

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 Service
Pending Disability Retirement of:

Case No. 2014-0092

EDITHA T. MORING,

OAH No. 2015020161

Respondent

and

SONOMA DEVELOPMENTAL CENTER,

Respondent.

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on November 12, 2015, in Sacramento, California.

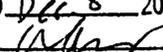
Preet Kaur, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

No one appeared for or on behalf of respondent Editha T. Moring or respondent Sonoma Developmental Center, each respondent's default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to both respondents.

Evidence was received, the record was closed, and the matter was submitted for decision on November 12, 2015.

SUMMARY

This appeal is limited to determining whether Ms. Moring is permanently and substantially incapacitated for the performance of her usual job duties as a Psychiatric Technician Assistant with the Sonoma Developmental Center due to orthopedic (low back, left arm, and shoulder) conditions. No medical evidence establishing Ms. Moring is

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RETIREMENT SYSTEM
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substantially incapacitated was introduced. Therefore, her application for disability retirement benefits must be denied.

FACTUAL FINDINGS

Ms. Moring's Employment History

1. Ms. Moring was hired by the Sonoma Developmental Center as a Psychiatric Technician Assistant in 2000, and was working in such capacity at the time she filed her application for disability retirement. She is a local miscellaneous member of CalPERS subject to Government Code section 21150¹ by virtue of that employment. She has the minimum service credit necessary to qualify for disability retirement. Ms. Moring retired for service, effective August 1, 2012, although her last date of actual work was February 3, 2012, as discussed further below.

Ms. Moring's Disability

2. As previously mentioned, Ms. Moring did not testify at hearing. The history of her alleged disability was culled from the Independent Medical Examination performed by Andrew T. Brooks, M.D., which is discussed further below. Ms. Moring suffered two separate injuries, the first of which occurred sometime in 2004. At the time, she was pulling a client and injured her left shoulder. She took one week off from work to recuperate, participated in physical therapy, and the injury resolved.

Ms. Moring's second injury occurred on February 3, 2012, when a client violently pushed back against her as she was trying to reposition him in bed. She immediately felt pain in her left thoracic area, with no radiation until April 2013 when she noticed pain radiating into her left buttock and posterior left thigh. She took Motrin on an as needed basis. She participated in 18 sessions of physical therapy, which she reported as being helpful.

Ms. Moring's Application for Service Pending Disability Retirement

3. Ms. Moring signed a Disability Retirement Election Application seeking service pending disability retirement benefits on July 17, 2012. She described the injury or illness which affected her ability to perform her job as "Permanent restriction." She identified her physical limitations/preclusions as not being able to bend or twist at the waist at all and the inability to lift, carry, push, or pull more than 20 pounds.

¹ That statute provides: "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. On September 27, 2013, CalPERS denied Ms. Moring's application based on its review of medical records from Jeffrey Gao, M.D., and Andrew Brooks, M.D. Ms. Moring timely appealed the denial. Anthony Suine signed the Statement of issues on March 12, 2014, solely in his official capacity as the Chief of the Benefit Services Division of CalPERS.

Job Duties of a Psychiatric Technician Assistant

5. The relevant physical requirements of Ms. Moring's job as a Psychiatric Technician Assistant at the Sonoma Developmental Center included "frequent" bending at the waist, pushing and pulling, and lifting or carrying up to 10 pounds, and "occasional" twisting at the waist and lifting or carrying up to 75 pounds. She was "never" required to lift or carry anything greater than 75 pounds.²

Medical Evidence

Ms. Moring's evidence

6. No medical evidence was introduced on Ms. Moring's behalf at hearing. However, Dr. Brooks's Independent Medical Examination of Ms. Moring included his review of medical records documenting Dr. Gao's and Marko Bodor, M.D.'s, treatment of her. She first treated with Dr. Gao, a physician board-certified in occupational medicine, on the day of her second injury (February 3, 2012) through the workers' compensation system. At the time, she complained of sharp, intermittent pain with tingling and burning in her back. Upon physical examination, Ms. Moring had tenderness to palpation in the area from her left thoracic back to her left lower trapezius. She had a decreased range of motion in her back by approximately 30 to 40 percent.

Records of Dr. Gao's subsequent treatment of Ms. Moring indicated her injury remained basically the same through July 20, 2012, her last day of treatment. X-rays of her thoracic spine and lumbar spine were unremarkable. She was placed on temporary modified duty, effective February 4, 2012, with restrictions of no bending or twisting in her back and no lifting, carrying, pushing, or pulling anything greater than 20 pounds. Dr. Gao made those restrictions permanent on July 3, 2012.

7. Ms. Moring treated with Dr. Bodor, a physician board-certified in physical medicine and rehabilitation, on April 19, 2012, only. Her chief complaint that day was of back pain on her left side. She explained she was adjusting a client in bed when she felt a crack in her back with a sudden onset of pain on the left side of her back down to the low back, as well as pain radiating down the left leg to her knee. Ms. Moring attended six physical therapy sessions, and reported the left leg pain as completely resolved. Her back

² "Frequent" is three to six hours during a given shift and "occasional" is up to three hours during a given shift.

pain was intermittent, and was exacerbated by standing, walking, or sitting for longer than 30 minutes. Motrin and heat compresses provided some relief.

8. There was no evidence that Drs. Gao or Bodor ever opined that Ms. Moring is substantially incapacitated for the performance of her normal job duties as a Psychiatric Technician Assistant. While Dr. Gao imposed temporary work restrictions on February 3, 2012, which he made permanent five months later, there was no evidence of whether those restrictions were imposed based on his opinion that she physically could not perform such tasks or that she should avoid performing them in order to prevent further injury. Such information is crucial to determining whether Ms. Moring is substantially incapacitated. (See, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863 [an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability determination].)

CalPERS's evidence

Dr. Brooks

9. CalPERS called Dr. Brooks as its medical expert at hearing. He is a board-certified orthopedic surgeon who was retained by CalPERS to perform an independent medical evaluation (IME) of Ms. Moring on May 2, 2013. Dr. Brooks prepared a report documenting his IME, and that report was introduced into evidence. His hearing testimony was consistent with his report.

10. At the IME, Ms. Moring complained of pain on the left side of her mid back in the thoracic region. She described the pain as intermittent, and it was exacerbated by standing or walking for more than 30 minutes or bending at the waist or neck. Sitting provided relief from the pain, as did Motrin.

Physical examination of Ms. Moring's back revealed tenderness upon palpation in the left side of her thoracic region around the tip of her scapula. She had no muscle spasm, bruising, or midline tenderness. There was no lumbosacral or paraspinal lumbosacral tenderness. The range of motion of her back was limited upon flexion, and she complained that such movement caused discomfort on the left side of her thoracic spine. She was able to squat approximately one-third of the way down, explaining she preferred not to go further because she was afraid of experiencing pain in the thoracic region.

Ms. Moring had full range of motion of both shoulders with no complaints of pain. Lateral side bending produced pain when bending to the right, but not the left. She had no complaints of pain when rotating her spine.

11. Based upon his physical examination of Ms. Moring and review of her medical records as discussed above, Dr. Brooks opined she is not substantially incapacitated for the performance of her normal duties as a Psychiatric Technician Assistant with the

Sonoma Developmental Center due to an orthopedic (low back, left arm, and shoulder) conditions. He explained:

Based on my examination today, the limited records provided, and the limited diagnostic studies performed, there are no objective findings to suggest that she would be unable to perform her customary and usual job duties.

[¶] ... [¶]

It is my professional opinion that Ms. Moring, at this time, is not substantially incapacitated for the performance of her duties. I do recommend, however, that she undergo MRI evaluation of the thoracic spine to rule out herniated disc as possible ideology for her ongoing complaints.

The only qualification to the opinions expressed in his report Dr. Brooks provided at hearing was that he had not seen Ms. Moring since the date of the IME and did not know if there was any additional information about her purported disability. But assuming there was none, he explained his opinion remained the same.

Discussion

12. When all the medical evidence is considered, Ms. Moring did not meet her burden to introduce medical evidence that she is substantially incapacitated for the performance of her usual duties as a Psychiatric Technician Assistant with the Sonoma Developmental Center due to orthopedic (low back, left arm, and shoulder) conditions. That is not to say she does not suffer from pain or that such pain would not make it more difficult for her to perform her job duties. But discomfort alone, even if it makes performance of one's duties more difficult, is insufficient to establish a substantial incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; citing, *Hosford v. Board of Administration, supra*, 77 Cal.App.3d 854, 862.)

Ms. Moring was required to produce a competent medical opinion to establish her substantial incapacity. (Gov. Code, § 21156, subd. (a)(2).) She did not appear at hearing, no medical experts testified on her behalf, and the medical records from Drs. Gao and Bodor summarized by Dr. Brooks contained no opinions that Ms. Moring is substantially incapacitated for the performance of her usual duties. Therefore, her application for disability retirement should be denied.

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LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Ms. Moring has the burden of proving she qualifies for a disability retirement, and she must do so by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) Evidence that is deemed to preponderate must amount to “substantial evidence.” (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be “substantial,” evidence must be reasonable in nature, credible, and of solid value. (*In re Teed’s Estate* (1952) 112 Cal.App.2d 638, 644.)

Applicable Statutes

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

“Disability” and “incapacity for performance of duty” as the 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: “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.” And the employer of such a member may not terminate the member’s employment based on his disability, but instead must apply for a disability retirement on the member’s behalf. (Gov. Code, § 21153.)

4. Government Code section 21156, subdivision (a), provides, in pertinent part:

(1) 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

(2) In determining whether a member is eligible to retire for disability, the board ... shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

5. The courts have interpreted the phrase “incapacitated for the performance of duty” to mean “the substantial inability of the applicant to perform [her] usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.)

Conclusion

6. Ms. Moring did not meet her burden of producing persuasive medical evidence demonstrating she is substantially incapacitated for the performance of her usual duties as a Psychiatric Technician Assistant with the Sonoma Developmental Center due to orthopedic (low back, left arm, and shoulder) conditions. Therefore, her application for disability retirement should be denied.

ORDER

Respondent Editha T. Moring's application for disability retirement is DENIED.

DATED: December 4, 2015

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Coren D. Wong

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COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings