

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for  
Disability Retirement of :

CAROLYN L. PYE,

Respondent.

and

DEPARTMENT OF DEVELOPMENTAL  
SERVICES-LANTERMAN STATE  
HOSPITAL,

Respondent.

OAH No. 2015010069  
Agency Case No. 2013-0988

**PROPOSED DECISION**

This matter was heard before Administrative Law Judge, Glynda B. Gomez, Office of Administrative Hearings, on September 9, 2015 in Glendale, California.

The California Public Employees' Retirement System (CalPERS) was represented by Jeanlaurie Ainsworth, Senior Staff Attorney.

Respondents Carolyn L. Pye (Pye) and Department of Developmental Services-Lanterman State Hospital (DDS) did not appear and was not otherwise represented.

Evidence was received and argument heard on September 9, 2015. The record remained open until September 16, 2015 for CalPERS to file case authority and attachments to the report of Keolanui Gregory Chun (Dr. Chun). CalPERS filed its case authority and a notice that there were no attachments to Dr. Chun's report. The case was submitted for decision on September 16, 2015.

**FACTUAL FINDINGS**

1. On August 15, 2012, Respondent Pye signed an application for industrial disability retirement through CalPERS. On her application, Respondent Pye claimed

PUBLIC EMPLOYEES RETIREMENT SYSTEM  
FILED October 13, 20 15  
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eligibility based on an orthopedic condition of her right shoulder as a result of an injury in 2011.<sup>1</sup> Respondent Pye also signed an application for service retirement on August 15, 2012. Respondent Pye retired for service effective September 18, 2012, and has been receiving her retirement allowance from that date.

2. On May 9, 2013, CalPERS notified Respondent Pye that it denied her request for disability retirement. Respondent Pye filed a timely appeal on May 31, 2013, and this hearing ensued.

3. Respondent Pye was employed by respondent DDS at Lanterman State Hospital as a Psychiatric Technician for over 20 years. Respondent Pye is a state miscellaneous member of CalPERS. Respondent Pye has the minimum service credit necessary to qualify for retirement.

4. Respondent Pye's essential job duties as a Psychiatric Technician are set forth in her job description as follows:

1. 25% Performs nursing procedures, such as administering medication and treatments including oral medication, hypodermic injections, urinary catheterization, enemas, and taking and recording temperature, pulse, blood pressure, respirations, and first aid as authorized within the Psychiatric Technician license. Document all required information following policies and procedures, including weekly and monthly review. Read and write all required information regarding client information and data, and interpret documentation.

2. 10% Observes clients' physical condition and behavior and reports significant changes to appropriate team member.

3. 1% Participates as a member of the Interdisciplinary Team in all aspects of the development and implementation of the Individual Program Plan.

4. 4% Maintains a safe, sanitary, and therapeutic environment which promotes respect and dignity for clients and protects the privacy, rights, confidentiality and physical and emotional well-being of clients. May perform laundry duties as well as housekeeping duties to ensure client and environmental needs are met, ongoing.

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<sup>1</sup> Respondent Pye suffered a work place injury which required surgery on her left shoulder in 2009. After recovery, she returned to work without restrictions.

5. 1% Provides one-to-one supervision and direct observation of clients on special precautions, such as elopement risks, suicide risks, serious medical condition and risk of serious self-injurious behavior to client.

6. 1% Responds to emergencies that involve the use of medical and behavioral intervention techniques.

7. 3% Escorts clients on the facility grounds and in the community. This may require pushing wheelchairs and/or holding onto a client's hand/arm.

8. 5% Works extended hours and/or varying shifts-Normal work week is generally 40 hours in length. However, may be required to work overtime as needed.

-As staffing needs arise, may be required to work any shift.

9. 5% Works at various sites as needed to meet staffing requirements-May be reassigned to any Program/Residence with clients of various degrees of disabilities and mobility need.

10. 20% Assists clients in all activities of daily living, such as bathing, dressing, grooming, and dining. These duties include lifting, positioning, and assisting in client mobility. Also performs passive range of motions exercises with clients (i.e. upper and lower extremity ranging)[.] May lift clients up to 50 pounds alone, or up to 100 pounds with assistance of one other employee, or it may be determined that a mechanical lift is required when lifting and transferring clients between bed, wheelchair, toilet, etc.

11. 1% Attends and participates, in training as required. Required to have knowledge of and the ability to use CPR, First Aid Procedures, and general nursing procedures.

12. 2% Assists staff in clients' occupational, recreational, vocational and educational therapy programs.

13. 2% Assists in the training of various Psychiatric Technician Classifications, such as Trainees, Psychiatric Technician Apprentices, and Psychiatric Technician Students.

14. 20% Bathing Clients-includes changing bed linen, dressing and undressing male and female clients, reposition clients in bed/wheel chairs, assist in self-care, and perform bathing

techniques in showers, regular tubs, pedestal tubs, bed bath with use of a washcloth, with due regard for privacy and dignity.

5. On August 27, 2011, Respondent Pye slipped and fell at work as a result of a water on the ground. She sustained injury to her lower back, right thigh, right knee, right ankle, right shoulder, right forearm, right wrist, and right thumb. She received physical therapy, medication and cortisone injections. She was also placed on modified duty. Respondent's right shoulder pain became more intense after she returned to work and attempted to resume her normal duties. On April 6, 2012, Dr. Smith performed an arthroscopic debridement of a superior labral tear and subacromial decompression with distal resection on Respondent Pye's right shoulder. Respondent participated in physical therapy as recommended by Dr. Smith for four months during which time she continued to complain of stiffness and restriction of movement in the right shoulder. Respondent received cortisone injections, but they did not relieve her pain. She was released to work on modified duty on July 26, 2012. Respondent's work restrictions included "limited right upper extremity use, no overhead work, and no lifting, pushing, or swelling [sic] over 10 pounds." Respondent Pye was subsequently diagnosed with arthrofibrosis in her right shoulder. This condition resulted in a "frozen shoulder" which prevents Respondent from raising her right arm. As a result, Respondent Pye is not able to perform her usual and customary duties as a psychiatric technician.

6. Respondent Pye consulted with Dr. Powers<sup>2</sup> on September 17, 2012. Dr. Powers noted and diagnosed "Adhesive capsulitis" (also known as arthrofibrosis) of the right shoulder. On October 16, 2012, based upon results of an MRI arthrogram and examination, Dr. Powers recommended that Respondent Pye undergo a shoulder manipulation and right shoulder arthroscopy to remove the adhesions under general anesthesia. Dr. Powers also noted that Respondent Pye had a history of hypertension and would require medical clearance for the hypertension before any surgery.

7. Complainant's expert witness, Dr. Chun, a Board Certified Orthopaedic Surgeon, examined Respondent Pye on February 6, 2013. Dr. Chun also reviewed Respondent Pye's medical records. He prepared reports and rendered an opinion as a qualified medical examiner (QME) concerning Respondent Pye's condition. In his June 28, 2013 report, Dr. Chun opined that:

At the time of my evaluation, the member should have been considered substantially incapacitated for performance of her usual and customary occupation.

Absent the recommended surgical procedure, this medical condition is permanent.

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<sup>2</sup> The evidence did not establish Dr. Powers' qualifications, experience or treatment relationship with Respondent Pye.

It is noted that if she were to undergo surgery, that she would likely be able to return to her usual and customary occupation within six months.

8. On July 12, 2013, In response to a CalPERS inquiry, Dr. Chun again advised CalPERS in writing that in his opinion Respondent 's incapacitation was permanent unless she underwent a second surgery.

9. At hearing, Dr. Chun testified that a manipulation alone would no longer be sufficient to restore Respondent' s right shoulder although at an earlier time, it might have been sufficient. He opined that at this time she needs surgical removal of the fibrous scar tissue in her shoulder in order to restore the movement. Dr. Chun opined that all surgery carries a risk and general anesthesia always has a risk of death. Dr. Chun made no mention or evaluation of the additional risk or lack thereof presented by Respondent Pye's history of hypertension. Dr. Chun predicted that it was nearly 100 percent certain that Respondent's right shoulder would be restored by surgical removal of the scar tissue.

10. Respondent Pye moved to Montana in November of 2012 and has not been able to locate a surgeon willing to perform the surgery using California Worker's Compensation benefits and has not been able to arrange for a California surgeon to perform the surgery. There was no evidence that Respondent Pye has refused to have a second surgery.

### LEGAL CONCLUSIONS

1. 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.)

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, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion."

3. 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.

4. Government Code section 21152 provides:

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.

[¶] . . . [¶]

(c) The governing body or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

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

5. Government Code section 21153 provides:

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.

6. Government Code section 21154 provides:

The application shall be made only (a) while the member is in state service, or (d) while the member is physically or mentally incapacitated to perform duties... 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....

7. Government Code section 21156, subdivision (a)(1) provides 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... .

8. 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.)

9. In *Reynolds v. City of San Carlos* (1981) 126 Cal. App. 3d 208, the court held that an applicant for retirement benefits has a duty to seek medical treatment and take reasonable steps to correct a medical problem. In *Reynolds*, the reasonable steps included knee surgery.

10. Here, CalPERS' own expert acknowledges that Respondent is substantially incapacitated from the performance of her regular duties as a psychiatric technician and will continue to be so incapacitated unless she has a second surgery and a successful outcome from the surgery. The law requires Respondent Pye to take reasonable steps to obtain medical treatment and to mitigate harm. Here Respondent Pye has already undergone one surgery, substantial physical therapy, and testing in a reasonable effort to correct her shoulder injury and return to work. Assuming that Respondent can locate a surgeon to perform the procedure either in California or Montana, it is not reasonable to require Respondent Pye to undergo a second surgery four years after her injury and endure the risks of general anesthesia and risks presented by Respondent Pye's history of hypertension in order to alleviate problems created by the first surgery. The *Reynolds* court did not contemplate the type of injury presented here involving the need for multiple surgeries and therapies over a period of years. Instead, the *Reynolds* court was presented with a case in which the applicant refused to undergo a single surgical repair of a torn meniscus in his knee. In this case, Respondent Pye has not refused surgical intervention and has already undertaken reasonable efforts and medical procedures to alleviate her injury. The insistence on further surgical procedures four years after her injury is not reasonable. Accordingly, Respondent Pye has established by a preponderance of the evidence that she is substantially incapacitated from her usual duties as a psychiatric technician and is entitled to industrial disability retirement.

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ORDER

The application of Carolyn L. Pye for disability retirement is granted.

DATED: October 12, 2015

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GLYNDA B. GOMEZ  
Administrative Law Judge  
Office of Administrative Hearings