

ATTACHMENT A
THE PROPOSED DECISION

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

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

CAROL A. GONZALES,

Respondent,

and

PLEASANT VALLEY STATE PRISON,
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,

Respondent.

OAH No. 2014070071

CalPERS No. 2014-0095

PROPOSED DECISION

This matter was heard before Erin R. Koch-Goodman, Administrative Law Judge, Office of Administrative Hearings, State of California, on August 26, 2015, in Fresno, California.

The California Public Employees' Retirement System (CalPERS) was represented by Elizabeth Yelland, Senior Staff Counsel.

Carol Gonzales (respondent) was present and was represented Janac Lopes, Attorney at Law, Griswold, LaSalle, Cobb, Dowd & Gin.

FACTUAL FINDINGS

1. Anthony Suine, Chief, Benefit Services Division, CalPERS, made and filed the Statement of Issues in his official capacity.
2. Respondent was employed by California Department of Corrections and Rehabilitation (CDCR), Pleasant Valley State Prison (PVSP), as a Licensed Vocational

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED September 28, 2015

Kathy Pasley

Nurse (LVN) at the time that she filed her application for industrial disability retirement. By virtue of her employment, respondent is a state safety member of CalPERS subject to Government Code section 21151, subdivision (a).

3. On April 9, 2013, respondent signed her application for industrial disability retirement, which was received by CalPERS on April 9, 2013. In filing the application, disability was claimed on the basis of an orthopedic (bilateral wrist/hand, right elbow) condition.

4. After a review of respondent's medical reports concerning her orthopedic condition, CalPERS determined that respondent's condition was not disabling; and that respondent was not substantially incapacitated from the performance of her job duties as an LVN with CDCR. By letter dated October 9, 2013, CalPERS notified respondent of its decision to deny her application for industrial disability retirement and advised her of her appeal rights. Respondent filed an appeal on November 7, 2013.

5. The appeal is limited to the issue of whether respondent is permanently disabled or substantially incapacitated from performance of her usual and customary duties as an LVN for CDCR on the basis of an orthopedic condition (bilateral wrist/hand, right elbow). If such disability is found to exist, the issue of whether the disability is industrial or nonindustrial will be resolved pursuant to Government Code section 21166.

Job Duties

6. Respondent began work as an LVN at PVSP in 2006. Taken from the California Correctional Health Care Services, Licensed Vocational Nurse, Essential Functions List, the LVN provides direct and indirect nursing care to inmate-patients and does other related work. The LVN must be able to work in conditions that require all of the following essential functions:

- a. administrative functions, including but not limited to, communicate effectively, document appropriate information, observe and report inmate conduct, maintain appropriate certifications and licensures;
- b. physical functions, including but not limited to, have and maintain sufficient strength, agility and endurance to perform during stressful situations, remain alert, move about the institution, walk stairs, remain stationary, stoop, bend, reach, twist, and stretch, frequently lift and carry light (20 pound maximum) to medium (50 pounds maximum) loads, and occasionally to frequently, lift very heavy (over 100 pounds) loads, pushing and pulling, and work on uneven surfaces;

- c. nursing functions, including but not limited to, interview patients, collect data for medical histories, and provide appropriate treatments, observe and report inmates' medical information and vital signs, judgment, stamina, and skill, coordination dexterity, understanding and communication and motor skills/ability sufficient to understand and carry out orders, refer patients, dress wounds, assist with medical/surgical procedures, obtain specimen cultures, assist in performing diagnostic tests, monitor inmate care, report effectiveness of nursing care, document and maintain accurate detailed reports, and administer CPR, BLS, and first aid.

7. Taken from the CalPERS Physical Requirements of Position/Occupational Title form, PVSP provided the following information about the physical requirements of the LVN position.

- a. Occasional tasks, for up to three hours per shift, include: running, crawling, kneeling, climbing, squatting, power grasping, lifting 51 to 75 pounds, lifting 76 to 100 pounds, and lifting 100 plus pounds, driving, working with heavy equipment, working at heights, operation of foot controls or repetitive movement, use of special visual or auditory protective equipment.
- b. Frequent tasks, for three to six hours per shift, include: sitting, standing, walking, bending neck, reaching above shoulder, keyboard use, mouse use, lifting 0 to 10 pounds, lifting 11 to 25 pounds, lifting 26 to 50 pounds, walking on uneven ground, exposure to excessive noises, exposure to extreme temperature and humidity wetness, exposure to dust gas, fumes or chemicals, working with bio-hazards (e.g. blood borne pathogens, sewage, hospital waste.)
- c. Constant tasks, for over six hours per shift, include: bending waist, twisting neck, twisting waist, reaching below shoulder, pushing and pulling, fine manipulation, simple grasping, repetitive use of hand(s).

Respondent's Medical History

8. On March 1, 2011, respondent developed numbness in her right hand while sleeping, in the thumb, index and middle fingers. In August 2011, respondent completed worker's compensation paperwork and was referred to a clinic for evaluation. Respondent

did not return to work. On November 14, 2011, respondent had a right carpal tunnel release surgery. Respondent was released back to work on March 9, 2012.

On May 6, 2012, respondent developed numbness in her left hand, in the thumb, index and middle fingers. In July 2012, respondent developed pain in both elbows and stopped working on July 18, 2012. On November 15, 2012, respondent had a left carpal tunnel release and right elbow surgery. From January 16, 2013, through February 13, 2013, respondent was released to modified work.

On April 15, 2013, respondent had a second right carpal tunnel release surgery. On April 22, 2013, respondent was released to modified work. From April 24, 2013, through June 10, 2013, respondent was released to return to work with work restrictions – no use of the right hand. From May 15, 2013, through June 12, 2013, respondent was released to return to work with work restrictions – no use of the left hand.

9. Today, respondent complains of numbness of the fingers and “stenosising tenosynovitis” (locking and popping) of the right and left thumbs. The thumbs have been treated with injections of cortisone and lidocaine.

10. Respondent testified that she is unable to do the essential functions of her job as an LVN due to pain in her hands and arms/elbows, limited grip strength, a lack of fine motor skills, or manual dexterity.

11. At all times relevant, respondent has been treated by medical professionals associated with her worker’s compensation claim. To that end, respondent has participated in two Qualified Medical Examinations in Spring 2014 and May 2015.

Respondent offered her worker’s compensation medical records to CalPERS in support of her disability claim. CalPERS objected to the consideration of respondent’s worker’s compensation medical evaluations. The worker’s compensation reports were not admitted; the reports offer conclusions based on the legal standard for worker’s compensation determinations and not the CalPERS disability standard. (*Los Angeles County School District (Keck)* (2000) CalPERS Dec. No. 00-05, Factual Finding 21.) As such, the reports are not relevant or helpful to resolve the disability claim at issue. (*Ibid.*)

Independent Medical Examination

12. Joseph Serra, M.D., a highly qualified orthopedic surgeon, was retained by CalPERS to evaluate respondent and her orthopedic condition. Dr. Serra saw respondent on August 12, 2013, for examination. Dr. Serra interviewed respondent, asking questions about her condition, including her medical history, her present complaints, work history, and activities of daily living. Dr. Serra reviewed respondent’s medical and non-medical (e.g. job duty statement) records. Dr. Serra also conducted a physical examination of respondent.

During the physical examination, Dr. Serra found no evidence of atrophy in respondent's shoulders, upper arms, forearms, or hands. He found respondent's range of motion in the forearms to be normal; limited in the left wrist during dorsiflexion with resistance; and normal in all digits. Jamar measurements of grip strengths were tested with three trials; on the right, the results were 25, 40, and 30, and on the left, the results were 30, 30, and 20 PSI. Interpreting the Jamar results, Dr. Serra indicated that respondent's grip strength was normal.

Dr. Serra's diagnostic impressions included:

- (1) Status post right carpal tunnel release (2x);
- (2) Status post left carpal tunnel release;
- (3) Status post decompression ulnar nerve, right elbow.

Dr. Serra wrote a report and testified to the same at hearing. Dr. Serra was the only physician to testify in this case. His medical opinion was credible, reliable and persuasive.

Dr. Serra opined that: there are no specific job duties that respondent is unable to perform because of her condition; respondent is not substantially incapacitated from the performance of her duties as an LVN; respondent has no substantial incapacity present; and orthopedically, there is no significant disability present. Dr. Serra acknowledged that respondent might in fact have pain, and could even have more pain than others with the same condition, but he believes that respondent exaggerates her pain complaints at all times.

13. For all the above reasons, respondent has failed to establish through competent medical evidence that her orthopedic (bilateral wrist/hand, right elbow) conditions substantially disable her from performing her regular duties as a LVN at PVSP.

LEGAL CONCLUSIONS

Applicable Laws and Statutes

1. In determining whether a member is eligible to retire for disability, the board shall make a determination on the basis of competent medical opinion. (Gov. Code, § 21156, subd. (a)(2).) Disability, as a basis of retirement, means disability that is permanent or extended and of uncertain duration. (Gov. Code, § 20026.)

2. Any state safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability. (Gov. Code, § 21151, subd. (a).) An applicant must demonstrate their substantial inability to perform their usual duties on the basis of competent medical evidence. (*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* (1978) 77 Cal.App.3d 854.)

3. According to Government Code section 21154, “[o]n receipt of an application for disability retirement of a member, the board 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. 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 her duties and is eligible to retire for disability, the board shall immediately retire her for disability, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service. (Gov. Code, § 21156, subd. (a)(1).)

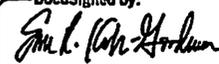
Determination

5. No cause exists to grant respondent’s application for industrial disability retirement within the meaning of Government Code sections 21151, 21156, and applicable case law. Respondent did not establish that she is permanently disabled or incapacitated from the performance of her duties as an LVN on the basis of her orthopedic condition, based upon competent medical evidence. Respondent failed to submit any competent medical evidence upon which CalPERS can rely. (Factual Finding 11.) Dr. Serra testified competently and clearly about the medical procedures respondent underwent, her current condition, and the interplay between her status post-surgery and her essential job functions. (Factual Finding 12.) Dr. Serra applied the CalPERS standard of substantial incapacity and determined that respondent is not disabled; and she can perform the essential functions of her job. In other words, respondent is not precluded from performing her usual duties as an LVN with the CDCR, PVSP.

ORDER

The application of Carol A. Gonzales for CalPERS Industrial Disability Retirement is DENIED.

DATED: September 23, 2015

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ERIN R. KOCH-GOODMAN
Administrative Law Judge
Office of Administrative Hearings