

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

ANNIE ACHETA,

Respondent,

and

DEPARTMENT OF DEVELOPMENTAL
SERVICES FAIRVIEW
DEVELOPMENTAL CENTER,

Respondent.

Case No. 2012-0531

OAH No. 2013120220

PROPOSED DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings (OAH), on May 7, 2015, in Orange, California.

Jeanlaurie Ainsworth, Senior Staff Counsel, represented the California Public Employees' Retirement System (PERS).

Danny T. Polhamus, Esq., represented Annie Acheta (Respondent), who was present.

No appearance was made by or on behalf of the Department of Developmental Services Fairview Developmental Center, which was served with notice of the hearing.

Oral and documentary evidence was received on May 7, 2015. At the request of the parties, the record was held open for the parties to file written closing briefs by July 1, 2015, and reply briefs by July 22, 2015. The parties timely submitted their briefs, which were marked as follows: PERS' closing brief and reply brief were marked as Exhibits 16 and 17, and Respondent's closing brief and reply brief were marked as Exhibits B and C. In addition, PERS filed a copy of the hearing transcript concurrent with the filing of its closing brief. Respondent's reply brief contains references to the transcript. The hearing transcript is

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marked as Exhibit 18. The record was closed and the matter was submitted for decision on July 22, 2015.

ISSUE

Whether, at the time of her application for disability retirement, Respondent was permanently substantially incapacitated from performance of her usual and customary duties as a senior psychiatric technician on the basis of her neck, bilateral shoulders, left arm, and bilateral wrist/carpal tunnel syndrome conditions.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Anthony Suine made and filed the Statement of Issues in his official capacity as the Chief of the Benefit Services Division of PERS.
2. On June 16, 2011, Respondent signed an application for "Service Pending Disability Retirement" by which she applied for service retirement and disability retirement. At the time of the application, Respondent was employed by Fairview Development Center (Fairview) as a senior psychiatric technician. By virtue of her employment, Respondent was a state miscellaneous member of PERS subject to Government Code section 21150. At the time of the application, Respondent had the minimum service credit necessary to qualify for service retirement. Effective July 15, 2011, Respondent was retired for service and has been receiving her monthly service retirement allowance as of that date.
3. In applying for disability retirement, Respondent claimed disability on the basis of neck, bilateral shoulders, and left arm conditions. In or about January and February 2012, PERS obtained medical reports concerning Respondent's neck, bilateral shoulders, and left arm conditions from competent medical professionals. Based on its review of the medical evidence, PERS concluded that Respondent was not permanently substantially incapacitated from the performance of her duties as a senior psychiatric technician, and denied her application for disability retirement.
4. By letter dated April 13, 2012, PERS notified Respondent that her application for disability retirement was denied and advised her of her appeal rights. By letter dated May 12, 2012, Respondent timely appealed the denial of her application for disability retirement and requested a hearing. The Statement of Issues was filed on October 14, 2013.
5. On August 14, 2014, Respondent amended her application for disability retirement to add bilateral wrist/carpal tunnel syndrome as additional conditions for which she claimed disability.

Senior Psychiatric Technician Job Duties

6. Fairview is a facility operated by the Department of Developmental Services. The clients at Fairview are persons with developmental disabilities referred by regional centers. Fairview is generally the last resort for the treatment and care of persons when the regional center has no other placement that can provide the services required for the person, or when no one else, such as a board-and-care home or other smaller, less restrictive setting, will take the person.

7. A senior psychiatric technician at Fairview works on an assigned shift and directs and provides for the care, treatment, and training of clients following established standards and procedures. The essential job skills for the position include, but are not limited to, knowledge of fundamental nursing care and basic general behavioral and psychiatric nursing procedures, daily living care requirements and mental health principles and techniques involved in the care and treatment of individuals or groups of mentally or developmentally disabled clients, the ability to establish effective therapeutic relationships with mentally or developmentally disabled clients, and the ability to think and act quickly in emergencies. The job duties for the position include, but are not limited to, working as a team member to provide optimal services and supports to clients, communicate and collaborate with staff, making daily rounds and overseeing the staff assigned to a living unit or training unit on a particular shift to ensure that services are provided in accordance with each client's individual program plan, ensuring that required reports and documentation are timely and properly completed, and responding to emergencies that involve the use of medical or behavioral intervention techniques. On occasion, the senior psychiatric technician may be required to perform the duties of a Unit Supervisor.

8. The typical physical demands for a senior psychiatric technician include possession and maintenance of sufficient strength, agility and endurance to perform during emergency situations or physically, mentally or emotionally stressful situations. The typical physical demands also involve heavy lifting over 25 pounds, often combined with pushing, pulling, and reaching at or above shoulder level. The physical requirements of the senior psychiatric technician position include occasionally lifting or carrying 26 to 50 pounds; frequently pushing and pulling; and occasionally reaching above shoulder level.

Respondent's Work History at Fairview

9. Respondent worked for Fairview for over 20 years. She began working at Fairview as a pre-licensed psychiatric technician on September 16, 1989. She passed the licensing examination in 1989 and continued working at Fairview as a licensed psychiatric technician. Approximately one to two years later, Respondent was promoted to senior psychiatric technician. She was working as a senior psychiatric technician when she applied for disability retirement in June 2011.

10. During her employment at Fairview, Respondent had two work-related injuries. The first work-related injury occurred in September 2008. While reaching for a patient chart, Respondent heard and felt a click in her neck associated with sharp pain. She reported this injury to her supervisor. She filed a workers' compensation claim and received medical treatment for the injury through workers' compensation. Respondent missed 90 days of work. When she returned to work, Respondent was assigned to light duty for three months. After the three months of light duty, Respondent's doctor authorized her to return to her regular duties, which she did. At this hearing, Respondent testified that, after returning to her regular duties, she continued to have "mild pain" from the back of her neck to her shoulders which then radiated to her left arm. However, she was able to perform her regular duties with those symptoms. At the time, the only medications she was taking were Tylenol and Motrin.

11. Respondent's second work-related injury at Fairview occurred on August 27, 2010. Respondent was standing and giving a report to a nurse. A client in a wheelchair came up behind Respondent and pulled the back of her hair, causing Respondent's head and neck to be pulled backward and down to the level of the client's wheelchair. Respondent felt pain in the back of her neck right away. The pain went down to her shoulder and then her arm. She reported the injury to her supervisor. Respondent filed a workers' compensation claim. She received medical treatment for this injury through workers' compensation from Dr. Behzad Haghi. Respondent testified she did not return to work at Fairview, and has been off work, since August 27, 2010. She filed her application for disability retirement on June 16, 2011.

12. Respondent began treating with Dr. Haghi, as her workers' compensation doctor, on August 27, 2010. On or about December 10, 2010, Dr. Haghi declared Respondent to be permanent and stationary with permanent restrictions. The permanent restrictions are: no lifting and carrying over 25 pounds; no pushing and pulling over 25 pounds; no repetitive overhead work; and no contact with combative/aggressive patients. Respondent stopped treating with Dr. Haghi in 2011. She did not treat with another physician until she began treatment with Dr. Mumtaz Ali in November 2013 (discussed below).

Medical Examination by Dr. Neil Katz

13. At the request of PERS, Neil Katz, M.D., performed a medical examination of Respondent on January 17, 2012. Dr. Katz graduated from medical school in 1981. He is board certified in orthopedic surgery. Dr. Katz spent 45 minutes with Respondent interviewing her and performing a physical examination. Respondent provided information to Dr. Katz by filling out a questionnaire. Dr. Katz reviewed Respondent's medical records and descriptions of the job duties and physical requirements for a senior psychiatric technician at Fairview. Dr. Katz prepared a written report dated January 17, 2012, which set forth his findings and conclusions. Dr. Katz testified at this hearing.

14. Respondent's chief complaints at the time of Dr. Katz's examination were neck pain, left shoulder and upper arm pain, left elbow and forearm pain, left wrist, hand, and fingers pain, and numbness and tingling in her arms and hands. She also complained of pain at night and while resting, and weakness in her left arm. She reported that flexing, bending, carrying, pushing, pulling, reaching, and lifting aggravated her symptoms. Respondent did not make any complaint about headaches.

15. Dr. Katz performed a physical examination of Respondent. Dr. Katz found Respondent had some areas of tenderness on her cervical spine, but her reflexes were within normal limits. Dr. Katz found there was no weakness of the neck musculature, and gross muscle strength testing was normal about the neck. However, Dr. Katz did find some slight limitations in the range of motion in her neck. Dr. Katz's examination of Respondent's shoulders and elbows found some tenderness but full motion and strength. The results of Dr. Katz's examination of Respondent's hands and wrist were normal, and there was no evidence of carpal tunnel. There was no decreased sensation and/or pain, and tests for carpal tunnel did not result in any positive findings for the condition. Dr. Katz found there was some tenderness to palpitation (low level pain) in Respondent's shoulders, elbows, and wrists.

16. Based on his medical examination of Respondent, Dr. Katz opined that Respondent did not appear to be substantially incapacitated from the performance of her usual duties, but she did appear to be mildly incapacitated from the performance of her usual duties. Dr. Katz concluded that Respondent had some mild symptoms but they were not enough to prevent her from performing her job as a senior psychiatric technician. Dr. Katz opined that Respondent is capable of some work. He noted that Respondent's cervical spine range of motion is quite limited and her complaints of pain and numbness down her left upper extremity cause her discomfort. Because Dr. Katz and Respondent disagreed about her true work capacity, Dr. Katz recommended that Respondent undergo a monitored functional/work capacity evaluation, which involves having the person being placed on cardiac monitors in order to evaluate their pulse, blood pressure, and heart rate as they are asked to perform various activities.

17. According to Dr. Katz's testimony, in workers' compensation cases, permanent restrictions may be ordered for the purpose of preventing further and future injury and are not necessarily indicative of activities that an employee is unable to perform. The Industrial Work Status Report from Dr. Haghi (Exh. A, p. 3) listed the permanent restrictions for Respondent but did not explain or correlate them to her diagnoses or conditions at the time.

Respondent's Evidence

18. Respondent presented the testimony of Mark Swanson. Swanson was the Unit Supervisor for the unit where Respondent was assigned at the time of her first work-related injury in September 2008. Swanson worked at Fairview from approximately 1976 until 2010, when he retired. He retired prior to Respondent's second work-related injury on August 27, 2010. During the time he was Respondent's supervisor, Swanson found Respondent to be an excellent employee.

19. Swanson was the Unit Supervisor for Unit 214. Respondent was one of the senior psychiatric technicians assigned to Unit 214. Swanson was Respondent's supervisor from July 2008 to November 2009. According to Swanson, there were approximately 24 licensed psychiatric technicians and five registered nurses, and other staff (such as pre-licensed psychiatric technicians) under his supervision. The approximately 24 licensed psychiatric technicians covered three shifts: five or six worked on the morning shift, five worked on the afternoon shift, and two worked on the night shift. Respondent was assigned to work on the morning shift.

20. Swanson's testimony established that Unit 214 had 27 or 28 clients. The clients were non-ambulatory and used wheelchairs, and received more medications and tube feedings than clients in other units. By contrast, Respondent's testimony established that, at the time of her second injury on August 27, 2010, she was assigned to a different unit. That unit was an acute unit which had a mix of ambulatory clients and non-ambulatory clients. Respondent described the acute unit as the "emergency room" of Fairview. The clients brought to the acute unit had critical, severe medical conditions, and generally stayed in the acute unit for no more than one week.

21. (A) Based on his experience at Fairview, Swanson's opinion is that a person under the types of restrictions ordered by Dr. Haghi would not be able to perform some of the job duties of a psychiatric technician. The restriction of no lifting or carrying more than 25 pounds would restrict performance of the job duty of taking care of the laundry, which involves lifting large laundry bags and putting them in even larger containers, or handling a situation where a client who has fallen and must be lifted off the floor. The restriction of no pushing or pulling more than 25 pounds would restrict the performance of the job duty of dispensing medications, which involves pushing the medication cart from room-to-room and dispensing medications to the client, or a situation that requires pushing a client in a wheelchair or gurney to a destination.

(B) The restriction of no repetitive overhead lifting would impact the job duty of preparing patient charts for doctors' visits. The patient charts were kept in large binders on a rack. To remove the binders from the rack, a person must reach over a permanent desk located under the racks and then reach up to the rack to get the binder. Finally, the restriction of no contact with combative or aggressive clients would prevent the person from being able to deal with unruly, aggressive, or combative clients, which according to Swanson generally occurs at least once a day. Swanson acknowledged that behavior interventions for such situations could be as simple as talking to the client and do not necessarily have to involve a physical take-down of the client. Respondent, in her testimony, stated that talking or voice is usually the first behavior intervention attempted. On the Duty Statement for the senior psychiatric technician position (Exh. 14), responding to emergencies involving the use of behavioral interventions is included in the Essential Duty of maintaining a safe, sanitary, therapeutic, and professional environment, which makes up 10 percent of the total Essential Duties of the position.

22. Respondent presented the testimony of Mumtaz Ali, M.D. Dr. Ali graduated from medical school in 1980. He is board certified in neurology, pain medicine, and electro-diagnostic medicine. He is also certified as an independent medical examiner. Respondent began treating with Dr. Ali in November 2013. Dr. Ali has diagnosed Respondent with chronic pain due to cervical spine injuries, chronic headache, and bilateral carpal tunnel syndrome. Dr. Ali opined that Respondent has suffered from chronic pain syndrome since she began treating with him in November 2013. Dr. Ali testified at length regarding the medications he has prescribed for Respondent. Dr. Ali's opinion is that the combination of Respondent's chronic pain and the side-effects of her medications prevent Respondent from performing her job duties as a senior psychiatric technician. In Dr. Ali's opinion, the most important restriction for Respondent is that she have no contact with combative or aggressive clients. Based on his review of the job description for Respondent's position, Dr. Ali's opinion is that Respondent "should not" be involved in any combative situation or in any taking-down procedures involving clients. (Exh. 18: Transcript, p. 26.) Dr. Ali agrees with the permanent restrictions ordered by Dr. Haghi. Dr. Ali acknowledged that Respondent can perform most of the duties on the Duty Statement (Exh. 14), except the duties relating to responding to emergencies. He reiterated his opinion that Respondent cannot be involved in situations requiring the ability to think and act quickly in emergencies due to the side-effects of the medications she has been taking.

23. Respondent contends that, since August 2010, she can no longer perform the job duties of a senior psychiatric technician that involve lifting, pushing and pulling. Respondent feels that the amount she can lift without pain that she finds unacceptable is five to 10 pounds. As a psychiatric technician, she was required to lift dirty laundry bags and boxes of diapers. According to Respondent, the laundry bags had to be carried to and placed in the dumpster. She had to lift the laundry bags over her shoulder in order to get them into the dumpster. Respondent testified that it hurts her hand when she pushes or pulls something. Respondent feels she can no longer perform the job duty of pushing the medication cart from room to room. Respondent testified she has problems with above shoulder or overhead type of work, such as reaching for the binders of patient charts to prepare for doctor visits, which is what precipitated her first work injury to her neck.

LEGAL CONCLUSIONS

1. Government Code section 21150, subdivision (a) provides:

"Any member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076 or Section 21077."

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2. Government Code section 20026 states, in pertinent part:

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

3. Government Code section 21154 provides, in pertinent part:

"On receipt of an application for disability retirement of a member, . . . the board shall, or of its own motion 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."

4. Government Code section 21156 states, in pertinent 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"

5. 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.) In state administrative hearings, unless indicated otherwise, the standard of proof is "persuasion by a preponderance of the evidence." (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

6. Thus, to establish entitlement to disability retirement, an employee must show that he or she is "incapacitated for the performance of duty," which courts have interpreted to mean a "substantial inability" to perform his or her "usual duties." (*Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, 876.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854.) When an applicant can perform his or her customary duties, even though doing so may sometimes be difficult or painful, the applicant is not "incapacitated" and does not qualify for a disability retirement. (*Hosford, supra*; *Mansperger, supra*, at p. 876-878.)

7. Findings and rulings in workers' compensation actions do not address the issue of substantial incapacity to perform one's duties that is the crux of disability retirement cases. "[A] workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties is different." (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.) Moreover, a workers' compensation award may be based on discomfort making it difficult to perform duties, but this standard is insufficient to show a substantial inability to perform duties. (*Id.*)

8. In this case, Respondent failed to show, by a preponderance of the evidence, that she is substantially incapacitated from performing her usual duties as a senior psychiatric technician at Fairview. Dr. Haghi's findings that Respondent was permanent and stationary, and his order of permanent restrictions, were made in connection with Respondent's workers' compensation claim. The purpose of the permanent restrictions for Respondent was to prevent future injury. PERS is not bound by findings and rulings from Respondent's workers' compensation action. Dr. Ali's testimony is not sufficient or probative to establish "substantial incapacity" at the time of Respondent's application. Respondent did not begin treating with Dr. Ali until two years after she submitted the application. Evidence of the side-effects of the medications prescribed by Dr. Ali is not probative, as Respondent was not taking such medications at the time of her disability retirement application. Swanson's testimony, which focused on the effects of the permanent restrictions on a senior psychiatric technician's job duties, does not constitute "competent medical opinion" required for a disability retirement determination. Swanson was a Unit Supervisor at Fairview; no evidence was presented that he is a medical doctor. The testimonies of Dr. Ali and Unit Supervisor Swanson, at most, established that Respondent might have difficulty or discomfort in performing certain tasks. But such difficulty or discomfort in performing certain tasks is not enough to support a finding of disability. Dr. Ali's testimony established that Respondent could perform most of the job duties contained in the Duty Statement. He recommended that she should not perform the duties involving contact with combative or aggressive clients and take-down procedures. The Duty Statement indicates that responding to emergencies involving the use of behavioral intervention techniques was part of the 10 percent component of the "essential duties" of maintaining a safe, sanitary, therapeutic and professional environment. Dr. Katz presented the only credible medical evidence as to Respondent's condition at the time she applied for disability retirement. Dr. Katz, in his testimony, acknowledged that Respondent had "mild incapacity" in performing her job duties, but not "substantial incapacity" as required for disability retirement. The totality of the evidence presented established that Respondent might have some difficulty or discomfort in performing the usual job duties of a senior psychiatric technician, but she was not substantially incapacitated in performing those duties.

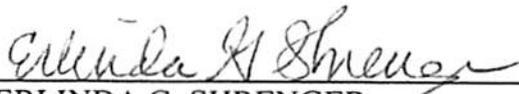
9. Based on the foregoing, the preponderance of the evidence supports PERS' determination that Respondent, at the time she applied for disability retirement, was not substantially incapacitated from performance of her usual and customary duties as a senior psychiatric technician based on her neck, bilateral shoulders, left arm, bilateral wrist and carpal tunnel syndrome conditions. (Factual Findings 1-23.)

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ORDER

Respondent Annie Acheta's appeal of PERS' decision to deny her application for disability retirement is denied.

Dated: August 18, 2015



ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings