked, "If yes, is the member substantially incapacitated from her usual duties based on her jaw pain?" Dr. Porecha responded, "No."

24. During hearing, Dr. Porecha testified that his opinion had not changed regarding whether respondent Lindsey was substantially incapacitated for performance of her usual duties.

25. Dr. Porecha testified that he did not substantiate respondent Lindsey's complaints of dizziness and pain with objective findings. However, in Dr. Porecha's opinion, respondent Lindsey's complaints were reasonable and credible considering that she suffered a traumatic injury, despite the fact that he found no neurological impairment.

Duties and Physical Requirements of a Registered Nurse at Avenal State Prison

26. The evidence of the duties and physical requirements of a registered nurse employed at CDCR – Avenal State Prison include: (1) Physical Requirements of Position/Occupational Title (Physical Requirements), (2) CDCR Registered Nurse, Essential Functions (Essential Functions), and (3) Avenal State Prison Duty Statement (Duty Statement).

27. CDCR employees are required to meet all of the essential functions of the position of the registered nurse in a correctional facility. The document entitled Essential Functions sets forth the most comprehensive description of the duties and essential functions of the position and is supplemented by the remaining documents. As a registered nurse at CDCR, respondent was required to, in part:

- Follow and articulate verbal and written instructions in order to plan and implement nursing care for inmate patients, including administering medications, therapeutic agents, treatments, disease prevention and restorative measures.
- Perform assessments and ongoing monitoring of inmate patients' physical and psychosocial status including evaluation of effectiveness of medical care and treatment and documentation in medical records and other reports.

- Provide emergency first aid or medical treatment to inmates and/or staff by quickly responding to emergencies throughout the institution.
- Remain alert, focused and effectively evaluate and respond to dangerous or emergency situations, including sensory perception (see, hear, smell and touch) to detect danger, may involve physical defense of self or co-workers.
- Protect and maintain safety and security of persons and property, including documentation of unusual occurrences and inventory control of medical materials, tools, and equipment.
- Maintain order and supervise the conduct of persons committed to the CDCR in order to prevent escapes or injury by these persons to themselves or others.
- Perform daily nursing functions of the job, including physical mobility at an acceptable pace, standing for long periods of time indoors or outdoors in various weather conditions.
- Ability to work eight-hour mandatory overtime holdover shifts in various post assignments as required, to meet the needs of the institution in order to ensure patient care needs are met.
- Must be able to perform the duties of all the various posts.
- Walk occasionally to continuously up to long distances indoors or outdoors in various weather conditions.
- Sit occasionally to continuously.
- Stoop and bend occasionally to frequently.
- Lift and carry occasionally to frequently in the light (20 pound maximum) to medium (50 pound maximum) range throughout the workday and in the heavy (100 pounds) occasionally, such as preventing a patient from falling.
- Push and pull occasionally to frequently.

- Reach occasionally to continuously.
- Twist the body frequently to continuously, twist the body in all directions, while performing regular duties; twisting may take place with the body in an upright position while either standing or walking.
- Perform regular duties on a wide range of working surfaces, which can become slippery due to weather or spillage of liquids.

28. In addition, among other things, respondent was required to work with heavy equipment and work with biohazards, e.g. blood-borne pathogens, sewage, hospital waste, etc., constantly.

Finally, as an infection control nurse, among other things, respondent Lindsey was required to follow up on inmates with infectious disease and oversee tracking and administration of PPD skin tests.

Dr. Porecha's opinion regarding duties and physical requirements

29. In order to determine the duties and physical requirements of the position, Dr. Porecha relied on his understanding of the duties and physical requirements of a nurse in a community hospital, and he reviewed a document entitled: "Registered Nurse, CF Post Orders from CDC, California State Prison – Avenal (Post Orders)". Among other things, this document sets forth: (1) area of responsibility, (2) professional requirement, (3) special physical characteristics, (4) general duties and responsibilities, attendance/sick leave usage, and (5) time schedule.

Under Special Physical Requirements, it states:

Persons appointed to the position must be reasonably expected to have and maintain sufficient strength and endurance to perform during stressful (physical, mental, and emotional) situations encountered on the job without compromising their health and well-being or that of their fellow employees, or that of inmate-patients.

Assignments may include sole responsibility for the supervision of inmates and/or the protection of personal and real property.

30. Until questioned during the hearing, Dr. Porecha had not seen or reviewed: (1) Physical Requirements of Position/Occupational Title (Physical Requirements), (2) CDCR Registered Nurse, Essential Functions (Essential Functions), or (3) Avenal State

Prison Duty Statement (Duty Statement), the documents relied upon by petitioner to establish the duties and physical requirements of a registered nurse at CDCR. During the hearing, the administrative law judge ordered Dr. Porecha to review the foregoing documents. After his review, Dr. Porecha testified that he did not “visualize” the duties and physical requirements described in the foregoing documents when he rendered his opinions; in addition, the foregoing documents were more comprehensive than the document he reviewed.

31. After his review of (1) Physical Requirements of Position/Occupational Title, (2) CDCR Registered Nurse, Essential Functions, and (3) Avenal State Prison Duty Statement, Dr. Porecha testified that he had changed his opinion; he said there are duties and physical requirements that respondent Lindsey is not able to perform and stated the basis for his opinion.

- She is not able to follow-up on inmates with infectious diseases or oversee tracking and administration of PPD skin tests. These tasks require that respondent Lindsey give injections to inmates, review results of the tests, and make entries into charts. If she is exposed to tuberculosis, her resistance against infection is low because of “all she has been through.”
- She is not able to work with biohazard materials because of her susceptibility to infection and her reduced resistance.
- She is not able to lift 51 to 100 pounds, walk on uneven grounds because of her dizziness.
- She is not able to work with heavy equipment because this task requires that she exert force; if she exerts force, she will become dizzy.

32. Respondent Lindsey described her complaints as the following.

- Head pain
- Jaw pain, TMJ
- Headaches
- Dysarthria, a motor speech disorder, which results from impaired movement of the muscles used for speech production
- Swallowing difficulty

- Carpel Tunnel Syndrome, with frequent numbness and tingling in arms and hands
- Decrease in immune system
- Possible multiple sclerosis which has been ruled out but requires yearly recheck
- Insomnia

33. It was determined that respondent Lindsey had immunosuppression, which led to the development of shingles, very painful lesions. She was treated with medication. Thereafter, respondent Lindsey developed post herpetic neuralgia. According to respondent Lindsey, this disease cannot be treated with medication, and there is no cure for it. As a result, she takes the maximum dose of seizure medication (with numerous side effects) and another medication for diabetic nerve pain to make the pain manageable. Presumably, Dr. Porecha was aware of the foregoing because he identified duties and physical requirements that respondent Lindsey was incapable of performing because of her suppressed immune system.

34. Respondent Lindsey stated that, with her limitations, it would be impossible for her to perform the duties and satisfy the physical requirements of an infection control registered nurse.

35. Based on competent medical evidence, it was established that respondent Lindsey is permanently incapacitated for the performance of the usual duties of an infection control registered nurse.

LEGAL CONCLUSIONS

1. On the date that she filed her application for industrial disability retirement respondent Lindsey, was a safety member of CalPERS, seeking disability retirement pursuant to Government Code sections 20026 and 21151.⁴

Section 20026 states, in part:

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

⁴ Hereinafter all reference is to Government Code.

Section 21151, subdivision (a), states:

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.

Section 21152 states, in part:

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

- (a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

[¶] ... [¶]

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

Section 21153 states:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.

Section 21154 states 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 on 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. ...

Section 21156 states in part:

If the medical examination and other available information show to the satisfaction of the board ... that the member in the state service is incapacitated physically or mentally for the

performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability ...

Section 21166 states 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. ...

2. In 1970, the Court of Appeal held that to be "incapacitated for the performance of duty" within Government Code section 21022 (now section 21151) means "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.)

In *Mansperger*, the appellate court found that, while a game warden's disability incapacitated him from lifting or carrying heavy objects, which was sometimes a remote occurrence, the game warden was not entitled to a disability retirement because he could substantially perform most of his usual duties. (*Ibid.*, at pp. 876-877.) The appellate court drew a crucial distinction between a person who suffers some impairment that does not impact his performance of his customary and usual duties, and one who suffers a substantial impairment that prevents him from performing those duties.

3. Substantial inability to perform one's usual duties must be measured by considering the applicant's present abilities; disability cannot be prospective or speculative. (*Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 863.) The fact that an activity might bother a person does not mean, in fact, he cannot do that activity. In *Hosford*, the Court of Appeal reasoned that, the fact that Hosford testified to having to perform several of the duties described as only "occasional" and did those tasks without reporting any injury, represented further evidence of Hosford's ability to perform the more strenuous aspects of his work. (*Ibid.*)

4. Neither risk of injury nor risk of aggravation of an injury is sufficient basis to award a disability pension. Many injuries or medical conditions create an increased risk that a person will suffer a further injury or aggravation at a later time. For example, a person with a back injury or a heart problem is sometimes advised by doctors to avoid heavy lifting in order to prevent further injury. Although the person is presently capable of performing a certain task, the task should be avoided on a prophylactic basis.

In *Hosford v. Board of Administration* (1978), 77 Cal.App.3d 854, the disability applicant argued that his back injuries created increased risk of further injury. The Court

rejected his contention that the increased risk constituted a present disability and stated that Hosford's assertion did "little more than demonstrate his claimed disability is only prospective (and speculative), not presently in existence." (*Id.* at p. 863.)

As evidenced by *Mansperger* and *Hosford*, and numerous subsequent cases that followed, mere difficulty in performing certain tasks is not enough to support a finding of disability. (See, e.g., *Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689; *Cransdale v. Board of Administration* (1976) 59 Cal.App.3d 656; *Bowman v. Board of Administration* (1984) 155 Cal.App.3d 937.) A person must be substantially incapacitated from performing her duties.

5. *Wolfman v. Board of Trustees* (1983), 148 Cal.App.3d, 787, involved facts similar to but nonetheless clearly distinguishable from those in *Hosford*. In *Wolfman*, the court found that the reinstatement of Wolfman would initiate a vicious circle of infection, leading to severe pulmonary attack, and the need for dangerous steroid therapy. Disability was not merely a prospective probability, but a medical certainty.

6. Respondent Lindsey has the burden of proving entitlement to disability retirement by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5; *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

7. On November 10, 2010, after donating blood at CDCR, respondent Lindsey became dizzy and fell. Between the date of her injury and the date of hearing, respondent Lindsey continued to receive medical treatment for the injuries she sustained.

The medical evidence consisted of the medical evaluations by Doctors Bhatia and Porecha, which included taking a history, performing a physical examination and reviewing medical records. No evidence was offered regarding Dr. Bhatia's qualifications, and he did not render an opinion regarding respondent Lindsey's ability to perform her duties as an infection control registered nurse. Dr. Porecha established that he is a practicing neurologist and therefore qualified to render an opinion about respondent Lindsey's neurological condition. Dr. Porecha opined that, based on the medical evidence, there is no objective evidence of respondent Lindsey's neurological condition. However, in his opinion, her complaints of dizziness and pain are reasonable.

Initially, Dr. Porecha opined that respondent Lindsey was capable of performing the duties of a registered nurse. But, this opinion was based on his understanding of the duties and physical requirements of a registered nurse in a community hospital and the duties set forth in the Post Order. Prior to hearing, Dr. Porecha had not reviewed petitioner's documentary evidence of the duties and physical requirements of the position. After his review, Dr. Porecha changed his opinion; he identified the duties and physical requirements that respondent Lindsey is not capable of performing and stated the reason for his opinion. In Dr. Porecha's opinion, among other things, respondent Lindsey is not able to walk on uneven ground or lift 51 to 100 pounds, tasks that she is required to perform. In addition, she

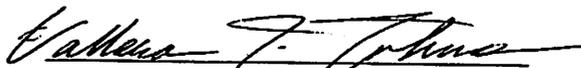
is not able to work with bio-hazardous materials or administer TB injections because of her suppressed immune system.

8. Respondent Lindsey is substantially incapacitated from performing her usual and customary duties as an infection control registered employed by respondent CDCR on the basis of her neurological (head and jaw) condition.

ORDER

The application for disability retirement of Natalie Lindsey is granted.

DATED: June 3, 2015



VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings