

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
Reinstatement from Disability Retirement of:

JOSEPHINE OKWU,

Respondent,

and

STATE OF CALIFORNIA, DEPARTMENT
OF TRANSPORTATION,

Respondent.

Case No. 2014-0585

OAH No. 2015010373

PROPOSED DECISION

Administrative Law Judge Ed Washington, Office of Administrative Hearings (OAH), State of California, heard this matter on August 31 and September 1 and 2, 2015, in Sacramento, California.

D. Gregory Valenza, Attorney at Law, represented the California Public Employees' Retirement System (CalPERS).

Staff Counsel Navtej S. Bassi represented the State of California, Department of Transportation (CalTrans).

Elizabeth Betowski, Attorney at Law, represented Josephine Okwu (applicant), who was present.

The matter was submitted for decision September 2, 2015.

ISSUE

Does applicant remain substantially incapacitated for the performance of her former duties as an Accounting Officer (Specialist) for CalTrans?

FACTUAL FINDINGS

Procedural History

1. Applicant worked for CalTrans for approximately 12 years as an Accounting Officer (Specialist). At all times relevant to this Decision, applicant has been and remains a state miscellaneous member of CalPERS.

2. In response to assertions from CalTrans that she was exhibiting “bizarre and threatening behavior” in the workplace, applicant was subjected to a fitness for duty psychological examination. She was deemed unfit for duty, and applied for disability retirement on September 3, 2003. Applicant claimed in the application to be permanently disabled from the performance of her duties due to a psychological condition, depression, anxiety and bipolar disorder. CalPERS approved her application on February 21, 2004, with an effective date of September 1, 2003.

3. On May 18, 2004, just three months after CalPERS approved her application for disability retirement, applicant filed a Reinstatement from Disability/Industrial Disability Retirement Application (reinstatement request) with CalPERS requesting reinstatement with her former employer on the basis that she was no longer substantially incapacitated for the performance of her former duties with CalTrans. CalPERS denied applicant’s reinstatement request in April 2005.

4. On August 24, 2005, approximately four months after the denial of her initial reinstatement request, applicant again requested reinstatement. CalPERS denied applicant’s second reinstatement request in April 2008. Applicant appealed the denial and requested an evidentiary hearing. On April 22, 2009, the CalPERS Board of Administration (Board) adopted in its entirety the Proposed Decision of Administrative Law Judge Stephen J. Smith denying applicant’s appeal in Board Case No. 8812, OAH Case No. 2007070393.

5. In November 2011, applicant filed a third reinstatement request. The latest reinstatement request specified that she continues to suffer from several mental disorders, including Bipolar Disorder, Schizoaffective Disorder, and psychosis, and seeks reinstatement into active CalPERS membership with CalTrans. Through her reinstatement request, applicant asserts that despite these disorders, she is no longer incapacitated for the performance of her former duties.

6. CalPERS denied the November 2011 reinstatement request. Again, applicant appealed and requested an evidentiary hearing. On October 15, 2014, petitioner, Anthony Suine, Chief, CalPERS Benefit Services Division, made and filed the Statement of Issues in his official capacity.

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Diagnoses, Treatment, and Decompensation

7. Applicant is 51 years old and was born in Nigeria. She moved to the United States in 1983 to join her husband, a CalTrans employee. Applicant began working for CalTrans as a student assistant in 1990, and then began working as an Accounting Officer (Specialist) in 1991. In 1992, applicant was passed over for a promotion for reasons she perceived as unjustified. This incident caused her significant emotional distress and she experienced the initial onset of depression and psychosis, which evolved to Schizoaffective Disorder, bipolar type. Applicant experienced recurring episodes of significant psychiatric decompensation. Decompensation occurs when an individual fails to utilize effective psychological coping mechanisms in response to stressors, resulting in disintegration.

8. Prior to the Board's denial of applicant's previous appeal, she was involuntarily hospitalized for psychiatric treatment at least four times due to decompensation. In 1995, she was involuntarily hospitalized due to psychotic symptoms and bizarre behavior. In June 1999, applicant was involuntarily hospitalized due to severe psychiatric symptoms, including her refusal to take psychiatric medication and acute agitation. In February 2003, she was involuntarily hospitalized due to crying spells, acute suicidal behavior, agitation, confusion, involuntary weight loss and severe insomnia. In May 2005, applicant's decompensation resulted in an involuntary commitment under Welfare and Institutions Code section 5150, after she refused to eat or take her medication for several days. She was rocking, presented a semi-catatonic state, and reported hearing voices telling her not to eat or drink.

9. In July 2009, applicant stopped taking her medication again and experienced decompensation. She was initially placed in an intensive outpatient treatment program, which was unsuccessful. As a result, applicant was involuntarily hospitalized for psychiatric treatment in December 2009.

10. Applicant is prescribed treatment with the antipsychotic and mood stabilizing medication Zyprexa, also known as Olanzapine. She is also prescribed treatment with the antidepressant medication Sinequan, also known as Doxepin. Despite a significant history of refusing to take her medication as prescribed, applicant claimed she takes her medication every night as prescribed and has done so for the past seven years.

11. Applicant's psychiatrist encouraged her to engage in volunteer work as part of her recovery. Applicant performed light accounting work for her church and a local women's shelter between 2007 and 2010. She also volunteers at the local library four days a week, seven hours per day.

Customary Duties of a CalTrans Accounting Officer (Specialist)

12. Applicant last worked for CalTrans in the Local Programs Accounting Division. This division receives and reconciling payments to local agencies for state and federally funded or assisted transportation projects. Applicant processed invoices, prepared

financial statements, set up accounts, monitored those accounts, and saw that invoices received from various local agencies were processed and paid in a timely fashion. The position required considerable computer and telephone work and a great deal of contact with local agency representatives.

13. Annie Wong is an Accounting Administrator II for CalTrans who supervises the Local Programs Accounting Division. She has held various accounting positions with CalTrans over 18 years and is familiar with the duties of an Accounting Officer (Specialist). Ms. Wong testified that the position of Accounting Officer (Specialist) in the Local Programs Division has always been challenging. It is a high turnover job, requiring significant attention to detail, organizational skills, and the ability to work independently and under time pressure. The position has gone from being stressful when appellant last worked there to being even more stressful now. There is increased pressure over losing federal matching funds due to slow processing of payments and invoicing problems. The potential loss of significant amounts of federal money has increased expectations of employees to quickly process invoices and reconcile accounts.

14. Ms. Wong also characterized the position as being more challenging now than it was when applicant last worked, because they have implemented a new software system that is much more complex than the former system. The duties are more technical, there are new terms to learn, a new workflow process to adopt, and an increased workload.

Applicant's Testimony

15. Applicant's testimony was unusual. She was somewhat disengaged and took an inordinate amount of time to respond to many of the questions asked by counsel. She had difficulty performing mathematical functions and could not recall several of her psychiatric hospitalizations, without assistance. With rare exception, she limited her testimony to very brief responses. Her more expansive testimony sounded oddly robotic, as if being read from a book for the first time.

16. Applicant testified that CalTrans caused her bipolar disorder and depression, but she has "learned to forgive them." Specifically, she believed unfair treatment by her supervisor, by being overly-critical and micromanaging, caused her disorder. She testified that her condition has stabilized because she takes her medication nightly. She takes care of her kids, works at the library, no longer hears voices, and is sleeping at night. She also asserted that she has not been hospitalized since 2003, although she had been hospitalized in 2005 and 2009. When asked if she feels she can do her job, she responded:

I believe very well that I can do my job as an Accounting Officer Specialist. I believe I am fit to return to work. I don't have any episode (*sic.*) of bipolar. I haven't been admitted to the hospital since seven years ago. I can do my work. I have a B.S. in Accounting, I have an M.B.A. in Finance, to help me do my job as an Accounting Officer Specialist.

17. Separate from her assessment of her ability to perform her former duties, applicant also believes she should be reinstated because her psychiatrist, Haifeng Yu, M.D., cleared her to return to work without restriction in 2009, 2010, and 2011. Applicant sees Dr. Yu once every six months to assess her progress and treatment plan. She does not participate in psychotherapy or any form of counseling because she feels it's unnecessary.

Dr. Yu's Assessment

18. Dr. Yu began treating applicant in March 2009. He is certified in psychiatry by the American Board of Psychiatry and Neurology. He obtained his medical degree in 1982 from Shanghai Second Medical College, in Shanghai, China, and also attended Drexel University School of Medicine in Philadelphia, between 2004 and 2008. Dr. Yu does not provide psychotherapy or any form of counseling. His treatment of applicant is limited to treating her condition with medication, meeting periodically to assess her progress, and adjusting her prescription as needed.

19. At hearing, Dr. Yu explained that when he provided applicant with written authorization to return to work without restriction, he did not mean to indicate that she could return to her former position as an Accounting Officer (Specialist). Instead, he meant it "in a therapeutic sense." It was his opinion that since applicant wanted to return to work, appeared stable, and had reintegrated into social and professional circles by spending time with her family and volunteering at the library, the next logical step in her treatment would be to reintegrate into the workforce.

20. Dr. Yu knew applicant's last position was "some accounting job," but never discussed her former duties with her. He has never seen a job description or duty statement for a CalTrans Accounting Officer (Specialist), and did not intend to indicate that she could perform those duties when he authorized her to return to work in 2009, 2010, and 2011.

Dr. Walcott's Independent Medical Examination

21. Damon Walcott, M.D., is a psychiatrist certified in both general and forensic psychiatry by the American Board of Psychiatry and Neurology. He obtained his Doctor of Medicine from the University of Southern California in 1995. He completed his pre-clinical studies at the University of Illinois at Chicago College of Medicine in 1993 and obtained his Bachelors of Arts in Genetics from the University of California at Berkeley in 1991.

22. Dr. Walcott performed an Independent Medical Evaluation (IME) of applicant and generated a report dated December 20, 2013. Dr. Walcott reviewed treatment records, interviewed and examined applicant, and diagnosed her with Schizoaffective Disorder, bipolar type. He also reviewed her usual and customary duties for her former position and determined that she remained substantially incapacitated for the performance of her former position. Dr. Walcott's opined that although applicant obtained a graduate level degree and worked as an accountant for several years, she no longer possessed the capacity to function at that level due to her medical condition and series of decompensation. He noted that "as is

typical of the course of individuals with Schizoaffective Disorder, applicant never recovered [to] her previous baseline level of functioning she had demonstrated prior to the onset of her psychiatric illness.”

23. Dr. Walcott disagreed with Dr. Yu’s opinion that applicant could return to work. He felt that although applicant’s condition had improved, she regularly engaged in a pattern of “superficial cooperativeness” in which she denied multiple aspects of her disorder demonstrating a lack of judgment and the insight to recognize and address symptoms which cause continuing substantial incapacity. His examination revealed severe degrees of impairment in memory, recall, and abstract thinking. She could not demonstrate the basic mathematic abilities to perform the core functions of her duties as an Accounting Officer (Specialist). Dr. Walcott also felt that applicant’s volunteer work at the library was incongruent with the levels of complexity and attention to detail required in her former position.

24. Dr. Walcott also observed applicant’s testimony at hearing. He noticed significant cognitive impairment, which manifested in her inability to perform simple mathematic functions, and notable latency when responding to questions. He attributed the latency to reduced cognitive processing speed due to interference from chronic psychotic symptoms and gradual declines in cognitive capacity caused by the “natural progression” of her mental illness. He explained that Schizoaffective Disorder is one of the most serious mental health conditions an adult can be afflicted with. It is generally life-long and chronically disabling. A person with Schizoaffective Disorder never heals to a curative state. The symptoms of the condition can be managed and sometimes reduced, but the condition progresses over time and leads to a slow accruing of deficits and functional limitations. That applicant’s condition is “bipolar type” means that her psychotic symptoms will be exacerbated by lasting episodes of depression and at times mania (the opposite of depression), which results in hyperactivity, hyperirritability, impulsiveness, and losing the desire to obtain restorative sleep.

25. Dr. Walcott also emphasized that because applicant has experienced at least six decompensation episodes, her risk of having another episode is “virtually 100 percent.” The time frame for which this may happen is indistinct. “The fact that she has remained out of the hospital for a longer interval this time doesn’t mean that she is not at risk of serious decompensation in the future.” However, returning applicant to a stressful work environment would likely cause her to decompensate more rapidly and more frequently than if she had not been returned to the work environment.

Discussion

26. Applicant’s efforts to return to her former position are commendable. She has been diagnosed with a very serious mental illness. Despite 20 years of extremely challenging symptomology, she optimistically and persistently continues to seek the treatment necessary to allow her to reintegrate into the workforce. She has made significant

steps toward that goal, but has not established that she is capable of returning to work in her former position.

27. While applicant's belief in her abilities is admirable, there is no competent medical evidence she is no longer substantially incapacitated for the performance of her former duties as an Accounting Officer (Specialist). Dr. Yu was the sole witness to testify on her behalf. He believed it would benefit applicant "in a therapeutic sense" to return to the workforce, as a logical next step in her treatment. He was not familiar with applicant's former duties and offered no opinion on whether she remained substantially incapacitated for the performance of those duties.

28. After conducting an IME and observing applicant's testimony at hearing, Dr. Walcott testified that applicant lacks the capacity to perform her former duties due to the natural progression of her mental illness. He also opined that applicant was certain to continue to experience episodes of decompensation, and returning her to her former position would cause this to occur more rapidly and more frequently.

29. When all the evidence is considered, applicant did not establish that she is no longer substantially incapacitated for the performance of her former duties as an Accounting Officer (Specialist) for CalTrans. Her reinstatement request must therefore be denied.

LEGAL CONCLUSIONS

1. The burden of proof flows from the type of process initiated and lies with the party making the charges. (*Martin v. State Personnel Board* (1972) 26 Cal.App.3d 573, 582.) Ms. Okwu has received disability retirement benefits since 2003. She applied for reinstatement and is appealing CalPERS' determination that she remains substantially incapacitated for the performance of her former duties. CalPERS filed the Statement of Issues in response to her appeal. As such, the burden rests with applicant to prove by a preponderance of the evidence that she is no longer substantially incapacitated for the performance of her former duties based on competent medical evidence.

2. Government Code section 20026 provides, in pertinent part, that "'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 21150, subdivision (a), provides, in pertinent part, that "[a] 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, 21076.5, or 21077."

4. Government Code section 21156, subdivision (a)(1), provides, in pertinent part, "[i]f 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. Government Code section 21220 provides, in pertinent part, “[a] person who has been retired under this system, for service or for disability, shall not be employed in any capacity thereafter by the state . . . unless he or she has been reinstated pursuant to this chapter”

6. Government Code section 21192 provides, in pertinent part:

The board ... may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. The board, or in case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, shall also cause the examination to be made upon application for reinstatement to the position held at retirement or any position in the same class, of a person who was incapacitated for performance of duty in the position at the time of a prior reinstatement to another position. The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

7. Government Code section 21193 provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to

reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position. However, in that case, acceptance of any other position shall immediately terminate any right to reinstatement. A recipient who is found to continue to be incapacitated for duty in his or her former position and class, but not incapacitated for duty in another position for which he or she has applied for reinstatement and who accepts employment in the other position, shall upon subsequent discontinuance of incapacity for service in his or her former position or a position in the same class, as determined by the board under Section 21192, be reinstated at his or her option to that position.

[¶] ... [¶]

8. Ms. Okwu did not meet her burden. She offered no competent medical evidence at hearing regarding her level of incapacity relative to the performance of her former duties. Therefore, her reinstatement request must be denied.

ORDER

1. The determination by CalPERS that respondent Josephine Okwu remains substantially incapacitated for the performance of her former duties as an Accounting Officer (Specialist) with CalTrans is SUSTAINED.

2. Respondent Josephine Okwu's Application for Reinstatement from Disability Retirement is DENIED.

DATED: October 1, 2015

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Ed Washington
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ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings